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Switzerland: Class actions – litigation, policy and latest developments

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Introduction

The global trend of strengthening collective redress mechanisms has reached Switzerland as well. In the recent past, class actions have been in fact one of the prime topics discussed among both scholars and practitioners of Swiss civil procedure. As the Swiss Code of Civil Procedure (Swiss Procedure Code or CPC) lacks a true representative mechanism of collective redress, the core of the debate is about whether – and if yes, to what extent – such litigation mechanisms should be adopted to ensure effective access to justice for persons affected by mass damages.

Among others, competition law is one of the key fields of application for collective redress tools, which is why the current political debate is followed closely by trade associations and competition law practitioners. On the one hand, mass damages are likely to happen in this field as inevitably a large number of consumers or competitors may be affected by competition law infringements. On the other hand, the true extent of damages arising out of anticompetitive practices will often only become apparent when individual claims are bundled and considered in their entirety.

It has been the Swiss Federal Council's general aim to amend the existing procedural instruments for claims bundling by means of genuine tools of collective redress that are applicable to all areas of law. By the end of 2021, the Swiss Federal Council issued the message on a draft legislation for the introduction of new collective redress mechanisms. Although parliamentary consultations are at the moment suspended, the draft reflects the key legislative projects in the field of collective redress that, in one form or another, will be discussed in the near future. These are the introduction of (i) a reparatory association claim and (ii) collective settlement proceedings.

In what follows, we will first provide an overview of the collective redress tools that we believe are particularly relevant in a competition law context. We will then present the current state of the political debate on the introduction of new collective redress mechanisms in Switzerland and finally discuss the legislative amendments that have been recently proposed by the Federal Council.

Notable collective redress mechanisms under current law

The Swiss legislator has historically opposed providing a tool for collectively asserting mass damage claims – namely, US-style class actions that are generally deemed incompatible with the fundamental principles of Swiss law. During the drafting of the unified CPC, which came into force on 1 January 2011, it was repeatedly emphasised that the existing procedural mechanisms already provided for sufficient means for parties to collectively assert mass damage claims.[2] Against this background, the most important tools that under current law allow for a bundling of claims in a competition law context warrant a closer look.[3]

Association claim

Under current law, the association claim provides for a representative litigation tool. The Swiss legislature first introduced the association claim in the area of unfair competition, enabling authorised associations to safeguard the economic interests of their members to bring claims of violations of the Unfair Competition Act on their behalf. In time, the scope of the application of the association claim has been extended gradually.[4] In its current version, article89 of the unified CPC provides that associations and other organisations of national or regional importance that are authorised by their articles of association to safeguard the interests of their members are – in specific cases – allowed to bring claims in their own name on behalf of those members. Furthermore, specific legal provisions provide for similar association claims for additional areas of law, including, for example, unfair competition, trademark, gender discrimination and the rights of dispatched workers from the European Union.

However, despite being praised in the 2006 message on the unified CPC as a class action-like mechanism,[5] the association claim has thus far proved toothless in practice. The lack of practical significance is attributable to a variety of reasons: not only is the association claim limited to violations of the personality rights of the members of the group, but remedies are limited as associations can only request that (i) a threatened violation be prohibited; (ii) an existing violation be ceased; or that (iii) a violation that continues to have a disturbing effect be declared unlawful. By contrast, monetary claims are not admissible and must therefore be levied by the individuals themselves. Moreover, only associations of Swiss or regional importance can make use of this tool.[6] The same is true for association claims brought under special legal provisions, to which the current version of article89, paragraph3 of the CPC expressly refers.

The reform proposed by the Federal Council aims to strengthen the practical impact of the association claim by broadening its scope of application in several respects. Most importantly, the current limitation to violations of personality rights is to be abolished by opening the scope of application to the enforcement of all violations of rights. In future, therefore, association claims could be made in a broad range of substantive areas, such as antitrust and unfair competition law, financial services, data protection, product liability and telecommunication, with the aim of making collective redress more uniformly available. In this respect, the proposal goes even further than the EU Directive,[7] which only covers consumer protection.

The requirements are defined more clearly with associations and organisations being entitled to bring a claim in their own name if they:

- are not profit oriented (indicating that the Federal Council has in mind as potential claimants associations according to articles 60 et seq of the Swiss Civil Code and foundations according to article80 of the Swiss Civil Code rather than commercial organisations);
- have existed for at least 12 months (and are thus not established ad hoc on a short-term basis);
- are authorised by their articles of association or bylaws to safeguard the interests of the affected persons; and
- are independent of the defendant (which under the EU Directive is also a key element, see article 4, paragraph 3, letter e of the EU Directive).

