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Dispute Resolution

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# Swiss Civil Procedure Code: New Proposal to Strengthen Collective Redress

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## Key Take-aways

- 1.** In order to strengthen collective redress in civil proceedings, the Swiss Federal Council proposes to extend both the scope of application and the available relief of the group action to include monetary claims.
- 2.** Proceedings could be terminated by way of a court-approved collective settlement. Within narrow limits, court-approved collective settlements would also be possible outside of group action proceedings.
- 3.** Only those who actively join the action would be involved in the reparatory group action (opt-in). As an exception to this rule, opt-out settlements would be possible in the case of so-called dispersed damage.

## 1 Background of the Proposal

According to the **Federal Council's findings** in its Report on Collective Redress (2013), the **instruments currently available** in the Swiss Civil Procedure Code (CPC) and other special laws are **insufficient** to deal with so-called mass and dispersed claims. The Federal Council's report can be considered a reaction to legal developments abroad, especially in the member states of the European Union.

In response to a **parliamentary motion**, the Federal Council presented initial proposals for regulation in **2014**, which were, however, rejected. Subsequently, the Federal Council took up elements of these proposals again in the preliminary draft for the partial revision of the CPC published in **2018** (see our [newsletter of April 2018](#)). As the proposals remained highly controversial, they were not included in the final draft revision (2020), which is currently being discussed in parliament.

With the bill published in **December 2021** and passed for the attention of parliament, the Federal Council is putting forward for discussion substantially revised **regulatory proposals for the expansion of instruments of collective redress in the CPC**.

In the following sections we will briefly introduce the key proposed amendments.

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### A further development of the long-established group action under Swiss law is envisaged.

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## 2 Key Amendments

### 2.1 Overview

As in the preliminary draft of 2018, the Federal Council essentially proposes to extend both the scope of application and the available relief of the **group action to include monetary claims**. The Federal Council intentionally refrains from creating a new representative class action based on the US model, which would in principle cover all affected persons even without individual participation in the proceedings. Instead, the long-established instrument of group action in Swiss law is to be further developed. The interests of the individual group members, who would in principle have to actively join the group action, would be represented by an association or another organisation, which would have to meet certain requirements. The proceedings would result in a **court decision** or a **court-approved collective settlement**. Furthermore, collective settlements could also be concluded and submitted to the court for approval outside of group action proceedings,

which would in particular enable also parties who have caused damage to proactively seek – under certain conditions – a comprehensive and binding solution.

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### Class action proceedings regularly result in settlement.

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### 2.2 Scope of Application and General Requirements of the Group Action

The current restriction of the scope of application of the "general" group action (Art. 89 CPC) to violations of personality rights would cease to apply, which means that the action could theoretically be applied in **all areas of private law**.

Only organisations, namely associations and foundations, which are

- i. **non-profit-oriented**,
- ii. have existed for at least **twelve months** at the time the action is brought,
- iii. empowered by **statute** or by their **articles of association** to protect the rights and interests of the group of persons affected, and
- iv. **independent** of the responding party would be entitled to file a group action.

This is to ensure adequate representation of the group members by the organisation.

The criterion of organisations having to be "of nationwide or of regional significance" contained in the current law would no longer apply, so that **foreign organisations** could also act as plaintiffs.

Unlike before, **special group actions** would only take precedence insofar they have a broader scope than the general group action under the CPC.

The **relief sought under the group action** could, as before, include injunctive measures (such as cease and desist orders) or declarations of unlawful conduct. With regard to declaratory actions, it would no longer be a prerequisite that the violation continues to have a disruptive effect. In addition, an application for notification of the decision to third parties or for publication would now be possible as a further means of redress. The most important innovation would be the admission of **reparatory claims**, i.e. claims for damages, moral compensation or disgorgements of profits.

### 2.3 Special Requirements of the Reparatory Group Action

The reparatory group action would be admissible under the following conditions:

- i. The plaintiff organisation fulfils either the **four general requirements** set out above (section 2.2) or those of the pertinent special law.

- ii. The organisation is authorised to conduct litigation by **at least ten persons affected** by the damaging event in a form that can be proven by text.
- iii. The claims for damages asserted are based on **similar facts or legal grounds**.

## 2.4 Certification

The court would examine the special requirements of the reparative group action within the framework of a **certification procedure**. The criterion that the claims for compensation must be based on similar facts or legal grounds raises difficult questions of delimitation. Only after certification, the actual statement of claim would have to be filed within a deadline set by the court.

