

Introducing Class Actions in Finland – an Example of Lawmaking without Economic Analysis

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1. Introduction

Finnish Parliament accepted in February 2007 a new law on class actions (literally “group actions”), which enters into force January 1, 2008.¹ The legislative process was particularly slow. Finland has been preparing a law on class actions since the early 1990s and this was – depending on the criteria of counting – the fourth try. Some fifteen years ago the idea of class actions was something new in Europe. Time passes quickly however, and the new Finnish law cannot be described as “radical” by any meaning of the word. Many European countries, as described in other articles in this volume, have changed their existing procedural codes and enacted new laws to make class action litigation possible.

The new Finnish class action law differs from the mainstream in fundamentally limiting its scope of application. Although the law is titled as being a general law on class actions, it only applies to consumer cases where the government-funded Consumer Ombudsman is acting as the lead counsel. This was not the case in the beginning. Years ago, the first law proposals had much broader scope of application but as the lobbying between potential defendants (the industry) and plaintiffs (consumer agencies etc.) became polarized, it became evident that there can be either a major compromise or no law at all. Indeed, the objectives and contents of the law proposals changed many times during the years

This article analyses the Finnish lawmaking process from comparative and economic policy viewpoints. First, the article discusses how did the Finnish legislative process end up with a certain outcome. It is argued that neither well-founded economic nor empirical arguments had any relevant role. Instead, partisan claims on class action cases in the United States and their potential implications to companies were used as a strong argument to restrict the law’s scope of application. The official preparatory documents did not present any study on experiences from the United States. There was non-partisan empirical evidence of the use of class actions only from Sweden.

Second, this article compares the claims presented in the Finnish lawmaking process to studies and legislative work made in other countries. Can one really claim, as was done during the legislative process in Finland, that other countries have made serious mistakes when they have not restricted the scope of application in class actions? Would a law on class actions also open doors to the misuse of the system through frivolous suits? Are class actions a totally foreign tool to continental European legal systems? The article concludes that these claims are mainly based on partisan opinions, not on well-founded studies. The examples of other Nordic countries show that there is nothing uncommon in

¹ Ryhmäkannelaki, 13.2.2007. The law is based on government’s proposal nr. 154/2006.

implementing class actions in a Northern European legal system. Misuse of class actions is not likely due to e.g. fundamental differences in the substance of accident law and the rules regarding the indemnification of legal costs in litigation.

Third, this article argues that the main reason why the Finnish class action law “failed” was the dynamics of the legislative process. The process may not aim to the best possible outcome for the society as a whole. In accordance with the theory of public choice, the result is often a compromise between conflicting interests. The idea of reaching a consensus in preparatory work before a law is submitted to the parliament means that if well-organized interest groups are able to form a strong opposition, the law may never enter the parliament no matter of the substantial arguments.² The result is that an unknown number of cases are not litigated at all in Finland because the scope of application of the law is restricted. Regulatory authorities have no resources to provide as extensive preventive threat as would a complementary private mechanism.

2. A History of Finland’s Class Action Law

2.1 Minimalist Approach

According to the first paragraph of the Finnish law on class actions, the law can be applied only in civil litigation in cases between *consumers and businesses*. In addition, *Consumer Ombudsman* is the only party that can bring in and litigate cases on behalf of consumers.³ The first paragraph then further clarifies that the law is not applicable in securities cases (stock owners are not consumers).⁴ If a case is filed, the Consumer Ombudsman must inform all the individuals that can be considered to be in the relevant class. An individual must then submit a written acceptance to the Consumer Ombudsman that he wants to be member in the suing class. This follows the so-called *opt-in* procedure.

In short, the Finnish law on class actions introduces at least three major limitations into its scope of application:

- The case must be between consumers and businesses; particularly securities cases are not allowed, however.
- The only party that can litigate on behalf of consumers is the Consumer Ombudsman.
- Consumers must submit written acceptances to the Consumer Ombudsman if they want to be members in the suing class (*opt-in*).

