KEYNOTE

Collective redress: the known unknowns

The Honourable Mr Justice Barling
President, Competition Appeal Tribunal

Comments: Elizabeth Morony, Clifford Chance
Introduction

- EC Directive on antitrust damages claims
- EC proposals on collective redress
- Jackson reforms to litigation in England/Wales
- UK proposals on antitrust litigation
- The future
EC Directive on antitrust damages claims

- Introduction of disclosure rules in EU member states
- Protection of leniency documents from disclosure
- Use of evidence obtained through access to file
- Joint and several liability
- Pass on defence

EC proposals on collective redress

- Opt-in collective actions
- Frivolous cases
- Punitive damages
- Funding arrangements
- Representative groups
Jackson reforms to litigation in England/Wales

- "Standard" disclosure no longer always the norm
- Disclosure reports required from parties
- Changes to CFA regime
- Introduction of Damages Based Agreements
- Introduction of costs budgeting

UK proposals on antitrust litigation

- Extension of CAT’s jurisdiction
- Limited opt-out collective actions regime for competition law
  - Will apply to follow-on and stand-alone actions
  - Cases heard only in the CAT
  - Procedural safeguards against disadvantages of US actions
- Promotion of ADR
BIICL – Righting Private Wrongs

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Righting Private Wrongs: Competition Law, Investor Claims and Mass Litigation in the EU

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Amicus briefs in private actions
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Between legal and social control – Scandinavian ombudsmen
Laura Ervo, Örebro University, Sweden

Involvement of public authorities – Ombudsman systems
Henrik Saugmandsgaard Øe, Danish Consumer Ombudsman

Comments: Douglas Lahnborg, Orrick

Between legal and social control – Scandinavian ombudsmen

Laura Ervo
Professor of law
Örebro University Sweden
In my presentation I will cover the East-Scandinavian countries (= Sweden and Finland). I will take up some examples from Sweden and some from Finland.

I will use the word "ombudsman" to cover both the Parliamentary Ombudsman and the Chancellor of Justice as well as the specific ombudsmen.

I will focus on the Consumer Ombudsman but I will shortly cover the ombudsmen institution even generally.

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**Scandinavia – a wonderland of boards and ombudsmen**

The existence of different types of boards for solving disputes, especially between consumers and entrepreneurs, is typical of the Scandinavian countries. For instance, in Denmark, there exists the Consumer Complaint Board and 17 approved private complaint boards. In addition, there are a number of non-approved private complaint boards. The boards can give recommendations on how the case should be solved. Therefore the procedure can be seen a type of conciliation. However, their decisions are not binding.

In addition, there exist the Parliamentary Ombudsman, the Chancellor of Justice and several specific ombudsmen like the Consumer Ombudsman.
The tasks of the Ombudsman

The Ombudsman has the task of exercising oversight to ensure that authorities and officials observe the law and discharge their duties.

In addition to authorities and officials, the scope of the Ombudsman's oversight includes also others when they are performing tasks of a public nature.

Special attention

The Ombudsman oversees legality principally by examining complaints received. He can also intervene in perceived shortcomings on her own initiative.

In addition, the Ombudsman carries out inspections at offices and institutions.
Ombudsman institution has its roots in Sweden

The institution of the ombudsman was originated in Sweden. In 1809 the parliament created the post of the parliamentary ombudsman.

Following the Swedish model, Finland created the post of Parliamentary Ombudsman in 1920.

The ombudsman institution spread to the other Nordic countries in the mid 20th century. In Denmark the post of Folketingets ombudsmænd was created in 1955. In Norway the first Stortingets ombudsman assumed his post in 1962.

In both of these countries, the powers of the Ombudsman are more limited than in Sweden and Finland. The institution later spread to other parts of the world, mainly following the Danish model.
Complaints to the Parliament’s ombudsman or to the Chancellor of Justice

Often used tool to control and complain in the case if people are not satisfied with the authorities including the proceedings and decisions made legally and correctly by them as well as their behavior (good administration, fair trial, good service).

Their tasks and powers are largely the same. Both oversee the legality of the actions of authorities and officials. The Chancellor of Justice also oversees the actions of lawyers.

