Revista Ítalo-Española de Derecho Procesal
Vol. 2 | 2020 Procesos colectivos pp. 143-163
Madrid, 2020
Marcial Pons Ediciones Jurídicas y Sociales

ISSN: 2605-5244

THE IMPACT OF THE DIRECTIVE ON REPRESENTATIVE ACTIONS FOR THE PROTECTION OF THE COLLECTIVE INTERESTS OF CONSUMERS[1] ON THE EAST-NORDIC COUNTRIES' LEGISLATION

Laura Ervo
Dr. Professor of Law, Örebro University Sweden
Adjunct professor (docent) at the Finnish universities
of Helsinki, Turku and Easter Finland

Abstract: In this article, it will be discussed how the EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers will affect the East-Nordic countries. In this context, Finland and Sweden are compared. Special emphasis is placed on the current problems concerning class actions *vis á vis* access to justice and how the new EU Directive will possibly solve the experienced deficiencies. Additionally, the more general perspective on problems in access to justice will be studied from the class-action point of view. Thus, one of the research objectives of this paper is to evaluate whether the current scope of class actions at the national and EU levels is satisfactory and whether there is still space for improvement and additional development at both the EU and national levels.

Keywords: Board, Class action, Costs, Finland, Friendly settlement, *Res judicata*, Sweden.

[1] 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. Later referred to "Directive".

1. INTRODUCTION

In this article, the effects of 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 are discussed from the East-Nordic[2] point of view. The East-Nordic perspective covers Sweden and Finland. The current situation concerning consumers' collective interest in both Sweden and Finland is compared in the light of the Directive to establish what kind of potential and input the Directive could bring about to promote consumers' interests in these countries.

Sweden and Finland are compared because they are neighbouring countries that share a similar legal culture and a common history. They have also traditionally had a lot of legislative cooperation, but regarding class actions the national legislation and application of the instrument differs quite significantly. Therefore, it is interesting to compare these two countries and the ways in which the Directive will affect the current national situations.

To this end, the Nordic tradition of using boards for settling consumer disputes will firstly be introduced. After that, both the Swedish and Finnish class action systems are presented, with particular emphasis on local impediments to developing class action systems at the national level. Then some specific problems and opportunities, like *res judicata*, friendly settlements, and procedural costs are discussed to evaluate how the Directive could change the current situation and legislation.

The article concludes with future visions and a summary.

2. THE NORDIC WAY OF SOLVING CONSUMER DISPUTES — THE SIGNIFICANCE OF CONSUMER BOARDS.

Traditionally, consumer boards have played a significant role in the Nordic countries as a means of gaining access to justice in consumer disputes. They offer a rapid and economic way to solve a dispute without a trial. The decision of a board, however, is not binding but merely a recommendation. If the opposite party will not voluntarily follow the recommendation, the winning party must go to the courts anyway to try to obtain an enforceable judgment. Therefore, a consumer board does not fulfil the requirements of access to court. Still, in practice, consumer boards have enabled access to justice

[2] The Nordic countries are often divided into East-Nordic (Sweden and Finland) and West-Nordic countries (Norway, Denmark and Iceland). This division is used especially in the legal context due to the fact that West-Nordic countries have started to get closer to common law legal culture compared with the East-Nordic countries which still are very clearly civil law countries. Nylund, Anna: European Integration and Nordic Civil Procedure. In: The Future of Civil Litigation - Access to Courts and Court-annexed Mediation in the Nordic Countries, by Ervo, Laura - Nylund Anna (eds.), Springer 2014, p. 33–34.

in simple consumer cases for single individuals, and this has worked quite well not least because many SMEs or smaller-scale businesses will normally follow the recommendations given by the boards. Consequently, consumers get compensation on a voluntary basis based upon the recommendation of a board.[3] However, whenever the opposite party is a powerful company with an interest in saving money and operating in an economical and effective way through interpreting current legislation to its own benefit, or by actually exploiting ambiguities in regulations, there might be problems in using consumer boards as a means of solving disputes. Also, whenever a big group of consumers is demanding compensation, the economy can play a bigger role than "fair play" from the company´s perspective. In such situations, class action would be the better tool for gaining access to justice than boards. It should be added that of course companies' reputation also represent a value. That is, any negative publicity that may ensue from a company not following a recommendation given by a board may count for something. Thus, companies are to some degree prone to follow the boards' recommendations in practice, but whenever the dispute is a real and substantial one and a group of consumers are up against a powerful company or an insolvent or otherwise negligent company to whom negative PR is not of great import anymore, a single complaint put to a consumer board is rarely an effective tool.

As a consequence, the next step was to create a system of class complaints. In Sweden, class complaints have been possible since 1991 at the National Board for Consumer Disputes (ARN), which is a public authority and which functions roughly like a court. The Consumer Ombudsman and in the second instance also associations of consumers or wage-earners can start a class complaint through the ARN. This system is not based on an opt-in model, but the recommendation covers all consumers who could have identical demands based on the same grounds against the same business party.[4]

In Finland, "class action" was likewise first introduced in consumer complaint boards, where a class complaint has been possible since 2007. Only public class complaints are allowed in Finland. Hence, if a recommendation issued by the Consumer Complaint Board is not followed, the Consumer Ombudsman can take the matter to court as a class action.[5] In Finland, there has been one class complaint so far (Case 2012-05-15, 1070/81/11 Peab Oy),

---

[3] Ervo, Laura: Current consumer problems and alternative dispute resolution in banking: East-Scandinavian comparisons. Vías Extrajudiciales de Protección del Inversor e Instrumentos en la Financiación de Empresas / [ed] Beatriz Belando Garin och Carmen Boldó Roda, Forlaget Thomson, 2018, pp. 145-152, Ervo, Laura – Persson, Annina: The Finnish and Swedish legislation in the light of the ARD-Directive: boards and ombudsmen Collective redress in Europe: why and how? / [ed] Eva Lein, Duncan Fairgrieve, Marta Otero Crespo, Vincent Smith, British Institute of International and Comparative Law 2015, p. 463–465 and Viitanen, Klaus: Lautakuntamenettely kuluttajariitojen ratkaisukeinona. Suomalainen Lakimiesyhdistys 2003, p. 438.

[4] See Lindblom, Per Henrik: Grupptalan i Sverige, Norstedts Juridik 2008, pp. 251.