² On the theory of public choice and interest groups see e.g. Nicholas Mercurio and Steven G. Medema (2006): *Economics and the Law. From Posner to Post-Modernism and Beyond*. 2nd edition. Princeton University Press. pp. 191-195.

³ In practice, the Ombudsman can delegate representation and according to the law even hire outside counsel as an advisor.

⁴ It is unclear whether various kinds of modern investment instruments could be defined as securities based on the law’s definition.

All these limitations support a *compensatory* rather than preventive objective. The limitations make sense if the law is to defend first and foremost the subjective interests of individuals. The limitations make the law an unsuitable tool for social engineering through private means. In other words, Finland still trusts on *regulation* rather than private enforcement. It is assumed that the Finnish state and its various governmental agencies keep on monitoring corporate behavior. Next, it is considered how and why did the Finnish legislative process end up with this outcome.

2.2 Early Law Proposals with Broader Approach Failed

Finland and Sweden were the first Nordic countries to start officially prepare class action legislation in the early 1990s.⁵ The first Finnish preliminary investigation was published in 1992 concluding essentially that it was possible to introduce class actions in Finland following the United States model.⁶ The Ministry of Justice set up a follow-up preparatory group, which published in 1995 a draft law proposal that argued for a new class action law with a broad scope of application.⁷ The group consisted of a law professor, civil servants, members from the judiciary and the Consumer Ombudsman – but notably none from the industry and neither was any industry representative heard in the preparatory work. The group’s proposal would have made it possible to initiate class action on any actionable claim under Finnish law. Anyone could have been the lead plaintiff with his chosen attorney. Class membership would have been based on the opt-out principle. Because of increasing critique from the industry representatives, the first draft never proceeded as a formal law proposal in the parliament. Instead, a new working group – now including industry representatives – published a new draft proposal in 1997 with some limitations in the scope of application.⁸ Due to intense lobbying from the industry, the limited proposal did not proceed any further either.

Meanwhile Sweden adopted a law on class action that entered into force in 2003. Save for the opt-in principle, the Swedish law did not have any relevant restrictions in its scope of application. Norway and Denmark, which were not that active in the 1990s, followed quickly with their own law proposals based on the Swedish example.⁹

⁵ One can say the initiative came from Sweden. See section 4 below.

⁶ Antti-Juhani Wihuri (1992): *Ryhmäkänne. Perusselvitys käyttömahdollisuuksista Suomessa*. Oikeusministeriön lainvalmisteluosaston julkaisu 3/1992. (In Finnish, “Class action. Basic investigation on the usage possibilities in Finland.”)

⁷ Ehdotus ryhmäkannelaiksi. Työryhmän mietintö. Oikeusministeriön lainvalmisteluosaston julkaisu 1/1995. (In Finnish, “Proposal for a law on class actions.”)

⁸ Ryhmäkannelaki. Työryhmän 1996 mietintö. Oikeusministeriön lainvalmisteluosaston julkaisu 3/1997. (In Finnish, “Law on class action.”) According to this proposal, private organizations such as workers unions could have not been claimants, class membership would have been based on opt-in principle, and it would have not been possible to sue for specified issues such as contract breach.

⁹ See section 4 below.

Finland continued the work as well. The Ministry of Justice set up the next governmental working group in 2004, which published its preliminary findings in 2005.¹⁰ In addition to civil servants and members from the judiciary, two members came from the industry, two represented consumer protection interests, one environmental protection, one came from a labor union, and one was an attorney. Despite opposing comments by the industry representatives, the work finally resulted in a formal law proposal in the next year.¹¹ The 2005 working group did not take a certain position for example following the United States, Sweden, or other Nordic countries for that matter, but continued the work from where the previous groups in the 1990s had left it. Partly to mitigate industry worries, the group introduced possibilities to introduce an even further limited approach to class actions. From now on, it was a question about a minimalist class action law or no class actions at all.

