THE CLASS ACTIONS LAW REVIEW

FIFTH EDITION

Editor
Camilla Sanger

THE LAWREVIEWS

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Editor
Camilla Sanger

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PREFACE

Class actions and major group litigation can be seismic events, not only for the parties involved, but also for whole industries and parts of society. That potential impact means they are one of the few types of claim that have become truly global in both importance and scope, as reflected in this fifth edition of *The Class Actions Law Review*.

There are also a whole host of factors currently coalescing to increase the likelihood and magnitude of such actions. These factors include continuing geopolitical developments, particularly in Europe and North America, with moves towards protectionism and greater regulatory oversight. At the same time, further advances in technology, as well as greater recognition and experience of its limitations, is giving rise to ever more stringent standards, offering the potential for significant liability for those who fail to adhere to these protections. Finally, ever-growing consumer markets of increasing sophistication in Asia and Africa add to the expanding pool of potential claimants.

It should, therefore, come as no surprise that claimant law firms and third-party funders around the world are becoming ever more sophisticated and active in promoting and pursuing such claims, and local laws are being updated to facilitate such actions before the courts.

As with previous editions of this review, this updated publication aims to provide practitioners and clients with a single overview handbook to which they can turn for the key procedures, developments and factors in play in a number of the world's most important jurisdictions.

Camilla Sanger
Slaughter and May
London
March 2021

Chapter 2

BELGIUM

Hakim Boularbah and Maria-Clara Van den Bossche[1]

I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

i Definition of class or collective actions

In Belgium, there are various forms of multiparty litigation (that is, litigation involving multiple claimants or defendants). These include the following.

Action for collective redress (class action)

This is an action exercised by a claimant appointed by law (the group representative) who, on behalf of an unknown group of individuals who have not previously given a proxy to this applicant, brings an action that leads to a decision that prevents subsequent litigation, not only towards the group representative and the defendants, but also towards all group members that have opted in or have not opted out of the procedure. Only the group representative and the defendants are parties to the proceedings, not the group members. There is no affiliation of membership between the acting representative and the individuals represented. At the beginning of the procedure, the number of represented group members is undetermined. This is the main type of class action addressed in this chapter.

Collective actions (related actions)

Several individual legal actions arising from the same or a similar event or contract joined and consolidated in the same proceedings by different claimants are often represented by the same lawyer. The related actions are examined by the court jointly, even though they remain individual actions.

Action of collective interest

This is an action brought by an organisation or by a group of people, regardless of whether they intend to achieve an objective of general interest, but with the aim of realising an objective that goes beyond the personal interests of the individual members of the organisation or group.

ii Use of class or collective actions

In principle, class actions are not permitted under Belgian law. For actions to be admissible, the claimant must fulfil the 'personal-interest' requirement.[2] An important exception to this principle was introduced in Title 2 of Book XVII of the Belgian Code of Economic Law by

1 Hakim Boularbah is a partner and Maria-Clara Van den Bossche is a senior associate at Loyens & Loeff.

2 Articles 17 to 18, Belgian Judicial Code.

the Act of 28 March 2014, providing for the 'action for collective redress'. Until 2018, the scope of this action was strictly limited: only groups of consumers represented by non-profit organisations or public bodies were allowed to bring an action for collective redress, which must be brought against an enterprise and must concern an alleged violation of specifically enumerated Belgian and European laws, which all include consumer protection provisions (see Section III). Since June 2018, actions for collective redress can also be instituted by small and medium-sized enterprises (SMEs) represented by non-profit organisations or public bodies as described in the law (see Section III). Since the Act entered into force in September 2014, 10 class actions have been instigated (see Section II).

Collective action is a very common method to collectively bring related actions before Belgian courts.

There are several exceptions to the personal-interest requirement. For example, labour unions and qualified human rights organisations are entitled to seek injunctive relief against practices that infringe upon specified labour rights or non-discrimination laws. Professional organisations and consumer protection organisations can also bring cease and desist actions in case of unfair commercial practices.

iii Principal institutions

Since 2018, the Brussels Commercial Court and the Brussels Court of Appeal (in appeal) have exclusive jurisdiction to rule on actions for collective redress.[3]

There are specific rules for actions of collective interest.

II THE YEAR IN REVIEW

Since the entry into force of the class action regime in the Belgian legal order in September 2014, 10 class actions have been instigated. Nine of the 10 actions were brought by Test Achats, the main Belgian consumer protection organisation.