[5] Laukkanen, Sakari: Last trends in the Finnish civil procedure and judicial administration. In: The recent tendencies of development in civil procedure law – between east and west. International conference to celebrate 100th anniversary of the birth of professor Jonas Žeruolis. Vilnius 2007, p. 81.

where the complaint was rejected. The class 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, and thus the complaint was dismissed.[6]

Moreover, mediation is trending in Finland, backed by a lively academic debate on this topic for quite some time.[7] Court-annexed mediation has existed in a Finnish context since 2006, based upon the Act on court-annexed mediation (663/2005). Likewise, the Act on Conciliation in Criminal and Certain Civil Cases (1015/2005) has been in force since 2006. Mediation is one – quite light or subtle - instrument for solving consumer or other type of disputes. By nature and purpose, mediation could be placed somewhere between consumer boards and traditional court procedure.

3. CLASS ACTIONS IN SWEDEN

In Sweden, there has been a system of class actions in place since 1 January 2003, when the Group Proceedings Act (2002:599)(GRL) came into force. Sweden was thus one of the first countries outside the Anglo-American legal sphere to introduce legislation in the field of collective redress.[8] The Swedish scope of class actions is quite wide. It covers civil cases, which belong to the competence of the general courts, as well as the cases concerning environmental damages in environmental courts.[9] However, the current national scope does not cover all significant areas. For instance, social security cases or labour market law are not covered by the class action remit - despite the fact that this type of collective redress would be quite useful in those areas. The repercussions for individuals in these areas are significant, and infringements can be serious ones where especially vulnerable people have problems in gaining access to justice. Therefore, this hole in the legislation should be filled, and one might argue that the EU Directive is rather deficient and not capable of improving the situation at the national level in this particular respect.

This is just one example of how the Directive does not solve all problems and proof that there are still national deficiencies in the scope of the collective judicial mechanisms which should be remedied. Clearly, one disadvantage

---

[6] https://www.kkv.fi/ajankohtaista/Tiedotteet/kuluttajavirasto/2012/19.4.2012-ryhmavalitus-peaboyta-vastaan-kaatui-kuluttajariitalautakunnassa/.

[7] See for instance Ervasti, Kaijus – Nylund, Anna: Konfliktinratkaisu ja sovittelu. Edita Publishing Oy. Helsinki 2014.

[8] Lindblom has commented the earlier Swedish proposals, see Lindblom, Per Henrik: Group Actions and the Role of the Courts - A European Perspective. Forum internationale, No. 23, May 1996. 1997, p. 15 - 21.

[9] GRL, Section 2 and Code of Environmental Matters, Chapter 32, Section 13.

of the EU legislation can be that the national deficiencies and needs for development are put aside in favour of a focus on implementation of Directives. EU legislation does not necessarily cover all important areas; and so a false feeling of security that everything is solved by common European legislation may prevail.

The Swedish system is based on an opt-in method.[10] Critics of the system have recommended that it be changed in future to make the Swedish class action system more efficient.[11] The Directive however cannot be the prime mover in this sense either, not least because all possibilities (opt-in, opt-out or a hybrid method) are accepted as alternatives in the Directive.[12] In general, the Swedish system is said to be "toothless". It has not been used that much in practice either and certainly not as much as was first estimated upon its introduction. The prognosis was to have about 15 – 20 cases per year, but so far there has been only 20 cases during the whole history of the Swedish class actions, which means about one case per year.[13] One way of making the Swedish system more efficient could be to base it on the opt-out system or at least the hybrid model employed in Norway and Denmark.[14]

Class actions in Sweden can take the form of individual group actions, governmental (public) class actions, and suits brought forward by organizations.[15] Based on the current national legislation in Sweden, there are already many qualified entities who can bring forward a class action. Any one individual, who is a member of the group concerned, can bring a suit against a defendant in the case of individual group action. Physical or legal persons can start the individual group action.[16] In suits made by organizations, the plaintiff is a non-profit-making association by consumers or employees.[17] In environmental cases, the non-profit associations can bring class actions if

---

[10] GRL, Section 14.

[11] Ervo, Laura: Opt in is out and opt out is in. In Dimensions Based on Nordic Options and the Commission's Recommendations, Hess, Burkhard – Bergström, Maria – Storskrubb, Eva (eds.), EU Civil Justice: Current Issues and Future Outlook, Hart, 2016, Lindblom, Per Henrik: Grupptalan i Sverige: bakgrund och kommentarer till lagen om grupprättegång, Norstedts, 2008, pp. 145–151, Lindblom, Per Henrik: Utvärdering av lagen om grupprättegång Svensk Juristtidning, 2008 p. 843 and Wallerman Ghavanini, Anna: United we stand, divided we sue: collective access to court in Sweden, particularly for labour and social security claims. European Labour Law Journal, 2021 p. 7 (unpublished manuscript).

[12] Directive, introduction, punkt 43.

[13] Ervo, Laura: Opt in is out and opt out is in. In Dimensions Based on Nordic Options and the Commission's Recommendations, Hess, Burkhard – Bergström, Maria – Storskrubb, Eva (eds.), EU Civil Justice: Current Issues and Future Outlook, Hart, 2016, p. 188, Government bill 2001/02:107, p. 134, Lindblom, Per Henrik: Grupptalan i Sverige: bakgrund och kommentarer till lagen om grupprättegång, Norstedts, 2008, p. 260, Wallerman Ghavanini, Anna: United we stand, divided we sue: collective access to court in Sweden, particularly for labour and social security claims. European Labour Law Journal, 2021 p. 1 (unpublished manuscript).

[14] Ervo, Laura: Opt in is out and opt out is in. In Dimensions Based on Nordic Options and the Commission's Recommendations, Hess, Burkhard – Bergström, Maria – Storskrubb, Eva (eds.), EU Civil Justice: Current Issues and Future Outlook, Hart, 2016, p. 200.

[15] GRL, Sections 1, 4, 5 and 6.

[16] GRL, Section 4.

[17] GRL, Section 5.

they work for the interests of nature or environmental conservation. Also, the associations for fishermen, farmers and reindeer management and forest societies can bring forward organizational suits regarding environmental issues.[18] The public class action is possible in cases where a suit has not been brought as an individual class action or by the organization named above.[19] Possible authorities that can bring a public suit include a consumer ombudsman and conservancy authorities in environmental cases.[20] From this perspective, the Swedish legislation corresponds quite well to the spirit of the Directive. The spectrum of the qualified entities is in fact rather wide.

As explained above, the Swedish class action system has been tested in practice too even if the frequency of application could be said to be too low. Despite that fact, some class actions have been successful,[21] while others have been dismissed[22] or cancelled,[23] or ended in a friendly settlement[24]. In the latter cases, the possibility to continue with the help of class action may indeed have played a significant role in negotiations. Most of the class actions have been individual class actions, yet mostly brought by associations that are established just for the purpose of starting the class action.[25] The first public class action in Sweden (against an electricity company) was in fact successful and the company had to pay damages to its clients.[26]

4. CLASS ACTIONS IN FINLAND

In Finland class actions are possible in disputes between consumers and business parties. The Act on Class Actions came into force on 1 October 2007 (RKL). Even if, based on the name of the Act, it seems to cover class actions in general, class actions are possible only in consumer disputes.[27] The system is based on an opt-in method. Only public class action is possible, and it is the Consumer Ombudsman who will bring the class action and act as the representative of the class. This extremely cautious start was to avoid actions for malicious purposes.[28] In reality, the Finnish system is too restricted and

[18] Code of Environmental matters, Chapter 32, Sections 13 and 14.