As is the case under current law, the association claim is available for claims for injunctive relief, removal or declaration of unlawfulness of a violation. In the latter case, the claim no longer depends on any additional special interest in a declaratory judgment (article 89, paragraph 2 of the Draft CPC). In particular, it would not be necessary that an alleged violation continues to have a disturbing effect, which in the past has led courts not to admit association claims.[8] In addition, a new paragraph 3 would explicitly provide for an option to request notification to third parties or publication of a court decision.

Joinder of parties and consolidation by the court

The CPC also provides for the joinder of parties (article71). Parties can join their claims provided that each of the claims is based on a similar set of facts or legal grounds and that the court has jurisdiction over these claims. However, the practical significance of the joinder of parties for the assertion of mass damage claims is limited, as the joinder of numerous parties having different – potential conflicting – objectives can be difficult to coordinate. Moreover, each case remains independent and must be pleaded individually with different outcomes possible.

Furthermore, related proceedings that have been initiated separately by different claimants can be consolidated. A consolidation of proceedings by the court ultimately results in a joinder of parties, which is why the specific issues as discussed above also need to be taken into account. It must be considered, moreover, that consolidation of proceedings is a tool of litigation management for the court, and the parties can only urge a consolidation of claims that have been filed separately to a limited extent. Likewise, the transfer of related proceedings to another court pursuant to article127 of the CPC – or in international litigation pursuant to article28, paragraph2 of the Lugano Convention – only provides limited relief.

Test cases

Test cases (also referred to as model or pilot cases) provide for a cost-effective way for handling mass damages effectively and ensuring uniformity of court decisions. This litigation tool is based on an agreement between the claimants and the defendant. The parties agree that the outcome of a test case brought by one of the claimants will be binding for all claims covered by the agreement. Since it is generally acknowledged that the extent of res judicata is not subject to party disposition, the effects of the judgment issued in the test case are not directly extended to the parties that are not formally part of the litigation.

Pursuant to article126, paragraph1 of the CPC, proceedings that are already pending can be suspended until the test case is settled. Hence, it is advisable for the parties to jointly submit a request for a stay of the proceedings to the court. Moreover, in order not to jeopardise the subsequent enforcement of the claims covered by the agreement, it is essential for claimants that the agreement also contains a waiver of the statute of limitations. Therefore, the feasibility of test cases significantly depends on the willingness of the defendant to cooperate, which may explain why in practice the use of this litigation tool is mostly considered where defendants are organised under public law.[9]

Assignment model

A further option for damaged parties is to join a multitude of claims by assignment to one party (assignee), which, for instance, is a consumer organisation, a professional service provider or an ad hoc founded entity. The assignee then bundles and files the claims in its own name, and not under the names of the assigning individuals, in a regular two-party proceeding by means of a joinder of claims (the assignment model). This concept also allows for third-party litigation funders to support the assignee financially, which in practice has proven to be a characteristic feature of the model. In the proceedings, every claim is then assessed individually on its merits. The judgment only has a binding effect on the parties that have effectively assigned their claims. On this basis, the assignment model is tailored as an opt-in mechanism of collective redress.

In Germany, the assignment model has been tried out in recent years with regard to the enforcement of antitrust-related damage claims, among others. Notable cases are the *Cement* cartel case[10] – occupying German courts for over a decade – and the Munich *Trucks* cartel case[11] or the *Sugar* cartel case.[12] These cases have revealed significant procedural hurdles that need to be considered when bundling and enforcing individual claims by means of the assignment model. Nonetheless, the German Federal Court of Justice has recently clarified that the bundling of claims through an assignment to a legal service provider is allowed and thus ended the battle over the general permissibility of the assignment model in Germany.[13] It is to be expected that in future companies that suffered damage from a cartel will have a solid tool at their disposal to pursue antitrust damage claims in Germany.

In Austria, the model has been successfully applied over two decades for bundling numerous individual claims in one proceeding against the same defendant. The method has proven so successful that among scholars and practitioners the assignment model is generally referred to as the 'Austrian style class action'. However, the scope of application of the assignment model in Austria is predominantly limited to the assertion of consumer protection claims with the Austrian Consumers' Association – a partially state-owned consumer protection association – being in charge as the assignee (claimant).[14]

In a recent high-profile case in Switzerland, the assignment model was tested in the context of 'Dieselgate'. A foundation for consumer protection (Stiftung für Konsumentenschutz) filed an action on behalf of approximately 6,000 consumers against Volkswagen AG and AMAG AG, the latter being the Swiss car importer for Volkswagen. The Commercial Court of the Canton of Zurich held that the foundation was essentially acting as a procedural vehicle for the individual car owners and that the foundation's articles of association did not allow for such activity.[15] Later on, the judgment was confirmed by the Swiss Federal Supreme Court in an unpublished judgment.[16]