The first action was brought against the commercial airline company Thomas Cook following a major delay of a flight from Tenerife South to Belgium. The second action was launched to obtain compensation from the national railway company SNCB/NBMS for the interruption and the suspension of the train service during eight days of strikes in 2014 and 2015. The third class action was brought against the Volkswagen Group within the context of the 'Dieselgate' scandal. The fourth action was initiated against the largest Belgian telecommunications company (Proximus) after it introduced a renting formula for its new decoders. The fifth class action was initiated against eight websites involved in the resale of concert tickets at exorbitant prices. The sixth class action was initiated against the marketing company Groupon following a sales offer for diapers by a company named Luierbox. The seventh class action was brought against three Facebook entities within the context of the Cambridge Analytica data scandal. The eighth class action was undertaken at the initiative of the Belgian Ombudsman Service for Energy against six energy suppliers concerning fixed fees that energy suppliers continue to charge when energy contracts are terminated early. The ninth class action was filed against Ryanair in relation to flight delays and cancellations

3 Article XVII.35, Belgian Code of Economic Law; Article 633 *ter*, Belgian Judicial Code.

resulting from the strikes during the summer of 2018. The most recent class action was filed in 2020 against Apple with regard to planned obsolescence of Apple devices through software updates.

III PROCEDURE

i Types of action available

Different mechanisms

Under Belgian Law, until 2018, only groups of consumers represented by non-profit organisations or public bodies were allowed to bring an action for collective redress, which must be brought against an enterprise and must concern an alleged violation of specifically enumerated Belgian and European laws.

Following an evaluation of the collective redress system at the national level, the Fipronil crisis in the EU and the recommendations in this sense of the EU institutions, the Belgian government decided to extend the scope of the collective action under Belgian law. Notably, since June 2018, actions for collective redress can also be instituted by SMEs represented by non-profit organisations or public bodies as described in the law. In this context, SMEs are defined (in accordance with EU Recommendation 2003/361/EC on SMEs) as enterprises that employ fewer than 250 persons and that have an annual turnover not exceeding €50 million, or an annual balance sheet total not exceeding €43 million, or both. This extension is applicable to all cases introduced after 1 June 2018, provided that the alleged breach occurred after 1 September 2014.

An action for collective redress can only be admissible if it appears more effective than an individual action of ordinary law.[4] The elements that can be taken into consideration by the judge when examining this admissibility requirement are:

a the potential size of the group;
b the existence of individual damage that can be sufficiently related to the collective damage;
c the complexity and legal efficiency of the action for collective redress;
d the legal certainty of the group of consumers or SMEs;
e efficient consumer protection;
f the smooth functioning of the judiciary; and
g the amount of damage suffered by each individual consumer or SME cannot be a decisive element in the consideration.

In a decision of 17 March 2016,[5] the Belgian Constitutional Court emphasised that it cannot be simply assumed for every instance of damage with a collective character that the action for collective redress will necessarily be more effective than an individual action of ordinary law. Whether this is so needs to be assessed by the judge on a case-by-case basis and according to different criteria (such as those listed above).

Collective actions are based on Article 701 of the Belgian Judicial Code, which stipulates that different actions between two or more parties can be brought by one single writ, if the actions are related. Actions can be dealt with as 'related' cases, if they are so closely connected that it is desirable to consider and rule on them together, in order to avoid

4 Article XVII.36(3), Code of Economic Law.
5 Case 41/2016.

conflicting solutions if the claims were adjudicated on separately.[6] Even after the initiation of the proceedings, related cases that are pending before the same judge can be compiled, on request or *ex officio*.[7]

Action for collective redress can only be commenced for alleged violations by an enterprise of its contractual obligations or of specifically enumerated Belgian and European Rules.[8] These rules have in common that they all contribute to the protection of consumers. This list includes provisions from the sections of the Code relating to competition law, price developments, market practices, consumer protection, payment and credit services, safety of products and services, intellectual property and electronic economy. There are also special pieces of legislation regarding privacy protection, electronic signatures, insurance, health, professional liability, banking and finance, tour operators, passenger transport, energy and product liability, among others.

In short, the action for collective redress can only be used for alleged violations of consumer protection provisions within these pieces of legislation.