[19] Government bill 2001/02:107, p. 54.

[20] GRL, Section 6 and decisions 1995:868 and 2001:1096 of the Council of State.

[21] For instance, so called SLU –case, RH 2009:90.

[22] Stockholm district court, T 17333-04 (and10992-04). The court decided that the Aftonbladet case did not fulfill the requirements to be litigated as class action. The same covers Nacka district court T 855-12, which covered the case against the childrens' home. The case on private alcohol import was partly cancelled and partly dismissed, Nacka tingsrätt, 29.4.2011, T 1286-07.

[23] Skandia case, Stockholm district court T 97-04. Instead of class actions the case was resolved by arbitration and the plaintiffs got their compensation. Therefore, the case was anyways successful.

[24] For instance, Stockholm district court T 3515-03/ Nacka district court, T 1281-07 and Gothenburg district court T 7247-05.

[25] The first 12 cases are commented in Lindblom Per Henrik: Grupptalan i Sverige. Norstedts Juridik 2008, pp. 209.

[26] The Court of Appeal in Övre Norrland 2011-11-04, T 154-10.

[27] RKL, Section 1.

[28] RKL, Section 4. See also the government bill 154/2006, p. 20.

too cautious[29]—to the extent that in Finland class actions exist *de facto* only in books while in practice there has not been one single case so far. The lack of case law has sparked some discussion and the Consumer Ombudsman has been criticised for not bringing class actions even when they were necessary/possible. The obstacles seem to be the costs and the lack of necessary human resources. Also, the Ombudsman has been called too prudent. The Ombudsman herself does not agree but says that it has been sufficient to have class actions as textbook examples only and that this in and of itself has proved a useful tool in negotiations. Thus, it may not even be necessary to mention the possibility of starting an action, because the opposite party knows implicitly that the option exists and hence the optionality of striking a friendly settlement is already evident and operative.[30]

Especially in Finland, as explained above, current class actions have often been mostly preventive tools that have been found to have a sufficient impact. Still, one may ask if it is logical to have procedural tools that are used as threats but not used in practice? Procedural tools should be instruments which are used in practice to get access to justice. They should not be "law in books"—style coercive measures only.[31] Such procedural threats are in and of themselves illogical. A normal, well-functioning procedural system is not based on remedies as threats but on effective and working access to courts and access to justice. Class actions, then, should arguably be one amongst those well-working and effective tools that form part of the everyday repertoire of measures that can be chosen to solve disputes whenever needed.

That is why Finland has seen some discussion on the scope of class actions. The spectrum has been said to be too narrow, and it has been argued that private or organizational class actions should also be allowed so as to make the system more efficient.[32] The system clearly is the most restricted of the Nordic ones, because only public class action is allowed, and because the Consumer Ombudsman owns the monopoly on bringing the action. From that perspective (i.e. opening up the monopoly and widening the scope), the EU Directive is warmly welcome. There was indeed an option in the Finnish class action preparatory works for widening the system later if it was wor-

---

[29] Välimäki, Mikko: Uusi ryhmäkannelaki – eräs lainsäädäntöpoliittinen seikkailu. Lakimies 1/2008, p. 4–5 and 18–19.

[30] https://kuluttaja-asiamies.fi/2015/09/04/ryhmakanteen-nostomahdollisuutta-voi-laajentaa/.

[31] However, this kind of threat has been a useful tool in the juridical literature. Viitanen wrote in his article that group action for compensation can, through its mere existence among other legal procedures, promote the opportunities to reach an agreement without needing to take a court action. This preventive effect of group action should not be underestimated. For example, in Sweden there have been several cases where the threat of group action has been successfully used to persuade the party causing damage to pay compensation in a voluntary way. This is the most effective way to use group action because it saves a lot of time and both parties' money. However, an essential precondition for this preventive effect is that there are practical possibilities to start a group action in a court if the persuasion fails. Viitanen, Klaus: Nordic Group Actions: First Experiences and Future Challenges, JFT 3–4/2009 s, p. 613.

[32] Group actions in Sweden: a moderate start. In Multi-party redress mechanisms in Europe: squeaking mice? / [ed] Viktória Harsági, C. H. van Rhee, Cambridge: Intersentia, 2014, p. 259.

king according to purpose and if no class actions were brought for malicious purposes, however until now, this option has not meant anything in practice. There have been no amendments nor serious discussions of any. Instead, the response has been that we need to glean more experience from the Swedish model before any changes can be instituted.[33]

The Finnish view on dispute settlement through class action, before class action was accepted into the legislation, was rather stormy. Especially, the associations which represent the business actors were very much against "the American style of class actions", which they deemed would cause damage to Finnish firms and their international competitiveness.[34] The same opinions are still commonly voiced whenever there is discussion in the media about the need to widen the spectrum of the Finnish class actions.[35]

We have yet to see the first example of class action in Finland, which has caused some debate in the media.[36] The ombudsman has been criticized because her threshold for starting a class action seems to be very high. Other actors in the field have been of the opinion that there have been several situations where class action could have been a good means for gaining access to justice and access to court, especially in consumer cases. However, the ombudsman has insisted that there has been no need for class actions because the instrument has worked as an implicit deterrent, and the situations that did arise could be solved by other means. She thinks that until now it is enough to have class actions in reserve or "in the arsenal" - and to use it as a threat only when promoting the rights of consumers.[37] The Consumer Agency adds as a further reason that collective actions entail 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 - while all the work and attorney's fees should be paid by the Agency itself. Therefore, the Consumer Ombudsman can refuse to start a class action.[38]

In sum: the Finnish Act exists, but it has no contents.[39] The scope covers only consumer cases; only public suits are possible, and the system is based on an opt-in system exclusively. Not even a single class action suit has been

---

[33] Ervo, Laura – Martinez, Elena: Class action - a solution to access to justice problems in consumer cases? Some thoughts between the North, South and Europe. Zeitschrift für Zivilprozess International, ISSN 1434-8888, Vol. 17, p. 213.

[34] Selvitys ryhmäkanteesta. Työryhmämietintö 2005:3, p. 45.

[35] https://www.sttinfo.fi/tiedote/eun-ajama-amerikkalaistyylinen-ryhmakanne-ei-sovi-suomeen?publisherId=25106402&releaseId=67332578.