In principle, a complaint can be made either to the Chancellor of Justice or the Ombudsman.

Measures used by the Parliamentary Ombudsman

– prosecution (quite rare but possible and sometimes happens)
– reprimands
– opinions
– as a rebuke
– for future guidance
– recommendations
– to redress an error or rectify a shortcoming
– to develop legislation or regulations
– to provide compensation for a violation
– matters redressed in the course of investigation
– other measure
Between legal and social control

Complaints to ombudsmen: A practical tool to react and get “justice”.
Usually does not lead to a prosecution or any other sanction, not even to damages.
Mostly a moral affect and “I was right” –feeling. The authorities may not treat me badly. Some kind of consolation from the individual’s perspective.
The effective tool from the preventive perspective as well. (Media will react and there are regularly news on newspapers on decisions made by ombudsmen.)
It is the appreciated method, authorities are afraid and take this in serious. It is a shame to get “convicted” by the ombudsman.

Statistical data on the Chancellor of Justice’s work in 2011 (Finland)

The Chancellor of Justice, Finland (5 millions of inhabitants):

New complaints 1464.
Decided complaints 1692.
- 260 complaints covering courts
- in 273 cases some kind of sanction
Measures taken by the Chancellor of Justice (Finland)

1) a reprimand 16
2) instructions 117
3) other kind of comment 21
4) other measure 104
5) the violation has been corrected 15

Total 273

Statistical data on the Parliamentary Ombudsman’s work in 2011 (Finland)

Cases initiated 4543
– complaints to the Ombudsman 4147
– complaints transferred from the Chancellor of Justice 38
– taken up on the Ombudsman’s own initiative 82
– submissions and attendances at hearings 37
– other written communications 239

Cases resolved 4728.
Measures taken by the Parliamentary Ombudsman (Finland)

Complaints 4385
Decisions leading to measures on the part of the Ombudsman 780
- prosecution 0
- reprimands 37
- opinions 604
- as a rebuke 340
- for future guidance 264
- recommendations 32
- to redress an error or rectify a shortcoming 1
- to develop legislation or regulations 17
- to provide compensation for a violation 10
- matters redressed in the course of investigation 40
- other measure 67

Consumer Ombudsman's duties and responsibilities (Finland)

The most essential responsibility of the Consumer Ombudsman is to supervise that the Consumer Protection Act and other laws passed to protect consumers are observed.

Particular attention is paid to ensuring that marketing activities, contractual terms, and collection activities conform to the laws.

The goal of the supervisory activities is to have the company cease or alter its marketing activities or unreasonable contractual terms so that they conform to current legislation.
Responsibilities (2)

The Consumer Ombudsman does not primarily resolve individual disputes where the consumer is seeking reimbursement for an error with a product or service. These cases are handled by consumer rights advisors and the Consumer Disputes Board.

The Consumer Ombudsman may, however, aid the consumer he or she sees necessary in resolving an individual dispute, if its resolution carries a significant impact on the interpretation of the law or the general well-being of consumers or in instances where the business is not compliant with the decision of the Consumer Disputes Board.

The Consumer Ombudsman may also refer group complaints to the Consumer Disputes Board (in Sweden the Swedish National Board for Consumer Complaints) for resolution or initiate class actions.

Courses of action (Finland)

The Consumer Ombudsman receives annually thousands of claims and communications from consumers, companies, other officials and associations. They are all processed and recorded in the Competition and Consumer Authority’s information system. The Consumer Ombudsman uses the obtained information in selecting which issues to supervise. The Consumer Ombudsman may also intervene on issues she has identified on her own. Identified problems are often handled as larger entities where several problems are addressed at once.
Courses of action (2)

According to law, the Consumer Ombudsman must be particularly active in areas that are of substantial importance to consumers or where problems can be presumed common to consumers. The focuses of the supervisory activities are to vary between different industries. The current Consumer policy programme also affects what areas the Consumer Ombudsman focuses on during a specific time-period.

Supervisory methods of consumer ombudsman (Finland)

The primary goal of the Consumer Ombudsman activities is to influence the business that is non-compliant with the law to cease such activities or alter them voluntarily.