2.3 *The Art of Identifying Needs a Priori*

The first main problem with the group's document was that it *did not empirically identify the needs for class actions in the first place*. The document did not present any data on the types of class actions in the United States or other countries, where the system had been in active use for decades. The only empirical data was from Sweden, where class actions were just introduced. Necessarily, the data set was far from representative although one must admit it was indicative. During the first three years there had been only one case lead by the Swedish Consumer Ombudsman among a total of six cases. None of them dealt with environmental issues.¹² For some unknown reasons, the group did not comment on that in any way or recognize a need to do a more comprehensive survey. Only consumer and environmental cases were discussed further as possible application areas.

The actual arguments used to limit the law's scope were rather formal and theoretical. Consumer protection was suggested to be the main application area because:¹³

- There are potentially an increasing number of consumer groups with similar small claims.
- Preventive function is important in the continuously evolving field of consumer protection.
- The scope of application in consumer protection law is clearly limited.

¹⁰ Oikeusministeriön työryhmämietintö 2005:3. Selvitys ryhmäkanteesta. (In Finnish, "Investigation on class action.")

¹¹ The follow-up draft law was Oikeusministeriön työryhmämietintö 2006:4. Ehdotus laiksi ryhmäkanteesta. (In Finnish, "Proposal for a law on class actions.") which was then forwarded to the parliament with minor modifications as Government's law proposal 154/2006.

¹² The first Swedish cases include e.g. securities and civil rights. See section 4 below.

¹³ Oikeusministeriön työryhmämietintö 2005:3, p. 54-55.

- There is Consumer Ombudsman, agencies, and voluntary dispute resolution mechanisms, which means that litigation becomes actual only after other conflict resolution possibilities have failed.

The draft law proposal further motivated consumer protection with speculative statements describing the rise of “global consumer society”. In addition, there was a reference to an earlier preparatory document from 1990s stating: “from the case examples [discussed in the document] it is possible to conclude that class actions would be first and foremost actual in [selected consumer protection issues]”. The referred cases did not however represent any statistically meaningful set – the areas of law were selected first before the actual cases were searched for.¹⁴ Environmental cases were also argued for although the motivations were briefer. Because the group had adopted a sector-focused approach to class actions, other areas of law did not receive any arguments for or against.¹⁵

Ministry of Justice received over 40 comments on the draft law.¹⁶ The only parties that argued for no limits in the scope of application were three professors of procedural law and a consumer interest group. Professors referred to formal reasons and the examples of other Nordic countries. The consumer group agreed. Two labor unions also advocated to extent the law’s scope to employment cases.¹⁷ Most of the commentators simply agreed with the chosen limitation on consumer cases, but were more cautious on environmental issues for both formal and substantial reasons. Industry representatives continued to be fundamentally against the idea of class actions in the first place. Based on the feedback the Ministry of Justice decided to drop environmental issues from the scope of application before the law was formally proposed in the parliament.¹⁸ The law’s scope of application did not change in the parliamentary process.

2.4 *The Art of Identifying Economic Effects a Priori*

Another major problem with the 2005 group’s document was that it started with a statement that *they did not have at their disposal any economic analysis* of the effects of class actions.¹⁹ This comment was perhaps more telling than any other. Namely it did not restrict the group to document numerous claims about the

¹⁴ Oikeusministeriön työryhmämietintö 2006:4, p. 39, which referred to the law proposal from 1997. The selection of the cases in the 1997 proposal was “exemplary” and it was specifically stated that “no comprehensive study of case law has been done.” Ryhmäkannelaki. Työryhmän 1996 mietintö, p. 17.

¹⁵ Interestingly, the 1992 investigation had some data from the United States (referred from Swedish studies) that indicated most the class action cases there were about civil rights. See Wihuri (1992).

¹⁶ Oikeusministeriön lausuntoja ja selvityksiä 2006:14. Ehdotus laiksi ryhmäkanteesta. Lausuntotiivistelmä. (In Finnish, “Proposal for a law on class action. Summary of responses.”)

¹⁷ Oikeusministeriön lausuntoja ja selvityksiä 2006:14, p. 11.

¹⁸ Government’s proposal nr. 154/2006.