[36] See for instance, http://www.hs.fi/kotimaa/AL+Ryhm%C3%A4kanteet+eiv%C3%A4t+etene+kuluttaja-asiamiehelt%C3%A4+oikeuteen/a1305581561697.

[37] http://kuningaskuluttaja.yle.fi/node/2234.

[38] See for instance, http://www.hs.fi/kotimaa/AL+Ryhm%C3%A4kanteet+eiv%C3%A4t+etene+kuluttaja-asiamiehelt%C3%A4+oikeuteen/a1305581561697.

[39] Why the Finnish legislative procedure misfired see more in: Välimäki, Mikko: Uusi ryhmäkannelaki – eräs lainsäädäntöpoliittinen seikkailu. Lakimies 1/2008 p. 3–19.

brought to bear in Finland, which is why, consequently, there are grounds to say that the system factually does not exist in Finland.

5. HINDRANCES IN THE EAST-NORDIC DEVELOPMENT

While the Nordic class action systems were in their planning phases, the main fear seemed to be that the Nordic legal culture could be spoiled by an American tool. In addition, there were fears that system would be subject to abuse. It was even argued that national competitiveness in international markets would be in danger because of potential abuse of class actions.[40]

In Finland, a system of class actions was underway for a very long time without much progress or success. Eventually, the establishment of the class action system in Finland came about quite rapidly - and unforeseeably so. The government bill was given on 29 September 2006; the parliament did not make any amendments, and the new legislation was accepted on 13 February 2007.[41] The Act then came into force on 1 October 2007. One of the most important reasons for the final success at that time was the government's carefulness. The government bill was not based exactly on the latest working group's report, and some very important limitations were made. The idea was to take the very first step and then make the class action field wider if the experiences were good enough.[42] The Swedish model and Swedish experiences have also had an important prime mover effect in Finland. Because Sweden adopted the system some years earlier and the experiences there have not been negative, it was easier to follow the neighbouring country's example.[43]

The Finnish Class Action Act includes only 19 Sections whereas the Swedish Act includes 50 Sections. However, both acts are quite open; the Finnish one is mostly like a framework only. And the lack of details in the Finnish Act gives an appearance of the legislator not having made the Act for the actual use. This lack of contents may be one reason for the current non-use of the Act; it leaves too many open questions and might appear to be too unsure a platform for bringing the cases.

---

[40] Hodges, Christopher: The Reform of Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe, Hart Publishing 2008, p. 68. On the critical aspects please, see collected: Oker-Blom, Max: Behovet av grupptalan – en argumentativ övning. JFT 1/2006 p. 86–107 and Pennanen, Mika: Ryhmäkanteen perusoikeusnäkökulmia. Edilex 2005, http://www.edilex.fi/lakikirjasto/2687.pdf, p. 7–10.

[41] Still, the government bill did not include the class actions in environmental matters like the working group had suggested. This was the compromise done already before the case was discussed and decided in the Parliament.

[42] Government bill 154/2006.

[43] More about these initial plans and the historical development, please, see Ervo, Laura: Class actions - Scandinavian novelties. In Current Topics of International Litigation. Ed. Rolf Stürner and Masanori Kawano. Mohr – Siebeck 2009, p. 118–126 and Ervo, Laura: Class actions in consumer cases – a Finnish start. In Comparative Studies on Business Tort Litigation. Ed. by Rolf Stürner and Masanori Kawano, Mohr Siebeck 2011, p. 203–212.

In Sweden, the legislation is more comprehensive. There is some case law as well, and thanks to *Lindblom*'s' detailed and comprehensive monographs, there is more substantial doctrine compared with neighbouring Finland. Even so, the very open and yet too narrow legislation combined with lacking doctrine and case law means that there are many questions begging answers, and all of this causes uncertainty. If parties and other actors in the field do not know the system or if they feel the system is lacking or raises too many questions, they will tend to avoid using it. This is also why the common EU legislation can work like an activating procedure if it brings more detailed and comprehensive national Acts with itself.

The Finnish *travaux preparatoires* included both the government's and parliament's promises that the class action system would be carefully researched after some first experiences and if it was found to be a good and suitable system, then the applicability of the class action system would be broadened, based not least upon the Swedish experiences. [44] A sizeable follow-up study has been made in Sweden, [45] but this has not led to wider class action possibilities in Finland - or in Sweden, for that matter. Despite the current Swedish system of class actions having been found to be rather toothless[46], no further amendments in legislation to make the system more efficient have been introduced in Sweden, either. And despite there having been no negative experiences, the same fears and apprehensions of the system seem to linger, barring legislative reforms.

From this East-Nordic national perspective (i.e. refraining from doing anything to avoid mistakes), the recent development at the EU level is very positive. It seems to be the only way to proceed at the national level when opposing opinions and fears remain in place and there is no political consensus to develop the system of class actions further. In the literature, attention has been paid to similar existing problems, but they did not get solved by the legislator. The problems are *i.a.* connected to low value claims, financing of group actions, and the duration of the procedure. [47]

If we aim for an effective class action system, the main problem in the existing legislation is that the opt out–system is very limited in Nordic countries. [48] The EU Directive, by contrast, allows both opt in and opt out as well as

---

[44] LaVM 30/2006, p. 4.

[45] Ju2007/5800/P.

[46] Ervo, Laura: Opt in is out and opt out is in. In Dimensions Based on Nordic Options and the Commission's Recommendations, Hess, Burkhard – Bergström, Maria – Storskrubb, Eva (eds.), EU Civil Justice: Current Issues and Future Outlook, Hart, 2016, Group actions in Sweden: a moderate start. In Multi-party redress mechanisms in Europe: squeaking mice? / [ed] Viktória Harsági, C. H. van Rhee, Cambridge: Intersentia, 2014, p. 243-259 and Wallerman Ghavanini, Anna: United we stand, divided we sue: collective access to court in Sweden, particularly for labour and social security claims. European Labour Law Journal, 2021 p. 1 (unpublished manuscript).

[47] Viitanen, Klaus: Nordic Group Actions: First Experiences and Future Challenges, JFT 3–4/2009 s, p. 613.

[48] Group actions in Sweden: a moderate start. In Multi-party redress mechanisms in Europe: squeaking mice? / [ed] Viktória Harsági, C. H. van Rhee, Cambridge: Intersentia, 2014, p. 243-259

a West-Nordic style of hybrid model. The Directive is thus rather "permissive" and unfortunately does not solve the problem either if the national legislators do not want to change the current system.[49] Arguably, the Nordic legislation, case law, and doctrine should then be developed in specific class action questions like friendly settlements, mediation, *res judicata* and enforcement. The Directive will probably partly help speed up this process, especially where friendly settlements and res judicata are concerned[50], but may, as indicated, still not solve all problems in the Nordic context.