If the company cannot be persuaded to cease the unlawful activities, the Consumer Ombudsman must take the necessary enforcement actions or refer the issue to the court for resolution. In practice, these situations are subject to imposing a prohibition reinforces with a penalty payment.

The prohibition is ordered by the Market Court, based on the application submitted by the Consumer Ombudsman. The Market Court may also order a temporary prohibition, where it is in force until the matter has been fully resolved.
The Swedish situation in practice

The Swedish national board for consumer complaints / Statistics

11531 cases in 2012 which is 23% more than in 2011. The reason can be that now it is possible to make a complaint on the web.

The following of decisions has increased from 71% in 2011 to 76% in 2012.
Class complaints at the board

The Swedish Consumer ombudsman has filed several (19) group proceedings with the Swedish National Board for Consumer Complaints. At least 7 have been successful (probably even more in the form of friendly settlements).

During 2010, for example, the board received a group complaint concerning district heat delivery. The complained was filed by ombudsman against a district heating company (Hammarö Energi AB.) Ombudsman alleged that the company is not entitled to charge certain of its district heating customers for administrative overheads, no provision to this effect being made in the contract between the parties. The case was successful and the company was recommended to return the extra payments.

Public class actions (by Consumer ombudsman) in Sweden

The Court of Appeal for northern Norrland, 4th November 2011, T 154-10, Kraftkommission

The Consumer Ombudsman /. Stärvullen Finance AB

Public group action. Damages due to the defendants’ failure to supply electric power. The case is pending but the intermediate judgement is delivered, affirmed by the Court of Appeal for Northern Norrland. The Supreme Court did not permit the leave for the appeal.

According to the judgement the company has to pay damages to the consumers. The next stage will be that the court confirms the amounts.
The Finnish situation in practice

Class actions - none

Until now there has been no case in Finland at all, which has caused some debate in media. The ombudsman has been criticized because her level to start a class action seems to be very high. The other actors in the field have been of opinion that there have been more situations where class action could have been a good tool to get access to justice and access to court especially in consumer cases.
However, the ombudsman says that there has been no need for class actions because it has worked as a threat and the situations could have been solved by other means. She thinks that until now it is enough to have class actions in the arsenal and to use it as a threat when promoting the rights of consumers. The Consumer Agency says also that the other reason is that collective actions affect the fear of difficult and lengthy legal proceedings, which can become expensive to the Agency because if the class action were dismissed, the state would pay the defendant’s costs, but all the work and attorney’s fees should be paid by the Agency itself. Therefore it is allowed to the Consumer Ombudsman to refuse to start a class action just because the procedure would be too complicated because of the complexity of the current case.

**Class complaint**

There has been one group complaint in Finland, which was, however, dismissed. The Consumer Disputes Board rejected the Consumer Ombudsman's class complaint against the construction company Peab Oy. The group complaint concerned the marketing of new houses and the information given on the maintenance charge. Namely, housing costs for residents were higher than they had originally estimated. The Consumer Complaints Board noted in its decision that the financing plan is just an estimate and therefore it should not be regarded as fully binding.
Lessons to be learned

Finland

Only the public class action and the public class complaint are possible.
The Consumer Ombudsman is the only actor in the field (monopoly).
The system is not effective in reality.
Sweden

More options (even private and organisational actions are allowed and the class complaint by the group of private persons in the case the ombudsman has made the decision not to start a class complaint).

Therefore the system has been more effective in the practice and there are some successful examples on class complaints and class actions filed by the Consumer ombudsman.

However, the system is based on opt in –method only and could be more effective even otherwise (more cases). The threshold to start the class action is still too high.

Summary

The ombudsman institutions are basically based on their preventive effects. They are for instance tools for mediation. Too soft?

The public class actions which are based on opt out -method and which are working well and effectively are the dream. To realize that dream we need resources, that is time and money.

In addition, the Consumer ombudsman should not be the monopolised actor in the field. In the case, also private and organisational class actions are possible, there is more threat and competition to activate the ombudsman as well.

Without these tools the system will be only law in books like has happened in Finland.