On 6 June 2017, following the recommendations of the EU institutions, the scope of the class action regime was extended to include infringements of EU competition law, including the ban on cartels and abuses of dominant positions.[9]

In the decision of 17 March 2016, the Belgian Constitutional Court held that it is legitimate to limit the scope of these laws. The court referred to the legislature's purpose to reserve the proceedings to consumer law, an area of law in which many cases of limited individual damage ('small claims') occur. In the view of the Court, the legislature struck the right balance between all interests at stake. These are, on one hand, the interests of the victims of collective damage, and on the other, those of the enterprises, and also the concern to increase the access to justice for such damage while guaranteeing the smooth implementation of these new proceedings in the judicial system (which are, therefore, better introduced gradually).

Collective actions arise in all areas. However, they are most commonly used in competition claims, and in environmental and financial services disputes.

Actions of collective interest can only be commenced for alleged violations of rights specified in the relevant special legislation.

ii Limitation periods

The Belgian Civil Code sets limitation periods.[10] The limitation periods vary depending on the nature of the action. The main terms of limitation are the following:

a Claims in tort are time-barred five years after the day on which the claimant in tort is aware of the damage and of the identity of the person liable for this damage, and in any event 20 years and one day after the date on which the fact, action or negligence that caused the damage occurred.

b Most other claims are time-barred after 10 years (for example, contractual liability).

6 Article 30, Belgian Judicial Code.

7 Article 856, Belgian Judicial Code.

8 Articles XVII.36(1) and XVII.37, Code of Economic Law.

9 Articles 101 and 102, Treaty on the Functioning of the European Union.

10 Article 2262 *bis*.

Specific rules, given below, are provided in the Code of Economic Law regarding action for collective redress:

a The term of limitation of SMEs' or consumers' individual actions that have exercised their opt-out option is suspended from the date of publication of the decision on the admissibility of the action for collective redress in the Belgian Official Gazette until the date SMEs or consumers inform the court registry of their option.[11]

b If the action for collective redress ends because there is no representative for the SMEs or consumers, the term of limitation for the SMEs' or consumers' individual actions that are members of the group is suspended from the date of publication in the Belgian Official Gazette of the decision on the admissibility of the action for collective redress until the date the end of the action is ascertained.[12]

c The term of limitation of SMEs or consumers' individual actions that have been excluded from the action is suspended from the date of publication of the decision on the admissibility of the action for collective redress in the Belgian Official Gazette until the date the SMEs or consumers are informed by the court registry that they are not members of the group.[13]

iii Commencing proceedings

Definition of class

The 'class' represented by the group representative in an action for collective redress is a group of consumers or SMEs that personally suffered damage as a consequence of a common cause (notably, a violation of one of the rules mentioned above).

The group of consumers or SMEs that can benefit from the compensation that would be awarded by the court can be composed by means of an opt-in or opt-out system.

Under an opt-in system, only the consumers or SMEs that have suffered the collective harm and have expressly notified the registry of their intention to belong to the group will potentially be considered as members.

Under an opt-out system, all consumers or SMEs that have suffered the collective harm and have not expressly notified the registry of their intention not to belong to the group (after having had knowledge of the existence of the action) will potentially belong to the group.

Once the action has been initiated, the judge chooses between an opt-in or opt-out system in the decision on admissibility, which then applies to the consumers or SMEs of the group having their habitual residence or main establishment in Belgium.[14]

However, the opt-in system is mandatory in two cases:[15]

a for consumers who do not have their habitual residence, or for SMEs that do not have their main establishment, in Belgium; and

b if the action aims for restoration of physical or moral collective damage.

The judge chooses between both systems on the basis of the following elements:

a the facts and arguments submitted by the parties;

b the interest of both the consumers or SMEs and the market;

11 Article XVII.63, Section 1, Code of Economic Law.

12 Article XVII.63, Section 2, Code of Economic Law.

13 Article XVII.63, Section 3, Code of Economic Law.

14 Articles XVII.38, Section 1(1), and XVII.43, Section 2(3), Code of Economic Law.

15 Articles XVII.38, Sections 1(2) and 1/1(2), and XVII.43, Section 2(3), Code of Economic Law.

c the type and the size of the damage suffered; and
d the number of potential victims.

The decision on the admissibility of the class action initiated by Test Achats against the airline Thomas Cook was the first decision on the admissibility of a class action in Belgium. The court held that, in deciding which system applies in a particular case, it must first be assessed how the consumers' interests can be best protected in the specific case.