The minimum requirement to protect class members and to provide consumer protection is to guarantee the effective and collective enforcement in class actions as in other forms of legal redress. Access to court does not mean access to justice if the result will be a judgment resulting in failing or lacking possibilities to effectively enforce the ruling.[51]

Regarding enforcement in Sweden and Finland, there are no special rules for class action judgment enforcement, and hence the usual enforcement system applies. In other words, no special group enforcement is possible, and the class action judgment is instead enforceable by all members of the group. A system of group enforcement should exist to minimize bureaucracy and maximize access to justice. According to the current system, the singular parties of the case are always the subjects of the enforcement. The grounds for execution, like a judgment, cannot be enforced upon a third party. That is why, the class action judgment is enforceable only by group *members* and this enforcement is based on the opt-in system. No persons outside the group can enforce the judgment. The subjects in the enforcement are always the class members who have opted into the class action proceedings. The representative cannot be a party at the enforcement level, and the enforcement happens in the name of each member. The reason is that in the judgment the representative cannot be a subject – of, for instance, damages. Hence, the judgment is always given in the name of group members directly and separately. Moreover, in the enforcement, the group members have a role as a full party even if during the proceedings it is the representative of the group who represents the members and the latter have only restricted a party role. This is criticisable from an access-to-justice point of view, not to mention the fact that this kind of individual enforcement system is also very bureaucratic.[52]

---

and Ervo, Laura: Opt in is out and opt out is in. In Dimensions Based on Nordic Options and the Commission's Recommendations, Hess, Burkhard – Bergström, Maria – Storskrubb, Eva (eds.), EU Civil Justice: Current Issues and Future Outlook, Hart, 2016, Lindblom, Per Henrik: Grupptalan i Sverige: bakgrund och kommentarer till lagen om grupprättegång, Norstedts, 2008, pp. 145–151.

[49] Csongor István Nagy: Collective Actions in Europe. A Comparative, Economic and Transsystemic Analysis. Springer 2019, p. 116–117.

[50] See the introduction of the Directive, points 47 and 53–57 and articles 9, 11 and 15

[51] Ervo, Laura – Martinez, Elena: Class action - a solution to access to justice problems in consumer cases? Some thoughts between the North, South and Europe. Zeitschrift für Zivilprozess International, ISSN 1434-8888, Vol. 17, p. 218.

[52] GRL, Sections 15 and 29 as well as RKL, Sections 4 and 11. Ervo, Laura – Martinez, Elena: Class action - a solution to access to justice problems in consumer cases? Some thoughts between the North, South and Europe. Zeitschrift für Zivilprozess International, ISSN 1434-8888, Vol. 17, p. 218–219.

This weakness in the execution of class actions has been criticised especially in Sweden and it has been suggested that the system should be changed in the future to make class actions more effective. In the *travaux preparatoires, 53* the group enforcement in the name of the representative of a group was suggested but the proposal did not go through.[54]

Despite promises to develop the class action system in the future, the legislator has not taken any further steps and there are as such no plans to develop the system further. In Finland, in the summer of 2012, in the reply to a written question put forward by a member of the parliament, the Minister of Justice similarly stated that before anything can be done, the Nordic experiences must be studied and there is not enough case law and experiences to go by yet. If was preferred to wait for the European legislative proposals before starting anything new at the national level. The reasons given were, for instance, that the preparatory work that was carried out before the current Act came into force was very disputed and disunited. Thus, any amendments would require careful, comprehensive preparation, which could mean a long-lasting and disunited work effort once again.[55] Still, in 2012, the Consumers' Association of Finland, which is an independent promoter of the interests and rights of consumers, suggested an initiative to the Ministry of Justice to broaden the Finnish class actions to cover also organisational and individual class actions.[56] But not even this initiative led to any concrete novelties in this field of class actions.

The same situation applies to Sweden. There has been regular discussion and criticism concerning the lacks in the class action system along with substantial reports, but they have not led to any development. Instead, quite a lot of attention has been paid to doubts and fears concerning the system, which is found to be too "American".[57]

We are now at the onset of 2021, and still nothing has happened at the national level. One reason for this 'moratorium' has certainly been the planned Directive. National legislators have been waiting for the development at the EU level and therefore paused the national legislative work. At the same time, the EU input is necessary to give courage to do something more in this disunited realm of class actions where opinions vary significantly actors are prone to fearing the system despite the fact that class action serves as judicial relief, and that especially access to court as well as access to justice needs to

---

[53] SOU 1994:151, p. 459–462.

[54] For this discussion, see for instance Lindblom 2008, p. 103–104.

[55] http://www.om.fi/Etusivu/Ajankohtaista/Vastauksetkirjallisiinkysymyksiin/Kysymysarkisto/Vuoden2012kysymykset/1342537252611.

[56] http://www.kuluttajaliitto.fi/ajankohtaista/kuluttajaliitto_esittaa_ryhmakannelainsaadantoa_uudistettava_pikaisesti_vastaamaan_nykypaivan_tarpeita.html.

[57] Ervo, Laura: Opt in is out and opt out is in. In Dimensions Based on Nordic Options and the Commission's Recommendations, Hess, Burkhard – Bergström, Maria – Storskrubb, Eva (eds.), EU Civil Justice: Current Issues and Future Outlook, Hart, 2016 and Group actions in Sweden: a moderate start. In Multi-party redress mechanisms in Europe: squeaking mice? / [ed] Viktória Harsági, C. H. van Rhee, Cambridge: Intersentia, 2014, p. 243-259.

be better safeguarded in many countries, not least in the East-Nordic countries of Sweden and Finland.

6. COLLECTIVE SETTLEMENTS

Collective mediation is not currently discussed in the East-Nordic countries, which is surprising. Collective mediation could have been one solution to remedy and develop the national situations concerning access to justice in consumer disputes. And yet, surprisingly, there has been little discussion in Nordic countries on mediation and friendly settlements connected with class actions or collective situations. Instead, class actions at court was the next step in the East-Nordic recent history. From this perspective, the EU Directive is warmly welcome and could have a positive effect in strengthening–collective friendly settlements (and perhaps even promote collective mediation) because this is one of the aims mentioned in item 53 of the introduction in the Directive. In addition, settlements are regulated in art. 11.