The need to change the role of ombudsmen – from advisers and peacemakers towards real actors?
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Agenda

- Consumer protection landscape
- Enforcement of consumer protection at national level
- ADR: Advantages and disadvantages
- The role of the Consumer Ombudsman and enforcement instruments
- Advantages of effective collective redress schemes
- Linking private group actions with actions taken by the Consumer Ombudsman
- Summing up
- Questions

Consumer protection landscape
Enforcement of consumer protection law at national level

Remedies available to the consumers (individual or collective redress)

- Complaint boards (ADR) – if the claim exceeds DKK 800 (EUR 120)
- Individual civil action in courts (small claims procedure)
- Complaint to the Consumer Ombudsman

......
- The Consumer Council voices consumer concerns
- The media

ADR: Advantages and disadvantages

Advantages:
- Informal, quick and inexpensive (maybe not for companies)
- Most decisions are followed

Disadvantages:
- Decisions are not directly enforceable
- Often not possible to produce evidence (e.g. witness statements) – subsequent court procedure may be necessary

Possible solutions:
1. The decision is enforceable by default if the trader does not inform the ADR board that the decision will not be followed
2. Free legal aid to consumers to continue in courts
3. ‘Name and shame’
4. Decision could be binding according to prior agreement

However: Case by case solutions only
The role of the Consumer Ombudsman as a public enforcer

‘Hard’ law enforcement in cases of more general interest:

- Administrative orders
- Information about limitation period order
- Interim injunctions
- Injunction or court orders
- Civil lawsuit for i.a. compensation to consumers
- Collective redress (opt in or opt out model)
- Supplements ADRs
- Criminal proceedings
- Administrative fines

The role of the Consumer Ombudsman as a public enforcer

‘Soft’ law approaches
Negotiations with the company or industry generally result in:

- **Settlements**
  Section 23 of the Danish Marketing Practices Act:
  ‘The Consumer Ombudsman shall seek by negotiation to influence traders to act in accordance with the principles of good marketing practices and to observe this Act in other respects’

- **Guidelines or guidance papers (allows the industry to influence how the law is interpreted, a result of which is joint ‘ownership’)**
  Section 24 of the Danish Marketing Practices Act:
  ‘Upon negotiation the DCO will seek to influence the conduct of traders by the preparation and issue of guidelines for marketing in specified areas that must be considered essential, especially in the interests of the consumer’
Benefits from effective collective redress schemes

**Small and founded claims are not necessarily left unpursued**
- Improvement of consumer confidence
- More equal and fair competition

**Sufficient safeguards in the Danish legislation to avoid unfounded claims**
- Court approval
- ‘Loser pays’ principle
- No punitive damages

**Two models are necessary:**
- Traditional *opt in* model (group representative)
- *Opt out* model (if the individual claim is less than EUR 270) – can only be used by public authority (DCO)
- Although not yet used in courts it is an effective tool when negotiating settlements
- The threshold should, however, be increased

Linking private group actions with actions taken by the Consumer Ombudsman

- A private group action and test cases by the Consumer Ombudsman
- A private group action in which the Consumer Ombudsman intervenes
- Settlements initiated by the Consumer Ombudsman which also include participants in a private group action but without prejudice to individual lawsuits
- Advantages:
  - Cost effective
  - Makes individual lawsuits more unlikely
Examples

In courts (private enforcement)
- Bank Trelleborg (redemption of minority shareholders)
- Løkken Savings Bank (compensation of guarantors who lost guarantee capital)
- Jyske Bank (risky investment product that lost most of its value)
- Sampension (pension fund’s withdrawal of ‘payment guarantee’ with retroactive effect)

In settlements (with the Consumer Ombudsman)
- BasisBank (unlawful increase of interest rates)
- Tyrkiet Eksperten (travel agency flying passengers to the wrong airport)
- Sampension
- DiBa Bank (judgment in the Supreme Court)
- Jyske Bank (DCO test cases)

To sum up

- Unfair commercial practises should not pay off or be supported by ineffective legislation
- The Consumer Ombudsman, the ADRs and small claims procedure constitute a robust setup that counters these practises

How to ensure that Consumer Ombudsman activities have a real impact

- Dialogue and negotiation are efficient tools when supported by enforcement remedies
- Guidelines and guidance papers contribute to building effective markets because they create a level ground for fair competition – and because business knows that enforcement may be used in case of non-compliance
- Collective redress schemes ensure that founded small claims are not left unpursued – and they facilitate settlement which also often solves private lawsuits
Thank you for your attention!