The Dieselgate case illustrates that in Switzerland – contrary to the trend in Germany and Austria – the assertion of mass damage claims via the assignment model is yet to gain momentum. But although the judgment reflects the scepticism that Swiss courts harbour towards potential negative side effects of group litigation, it must in our view not be misunderstood as a rejection of the assignment model in its entirety. As in the cases for Germany and Austria, it cannot be ruled out that in future the assignment model is going to have a further impact in Switzerland. Since both the German and Austrian legal systems are structurally comparable to the Swiss legal system, the experience with the assignment model gained there can also be taken into account for Switzerland. This is all the more true as the assignee does not necessarily need to meet the requirements set out in article89 of the CPC in order to file a claim on behalf of the affected individuals. In addition, given the significant political opposition that the draft provided by the Federal Council is likely to meet, the assignment model might remain one of a few litigation tools available for asserting mass damage claims in the near future.[17]

Law reform proposed by the Federal Council

Political debate on the adoption of new collective redress mechanisms in Switzerland

The Collective Redress Directive came into force on 24 December 2020 in the European Union.[18] Member states of the European Union have to transpose the EU Directive into their national laws by 25 December 2022 and apply those measures from 25 June 2023 onwards. Legislative procedures are currently underway in the member states to implement the EU Directive.

Although Switzerland does not form part of the European Union, the Swiss Federal Council has simultaneously sought to facilitate the assertion of mass damage claims by broadening the scope of the traditional association claim as well as through introducing new collective redress mechanisms. Thus, on 10 December 2021, the message on the draft legislation was issued.[19]

However, already in the build-up to the parliamentary consultation in the first half of 2022, the draft has been met with significant opposition. In a media release on 24 June 2022, the Legal Affairs Committee (LAC) of the Swiss National Council[20] rejected to commence consultation as it found that the Federal Council's draft left too many questions open and that it was therefore not possible to fully assess the need for legislative action in the area of expanding collective redress. In particular, LAC requested more comprehensive information on the economic impact of the instruments proposed on companies potentially

affected. Subsequently, the competent federal department[21] was instructed to carry out an assessment on the potential regulatory impact of the introduction of new collective redress mechanisms. Moreover, LAC requested a more comprehensive comparison of collective redress mechanisms in select EU member states. According to LAC's media release, the additional evaluation is extensive and requires a considerable amount of time.

Against that background, LAC will not resume debates on the draft until the second quarter of 2023 at the earliest. By that time, the EU member states will have already begun applying new measures pursuant to the Collective Redress Directive. Nonetheless, in view of the upcoming political debate in Switzerland, the new instruments for collective redress proposed by the Federal Council warrant a closer look.

New association claim to assert damage compensation claims

In addition to strengthening the existing association claim (article89 of the CPC),[22] the draft provides for a separate association claim for asserting damage compensation claims (article307(b) et seq of the Draft CPC). This 'reparatory' association claim is intended to allow the assertion of monetary claims, in particular in cases involving mass damages.

According to the draft, associations or organisations may bring claims in their own name and at their own risk but on behalf of the individuals they represent (article307(b) of the Draft CPC). The affected persons must either have previously authorised the association to bring an action on their behalf or joined the action after it was admitted (article307(d) of the Draft CPC). Persons not directly forming part of the claim are not bound by any judgment in connection with the association claim, even if they have faced a similar type of damage. Accordingly, the proposal is based on the opt-in principle, according to which only persons who have explicitly given their consent to the action are covered by the legal force of the judgment.[23]

The filing of a reparatory association claim as foreseen in the draft is permissible under the following conditions:[24]

- The association or organisation is entitled to bring an association claim either under article89 of the Draft CPC or under a special legal provision, such as the Swiss Federal Workers' Participation Act, the Unfair Competition Act, the Trademark Protection Act or under the Gender Equality Act (article307(b), lettera of the Draft CPC).
- The association or organisation has been authorised to bring a claim by at least 10 affected persons in writing or in any other form allowing it to be evidenced by text (article307(b) of the Draft CPC). This is to ensure that an association claim can only be brought if a fairly large number of persons are actually affected. The authorisation requirement must have been met at the time the association claim is filed.
- The claims asserted are based on similar circumstances or legal grounds (article 307(b), letter c of the Draft CPC). This requirement overlaps with the factual connection as required for the (voluntary) joinder of parties pursuant to article71 of the CPC and is intended to ensure that a bundled assertion of claims for damages is efficient and economical.