According to the court, when consumers are aware that they have become a victim of damage and when they can easily get an idea of their rights, the interest of the individual victims in being part of the group is sufficiently protected by the opt-in system, which requires an active effort of the victims.

The court further held that, by contrast, the consumers' interests are best protected by the opt-out system in cases where compensation of the damage is not so obvious and where consumers are not necessarily aware of the damage they have suffered, or when their rights are less clear.

These findings were confirmed in the decision on admissibility of the First Instance Court in the action initiated against Proximus. In that decision, the court specified that the fact that consumers are informed about their rights through the press or their group representative (Test Achats) does not imply that the interests of individual victims should be less protected and is not decisive in the assessment of whether consumers can be aware of their rights. This view was confirmed in the decision on admissibility in the *Dieselgate* case. In this case, the court decided that the application of the opt-out system was justified for the reason that the alleged material wrongdoing did not have any visible damage consequences for the consumer, so that the court was dealing with 'unconscious' consumers, in which case a higher level of protection is required.

However, in more recent decisions (i.e., the decisions on admissibility of the Court of Appeal in the *Proximus* case and the First Instance Court in the *Ryanair* case), the courts dismissed the criterion based on the effective awareness of the consumers about the damage suffered and their rights in that regard, since this criterion is not provided for in the law and serves an objective that is already accomplished by the publication of the decision on admissibility.

In the decision on admissibility in the action against *Ryanair*, the First Instance Court indicated that in its Recommendation 2013/396/EU, the European Commission prefers application of the opt-in system and recommends a reasoned decision by the judge choosing the opt-out system where its national law provides for both systems.

In the view of the legislator, the opt-out system is most appropriate in cases where the amount of the damages is limited. However, this reasoning has not always been applied in practice by the courts. In the decision on admissibility in the *Ryanair* case, the First Instance Court held that the existence of scattered and relatively low-value damage is in itself not sufficient reason to choose an opt-out system, which derogates from the principled opt-in system recommended by the European Commission. The Court further held that an amount of €500 as individual damage per person is too high to qualify as low-value damage, but is an amount sufficiently attractive for consumers to make the effort to join the class action.

As regards the type of damage suffered, the Court of Appeal, deciding on appeal on the admissibility of the action against Proximus, has chosen for the opt-in system for the reason that the alleged damage required an individual assessment of the personal situation of each consumer (the existence of damage and causal link to the alleged infringement had to be

proven (and decided upon) for each consumer individually). Similarly, in the *Ryanair* case, the First Instance Court based its choice of the opt-in system primarily on the fact that the intervention of individual passengers is required to establish some of the potential violations (referred to as 'the partial individualization of damages') and to obtain the details of the passenger bank account on which any indemnity would need to be paid.

The number of potential victims and the size of the group are not irrelevant, but in themselves are not decisive to determine the applicable system. In the action against Thomas Cook, the low number of potential victims was one of the reasons that the opt-in system was chosen. In the action against Proximus, the high number of potential victims resulted in the choice for the opt-out system in the decision on admissibility in first instance (on appeal, however, the opt-in system was chosen). Also in the *Dieselgate* case, the high number of potential victims was the second decisive element for the court to apply the opt-out system. However, in the *Ryanair* case, despite the First Instance Court's finding of a potentially high number of potential victims (which is claimed to be more than 30,000 passengers), the Court ruled that the opt-in system should be applied.

Potential claimant

Standing in actions for collective redress is governed by Article XVII.36 and Articles XVII.38 to 40 of the Code of Economic Law.

Actions for collective redress can only be brought on behalf of a group of consumers or SMEs that have been personally harmed by the alleged violation of an enterprise.

The action can only be brought by a representative of this group of consumers or SMEs. Where both consumers and SMEs decide to act in the same cause, the two groups will have to be represented separately.

Article XVII.39 of the Code of Economic Law identifies, exhaustively, the potential bodies that can act as group representative.