Henrik Øe
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PANEL 2: COLLECTIVE INVESTOR CLAIMS - NEW DEVELOPMENTS

Chair: Professor Renato Nazzini, King's College, London

Cross border investor claims
Dr Eva Lein, British Institute of International and Comparative Law

The revised German KapMuG
Professor Axel Halfmeier, Leuphana University Lüneburg

Introduction of collective investor claims in Switzerland
Sandrine Giroud, Lalive

Cross Border Investor Claims

Dr. Eva Lein, Herbert Smith Freehills Senior Fellow, BIICL
Investor claims – a global phenomenon

- Interconnected securities markets
- Security fraud, prospectus liability etc. are frequently a cross-border phenomenon concerning thousands of investors worldwide
- Practical need for international group securities litigation

Investor claims - a changing landscape

- Investor-friendly US were traditionally « the » place for securities litigation involving foreign investors
- *Morrison v NAB* limited circumstances in which cases can be brought in the US
- Shift to other jurisdictions: Canada (Ontario), Australia, but also to the EU (the Netherlands)
The Past: US as forum for f-cubed and f-squared cases

- Extraterritorial effect of US securities laws dependant on « conduct and effects test »:
  - Did wrongful conduct that directly caused the plaintiffs' losses occur in the US ("conduct test") or
  - Did conduct have significant effects on the US securities market ("effects test")
- Widespread f-cubed and f-squared litigation in the US

The Change: *Morrison v NAB*

- Supreme Court: new « transaction test »
- US Securities laws only apply to deceptive conduct in relation with
  - "the purchase or sale of a security listed on a US stock exchange, and"
  - "the purchase or sale of any other security in the United States"
- "Geographical“ approach
How to define transactions in securities « listed in the US »?

*In Re Alstom SA Securities*

- *Morrison* requires to focus on security at issue, not related securities traded in the US (e.g. American Depository Receipts - ADRs).

See also *In Re Vivendi Universal SA*

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How to define « domestic transactions »

*Elliot Associates v Porsche*

- « domestic transactions do not include transactions in foreign traded securities or swap agreements that reference them …» even if the latter are executed in US and subject to NY law
Post Morrison in the US

• Strict interpretation of *Morrison* by courts but uncertainty as to complex scenarios
• Overall decrease of securities litigation in US
• Need for *both* foreign and US investors to find alternative jurisdictions
• Introduction of an «effects-only» test: illegal conduct created direct, substantial, and reasonably foreseeable effects in the US?

Post Morrison in the EU

• Increasing interest of EU countries to attract litigation
• Are there practical collective mechanisms comparable to US framework?
• Crucial features:
  • who has standing
  • opt-in or opt-out approach
  • use of contingency fees
  • presumption of causation
The Netherlands: Your Best Alternative to the US

Two forms of investor collective redress:

- **Collective Action**, Art 3:305 NBW - Declaratory or injunctive relief
  
  **Cases:** *Fortis NV (Ageas NV); SNS Bank NV*

- **Collective Settlement**, WCAM - Monetary compensation on opt-out basis

Famous «Cross-border» Settlements in the NL

- **Shell** (including non-Dutch investors)
- **Vedior** (including US investors)
- **Converium** (none of liable parties and small minority of investors based in NL; wrongdoing took place outside NL)
The Netherlands versus the US

- Converium confirms broad approach regarding international jurisdiction
  (Art. 2, 6(1) and 5 Nr. 1 Brussels I/Lugano; Art. 3 DCCP)
- World-wide settlements easier in NL than US
- Provided that enforcement works throughout EU (notification/public policy concerns with opt out mechanism) & globally

Germany: A new alternative?

« Two forms » of investor collective redress:
- Test case proceedings under KapMuG
  Deutsche Telekom; Daimler Chrysler
- Collective settlements within the framework of the KapMuG on opt-out basis since 2012
Germany versus the Netherlands

- Settlement mechanism inspired by Dutch model
- But: test case proceedings as a precondition for settlement
- Advantages:
  - Better control of claimants /case management.
  - Stronger bargaining power when result on model case issue becomes apparent
- Disadvantage:
  - Jurisdiction issue already at model case stage (i.e. in contentious proceedings); less flexibility as to interpretation of Brussels I
  - Impact on recognition of Dutch opt-out settlements?