¹⁹ Oikeusministeriön työryhmämietintö 2005:3, p. xx.

negative economic effects of class actions in the United States. The only documented source on the effects of class action in the United States was an oral testimony and written brief from Nokia.²⁰ According to an article in a Finnish economic magazine:²¹

“The fight against class action legislation had its peak when Nokia director Rick Stimson gave his testimony to the working group in the Ministry of Justice. The American lawyer told how Finland should write its law. In the final minutes of his presentation he repeated six times that there are no reasons or needs to change the current practice... Stimson told to the working group several examples of the misuse of class actions in the United States. According to him, the ones benefiting from the system are attorneys, who share the millions of dollars in attorney fees. Claimants have received just little amounts of money or other benefits.”

It is difficult to assess the overall impact of the Nokia brief to the outcome of the legislative process. The brief is, however, interesting reading since it collects almost all negative claims about class actions presented in the United States. According to the brief:²²

“The United States Chamber of Commerce estimates that business in the US spend tens of millions of dollars each year defending against frivolous lawsuits and that the total cost of the US tort system (civil claims) to US businesses is more than \$129 billion USD per year. While there has been no allocation of that to class action litigation, class action litigation is the most costly to defend and the most costly to settle, even when no product defect or injury has occurred or been proven.”

In other words, the strategy was to blur any distinction between procedural law and substantial accident law as if a procedural class action instrument in Finland would also introduce American substantive law. Further, according to the Nokia brief, the argument that... :²³

“...class action litigation is required to regulate business practices, presumes that a) there are current deficiencies in corporate behaviour that need to be regulated; b) alternative mechanisms to control behaviour do not function or exist; c) class actions are an effective deterrent; and 4) there is some cost benefit relationship between class action litigation and social benefit. Those four arguments do not survive close examination when applied to Finland or the European community.”

²⁰ The document titled “The US Class Action” is on file with the author. It is unpublished but public.

²¹ Terho Puustinen: “Ei sarvia eikä hampaita”. Talouselämä, February 8, 2007.

²² Document titled “The US Class Action” is on file with the author. It is unpublished but public.

²³ Nokia’s brief.

The brief went to argue that there was high ethics in the industry (low corruption rate), much regulation and government control already in place, and good access to justice for individuals because of the legal cost indemnification principle. Other industry groups followed up with vague references to “legends” from the United States and argued that Finland would lose foreign investments if unlimited class actions would be possible. In essence, the industry argumentation did not differ from the 1990s at all.

The Ministry of Justice answered in the draft law noting that the claims of negative economic effects are necessarily theoretic. There were no indications that the Swedish law on class actions would have had any effect on investments into Sweden. No new insurance products had been introduced on the market, nor had insurance premiums risen. They had no information that multinational Finnish companies would have avoided Swedish or even American markets just because of class actions. They also noted that there was no real possibility for frivolous suits because the only party having power to initiate a suit was Consumer Ombudsman.²⁴ Although these arguments may sound like a general defense of class actions, they were modestly aimed at only defending the strictly limited draft proposal and make it possible to have at least some kind of law enacted.

As noted, the draft law received more than 40 comments. Maybe the most interesting regarding economic effects was the one from the Government’s Institute for Economic Research.²⁵ Although short and informal, this was the only one from a research organization and the only one – save for some partisan industry comments – that focused on the economic effects. The Institute first noted correctly that *most of the claims for and against certain economic effects of class actions were based on theoretical conclusions or pure guessing*. Unfortunately, the comment itself also fell to the same speculation fallacy it first criticized. The comment did not provide any empirical or economic evidence, or even references, on class actions. It plainly went on to criticize the idea of legal entrepreneurship with the following statement:

“If possible cases would be about compensating small claims, it is unclear what the benefits of class action would be. In this case the most important effect on companies would be the increase of law firm turnovers.”

Further, the comment trashed specifically environmental class actions, just because...:

“...It is easy to think of cases, where well-resourced organizations (e.g. Greenpeace) could with weak grounds litigate against Finnish forest and energy companies. Suits would not necessary be accepted, but they would tie large companies to lengthy trials and could at the same time harm smaller subcontractors of these large companies.”