To sum up, the 'reparatory' association claim provides for a true representative litigation tool to assert damage compensation claims. However, whether the association claim will also prove effective in small claims disputes, as envisaged by the Swiss Federal Council,[25] is difficult to predict. As mentioned above, the association claim is based on an opt-in principle and thus, in each case, a separate authorisation by the affected persons is required.

New collective settlement proceedings

Since experience has shown that a significant number of collective disputes are terminated by settlement, the draft seeks to supplement the new association claim procedure with provisions allowing for collective settlements (article307(h) et seq of the Draft CPC). Parts of the proposal are inspired by the Dutch model on collective settlement procedures adopted in July 2005 (the Collective Settlement of Mass Damage Act). Concerning the Swiss Federal Council's draft, a distinction can be made between (i) collective settlements in the context of an association claim and (ii) collective settlements without a preceding association claim. The key elements of the envisaged mechanisms are as follows.

Collective settlements in the context of an association claim

Collective settlements may be reached in the context of an association claim, in which case the settlement must be approved by the court, as the affected persons are not directly parties to the court proceedings. Consequently, the parties to the association claim – that is, the association or organisation itself on the one hand and the defendant on the other – must submit the settlement reached to the court for approval (article307(h) of the Draft CPC). The court approves the settlement if (article307(j) of the Draft CPC):

- it is reasonable;
- it is accepted by the parties (a minimum number or quota of affected persons bound by the settlement has been reached);
- it does not violate mandatory law;
- the consequences of its costs are adequately regulated; and

- the interests of the persons affected by the settlement as a whole are adequately protected.

As a rule, the persons included in the settlement are those who have joined the association claim (article307(h), paragraph 1 of the Draft CPC). The bulk of settlements reached will therefore be based on an opt-in principle. However, in some specific cases and upon request by the parties, the court may extend the effects of the settlement to all persons affected by the violation who do not opt out within a period of at least three months after the publication of the settlement proposal in an electronic register (article307(h), paragraph2 of the Draft CPC). In these cases, the group settlement would be of an opt-out nature. However, to avoid issues concerning due process or proper service, such extension will only apply to affected persons who have their seat or domicile in Switzerland. In addition, it will be necessary that (i) the claims covered are of such low value that an individual claim would not be worthwhile (article307(h), paragraph2, lettera of the Draft CPC) and (ii) a significant number of the affected persons have not joined the association claim (article307(h), paragraph2, letterb of the Draft CPC). According to the Swiss Federal Council, the latter should always be the case if at least one-third of the affected persons have not joined the claim.[26]

Collective settlements without a preceding association claim

Moreover, the draft also provides for a collective settlement procedure without a preceding association claim (article307(k) of the Draft CPC). According to the message, the option to conclude a collective settlement should also be available without the parties having to introduce an association claim first.[27] Here, the requirements are largely identical to those of the collective settlement in connection with an association claim as shown above. Collective settlements without a preceding association claim thus may only be negotiated by associations or organisations that are entitled to bring an association claim pursuant to article89 of the Draft CPC or under a special legal provision (article307(k), lettera of the Draft CPC). Furthermore, the claims asserted must be based on similar circumstances or legal grounds (article307(k), letterb of the Draft CPC). In contrast to a settlement reached in the context of an association claim, collective settlements without a preceding association claim are only permissible based on an opt-out principle. Therefore, the claims covered must be of such low value that an individual claim would not be worthwhile (article307(k), letterc of the Draft CPC). As regards the procedure, the provisions on collective settlements in the context of an association claim are applicable, all necessary changes having been made (article307(l) of the CPC). Consequently, in the scope of collective settlements without a preceding association claim, the parties must submit the draft settlement to the court for approval (article307(h) et seq of the CPC).[28]

Outlook

It can be surmised that in the recent years, quite a broad consensus has emerged across the European Union and also in Switzerland on the need for better access to justice for individuals as well as small and medium-sized enterprises affected by mass damages. By implementing new collective redress mechanisms, the Swiss Federal Council is keeping pace with the recent developments in the European Union. It is thereby fair to assume that the benefits to parties seeking an efficient and cost-effective way for the assertion of mass damage claims are likely to outweigh the potential risks generally associated with collective redress. The opt-out based collective settlement procedure, for example, may facilitate access to justice in cases where the assertion of claims on an individual basis would have failed because of cost-benefit reasons (rational apathy). Potential defendants could favour the option of collective settlements without a preceding association claim, whereby due to the application of the opt-out principle all claims of potential claimants can be settled in one go. This provides for a final solution as well as legal certainty which is relevant for any business. However, as the draft proposed has been met with some political opposition, it remains to be seen whether it will be enacted as intended by the Swiss Federal Council.