Towards an « Americanisation » of securities litigation in the EU?

- Introduction of opt-out settlements (NL, D; UK?)
- Less strict approach towards contingency fees
- presumption of reliance (NL, I)
Developments in other EU Jurisdictions

• Austria: assignment of individual claims to association acting on behalf of investors thereby funding litigation
• France: bill introducing consumer collective actions filed by associations
• Spain: arbitration procedures for small investors
• UK: only in other areas
• EU: Recommendation?

The Upshot

Cross-border securities litigation today:

« At the crossroads, waiting for a sign »
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The revised German KapMuG

Prof. Axel Halfmeier LL.M.
The revised German KapMuG

- KapMuG – a very brief history
  - KapMuG in context
  - KapMuG 2005 – 2012: evaluation
- KapMuG 2012: the revisions
  - „notification“ of claims
  - opt-out settlement procedure
- litigation strategy under the new KapMuG
  - plaintiffs’ perspective
  - defendants’ perspective
- new reform proposal: the green group action

Kapitalanleger-Musterverfahrensgesetz (KapMuG) in context

Telekom case
> 15,000 plaintiffs, prospectus liability claims, ruling in favor of defendants in May, 2012, appeal pending before Bundesgerichtshof

KapMuG 2005

world wide trend towards private enforcement

German federal government: KapMuG (private actions) as „second track“ of enforcement beside public authorities’ enforcement

„litigation industry“?
social and economic effects of collective litigation instruments insufficiently researched, some evidence from U.S.
### KapMuG 2005–2012: evaluation results

**Study commissioned by Fed. Min. Justice (Halfmeier/Rott/Feess 2010)**

1. KapMuG as a worthwhile start, potential for further development
2. Limitation of scope to capital markets liability as a historic contingency
3. Slow and complicated procedure – acceleration necessary
4. Little enforcement effect, recommendation to lower participation threshold
5. Facilitate settlements (learn from the Netherlands)

### KapMuG 2012: Most important revisions

**Evaluation results**

- **Potential for further development**
- **Scope of Application**
- **Acceleration of procedure**
- **Participation threshold**
- **Settlement**

**New law effective 1 November 2012**

- **New KapMuG expires in 2020**
- **Extension to claims based on inadequate investment advice, if capital markets information is relevant**
- **Various technical improvements, but no change to two-level procedure**
- **„Notification of claims“ will stop the statute of limitation period**
- **Opt-out settlement with court approval**
KapMuG 2012: „notification“ (Anmeldung) of claims

- § 10 KapMuG:
  - *Oberlandesgericht* chooses model plaintiff and publishes information on the proceedings
  - 6 months time for further claimants to „notify“ their claims to the court and the defendant
  - content of notification: information regarding the parties as well as „amount and grounds“ of the claim

- Effect of notification:
  - Notifying parties are not participants in the model procedure, results do not bind them
  - but: statute of limitation period is suspended
  - Problem: extent of suspensive effect may depend on description of the „grounds“ of the claim (i.e. in cases of several alleged errors in a prospectus)

KapMuG 2012: opt-out settlement procedure

- §§ 17 to 19 KapMuG:
  - model plaintiff or model defendant may file settlement proposal with the court (court may recommend)
  - approval of the settlement by the court if it finds that the settlement is an adequate solution on the basis of the current state of proceedings in the model procedure
  - opt-out possibility for the other participants
  - settlement will become final only if less than 30% of the participants opt out (head count, not value)
  - settlement effective for all participants who have not opted out, end of model procedure and of the individual proceedings
  - no legal effect for „notifiers“ or other claimants who have not filed suit – but maybe de facto effect
Litigation strategy under the KapMuG 2012: Plaintiffs' perspective

- use "notification" to reduce costs
- 10 plaintiffs – 10,000 notifiers

- build up a "threat" by many (unfounded) notifications of claims
- Problem: notification not for free, lawyer must be used, costs depend on value in controversy

- aim at a quick settlement
- plaintiff attorney normally not interested in long procedure
- possible conflict with client interests (settlement "too low")
- possibly division of plaintiff group, opt-outs

Problem: specific time window for notification must be used
- internal organisation, pooling of costs?