²⁴ Oikeusministeriön lausuntoja ja selvityksiä 2006:14, pp. 74-78.

²⁵ Document titled “Lausunto ryhmäkannetyöryhmän mietinnössä suoritettusta yritysvaikutusten arvioinnista.” is on file with the author.

The formal law proposal submitted to the parliament did not comment further on the Institute's claims although, as noted, environmental issues were left out of the its scope.

Perhaps the strongest argument against the idea of frivolous suits is the procedural rule that the losing party is subject to the legal costs of the winning party. For example if the Finnish Consumer Ombudsman loses a case where it has defended an individual consumer against a major industrial firm, it is not uncommon that a Finnish district court reimburses more than 100 000 euros of defendant's legal fees from the Ombudsman. Under these circumstances it is understandable that there will be no case unless the victory is almost sure.²⁶

3. Other Nordic Countries: Adopting the American Model with Adjustments

Discussion on class actions in Nordic countries can be said to have started seriously when Swedish law professor Per Henrik Lindblom publish a major book on the topic in 1989.²⁷ He carefully presented and rebutted numerous myths about class actions in the United States and finally concluded: "No decisive barriers to a Swedish adoption appear to be at hand."²⁸ The first policy meeting for all Nordic countries was arranged soon afterwards. According to the proceedings, "There appeared to be practically full agreement that the group action deserves special attention in the ongoing *de lege ferenda* discussion."²⁹

Sweden then went on to commission a working group to prepare an extensive three-volume legislative pre-investigation.³⁰ The working group was again lead by professor Lindblom with members from the judiciary, government institutions, an attorney, a lawyer from a labor union, and even one from the industry who objected particular issues such as the idea of private class actions and the opt-out principle.³¹ This was just the beginning compared to the industry critique following the investigation's publication. The critique may have been even stronger than in Finland. Lindblom took the time to answer the industry claims and forcefully defended the proposal he had initiated. Lindblom's conclusion was that *the proposal had nothing to do with substantive law, which was the*

²⁶ Phone conversation with Consumer Agency's lawyer Jari Suurla, June 25, 2007. The Consumer Ombudsman has secured to reserved only 20 000 euros for potential class actions in 2008. Thus, it is very likely there will be no class action cases in Finland in the near future.

²⁷ Per Henrik Lindblom (1989): *Grupptalan. Det anglo-amerikanska class actioninstitutet ur svenskt perspektiv*. Nostedts. The book has almost 800 pages.

²⁸ Ibid. p. 729 (English summary)

²⁹ The meeting focused on the possibility of class actions in consumer protection issues. Per Henrik Lindblom (ed.) (1990): *Grupptalan i konsumentmål*. NEK-rapport 1990:7. Nordisk Embetsmannkomité for konsumentspørsmål. Nordisk Ministerråd, Köpenhamn. p. 222 (English summary)

³⁰ SOU 1994:151. Grupprättegång. Del A-C.

³¹ Ibid. Del B, pp. 685-689.

*target of the critique.*³² After all the dust had settled, the investigation led eventually into a formal law proposal in 2001 with little details such as the opt-out principle omitted.³³ The law was accepted and came into force in the beginning of 2003.³⁴

Norway and Denmark followed the Swedish legislative work. Their proposals came after the Swedish law was already accepted. At this stage, the industry critique did not stop the proposals from becoming law quickly. Both Norwegian and Danish national laws are entering into force January 1, 2008.³⁵

The content of these Nordic laws is rather identical and in many respects close to the American model. The scope of application is not limited to certain types of cases and standard rules on attorneys apply. The only major difference is that opt-in is mandatory in Sweden. In Norway and Denmark opt-in is the main principle as well, but opt-out can be applied when the individual claim is small enough and it is not likely that the claimants would bother to take the time to opt-in.

| Country | Finland | Sweden | Norway | Denmark |
|----------|---------------------|-----------|--------------|--------------|
| In force | 1.1.2008 | 1.1.2003 | 1.1.2008 | 1.1.2008 |
| Scope | Consumer protection | Unlimited | Unlimited | Unlimited |
| Attorney | Consumer Ombudsman | No limits | No limits | No limits |
| Opt-out | N/A | N/A | Small claims | Small claims |

Table 1. A comparison of some key features of new class action laws in Finland, Sweden, Norway and Denmark. Finnish law is extremely restricted.

