

What shape a representative action will take within the meaning of the RDA in Poland

REPRESENTATIVE ACTIONS DIRECTIVE – INTRODUCTION

The Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (hereinafter referred to as the "**RAD**" or "**Directive 2020/1828**") adopted in 2020 is slowly changing the landscape of class action cases in Europe; in other jurisdictions (e.g. France), the first information about representative actions brought after the implementation of RAD is appearing. Poland is finally joining the group of European countries that have fulfilled the obligation to transpose this legal act. On 24 July 2024, the Polish Parliament passed an act amending the act on pursuing claims in group proceedings and other acts (hereinafter: "**Act of 24 July 2024**"), implementing Directive 2020/1828. The act was signed by the Polish President on 8 August 2024 and is currently awaiting publication in the Journal of Laws. The act will enter into force within 14 days of publication. We will present the model of group action adopted by the Polish legislator below.

EXISTING REGULATIONS OF POLISH LAW

The Polish legal system has had a mechanism for collective redress in the form of group proceedings since 2010.

Group/collective proceedings (which – we can say – is Polish version of American class action) have been functioning in Poland since 2010 and were introduced by the Act of 17 December 2009 on the Pursuit of Claims in Group Proceedings (Journal of Laws 2010.7.44 of 18 January 2010, hereinafter: "**UDRPG**"). The UDRPG was amended at least twice, after being in force for seven years, by the Act of 7 April 2017 Amending Certain Acts in Order to Facilitate the Recovery of Claims (Journal of Laws 2017.933 of 12 May 2017, hereinafter: "**Amendment No. 1**"), which entered into force on 1 June 2017. The second, minor, amendment to the UDRPG has been introduced by the virtue of the Act of 4th July 2019 amending the Code of Civil Procedure and some other acts (Journal of Laws 2019.1469 of 6th August 2019, hereinafter: "**Amendment No. 2**"); this amendment is in force since 7th November 2019.

In principle, the UDRPG is of a purely procedural nature – it does not introduce any changes to the substantive legal basis of claims or to the principles of defendant's liability.

Systemically, group proceedings are a parallel/optional (in relation to the traditional bilateral proceedings) mode of pursuing individual claims, which must meet certain requirements. Article 1 of the UDRPG, defining group proceedings, specifies that these are judicial proceedings in civil cases, in which claims of one kind, and based on the same or a similar factual basis, are pursued by at least 10 individuals.

In Poland group/collective proceedings are (systemically) court proceedings aimed at jointly pursuing many claims that meet statutory conditions. Such conditions for the admissibility of group proceedings under "classic" group proceedings include:

1) The claim belongs to a specific category of cases; the Polish Act (UDRPG) is an example of a sectoral approach, i.e. group proceedings can be initiated not in every civil case, but in a selected category of cases, including: cases involving claims

- for liability for damage caused by a dangerous product,
- for torts and thus also competition law infringements - where the unlawful practice is classified as a tort),
- liability for non-performance or improper performance of a contractual obligation or

- for unjust enrichment, and
- in other matters regarding claims for consumer protection

2) uniformity of claims, what means that all persons covered by a collective action must demand legal protection in the same form e.g. payment or establishment;

3) common factual basis for claims – the Polish Act requires that claims have the same or the similar factual basis; this condition is usually reduced to the requirement that the claims arise from one event, e.g. the same tort. It is assumed that it is sufficient that the basic set of facts constituting the factual basis of the claim is the same/ similar for a sufficient number of persons;

4) group size.

So far, group/collective proceedings have been based solely on the opt-in model. Each member of the group should expressly indicate their will to participate in group proceedings by submitting their declaration on joining the group.

Group proceedings in Poland are divided into three (or four) so-called phases, two of them are characteristic only of these mechanisms for pursuing claims:

1. Phase one - in which the court decides the admissibility of hearing the case in group proceeding; if the preconditions are met, the court renders its decision on examining the case in group proceedings; if the assessment is negative, the court rejects an action.

2. Phase two - in which the court determines the composition of the group; it begins with the publication of an announcement of the commencement of group proceedings, and concludes with the court's decision on the composition of the group.

3. The third phase - substantive examination of the case, in which the court conducts evidentiary proceedings and decides on the merits of the case.

4. The fourth stage is the enforcement proceedings.

Anything related to group proceedings but not regulated by the UDRPG is governed by the provisions of the Polish Code of Civil Procedure (hereinafter: "CCP").

In Poland, there is a list of group proceedings kept by the Minister of Justice. This list is intended to include information on all filed group actions, but is not updated on an ongoing basis. We constantly monitor the initiation and course of group proceedings in Poland - the information we obtain shows that group cases have been brought mainly against banks (cases related to loan agreements indexed or denominated in a foreign currency) and insurers, but also, among others, against travel agencies, developers, the State Treasury and local government units. Recently, for example, group lawsuits have appeared regarding regulations limiting the freedom to conduct business activities related to the COVID-19 pandemic and the introduced lockdown. Another interesting group of cases against public entities were proceedings brought on behalf of persons injured by the negligence of public authorities in the field of flood protection, i.e. environmental cases.