The following bodies can act as group representative of a group of consumers:

a a consumer protection organisation with legal personality, represented in the Council for Consumption or recognised by the Minister of Economy;

b a non-profit organisation with legal personality recognised by the Minister of Economy, of which the objective is directly related to the collective damage suffered by the group;

c the Ombudsman's office for consumers, but only for representing the group in the stage of negotiation of an agreement of collective redress; and

d a representative body recognised by a Member State of the European Union or the European Economic Area to act as a representative and meeting the conditions of point 4 of Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

Under the Recommendation, these bodies must be designated by the Member States on the basis of clearly defined conditions of eligibility, which must include at least the following requirements:

a the entity must have a non-profit-making character;

b there must be a direct relationship between the main objectives of the entity and the rights granted under EU law that are claimed to have been violated; and

c the entity must have sufficient capacity in terms of financial resources, human resources and legal expertise to represent multiple claimants acting in their best interest.

The following bodies can act as group representative of a group of SMEs:

a an interprofessional organisation with legal personality that defends the interests of SMEs, represented in the High Council for the Self-Employed and the SME or recognised by the Minister of Economy;

b a non-profit organisation with legal personality recognised by the Minister of Economy, whose corporate purpose is directly related to the collective damage suffered by the group; and

c a representative body recognised by a Member State of the European Union or the European Economic Area to act as a representative and meeting the conditions of point 4 of Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (see above about the minimum requirements).

Natural persons cannot act as a group representative, nor can commercial companies, trade unions or law firms. By limiting the pool of potential group representatives to certain categories of claimants selected on the basis of the interest they defend or the corporate goal they pursue, the legislator aims to avoid abusive or frivolous actions for collective redress.

In addition to the formal requirements set out above, the group representative must also be deemed 'suitable' for this purpose by the judge. This criterion has been introduced for three main reasons:

a to ensure that the group members are soundly represented, considering that, without having granted any mandate or proxy to the group representative, they will, however, be bound by the decision obtained by the latter;

b to protect defendants by avoiding frivolous actions; and

c if several candidates apply, to enable selection by the judge of the most suitable representative, and to exclude the principle of 'first come, first served'.

Lastly, the group representative must meet the above requirements during the entire procedure. If these are no longer met in the course of the proceedings, a new group representative is appointed by the judge. If no new group representative meeting the requirements can be found, the procedure is closed by the judge.[16]

Professional claimants

Only consumers and SMEs can be represented in an action for collective redress.

Professional commercial claimants cannot buy consumers' claims in exchange for a share of the proceeds of the action.

Funding

Third-party funding of action for collective redress is not prohibited. However, this type of funding is of limited interest owing to the legal provisions concerning the distribution of compensation among the consumers or SMEs.

The Code of Economic Law provides that a court-appointed administrator must pay compensation to members of the group under the court's supervision. Therefore, a third-party funder cannot take a share of any proceeds of the action unless it concludes an agreement

16 Article XVII.40, Code of Economic Law.

with the group members before the distribution of the compensation, which is unlikely. If a consumer uses third-party funding, it will not give the third-party funder standing to participate in the proceedings. However, given the potential influence of third-party funding on an action for collective redress, its existence must be disclosed in the application initiating proceedings for the judge to rule on its adequacy (as for the group representative).

No public funding is available for actions for collective redress.

The Code of Economic Law does not provide for the compensation or remuneration of the group representative. As a matter of principle, the action for collective redress cannot be a way for the group representative to make profits. The group representative is only entitled to the reimbursement of the costs and fees incurred in relation to the proceedings, as well as of the legal 'procedural indemnity' (that is, the lump sum that must be paid by the losing party to the winning party; see Section III.v).

Consequently, the group representative's financial capacity is one of the central criteria for the certification of the action for collective redress, specifically the assessment of its adequacy.

There are no other funding options available.

It is very likely that the lack of a funding regime will affect the attractiveness and frequency of actions for collective redress in Belgium, since group representatives must have adequate financial capacity to undertake such actions on behalf of consumers or SMEs, without any remuneration and with limited recovery of their lawyer fees.

However, financial benefits that indirectly result from class actions have increased the attractiveness of initiating such actions for one group representative (Test Achats) already.

As indicated, nine out of the 10 class actions undertaken so far have been initiated by Test Achats, the main Belgian consumer protection organisation. Although class actions cannot be initiated for profit and the class actions initiated by Test Achats can be joined by consumers without payment, it appears that class actions have become an important source of income for the organisation. Both by launching actions for collective redress and through activities relating to collective purchase of products and services, the organisation has reached 2.4 million consumers in recent years, which has resulted in 60,000 new paid member subscriptions and in an increased use of its service platform.