Sweden is the first Nordic country to have some data on class actions. There were total of six class actions initiated during the first three years. Only one of them was lead by the Consumer Ombudsman, others were private suits. As in the United States, case topics have varied from clear consumer protection issues

³² See on overview, see Per Henrik Lindblom (1996): "Gruppsyck mot grupptalan", *Svensk Juristtidning*, pp. 85-107, which starts with the following statement: "There is a strong, well-organized, well-funded and influential opposition to the proposal on class actions..." He identified the opposition to consist of a group of big companies ("storföretagsgruppen") who had further hired attorneys and lobby organization to advance their cause.

³³ According to Max-Oker Blom (2006): "Behovet av grupptalan – en argumentativ övning", *Tidskrift utgiven av Juridiska Föreningen i Finland*, p. 96, the reason why the proposal was idle for so many years was not the critique but rather the administrative burden initiated by Sweden's EU membership.

³⁴ Lag 2002:599 om grupprättegång.

³⁵ Norwegian law: Lov 2005-06-17 nr 90: Lov om mekling og rettergang i sivile tvister (tvisteloven). Kapittel 35. Gruppesøksmål. Danish law: Lov nr. 181 af 28. februar 2007 om ændring af retsplejeloven og forskellige andre love (Gruppesøgsmål m.v.). Kapitel 23 a. Gruppesøgsmål.

to corporate governance and constitutional rights.³⁶ The low number and topical variety of cases speaks for the fact that *class actions complement the role of regulatory authorities*. In this sense, one could argue that class actions also minimize regulatory costs.

One can find examples on the limits of government regulation also in its strong areas such as consumer protection. One recent example is a case when recording companies offered so called copy-protected CDs to consumers. Sony's particular copy protection system introduced a security vulnerability to the computers of thousands of consumers world-wide in 2005. Sony drew the CDs from the markets and settled a class action suit in the United States.³⁷ Meanwhile, hundreds of Finnish consumers protested openly against the problems of copy protections. After pressure from journalists, the Finnish Consumer Agency announced it would have a meeting with recording company representatives before it could make any statement of the case.³⁸ That statement never came.

Discussion on the principles of process law has differed somewhat from the United States. It is often argued that courts should decide individual lawsuits and not become arenas for social policy. Besides, lawmakers in the Nordic countries have had traditionally an active and strong role. On the other hand there has been increasingly demands for direct democracy. Legislators and other government authorities have been criticized to be unable to react quickly enough to complex issues. It has been questioned where one needs third parties to enforce the rights of individuals that have been clearly defined in the parliamentary process. As one example, Finnish law professor Thomas Wilhelmsson has argued for class actions based on societal and economic reasons. He has presented that the functions of liability law should include regulatory, monitoring, service, and social security functions.³⁹ He argues that class actions can be used as a "micropolitical instrument" in the Nordic market economies to further these "modern" goals of liability law.⁴⁰

4. Concluding Remarks: Why Did the Finnish Legislative Process Fail?

³⁶ For statistics of different areas of class actions in the United States, see e.g. Deborah R. Hensler et al. (2000): *Class Action Dilemmas. Pursuing Public Goals for Private Gain*, RAND Institute for Civil Justice, especially section 3 and Thomas E. Willging and Emery G. Lee III (2007): *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, Third Interim Report to the Judicial, Conference Advisory Committee on Civil Rules. Federal Judicial Center, April 2007. See also http://www.fjc.gov/library/fjc_catalog.nsf with search term "Class action litigation".

³⁷ Information about the settlement can be found here: <http://cp.sonybmg.com/xcp/>

³⁸ Jaakko Kuivalainen: "Kuluttajavirasto vaikenee toistaiseksi kopiosuojauksista". *Digitoday*, November 11, 2005.