In Sweden, the possibility to confirm a friendly settlement in the class action case is covered by legislation.[58] In addition, there is some case law. For instance, the very first example of class action in Sweden was completed through a friendly settlement confirmed by a court.[59] Also mediation is possible in the case of class actions.[60] In such a situation, the court will appoint a special mediator for the case according to Chapter 42, Section 17, Paragrap. 2 of the Code for the Judicial Procedure. In addition, according to Section 26 of the Swedish Group Proceedings Act, the normal regulation on friendly settlements will apply. This regulation is contained in the Code for the Judicial Procedure. Because friendly settlement covers the members of the class, it is not possible to confirm the settlement before the requirements for the class action have been examined. For the same reason, it is not possible to make an agreement before the trial in the case of class actions.[61] Friendly settlement can, if necessary, apply to only one part of the class members. A representative of the group can make this kind of agreement. However, the representative cannot make agreements which cover only single members. Still, the distinction between these two possibilities seems to be unclear.[62]

According to Section 26 of the Group Proceedings Act, the court shall examine the contents of the friendly settlement in a more extensive way com-

---

[58] The Swedish Group Proceedings Act, Section 26 "A settlement that the plaintiff concludes on behalf of a group is valid provided the court confirms it by judgment. The settlement shall at the request of the parties be confirmed provided it is not discriminatory against particular members of the group or in another way manifestly unfair." According to Section 49 "The court shall, in addition to what is prescribed by other provisions, notify a member of the group affected of a judgment or a final decision *and of a settlement* that is subject to a request for confirmation in accordance with Section 26.

[59] Case Aer Olympic, Stockholm District Court, T 3515-03.

[60] Lindblom, Per Henrik: Grupptalan i Sverige, Norstedts Juridik 2008, p. 128.

[61] Lindblom, Per Henrik: Grupptalan i Sverige, Norstedts Juridik 2008, p. 127.

[62] Lindblom, Per Henrik: Grupptalan i Sverige, Norstedts Juridik 2008, p. 127.

pared with the single actions. The court shall examine that the settlement is obvious and covers all claims and disputed questions. Based on Section 26, the court shall also examine that the settlement is not discriminatory from the single class members' point of view. In addition, the court shall examine that the settlement is not otherwise manifestly unfair. The court shall, however, *not* examine if the settlement is good enough or if it is more or less advantageous for some class members compared with the others.[63]

The court shall inform the class members on the friendly settlement according to Section 49 of the Group Proceedings Act. If they do not accept the friendly settlement, they can continue the proceedings as parties. If the prerequisites of the class action are fulfilled, a new class action is even possible.[64]

In Finland, the legislative situation concerning friendly settlements in class actions is much poorer. According to the Finnish Act on Class Actions, Section 1, Paragrap. 3, in addition to the rules of this special Act, the normal rules on civil proceedings (in the Code of Judicial Procedure) will apply *mutatis mutandis*. In the Act on Class Actions, there is no special regulation on agreements.[65] Instead, Chapter 20 of the Code is applied. Also, court-annexed mediation is possible. As explained above, there is no case law so far on class actions. However, in the doctrine it is obvious that these general rules on settlements apply also in the case of class action.

One possibility to intensify the collective dispute resolution mechanisms could be to design a new procedural tool based on the collective mediation and strengthen the role of friendly settlements in the context of class actions as mentioned in the introduction of the Directive (point 53, see also art. 11). If this point is taken seriously at national level, the Directive could have some prime mover effect in amending national acts on class actions towards collective settlements or even mediation solutions. By doing so, the Directive can have not only regulative power in consumer cases but would work also as an inspiration at the national level.

7. *RES JUDICATA*

In Sweden and Finland, the normal doctrine of *res judicata* covers the class actions. The *res judicata* thus applies to all the group members who have opted in. The *secundum eventum litis* phenomenon does not exist in Sweden

[63] Lindblom, Per Henrik: Grupptalan i Sverige, Norstedts Juridik 2008, p. 127-128.

[64] Lindblom, Per Henrik: Grupptalan i Sverige, Norstedts Juridik 2008, p. 128.

[65] However, according to Section 7, the plaintiff (the representative of the group) must inform the group members on her/his competence to make a friendly settlement, which is binding and in a normal case covers all group members who have opted in. In the government bill this mandatory information was an important safeguard because otherwise there is no special regulation in the Act on settlements and this kind of agreement is in every case very significant for group members. Therefore, they have be informed well beforehand on this possibility and this competence of the representative. The government bill 154/2006.

or Finland. Even if the class action is facing a public body or administration, there are no specialties in relation to *res judicata*, and instead normal doctrine is followed. This means that the result gets the *res judicata* effect when the facts or grounds of the judgment do not get the *res judicata* effect. The *res judicata* therefore covers the claims and the decision to the claims, while facts can have so-called proof effect in the forthcoming procedure.[66]

As explained above, if we aim for an effective class action system, one of the main problems in existing legislation is that the opt out–system is not accepted in the East-Nordic countries. The Directive does not provide any help towards this but there are some other openings in the Directive which could compensate for this lack in some small way. One of them is the lighter and wider interpretations of *res judicata*.[67] This possibility to develop and widen the class action system by opening *res judicata* up to cover even outsiders could be developed even more at the national level. This kind of lighter *res judicata* is needed at least in some specific situations, i.e. when a successful class action has been brought against the state or other public bodies. This novelty corresponds very well with common sense and the access to justice principles. The solution is also economic. There is no sense in each single consumer starting his or her own trial if an applicable class action where they have not participated has been successful. In such situations, it is clear, that also other consumers or other kind of plaintiffs (if allowed based on the national legislation) would win the case.

From this perspective, point 47 in the introduction of the Directive is a pertinent one. According to it:

> For reasons of expediency and efficiency, Member States, in accordance with national law, should be able to provide consumers with the possibility of directly benefitting from a redress measure after it is issued, without being subject to requirements regarding prior participation in the representative action.

This widening of *res judicata* doctrine corresponds to and is aligned with common sense, access to justice, and procedural economy. This initiative based on the Directive, then, is warmly welcome in a Nordic context - as a means to grant more space for useful and practical solutions where consumer protection in the context of class action is concerned. The opposite solution, to respect *res judicata* fully and very strictly, makes little sense in this context, where acting in the favour of consumers is the key point. This solution should fit very well into the Nordic pragmatical court culture, too, which is dominant especially in Finland and where judges try to find well-functioning

---

[66] Lappalainen, Juha: Tuomion oikeusvoima. In Juha Lappalainen – Dan Frände – Erkki Havansi - Risto Koulu – Johanna Niemi – Anna Nylund – Jaakko Rautio – Juha Sihto – Jyrki Virolainen: Prosessioikeus, WSOY 2007. This book can be found as an e-book. Please, see: http://www.wsoypro.fi.ezproxy.utu.fi:2048/wsoypro.aspx?prevpos=pr111.31727&page=selain&ts=jo&pos=pr111.31378&offset=0.588

See also Jarkko, Männistö: Effects of Judgments – Res judicata, pp. 144 – 169. In: Finnish Civil Justice. Ed. By Laura Ervo. Jigakusha 2009.