Therefore, despite the lack of a funding regime, indirect financial benefits resulting from class actions can raise the attractiveness of class actions and can financially enable group representatives to initiate subsequent class actions.

iv Procedural rules

Timetabling

Under the Code of Economic Law, the action for collective redress comprises four phases.

a Admissibility phase (within two months of the filing; however, it appears that this legal deadline is not applied in practice) – in the class actions initiated so far, taking into account the importance of the admissibility phase and the rights of defence (of the defendant in particular), a procedural timetable was set with deadlines for the parties to exchange briefs regarding the admissibility of the class action, followed by oral pleadings concerning this aspect only. Since this timetable has always been (and is usually likely to be) spread over several months, the decision on admissibility is generally not rendered within two months of the filing of the class action.

b Compulsory negotiation phase (three to six months after the judgment on admissibility).

c Litigation phase, which involves:
- proceedings on the merits;
- exchange of briefs;
- oral pleadings held before the court; and
- judgment rendered by the court.

d Distribution of compensation phase.

At the very beginning of the proceedings on the merits, the court or the parties must set a procedural timetable to determine the deadlines for filing the parties' briefs with the court and the date of the oral pleadings. Parties are entitled to request jointly the postponing of the case for an indefinite period.

Certification and qualification

As mentioned, the first stage of action for collective redress is the admissibility phase.[17] The purpose of the admissibility phase is threefold and aims at checking:

a whether the alleged breach suffered by consumers or SMEs falls within the scope of the action for collective redress (see Section III.i);

b the status and adequacy of the representative (see Section III.ii); and

c the efficiency of the action for collective redress compared to individual actions (see Section III.i).

Under the first condition of admissibility, the court must examine whether the cause invoked may constitute a potential infringement of the legal provisions or contractual obligations invoked. As confirmed in the first admissibility decisions rendered, the claim may already be rejected at this stage if at first sight it appears to be manifestly unfounded, for example because no damage is likely to be sustained or because the possibility of the infringement is not proven to be likely.

In addition, if the defendant claims that the action for collective redress is without basis (that is, devoid of purpose) because all (potential) victims have already been compensated, the court is allowed (for procedural efficiency) to assess the accuracy of this statement in the admissibility phase, even though this touches upon the merits of the case.

The court confirmed this in the decision on the admissibility of the class action initiated by Test Achats against the airline Thomas Cook.

The court specified that it can establish that the proceedings are partially or entirely without basis (that is, devoid of purpose) if it is either:

a not disputed that all or some of the victims have been compensated; or

b manifestly clear at first sight (and, therefore, it cannot be disputed) that full payment of the claim had been made.

The court indicated that in the admissibility phase the claimant cannot be obliged to demonstrate who has been compensated in full and to take a position concerning this issue, as this pertains to the merits of the case.

In theory, the court must rule on the admissibility of the action for collective redress within two months of its filing with the court (however, see 'Timetabling', above). If the

17 Articles XVII.42 to XVII.44, Code of Economic Law.

court considers the action for collective redress admissible, the judgment will authorise the group representative to act. The judgment must identify the group and any subcategories. It must also determine whether the group will be composed on an opt-in or opt-out basis, as well as determining how the option will be exercised.

The parties are entitled to lodge an appeal against the judgment on the admissibility of the action for collective redress.

Minimum and maximum number of claimants

No minimum or maximum number of claimants is required for an action for collective redress to be brought and declared admissible. The only condition is the efficiency of the action for collective redress, which can only be admissible if it appears more effective than an individual action of ordinary law. As indicated, the (potential) number of the claimants is an important factor to be taken into consideration by the judge when examining the admissibility requirement (see Section III.i).

An action for collective redress is more likely to be deemed more efficient than individual actions when a significant number of consumers is potentially affected by a common issue.

In the decision on the admissibility of the class action initiated by Test Achats against the airline Thomas Cook, the court indicated that, when the majority of the (potential) victims has already been compensated before the action was initiated and only a limited number of (potential) victims has not been compensated yet, the court can consider that collective redress is not more efficient and that the action is therefore inadmissible.

In this regard, the court specified that if some compensation was paid after the proceedings had been initiated, the action is inadmissible only in relation to the remaining (potential) victims who have not received compensation. However, it is still admissible in relation to the victims who have been compensated pending the proceedings. In relation to these victims, the proceedings will be without basis (that is, devoid of purpose) because once they are compensated, they will automatically lose their substantive right. Therefore, a decision on the admissibility becomes unnecessary.

