

Intervention at workshop on Alternative Dispute Resolution in Vienna February 2006

The Swedish *Group Proceedings Act* and other means for collective dispute resolution

The Swedish *Group Proceedings Act* entered into force on January 1, 2003. According to the Act it is possible to bring a private, *individual* class action by a class member as plaintiff, as well as organisation actions and public actions.

It is possible not only to bring actions for injunctions but also action claiming monetary damages for the class members.

1. Background

In 1994 an official report on the subject was presented. The report immediately generated a heated debate.

The proposal in 1994 was hailed by representatives of consumers and environmentalists, labour unions and others. On the other hand, it was attacked by industry and defendant lawyers dominating the Swedish Bar Association; by banks, insurance companies and by some judges unwilling to try anything new in their courtrooms. For many years nothing happened with the proposal. However, in May 2002, the Swedish Parliament, voted for a somewhat simplified and less powerful proposal than the original proposal and the Swedish *Group Proceedings Act* could enter into force in January 2003.

2. The aims of the Act

The amount of money claimed by the single plaintiff is often very small. However, there are perhaps thousands of consumers with the same interest and the proceedings are indirectly about a huge amount of money. The consumer's fragmented interest is "individually not recoverable"; even if the plaintiff wins, the net result of the

proceedings will be negative. Consequently, there is a lack of real and equal access to justice.

This might also affect the behaviour, not only of the defendant in question, but also of all persons in the same position. Some businesses might abuse the situation, knowing that there is a vacuum in access to justice; no one is going to go to court. This in turn threatens sound competition and a sound market. The substantive law loses its force as a behaviour modifier. There is no prevention while the unfair businesses are allowed to keep their ill-gotten gains.

There is also a risk that the courts will never get the opportunity to clarify the law where precedents are needed. On the other hand, if the individual damage is big enough, the result may be repetitive litigation about the same or almost the same question.

To meet these systematic weaknesses in society the traditional civil procedure needs to be *complemented* by a representative procedure adjusted to traditional two-party process. A piloted case might be suitable in some instances but not always; such a judgement has legal force only between the parties, while the problems of balance are not solved.

Consequently there are four major aims behind the Swedish *Group Proceedings Act*:

1. Increased individual access to justice (compensation, reparation), especially when it comes to individually *non-recoverable* claims;
2. Increased behaviour modification (prevention, deterrence) on the general level, especially in cases of *non-recoverable* claims;
3. Improved clarification of the law by the creation of precedents, especially with regard to individually *non-recoverable* claims;
4. Improved judicial efficiency and economy. This objective is relevant when it comes to individually *recoverable* claims.

3. Main content of the Act

1. The Act is **pluralistic** in three respects: **(a)** it provides for private, individual, class actions *as well as* organisation actions and public group actions; **(b)** it is possible to claim injunctions *as well as* monetary compensation for the group members; and **(c)** the Act is *not restricted* to consumer law or environmental

law only – it is applicable in *all* cases normally brought in the general courts of first instance.

2. The group action should be used only when it is **practical**, possible to manage, and the best procedural alternative (superiority). If the actual claim does not meet these demands in practice, it is not accepted as a group action.
3. The Act is purely **procedural**. It does not affect the content of substantive law. There are no new rules on causation, calculation of damages, etc.

The scope of the Act

The Act consists of 50 sections. Any legal issue that can be litigated in the form of a traditional individual action may be taken to a general court as a group action.

Standing

- ***Individual*** group actions (class actions) may be commenced by a person who is a member of the group. This means that the plaintiff shall have standing to be a party to litigation with respect to one of the claims to which the action relates.
- ***Organisation*** actions are restricted to two areas of law: consumer law and environmental law. In the field of consumer law, a group action may be instituted by an affiliation of consumers or wage-earners in disputes with a tradesperson relating to goods, services or other utilities offered by the tradesperson. There are no restrictions concerning authorisation, size, age, etc. of the organisation. But the court must find the organisation to be a good representative of the group. The organisation may claim damages not only for the members of the organisation but also for all members of the group concerned.
- ***Public group actions***; an authority stipulated by the government – at present the Consumer Ombudsman or the National Environmental Agency, may commence group proceedings.