[67] See the introduction of the Directive, point 47 and art. 9.

solutions also in the situations where the legislator has not (yet) reacted.[68] It is thus preferable to now have the Directive in place (followed by its later implementation at the national level) to function as a guideline and means to avoiding too creative case law, which sometimes happens in Finland.[69] The Directive with its clear aims is welcome also from the Swedish perspective, where courts normally quite strictly follow the laws and wait until the legislator reacts in the situations where the societal situation and practicalities de facto require a new interpretation or rule. The Directive is thus a welcome input to the Swedish legislator to make the *res judicata* wider based on class action.

8. COSTS

Traditionally, costs are one of the main problems when considering bringing class actions. Also, in Sweden, the reason for the low number of cases is probably at least partly due to costs and funding.[70] But costs are ambivalent by nature because cost risk is also used to as a deterrent - to minimize malicious use of class action. In the Directive, costs are described in the introduction (point 70) as follows:

> Having regard to the fact that representative actions further the public interest by protecting the collective interests of consumers, Member States should retain or take measures aiming to ensure that qualified entities are not prevented from bringing representative actions under this Directive due to the costs associated with the procedures. Such measures could include limiting applicable court or administrative fees, granting the qualified entities access to legal aid, where necessary, or providing qualified entities with public funding to bring representative actions, including structural support or other means of support. However, Member States should not be required to finance representative actions.

And in art. 12 on allocation of costs of a representative action for redress measures, the costs are shared as follows:

> 1.Member States shall ensure that the unsuccessful party in a representative action for redress measures is required to pay the costs of the proceedings borne by the successful party, in accordance with conditions and exceptions provided for in national law applicable to court proceedings in general. 2.Individual consumers concerned by a representative action for redress measures shall not pay the costs of the proceedings. 3.By way of derogation from paragrap. 2, in exceptional circumstances, an individual consumer concerned by a representative

[68] Ervo, Laura: Comparative analysis between East-Scandinavian countries. In Scandinavian studies in law, Stockholm: Stockholm Institute for Scandinavian Law, 2015, p. 145.

[69] Ervo, Laura: Culture and Mentality in East-Nordic Courts. In Rethinking Nordic Courts by Ervo, Laura – Letto-Vanamo, Pia - Nylund, Anna (eds.). Springer 2021 (unpublished manuscript), p. 5.

[70] Lindblom, Per Henrik: Grupptalan i Sverige, Norstedts Juridik 2008, p. 251, 255, 260 and Wallerman Ghavanini, Anna: United we stand, divided we sue: collective access to court in Sweden, particularly for labour and social security claims. European Labour Law Journal, 2021 p. 7 (unpublished manuscript).

> action for redress measures may be ordered to pay the costs of proceedings that were incurred as a result of the individual consumer's intentional or negligent conduct.

In Finland, cost does not pose a problem *per se*, because so far only public class action is allowed, and the consumer ombudsman, a state consumer authority, holds the monopoly on bringing class actions. As already described above, Finland has yet to see its first example class action. One practical reason for this is economy. To bring a class action requires a lot of human resources and substantial expenses may be incurred if a process were started, and it would appear that the consumer authority has not had enough resources to bring actions.[71] The state financed monopoly on class action therefore sounds like a very good solution *de jure* but does not work *de facto* /in practice. In fact, it is difficult to imagine any state having vast economic resources at their disposal to be poured into class actions in consumer cases.

In Finland, like in Sweden, the ordinary rules on litigation costs (namely the losing party pays) apply in principle. The plaintiff in a group action thus bears the litigation costs (including those of the defendant) if he or she loses the case.[72] In both countries, the rules on litigation costs aim at creating a balance between providing sufficient stimulus for bringing group proceedings and minimizing possible abuse of such proceedings for malicious purposes. Members of the groups are in principle not liable for litigation costs. They can be held liable to bear only part of the litigation costs corresponding to their benefit from the proceedings and only if the defendant has been ordered to pay and cannot pay, or if they with their conduct have incurred additional litigation costs. The same applies to additional costs in connection with risk agreements that the defendant has not been ordered to pay.[73]

In Sweden, the Class Action Act envisages a possibility for entering what has been termed a 'risk agreement' between the plaintiff in a group action and an attorney, whereby they agree that the attorney gets reduced compensation if the case is lost and increased compensation if the case is won.[74] The fairness of such agreements is controlled in several ways, such as e.g.: approval by the court; possibility for notice of dissatisfaction; and appeal of court decision to approve a risk agreement by members of the group. The Swedish lawmaker categorically rejected the American "contingency fee" idea.[75]

---

[71] https://www.kkv.fi/Tietoa-KKVsta/kuluttaja-asiamies/valvonnan-priorisointiperiaatteet/ and https://www.ts.fi/uutiset/kotimaa/1074229884/Ryhmakanne+parantaa+kuluttajan+oikeusturvaa.

[72] The Code of Judicial Procedure, Chapter 18 and 21 Finland, 17 § RKL.

[73] GRL Sections 33–36 and 41. Ervo, Laura – Persson, Annina H - Lindblom, Tomas: Focus on Collective Redress. Sweden. https://www.collectiveredress.org/collective-redress/reports/sweden/generalcollectiveredress.

[74] GRL Sections 38–41 and Ervo, Laura – Persson, Annina H - Lindblom, Tomas: Focus on Collective Redress. Sweden. https://www.collectiveredress.org/collective-redress/reports/sweden/general-collectiveredress.

[75] See Lindblom, Per Henrik: Lagen om grupprättegång - bakgrund och framtid, SvJT 2005 p. 183.

The law does not envisage that the class representative in a private group action should receive any additional compensation for his or her participation. If winning the case, his or her litigation costs will be paid by the losing party. If losing the case, the representative in principle will be solely responsible for his or her litigation expenses. However, the representative is in most cases expected to receive financial support from outside sources, i.e., by means of the Legal Aid Act, from the insurance for legal expenses of the group members, or through a 'risk agreement' with an attorney.[76] A special situation is regulated in Sections 30-32 of the Class Action Act. If during group proceedings, the group representative is found no longer appropriate to represent the group and the court appoints someone else who is entitled to bring an action in accordance with Sections 4 - 6 in the Class Action Act to conduct the group's action as plaintiff, this person is then entitled to compensation for litigation costs and for their own work and time expenditure from public funds.[77]

The Swedish system corresponds with the EU Directive where costs are concerned. In Finland, the change will happen as soon as the spectrum of class actions becomes wider according to the demands in the Directive, where more forms of class action will be possible and not public class action only. When this becomes the case, the Finnish legislator will need to also solve the cost dilemmas.