If all (potential) victims are compensated pending the proceedings, the entire action for collective redress can be declared without basis (that is, devoid of purpose).

v Damages and costs

Damages

Under Belgian law, the basic principle is the full compensation of the actual damage suffered. The injured person must be reinstated in the position he or she would have been in if the injury had not been committed. To that extent, punitive damages are prohibited. Quantification of the actual loss suffered is calculated by the judge on the grounds of parties' submissions and, possibly, experts' reports.

There is no cap on the quantum that can be recovered either from a single defendant, or overall. As a matter of principle, each defendant is jointly and severally liable for the damage suffered unless the judge rules otherwise.

It is possible for a defendant to bring a separate action against other persons responsible for the conduct complained of to recover part of the damages he or she paid (that is, a contribution claim).

There are no special rules applicable to the payment of interest in the field of actions for collective redress. However, specific interest rates are potentially applicable depending on

the area of law concerned by the action for collective redress. Post-judgment interest must be awarded from the date of the application initiating proceedings at a rate that is currently set (for 2020) at 1.75 per cent per annum.

Costs

There is a loser-pays principle under Belgian law. The losing party will bear all the costs of the proceedings (filing fee, expert costs, translation costs, among others). The recoverable lawyer fees of the winning party are limited to the procedural indemnity. The amount of the procedural indemnity is set by law. Since 1 March 2011, the amount of the procedural indemnity is calculated as follows.

If the claim cannot be appraised in monetary terms, the basic amount of this indemnity is €1,440.

If the claim can be appraised in monetary terms, the basic indemnity will range between €180 and €18,000.

Under certain circumstances, the amounts set by law can be increased or decreased by the court.

If the case is settled, costs and fees are set out in the agreement concluded by the parties.

vi Settlement

Settlement rules

Under the Code of Economic Law, a compulsory negotiation phase that lasts between three and six months must take place immediately after the decision of the court on the admissibility of the action for collective redress (see Section III.iii).[18] This compulsory stay of the proceedings is provided to allow parties to negotiate a potential collective settlement agreement within a specific time frame decided by the court.

At the end of this cooling-off period, either the court endorses the settlement by making the agreement binding on the parties or the proceedings on the merits start.

Otherwise, if the parties reach an amicable settlement of the case out of court before the decision on the merits, they can file an application with the court to enact the collective settlement agreement already entered into to make it binding on all group members.

Practice has shown that many of the class actions filed so far have resulted in a settlement agreement between the parties.

Separate settlements

The negotiation can cover all or part of the dispute. Therefore, where there is more than one defendant, they can settle separately. The settlement agreement will be endorsed by the court only with respect to them. The judge will remain seized of the action for collective redress with regard to the remaining defendants to rule on the merits.

18 Articles XVII.45 to XVII.51, Code of Economic Law.

IV CROSS-BORDER ISSUES

Consumers of the group who are domiciled or SMEs that have their main establishment outside Belgium can participate in an action for collective redress, provided that they explicitly opt in to the procedure within the term laid down in the decision on admissibility, by notifying the registry of their intention to join the action for collective redress.[19]

V OUTLOOK AND CONCLUSIONS

Proposals for reform

At the European level, for many years, the European Commission has been considering the introduction of a collective redress mechanism. Following the Commission Recommendation 2013/396/EU on collective redress of 11 June 2013, many Member States adopted a collective redress mechanism, but as each Member State adopted a slightly different model, the desired goal of harmonisation was not achieved. On 11 April 2018, the European Commission published proposals on the 'New Deal for Consumers', which aims to strengthen EU consumer rights and their enforcement in a more harmonised way. As part of the New Deal for Consumers, the Commission submitted a proposal for a directive on representative actions for the protection of the collective interests of consumers (the Collective Redress Directive),[20] repealing the Injunctions Directive 2009/22/EC, which was considered not to sufficiently address the challenges of the enforcement of consumer law. Although the Injunctions Directive already allows a court or an administrative authority to stop a practice violating consumer rules, the injunctions provided do not give harmed consumers the option of obtaining redress or compensation at the same time. Although compensatory collective redress is already available in 19 Member States, in over half of these it is limited to specific sectors, mainly to consumer claims. Furthermore, nine Member States do not provide the option to collectively claim compensation in mass harm situations, and only five Member States are considered to have a proper alternative dispute mechanism focused on mass harm situations: Belgium, France, Italy, the Netherlands and Spain.[21]