Litigation strategy under the KapMuG 2012: Defendant's perspective

- financial risk of "hardline defense" may be higher:
  - if defendant wins, no cost shifting with regard to the "notifiers"
  - if defendant loses, "notifiers" are likely to sue

- "hardline defense" remains an option
- delays in the beginning of the procedure may cause limitation period to run out before "notification" window opens

- problem: how to reach finality
  - opt-out possible
  - settlement under KapMuG creates three claimant groups:
    - plaintiffs of original proceedings (settlement has legal effect)
    - "notifiers" (effect only with explicit consent)
    - other claimants (if limitation period has not run out)

- "cooperative" defense strategy easier through opt-out settlement possibility
June 2013: “group procedure“ (Gruppenverfahren) – parliamentary proposal by Die Grünen –

- reform proposal in German parliament
- aims at replacing the KapMuG
- differences to KapMuG:
  - unlimited scope of application (all civil and commercial matters)
  - no ordinary filing of suit required
  - one group plaintiff, at least ten further participants necessary
  - opt-in possibility (costs similar to „notification“ under the KapMuG, cost ceiling inspired by Danish model)
  - results are binding on all participants
- but: mainly symbolic value before the federal election (autumn 2013)

Thank you!

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BIICL Annual Conference 2013
Introduction of collective redress for financial investors in Switzerland

Sandrine Giroud
11 June 2013 – London
I. Panorama of Swiss collective redress mechanisms (1/6)

- Civil law system
- Group litigation largely unknown → in most cases individual claims
- General mistrust towards class/mass action
I. Panorama of Swiss collective redress mechanisms (2/6)

- **2011**: Unification of the rules of civil procedure by way of the Swiss Code of Civil Procedure (SCCP)
  - Specific *refusal* of a mechanism of class action
    - Against principle of party disposition
    - "Against European legal principles"
    - Existing provisions for collective claims deemed sufficient

I. Panorama of Swiss collective redress mechanisms (3/6)

- **N.B.** Cases of *mass claims* related to Switzerland
  - United Nations Compensation Commission (UNCC)
  - Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT-I and CRT-II)
I. Panorama of Swiss collective redress mechanisms (4/6)

- **Swiss civil procedural law** is *not supportive* of redress for group claimants
  - No discovery proceedings
  - Fact-finding managed by the court
  - Remedies limited to compensatory damages actually incurred and low compensation for moral damages
  - Standards of proof very high
  - Cost-shifting and litigation funding
  - No pure contingency fees

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I. Panorama of Swiss collective redress mechanisms (5/6)

<table>
<thead>
<tr>
<th>Joinder</th>
<th>Several parties can join their claims if:</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Art. 15; Art. 71 SCCP</strong></td>
<td>(i) same set of facts; (ii) same questions of law; and (iii) same type of proceedings (i.e. under the jurisdiction of the same court)</td>
</tr>
<tr>
<td></td>
<td>• One taking of evidence, reduced costs, avoidance of conflicting judgments</td>
</tr>
<tr>
<td></td>
<td>• Each case has to be pleaded and adjudicated individually</td>
</tr>
<tr>
<td></td>
<td>• Difficult to coordinate in practice</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Group action</th>
<th>Action of organisations of national/regional importance, authorised by their articles of association to protect the interests of a certain group of individuals</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Art. 89 SCCP</strong></td>
<td>• Action in the name of the organisation</td>
</tr>
<tr>
<td></td>
<td>• Limited to violation of the personality of the members of the group</td>
</tr>
<tr>
<td></td>
<td>• Limited to declaratory and injunctive relief (no monetary relief)</td>
</tr>
</tbody>
</table>
### I. Panorama of Swiss collective redress mechanisms (6/6)