Notes

[1] Urs Feller is a partner and Martin Heisch is an associate with Prager Dreifuss Ltd, Zurich.

[2] Message of the Swiss Federal Council on the Swiss Code of Civil Procedure dated 28 June 2006, *BBl* 2006, p7224 and 7280.

[3] For a general overview of the mechanisms that under current Swiss law allow for claim bundling see, for example, Domej, Tanja, 'Einheitlicher kollektiver Rechtsschutz in Europa?', *ZZP* 2012, p 423 et seq; Müller, Karin, 'Kollektiver Rechtsschutz in der Schweiz, Braucht es ein Gruppenvergleichsverfahren?', *Haftpflichtprozess* 2019, p 18 et seq; Gordon-Vrba, Lucy, *Vielparteienprozesse*, Zurich/Basel/Geneva 2007, p169 et seq.

[4] Baumgartner, Samuel P., 'Switzerland', *The Annals of the American Academy of Political and Social Science* 2009, p 181 et seq.

[5] Message of the Swiss Federal Council on the Swiss Code of Civil Procedure dated 28 June 2006, *BBl* 2006, p 7224.

[6] Baumgartner, Samuel P., 'Switzerland', *The Annals of the American Academy of Political and Social Science* 2009, p 181 et seq.

[7] 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.

[8] Swiss Federal Supreme Court, 4A_483/2018, dated 8 February 2019, cons3.

[9] Baumgartner, Samuel P., 'Switzerland', *The Annals of the American Academy of Political and Social Science* 2009, p 185, with references to the relevant case law of the Federal Supreme Court.

[10] Higher Regional Court of Düsseldorf, Judgment of 18 February 2015, VI-U (Kart) 3/14, BeckRS 2015, p 5317 et seq.

[11] Munich I Regional Court, Judgment of 7 February 2020, 37 O 18934/17, EuZW 2020, p 279 et seq.

[12] Regional Court of Hannover, Judgment of 4 May 2020, 18 O 50/16, NZKart 2020, p 398 et seq.

[13] BGH, Judgment of 13 June 2022, VIa ZR 418/21; see also BGH, Judgment of 13 July 2021, II ZR 84/20.

[14] See, among others, Klauser, Alexander/Hadler, Peter, *ZZPInt* 2013, p 114 et seq.

[15] Commercial Court of the Canton of Zurich, Judgment of 6 December 2019, HG170257.

[16] Swiss Federal Supreme Court, 4A_43/2020, dated 16 July 2020.

[17] Heisch, Martin, *Abtretungsmodelle im Zivilprozess: Die gebündelte Anspruchsdurchsetzung mittels Inkassozession, objektiver Klagenhäufung und Prozessfinanzierung*, Zurich/Basel/Geneva 2022, p13 et seq.

[18] 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.

[19] Message of the Swiss Federal Council on the Amendment of the Swiss Code of Civil Procedure dated 10 December 2021, *BBl* 2021, p1 et seq.

[20] See press release of the Legal Affairs Committee of the Swiss National Council dated 24 June 2022.

[21] Swiss Federal Department of Justice and Police (FDJP).

[22] See Chapter II, section 1.

[23] Peter, Matthis/Hoffmann-Nowotny, Urs, *Der ZPO-Revisionsentwurf zum kollektiven Rechtsschutz*, AJP 2022, p 576 et seq.

[24] Message of the Swiss Federal Council on the Amendment of the Swiss Code of Civil Procedure dated 10 December 2021, *BBl* 2021, p23 et seq.

[25] Message of the Swiss Federal Council on the Amendment of the Swiss Code of Civil Procedure dated 10 December 2021, *BBl* 2021, p24.

[26] Peter, Matthis/Hoffmann-Nowotny, Urs, *Der ZPO-Revisionsentwurf zum kollektiven Rechtsschutz*, AJP 2022, p 582 et seq; Message of the Swiss Federal Council on the Amendment of the Swiss Code of Civil Procedure dated 10 December 2021, *BBl* 2021, p29.

[27] Message of the Swiss Federal Council on the Amendment of the Swiss Code of Civil Procedure dated 10 December 2021, *BBl* 2021, p31.

[28] Peter, Matthis/Hoffmann-Nowotny, Urs, *Der ZPO-Revisionsentwurf zum kollektiven Rechtsschutz*, AJP 2022, p 585 et seq.

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Authors

Urs Feller
Partner

Martin Heisch
Associate

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