The proposal aimed to strengthen the right to access to justice by allowing consumers to join forces across borders and jointly request unlawful practices to be stopped or prevented, or to obtain compensation for the harm; harmonise collective redress mechanisms and end disparities across Member States; expand the scope of representative actions to include infringements of many other EU laws; reduce the financial burden and make remedies more accessible through collective representation; and strike a balance between citizens' access to justice and protecting businesses from abusive lawsuits by way of safeguards (such as the loser-pays principle) and requirements applicable to 'qualified entities'. On 24 November 2020, the European Parliament finally adopted Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers. The Directive introduces a harmonised model for representative action in all EU Member States that guarantees consumers are well protected against mass harm, while ensuring appropriate

19 Article XVII.38, Sections 1(2) and 1/1(2), Code of Economic Law.

20 www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2018/0184/COM_COM(2018)0184_EN.pdf.

21 www.europarl.europa.eu/news/nl/press-room/20181205IPR21088/first-eu-collective-redress-mechanism-to-protect-consumers.

safeguards to avoid abusive lawsuits.[22] Under the Directive, all Member States must put in place at least one effective procedural mechanism that allows qualified entities (e.g., consumer organisations or public bodies) to bring court actions to seek an injunction (ceasing or prohibiting) or redress (compensation).

Following the publication of the Directive on 4 December 2020, the Member States have 24 months to transpose it into their national laws, and an additional six months to apply it.

While the Belgian legal framework already meets many of the requirements set forth in the Directive, the Belgian legislator will need to make slight amendments to fully implement the new rules. For example, the Directive stipulates that, in order to bring cross-border actions to court, qualified entities will have to comply with the same criteria across the EU, which will now have to be implemented in Belgian law.

22 See the press release ' EU consumers will soon be able to defend their rights collectively' at https://www.europarl.europa.eu/news/en/press-room/20201120IPR92116/eu-consumers-will-soon-be-able-to-defend-their-rights-collectively.

Appendix 1

ABOUT THE AUTHORS

HAKIM BOULARBAH

Loyens & Loeff

Hakim Boularbah is a partner in the dispute resolution department of the Brussels office of Loyens & Loeff.

He focuses on corporate litigation (class actions, shareholders' disputes, post-acquisition claims), international arbitration (including proceedings related to arbitration, such as enforcement, setting aside and interim measures) and asset recovery. Hakim is one of the most renowned specialists in the field of collective redress. He is currently defending the first class actions and follow-on actions brought in Belgium. He also has an extensive practice in enforcement of foreign judgments or awards (especially against sovereign states) as well as in obtaining interim reliefs and protective measures or resisting them. Hakim also frequently acts as counsel or arbitrator in international arbitration matters. He is also a member of the France Region Team.

Hakim is a professor at the University of Liège (ULg), where he teaches civil procedure law. He is the author of numerous books and publications on civil procedure, private international law and arbitration law.

He holds a law degree (1996) and a PhD (2007) from the University of Brussels (ULB).

Hakim is unanimously recommended as a leading lawyer in the fields of dispute resolution and arbitration, including by *Chambers Global* for dispute resolution, ranked Band 1 in 2020, and by *The Legal 500* for dispute resolution, ranked as a leading individual in 2019.

MARIA-CLARA VAN DEN BOSSCHE

Loyens & Loeff

Maria-Clara Van den Bossche is a senior associate in the dispute resolution department of the Brussels office of Loyens & Loeff.

She specialises in the field of complex and international dispute resolution. She advises and represents clients in court litigation in various fields and in different types of procedures. Maria-Clara has broad experience in enforcement of foreign judgments and arbitral awards, including against sovereign entities. Through her involvement in most of the class actions initiated in Belgium so far and several publications on this topic, Maria-Clara has gained extensive expertise in this field. Maria-Clara is a member of the US Region Team and of the Digital Economy Team within the firm. She is also the former president of the Dutch-speaking Brussels Bar Association (VPG).

LOYENS & LOEFF

Tervurenlaan 2
1040 Brussels
Belgium
Tel: +32 2 743 43 43
Fax: +32 2 743 43 10
hakim.boularbah@loyensloeff.com
maria-clara.van.den.bossche@loyensloeff.com
www.loyensloeff.com

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