The Directive pays attention to costs and how problematic that part usually is in the question of class actions. However, the Directive includes no comprehensive solution to the cost issue, and so the cost problems will continue to exist at member-state level also after implementation of the Directive. Broad public funding would be one solution but there seems to be no available means at the state level of economy for that, not even in relatively rich countries such as the East-Nordic countries.

9. VISIONS

The EU Directive on class actions is a much-wanted, welcome push for the East-Nordic legislators to finally act and continue to develop the class action system in consumer cases at the local level. This input from the EU level is needed both in Sweden and Finland, where the current, national class action systems are not working well enough. In both countries, there has been critical dialogue on the shortages in the class action legislation. Still, the legislators have not reacted but continued their extremely careful style for fear of

[76] Government bill 2001/02:107, p. 47.

[77] GRL Section 30 and Ervo, Laura – Persson, Annina H - Lindblom, Tomas: Focus on Collective Redress. Sweden. https://www.collectiveredress.org/collective-redress/reports/sweden/generalcollectiveredress.

an "American" style of class actions, which could trigger malicious use and other harmful actions.[78]

The Finnish class action is a mere "torso" and the Swedish one is said to be "toothless", as described above. One can only hope that the implementation of the Directive makes both acts effective enough to become well-functioning, full-bodied, and useful procedural tools that are actively used. It does not help anybody to have existing class action systems if they do not cover enough and if they are not useful *de facto*. Otherwise, the systems are merely cosmetic; mere text-book law, described in books made for marketing purposes to show that a class action system exists and to signal that the state in question is advanced enough.

Still, the Directive is not a definitive solution. The EU law on the subject is not fully comprehensive, and important areas are still mainly legislated at the national level only. For instance, social security and other situations where a group of individuals need to sue the state or municipality should be covered by class action systems. The need to protect individuals against a strong state or municipal authority is urgent from the access to court and access to justice perspective. If each individual needs to fight separately, for instance, in a case where laws on social security have been interpreted too narrowly to save money or where a municipality has destroyed a living environment, the chances to get access to justice as a single individual are indeed slim. Even access to court will not be a realistic alternative in many such cases. If, on the other hand, a group could react by using collective tools, the situation would be entirely different and more favourable for citizens.

There are several examples in the case law of such unbalanced stakes. In Denmark, for instance, a class action brought by a group of individuals against the state did not prove successful. The case in point went through the whole system. The Supreme Court finally did not change the judgment of the High Court, which had pronounced that the state was not liable for certain delays (contested in the suit) in the Danish land registering system.[79] The case specifically revolved around whether the National Board of Justice was liable for damages against a number of private homeowners who, after the introduction of a digital land registry in 2009, were subjected to delays in processing time for land registry cases/applications. The registrations were delayed due to a change in the processing procedure, where the existing system was changed into a digital format. The question raised in the action was whether the National Board of Justice had acted responsibly in connection with the introduction of the digital land registration system. The Supreme Court noted that it is an extremely complicated task to develop and implement an IT system such as the digital land registration system. Even with careful planning and implementation, problems of a technical, administrative, or-

[78] Csongor István Nagy: Collective Actions in Europe. A Comparative, Economic and Transsystemic Analysis. Springer 2019, p. 113–116.

[79] The judgement of the Supreme Court, 15th of June 2020.

ganizational, or other nature can arise, leading to extended case processing times. The Supreme Court found that compensation under the fault rule for extended case processing times, which is a consequence of the transition to the digital land registry, must presuppose that there is a significant delay and that this delay is due to significant and clear errors or omissions. The Danish Supreme Court however found that the association "Gruppesøgsmål.nu" had *not* demonstrated significant and clear errors or negligence, and there was consequently no basis for imposing liability on the National Board of Justice against the homeowners who were registered in the class action. The High Court had reached the same result.

The case was criticized because of the stipulation that an error or omission needs to be "significant and clear" before an individual can get compensation from the state.[80] This qualification in case of the liability of authorities or state institutions puts rather high requirements on individuals seen from an access to justice and access to court perspective. Here, class action could be one way of making access to justice realistic when the state or municipal authority is the opposite party. In Sweden, a similar initiative to bring a class action against the Social Insurance Authority, due to delays, is known. However, this initiative did not lead to an actual action.[81]

Because of the recurring and possibly severe economic crises of states and the accelerating privatization of the welfare state in countries that have one, such situations where individuals need legal protection against state authorities may become more frequent in future. This is why well-functioning tools for gaining access to justice will potentially become even more relevant and necessary than they are today.

10. SUMMARY

From the East-Nordic perspective, the EU Directive on class action is a useful and welcome tool for making existing class actions more efficient in Sweden and Finland. In both countries, the current national systems have not been functioning well enough. The legislators have not reacted to the deficiencies and seemingly have not had the courage to make the necessary amendments for fear of "Americanisation".[82] Especially in Finland, the business community has been against widening the scope and spectrum of the class actions. The reasons given have been the international compatibility of Finland.

---

[80] https://www.danskeboligadvokater.dk/om-dba/om-gruppesoegsmaal-mod-staten/.

[81] https://www.mynewsdesk.com/se/stiftelsen-sensus/pressreleases/sveriges-regering-allmaenheten-oevervaeger-grupptalan-emot-foersaekringskassan-740683.

[82] See also Csongor István Nagy: Collective Actions in Europe. A Comparative, Economic and Transsystemic Analysis. Springer 2019, p. 113–114.

In Finland, the new Directive will affect mostly the spectrum of the class actions. So far, only public class actions have been possible in Finland. With the EU Directive, at least organisational class actions will become possible, too. This will probably lead to the establishment of case law. So far, no class actions have been brought in Finland, the Act being a text-book, *de jure* possibility only. And the case law established in the field in Sweden is at a lower level than expected: only 20 cases in about 20 years of history. The Directive fortunately may have an activating effect in both countries.

Res judicata, costs issues, and a tendency towards friendly settlements are examples of national areas of deficiency which will get developed by the Directive, with the caveat that cost concerns will probably remain a global problem wherever class actions are concerned. The Directive itself cannot provide any money or funding to member states and therefore cannot solve this problem. Still, the Directive may have the capacity to inspire further use of the class action scope, even if it does not proffer a solution to the cost aspect.

The development in the context of class actions should continue even after the Directive is implemented in the member states. The privatization of welfare states and poorer state economies will continue to cause problems in terms of citizens' access to justice; problems which are difficult to solve if the solution must be sought by individuals on a single-case basis. Class action does seem to be the fairest solution in cases where the state or municipal authority acts as defendants. In conclusion, this area of collective redress still needs further development.