



LET'S TALK ABOUT...

FINANCIAL LEXICON EDITED BY THE SWISS ASSOCIATION OF ASSET MANAGERS

Class Action

(Part One) The legal term, which originated in the United States, denotes a form of lawsuit carried on not just by a single person, but a large group of people, in a collective and representative form, so bringing a common claim and defending common interests against a company or institution. Such form of action is pretty common in the Anglo-Saxon legal context, where the principles of the common law are dominant, whilst in the European countries, where legal scenario are based on totally different principles, introducing class actions has required regulation changes, which had however to be adopted under the pressures of consumer-defence groups and other organizations, particularly when certain events took place which had great echo in the media and the public opinions. A class action may be carried on in different domains, commercial, industrial (just remind the asbestos case), medical, but our interest is particularly oriented to the financial sector, where many class actions concern investment-related matters, financial issuers and promoters, their instruments and products. In the United States the history of class actions goes back to 1833, when a court stated that when many people brought a common claim, just one or some of them could proceed against the common defendants as representatives of the whole group, and the related decision was then valid for them all. Such statement was later ratified by the Supreme Court, although the subject of ass classes remains sometimes contradictory and complex. The matter is now pretty consolidated, at least in the United States. The class action that many persons promote in defence of their rights against a certain corporation or institution, normally by creating an ad hoc representative committee, offers many advantages, first of all making the lawsuit more efficient and spreading the connected costs on a wider numbers of subjects, so making them more affordable. The judicial procedure also may be some simplified and more rapid in terms of collecting evidences, witnesses, appraisals, and so on. Other advantages may come from the increased visibility of the subject discussed in the legal suit, not to mention the interest of the media for it. Another advantage is the possibly to reach a "critical mass", so justifying the action itself. In the event of a financial crack, an insolvency or fraud, the single investor of few bonds or shares, might find the legal action not so convenient, but if thousands of investors share the same condition, the legal action is not only more practicable in terms of motivation and public interest, but also in terms of costs and expected benefits and compensations. *(to be continued)- GLT*

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(Part Two) A legal action that many investors promote on common basis, usually through an *ad hoc* established committee, may give many advantages, in improving their claim possibilities while spreading and making related costs more affordable. Thus class actions may not just make reimbursements more likely but also act as a deterrent for other financial actors. It may also contribute to better clarify claims and responsibilities and make the participants' treatments more fair. For example, were a fund to become insolvent or be involved in fraudulent situations (as in the case of a Ponzi scheme), the class actions not only check the legal rights of the suit's promoters, but also retrace and in case revoke the operations and transactions carried on before the collapse took place, along with a certain period of time, so to make funds available to be shared, if possible, and according to fair criteria, among all entitled participants. Moreover class actions are a sort of unifying solutions when different courts might treat the same matter in different ways, although some sentences by US courts have reaffirmed that single claimers may promote further suits should they not be satisfied by the class action's outcome.

And the class action has been widely appraised by the US Congress itself. However, despite such acknowledgements and commendations, together with progressive procedural consolidations, particularly in the Anglo-Saxon legal environment, the class action is not exempt from criticisms and polemics. Often cited arguments consider the high costs required by the claimers' committees and their lawyers in promoting and proceedings along the legal action, the privileged treatments some participants may enjoy to prejudice of others, and the not always clear and complete communication made available about the legal process itself. That was for instance the case for some events involving defaulting Italian bond issuers some years ago. So it may happen that class action participants find them bound by agreements whose terms of partial or complex settlements may sound inadequate and unsatisfactory, with no possibilities of further actions, particularly within those European jurisdictions which do not benefit from the principles of the Anglo-Saxon "common law". (*to be continued*)- GLT

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(Part Three) We have just mentioned some benefits that class actions may provide, particularly in the financial area: setting common bases for collective actions, making legal claims more efficient and cost affordable, in that fees are more widely spread; making the matter echoed in the media and the public opinion; allowing small investors too to protect their interests and often taking to more fair treatments of plaintiffs: this may be achieved through a clear assessment of the parties' rights, the reviewing of the defendant institution's latest operations and transactions, sometimes revoking some of them in order to get more funds to be redistributed among participants. However some criticisms are also noted: the high costs of committees and their lawyers; the often confusing and uncompleted information about the procedures; the possibility of unsatisfactory outcomes, more or less negotiated between the parties but unacceptable for some plaintiffs, who may be prevented from further enforcing their rights after the class action's conclusions. We have told about the long tradition and wide use of class actions in the United States. But what about Europe? In many countries something equivalent has been introduced, so admitting collective legal suits by consumers and investors associations against a common counterpart. However different and old legal traditions persist which may oppose the spirit and the substance of the class action itself. That is, among others, the case for Austria, where the admission of collective suits is rare and subject to several restrictions, or France, where the common action is a *de facto* sum of individual legal proceedings, as all claimants are to be personally identified and named in the suit. In Germany the new law on capital markets allows common actions related to mass market financial transactions, but with no civil legal results and not in the name of undefined groups of claimants. In Italy a full law on class actions is now in force, firstly promoted by consumers' associations and progressively used in financial and banking sectors. In Switzerland class actions are not admitted, although in 2006 a proposal was issued for its introduction by the Federal Government. The reasons for its rejection were based on the supposed opposition with the general principle of individual actions, the complex procedural problems it would have caused (and which actually are present, in the US system too), and the possibility of abuses, particularly in terms of excessive compensations requested (being such cases also frequent in reality), which may take the involved institutions to financial collapses and even bankruptcies. However it is desirable that class actions may be soon admitted in our country, at least for their being a deterrent against too free-and-easy issuers and promoters of financial instruments. (*the end*)- GLT

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