<table>
<thead>
<tr>
<th>Other collective actions</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Investors in collective investment schemes</td>
<td>Art. 86 Federal Act on Collective Investment Schemes</td>
</tr>
</tbody>
</table>
|  | • Court-appointed representative may initiate a collective action  
|  | • Monetary redress on behalf of the affected investors  
|  | • Damages only for the investment scheme  
|  | • Costs borne by the collective investment scheme |
| Shareholders in a merger transaction | Art. 105 Swiss Merger Act |
|  | • Shareholders’ claim for losses due to an alleged inadequate treatment in a merger  
|  | • No opt-out for shareholders in a similar situation  
|  | • Costs generally borne by the company |
| Nuclear accidents | Nuclear Third Party Liability Act |
|  | • Simplification of the administration of mass claims in cases of nuclear accidents |

<table>
<thead>
<tr>
<th>Court procedural powers</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedural power enabling a simplification of the proceedings</td>
<td></td>
</tr>
</tbody>
</table>
|  | • Joinder Art. 125 SCCP  
|  | • Stay of the proceedings Art. 126 SCCP  
|  | • Referral of an action to another court seized with a related action is pending Art. 127 SCCP |

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### II. Focus on the protection of financial investors (1/3)
II. Focus on the protection of financial investors (2/3)

- **Evolution** regarding collective redress since the **financial crisis** 2008/2009

- Several **scandals**:
  - UBS fallout
  - Lehman Brothers Holdings Inc. bankruptcy
  - Madoff fraud
  - Retrocessions taken from banks in the context of asset management services

II. Focus on the protection of financial investors (3/3)

- **Surveys** from the Swiss Financial Market Supervisory Authority (FINMA) re **Madoff fraud** and **distribution of Lehman products**
  - Inadequate legislation regarding investors’ protection
  - Need for a **review** of the **supervisory and legal framework** in relation to **investment product intermediation**
    - Improving business conduct rules when marketing and distributing financial products
    - Increasing client information
    - Improving **enforcement of clients’ claims**

- **Swiss Financial Services Act** (SFSA)
III. Reform discussions in Switzerland (1/3)

- **Political initiatives**
  - **May 2010**: Parliamentary commission report regarding the UBS fallout and transfer of data to the USA
    → Action required in respect of corporate liability claim
  - **September 2011**: Parliamentary Motion Birrer-Heimo
    → Simplification of claim enforcement by way of collective actions
  - **March 2013**: Parliamentary Motion Schwab
    → Collective action for breach of data protection in particular on the internet

III. Reform discussions in Switzerland (2/3)

- **SFSA**
  - 18 February 2013: Hearing Report
  - 7 March 2013: Panel
  - Entry into force expected in 2015/2016

- **Key thrusts** regarding the enforcement of retail clients
  - Reversal of the burden of proof regarding conduct obligations
  - Expansion of the Ombudsman system
  - Collective redress
III. Reform discussions in Switzerland (3/3)

- Swiss Federal Office of Justice’s broad-based investigation on the suitability of introducing collective legal enforcement of claims relating to damages involving a large number of aggrieved parties with the same or similar claims.
- Report to be approved by the Swiss government in the course of 2013.
- Early stages:
  - Focus on access to justice.
  - Re financial investments: limitation to cases of structural breaches of duty (e.g. prospectus with erroneous information).
  - Opt-in system more likely.

IV. Conclusion

- Change of paradigm in Switzerland.
- Cultural scepticism but increasing need for more protection and improvement of access to justice.
- Focus on financial investors’ and consumers’ protection.
- Industry awareness of the trend:
  - Banking industry.
  - Swiss Re’s report.
- More changes expected in 2013 and in the coming years.
  ... to be continued.
Thank you

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Annual Conference 2013
Righting Private Wrongs: Competition Law, Investor Claims and Mass Litigation in the EU

PANEL 2: COLLECTIVE INVESTOR CLAIMS - NEW DEVELOPMENTS

Chair: Professor Renato Nazzini, King’s College, London

Cross border investor claims
Dr Eva Lein, British Institute of International and Comparative Law

The revised German KapMuG
Professor Axel Halfmeier, Leuphana University Lüneburg

Introduction of collective investor claims in Switzerland
Sandrine Giroud, Lalive
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CONCLUDING SPEAKER

EU initiatives in the area of collective redress - which options?

Diana Wallis
Former MEP and Vice President European Parliament