³⁹ Thomas Wilhelmsson: *Senmodern ansvarsrätt. Privaträtt som redskap för mikropolitik*. Kauppakaari 2001. pp. 64-64.

⁴⁰ *Ibid*, pp. 176-177.

As this volume shows, it is evident that class actions are in Europe to stay. Their introduction, however, has not happened in a straightforward way. Many countries have adopted a very similar approach compared to the United States, but this has not been the case everywhere. The Finnish implementation is one example of a failed process.⁴¹

This article has presented that the main failures in the process were:

1. *Lack of empirical data of the various needs for class actions.* For some unknown reasons lawmakers focused only on consumer protection and environmental issues. They did not bother to survey empirical data from other countries but relied on theoretical speculations and submissions from selected interest groups. Comparative empirical data shows, however, that consumer protection and the environment are just two of the potential application areas for class actions. Issues such as constitutional rights could be considered fundamentally more important for the society as a whole. In the United States, these cases account for about 15% of all cases and even one the first Swedish cases dealt with constitutional issues. To compare, no document in the Finnish legislative process mentioned the need to discuss constitutional rights or even any need to consult such interest groups.
2. *Lack of analysis of various economic effects of class actions.* True, it is difficult to estimate the economic effects of class actions but this should not be a reason to skip the issue. Perhaps the easiest way to start such analysis is to survey published empirical studies from other countries. Necessarily, one must collect this material from other jurisdictions than Sweden. Obviously United States has been the leading “test market” for class actions and there is abundance of economic research material and empirical studies on the effects of class actions. Especially indicating in this regard is the final Finnish law proposal’s *formal argument* why American experiences were not surveyed in-depth: “...the process law in common law legal systems is not directly comparable to the process laws and other legislation regarding legal process in Finland... likewise, substantial law is based on a different legal culture.” Also of note here is that Finnish lawmakers have traditionally been interested in other Nordic countries. In this case other Nordic countries took example from America. Indeed, the *economic problem* to which class actions have tailored to give an answer is not totally different in Finland compared to the United States.

A critical commentator must now point out how little the Finnish process relied on substantive and verified arguments especially when such arguments would have been available. Already the first government investigation from 1992 stated that empirical studies had proved most of the numerous claims against class

⁴¹ As another similar example, Samuel P. Baumgartner (2007): “Class actions and group litigation in Switzerland”, *Northwestern Journal of International Law and Business* 301, criticizes how a class action law proposal in Switzerland was rejected with formal arguments without any empirical study on the various needs to have class actions.

actions as groundless.⁴² For some reason, the preparation of the law continued years later if that finding would never had been published. In addition, the Ministry of Justice was able to construct good arguments to defend its draft law against industry claims in 2006. However, at that point their modest aim was to only defend a very limited approach to class actions.

A cynical commentator could now conclude that *the Finnish legislative process has fundamental flaws* if it cannot get clear issues right. As noted, in Finland laws are prepared in ministries where working groups discuss the political details before a formal law proposal is submitted to the parliament for review. The most important part of the process is the composition of the working group. In the case of class actions, industry representatives were able to maintain a polarized situation no matter of the merits of their arguments. The only way to reach “a politically correct consensus” in this kind of situation was a substantially ill-founded compromise.

Interestingly, the result is *in accordance with the theory of public choice*. Industry representatives were able to influence the legislative process with effective coordination considerable more than groups with diverse interests, even though the latter groups may have had more to lose.⁴³ Some interests supporting class action were not heard in the process at all – it is for example difficult to name a certain group that would actively support constitutional rights in Finland. The state did not take a position of a referee but had its own interest to have at least some kind of law accepted and avoid among other things critique for the lack of authority.⁴⁴

⁴² Wihuri (1992), p. 13.

⁴³ For example Mancur Olson (1971): *The Logic of Collective Action*. Harvard University Press. argues in pp. 141-143 why industry interests can be over-represented in the legislative process: there are after all not that many politically active big companies (they have same opinions) and they have more resources compared to other interest groups.

⁴⁴ On public choice arguments for failure in legislative process see for example Mercurio and Medema (2006), pp. 186-195.