POLISH REPRESENTATIVE ACTION AS A SUBTYPE OF GROUP PROCEEDINGS

When implementing Directive 2020/1828, the Polish legislator decided that a representative action for the protection of the collective interests of consumers will take the form of group proceedings regulated in the UDRPG, but with important changes resulting from the requirements of the Directive

Thus, the Act of July 24, 2024 introduces changes to the UDRPG, which enable the filing of a representative action to determine the use of practices violating the collective interests of consumers and actions for claims related to the use of such practices. These cases will include cases related to violations of European Union law provisions specified in Annex I to Directive 2020/1828, which violate or may violate the general interests of consumers. Annex I to Directive 2020/1828 contains a list of 66 legal acts - and it follows from it that the intention of the EU legislator was to cover with the new regulation all industries that sell or provide services to consumers, especially on a mass scale (such as carriers, entrepreneurs providing distance services, producers of food, cosmetics, medical products, financial institutions and banks, insurers, travel agencies, etc.).

The new mechanism will complement the current system of consumer rights protection; to a certain extent, competitive with the activities of the President of the Office of Competition and Consumer Protection in the field of proceedings regarding infringement of collective consumer interests or in cases regarding the recognition of the provisions of a standard contract as prohibited.

We consider the following four issues to be the key issues of the new "subtype" of group proceedings:

- (a) the entity authorized to initiate the proceedings,
- (b) simplifying the formal conditions for the admissibility of group proceedings,
- (c) allowing the possibility of financing the proceedings by third parties, and
- (d) facilitating the collection of evidence in the form of the so-called institution of disclosure of evidence - the possibility for the plaintiff or defendant to demand that the court oblige the other party or third persons not participating in the proceedings to present specific evidence.

Below we will focus on the essence of representative actions, and in the following articles we will discuss the remaining key issues.

The new "subtype" of group proceedings will include two groups of cases from the consumer protection category:

- 1) cases for determining the use of practices infringing the general interests of consumers,
- 2) cases for claims related to the use of practices infringing the general interests of consumers.

A practice infringing the general interests of consumers is an act or omission by an entrepreneur that is inconsistent with the provisions of European Union law referred to in Annex I of Directive 2020/1828 or the provisions implementing them or serving to apply them, which act or omission violates or may violate the general interests of consumers.

The first category of cases - for determining the use of practices infringing the general interests of consumers, is intended to establish in general, for the benefit of all potential harmed consumers, that a specific infringement has taken place.

In turn, cases for claims related to the use of practices infringing the general interests of consumers are cases for claims aimed at providing specific benefits to consumers specified by name. Such claims will be:

- (a) a request to eliminate the effects of a practice infringing the general interests of consumers;
- (b) a request for the defendant to submit a single or repeated statement of appropriate content and in an appropriate form;
- (c) a request for a price reduction;

(d) a request to recognize the act as invalid with the obligation to return the benefits;

(e) a request to compensate for the damage on general terms.

The defendant may be any entrepreneur who operates in the industries specified in Annex I to Directive 2020/1828 - and uses practices infringing the general interests of consumers.

Possible decisions that may be made in the event of upholding the claim against the entrepreneur in the new "subtype" of group proceedings are:

1) recognizing the defendant's practice as violating the general interests of consumers and ordering the defendant to discontinue its use, together with setting a deadline for the defendant to discontinue the practice,

2) recognizing the defendant's practice as violating the general interests of consumers and specifying the deadline for the defendant to discontinue the practice,

3) imposing on the defendant the obligation to submit, within a specified deadline, a single or multiple statement in an appropriate form and with appropriate content about the defendant's use of practices violating the general interests of consumers,

4) upholding - on the basis of separate acts - claims related to the use of practices violating the general interests of consumers (e.g. awarding compensation in a specific amount, reducing the price, terminating the contract).

In one proceeding (depending on the claim), it is possible to both establish the use of practices violating the general interests of consumers and uphold claims related to the use of such practices.

SUMMARY – PURSUING CLAIMS BY CONSUMERS SHOULD BE EASIER

The new regulations of Act of 24 July, 2024 should result in more group proceedings, especially in the perspective of several years. The main goal of Directive 2020/1828 is to facilitate the pursuit of claims by consumers - and this is also the goal pursued by Polish regulations. The mechanism is to guarantee a quick and cost-effective (from the consumers' perspective) resolution of consumer protection cases.

In our opinion, the newly introduced Polish regulations will contribute to the popularization of group proceedings and increase the number of proceedings brought on behalf of consumers against entrepreneurs (especially those providing services on a wider, even mass scale and regardless of the value of the goods/services).

The Act of 24 July, 2024 introduces in particular the following facilitations for the pursuit of claims by consumers through a representative action - in group proceedings:

1) a wide scope of matters that will be suitable for consideration in this procedure;

2) allowing the case to be considered as a group case if there are differences between the factual situation of individual group members (consumers) – provided that their claims are derived from the same legal basis.

3) Allowing third-party financing of an authorized entity acting on behalf of consumers.

4) Exempting the authorized entity from the obligation to pay a court fee for the claim.

5) Exempting consumers (group members) from the obligation to bear any costs related to the proceedings.

6) Excluding the application of the provisions on deposits when the plaintiff is an authorized entity – in “classic” group proceedings, at the defendant’s request, the court may require the plaintiff (group representative) to pay a deposit to secure the costs of the proceedings, which may amount to up to 20% of the value of the subject of the dispute, and failure to pay the deposit results in the dismissal of the claim.

In subsequent articles, we are going to discuss the remaining issues in detail.

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