Special preconditions

The new Act contains certain special preconditions for cases when an action for a group should be permitted. One such condition is that the group's representative must be considered to have his/her finances in order and be suitable to represent the group. As a further guarantee for the protection of group members in private class actions and organisation actions, the proceedings must be conducted by an attorney

who is a member of the Bar. This is the only situation in civil proceedings in Sweden when this is necessary.

Group members

Contrary to the situation in the United States, Canada and most other countries, membership in the group requires that a member makes an application to the court – after notification from the court - to join the action, an *opt-in*, not an *opt-out* regime (as was originally proposed). Although the authority of the group representatives to act on behalf of the members of the group is strictly procedural, the group representative is empowered to make settlements with the opponent on behalf of the group. However, the settlement will be binding for members of the group only after notice and on order of the court.

Litigation costs

In Sweden we use the English rule on costs. This means that the representative of the group will take the risk of having to pay the opponent's costs if the group loses the case.

4. Cases so far

As far as I know, the Act has resulted in six private class actions and one public action. None of these cases have resulted in a ruling from court yet. It is expected that most group actions will be settled. In almost all cases started so far the group consists of consumers.

Examples of what the cases have dealt with are

- airplane passengers having to buy new tickets to get home;
- 1.2 million insurance holders claiming compensation from the insurance company for transferring capital to the company's mother-company.
- a group action was started against the Swedish state for refusing to let big trucks with wine from the continent pass through the Swedish border, thereby leaving a big group of Swedes who ordered and paid for the wine on the Internet without goods. According to the group, the Swedish customs laws are not compatible with the free movement of goods in the European Union.

The first *public* action started in December 2004. It was brought by the Consumer Ombudsman, claiming damages for about 7 000 people who did not get the fixed

price for electricity they were entitled to. In a decision in June 2005, the district court of Umeå concluded that the action fulfilled the special conditions for a group action. That decision was later confirmed by the court of appeal. The question has now reached the Supreme Court. The material proceedings have in other words not really started yet.

5. Group action out of court

In Sweden there is also another system for collective action for consumer redress within the ADR scoop.

Already in 1991 the CO was given the competence to bring action on the behalf of a group of consumers with claims founded on circumstances that are of a similar nature for the members of the group. To start with this competence was limited to cases where the National Board for Consumer Complaints had already tried a pilot case and recommended a trader to compensate consumers. The mandate for the Ombudsman was a few years later enlarged to all cases where consumers had claims on similar circumstances. This competence can be described as an ADR scheme where the board will make recommendations for dispute resolution, which are in most cases complied with by traders.

Over the years there have been about 16 cases in out of court action. In 14 of these cases the CO:s motions were approved by the board and the trader was recommended to compensate the consumers. The most important of these as far as economic impact is the cases with the undue raise of mobile phone charges. The estimated sum the operator was supposed to pay back was 60-70 million SEK (6-7000 euro).

The most recent case the CO tried in this ADR scheme turned out to be a real success and yet a great failure for the system. The Consumer Complaint Board ruled in favor of the CO on a group action where about 7000 consumers had claims on compensation from an electricity distributor. The same case I just described as an ongoing court case as a public action according to the Group Proceedings Act..

The Board rendered in July 2004 a decision and recommended that Kraftkommission should pay compensation for additional costs for electricity to all customers with fixed price contracts according to a standard calculation method based on electricity consumption per house/flat and the different contract periods. Unfortunately the company did not comply with by this recommendation. The CO was forced to go to court and litigate on the basis of the new Group Proceedings Act.

6. Summing up

To summarize Sweden has two systems for collective action, one ADR scheme and one general court litigation system. They complement each other and combine the possibility to choose the advantages of the ADR scheme where that is appropriate.

Group action is already widely known to Swedish citizens and several important steps have been taken in courts to improve both individual access to justice and judicial efficiency. Thus, it can be said that the capacity of the procedural system to satisfy the problems connected with group claims has been improved considerably.

I expect the legal instrument of group proceedings will have both compensatory and a preventive effect for consumers since it will be possible for the CO and group representatives to claim compensation. The extent of the preventive effect is at this point difficult to evaluate but for sure the legislation is of great value for the consumers as a collective and for a climate of fair-trading on the market.

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