## 2.5 Principle of the Opt-in Concept and Relation to Individual Procedures

The proposed regulation follows a so-called **opt-in concept**. Within a **period** of at least three months from the **public announcement of the certification**, all persons affected by the damage event could join the reparatory group action. Individuals would in principle only be bound by the court judgement based on such a **declaration of accession**. Persons who have already filed an individual action could (voluntarily) switch to the group action procedure.

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**It remains to be seen whether the bill will have majority appeal in parliament.**

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## 2.6 Procedure, Court Decision and Court-approved Collective Settlement

The procedure would largely follow the provisions of the so-called **ordinary procedure** (Art. 219 et seqq. CPC). In contrast to the EU Directive on collective redress (Directive 2020/1828 of 25 November 2020), the Federal Council does not include any special provisions on the rules of evidence in its draft. Accordingly, the bill is limited to special provisions regarding the **conduct of proceedings**, the **court decision** (minimum content, binding effect, allocation of legal costs) and the conclusion of a court-approved **collective settlement**.

In doing so, the draft considers the practical experience that class action proceedings **usually result in a settlement**, and furthermore that a collective settlement – in contrast to two-party proceedings – requires a **substantive review and approval** by the court, because the individually affected class members were not personally involved in the negotiation of the settlement terms.

To this end, the draft provides for a number of provisions

that would regulate the procedure and the requirements for approval: first, the plaintiff organisation and the defendant party could submit a **joint application** for a binding declaration of the settlement. Subsequently, the affected group members would have the opportunity to **comment** on the content of the settlement within a deadline. The court would then **examine the content** of the settlement, whereby it could, among other things, call in third-party experts. The approval of the settlement would be subject to a **number of conditions**: the court would have to be convinced that the settlement is an **appropriate solution** to the dispute in terms of the amount of compensation and allocation of costs. If the court approves the settlement, it would be binding on all affected parties who joined the group action. This is one of the key **differences** to the preliminary draft of 2018, which provided for a general opt-out concept for collective settlements.

## 2.7 Opt-out Settlement upon Joint Request

Pursuant to the current draft, an opt-out settlement would only be possible within narrow limits: the plaintiff organisation and the defendant party could file a **joint request** to extend the binding declaration of the settlement to all affected **persons domiciled or headquartered in Switzerland**. This under the prerequisite that the case concerns so-called **dispersed damage**, i.e. that the individual claims of the affected persons are **so small that individual lawsuits would not be worthwhile**. This prerequisite should be fulfilled without further ado up to an amount of several hundred Swiss francs. Furthermore, the application for extension would have to be legitimised by the fact that a significant number of the affected group members – the Federal Council refers to at least one third of all group members – have remained passive up to that point, i.e. that they have not actively joined the group action. If these and other formal requirements are met, affected persons who reject the settlement would have to **declare their withdrawal within a certain deadline**. Hence, exceptionally, an opt-out concept would be applied, the advantage of which is increased legal certainty. The requirement of a joint application ensures that an opt-out settlement can only be considered if the party causing the damage also seeks a settlement that is as comprehensive as possible.

## 2.8 Collective Settlement Outside of Group Action Proceedings

In view of the experience from foreign proceedings, where the conclusion of a collective settlement sometimes also takes place on **the initiative of the party causing the damage**, the draft provides that the joint application of the parties for the examination and approval of a collective settlement could also be made outside of group action proceedings – but only in cases of dispersed damage.

Prerequisites would be:

- i. the group members are represented by an **organisation entitled to bring group actions**,
- ii. the claims for compensation are based on **similar facts or legal grounds**, and
- iii. the individual claims for compensation are so **small** that an individual action would **not be worthwhile**.

If these conditions are met, the **opt-out procedure** described above (section 2.7) would also apply outside of a group action.

## 2.9 Other Regulatory Aspects of the Proposal

The filing of a group action respectively the application for admission of a reparatory group action would **interrupt the statute of limitation**. The same would apply to the conclusion of a collective settlement for claims of the affected persons arising from the alleged infringement.

New rules are also envisaged regarding the international, domestic and subject-matter **jurisdiction** of Swiss courts in connection with group actions and collective settlements.

## 3 Outlook

The Federal Council's draft and dispatch will next be dealt with in **parliament**. Considering the experience with previous proposals, it can be expected that the Federal Council's proposals will lead to lively discussions. It remains to be seen whether or not the bill will have majority appeal.



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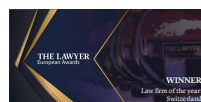
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