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ARTICLE

Consumer Collective Redress in Belgium: Class Actions to the Rescue?

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Abstract This paper analyses Belgium's new consumer class action act (Act of 28 March 2014 introducing a consumer collective redress action in the Code of Economic Law), which entered into force on 1 September 2014. First, attention is paid to the three class action prerequisites: the violation of a Belgian or European consumer regulation or act, an adequate class representative (i.e., a consumer association or the Consumer Ombudsman Service) and the superiority of the class action mechanism. Subsequently, the exclusive competence of the Brussels courts and the opt-in or opt-out system are discussed. The procedure consists of four phases, which are analysed in detail: a certification phase, a mandatory negotiation phase, a possible phase on the merits of the case, and an enforcement phase under the supervision of a collective claims settler. The paper concludes that a holistic approach to tackle mass harms in Belgium is missing. The new consumer class action contains some procedural bottlenecks that could undermine its efficiency. Its biggest shortcoming is the lack of appropriate rules on funding and financing.

Keywords Consumers · Collective redress · Class actions · Belgium · Europe

1 Deficient Collective Redress Tools

During the last decades, Belgium, just like many other European countries, was confronted with a number of high-profile mass cases.[1] Some were single-incident

[1] Most of these cases are analysed in Taelman and Voet (2011), at pp. 325–327, and Voet (2013a), at pp. 448–450.

The law is stated as at 15 November 2014.

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mass torts involving personal injuries and death. On 30 July 2004, there was a gas explosion in Ghislenghien. Twenty-four people were killed, 132 injured, 400 people suffered damages and insurance companies had to pay out more than €20 million. On 15 February 2010, two passenger trains collided in Halle. Eighteen people were killed and more than 100 injured. On 4 May 2013, a train transporting chemicals derailed in Wetteren. Dozens of people were injured. Hundreds could not go back to their houses for days. Other cases involved financial harms to shareholders. As a result of the worldwide financial crisis in 2008, the Belgian Fortis Bank, whose main shareholder was the Belgian government, had to be sold to BNP Paribas to avoid bankruptcy. This takeover led to several legal proceedings initiated by aggrieved minority shareholders.[2]

The Belgian judicial system has always struggled with these kinds of mass cases.[3] In addition to joinder of claims, claims in intervention and the technique of party representation,[4] only injunctive or declaratory collective actions are possible, allowing (public or private) associations or organisations that satisfy certain legal criteria (e.g., having had legal personality for a number of years) to bring an injunctive or declaratory action on behalf of a group of people. These actions only exist in a limited number of legal fields: consumer protection, environment, discrimination and racism. All these tools are deficient for the redress of collective harms. The techniques of joinder of claims, claims in intervention and party representation remain embedded in an individualistic context, designed for conflicts involving a limited amount of people. Injunctive or declaratory collective actions are rarely used in Belgium. Their biggest shortcoming is the impossibility of claiming damages, as they can only be used for injunctive or declaratory relief. In addition, associations and organisations lack the financial means to initiate them.

Another frequently used method is the piggyback or *partie civile* technique.[5] Contrary to the situation in common law systems, crime victims in Belgium and other European countries, such as France, can bring their civil claims during the criminal proceedings. After the criminal judge has dealt with the criminal aspect of the case and has convicted the defendant, he will rule upon the civil claims. The gain for the victim is that he can piggyback on the evidence brought forward by the public prosecutor, thus he only has to prove damages and causation. In most criminal mass cases, the civil parties give a mandate to a consumer association or a minority shareholder association to bring, on their behalf, their civil claim before the criminal judge. Although at first sight the piggyback technique only seems to have advantages—it is easily accessible, informal and cheap—it remains an opt-in system and all civil parties are treated as separate parties. They all have to come forward and have to give a mandate to a representative, which is unmanageable in mass criminal cases.

[2] This case is briefly discussed in Andenas (2013) and Coleton (2012).

[3] Voet (2013a), at pp. 442–447.

[4] Party representation makes it possible for a natural or legal person to represent a group of individuals if the representative receives an explicit mandate from each individual. In a situation involving multiple people with a common claim against the defendant, only the group members who gave a mandate will be represented in court and will be considered a party to the proceedings.

[5] Voet (2013b), at pp. 279–284.

2 Two-Tiered Approach

In 2014, and following the European path, the Belgian government adopted a two-tiered approach regarding consumer collective redress. On the one hand, the aim is to improve and facilitate the out-of-court and online resolution of consumer disputes. In 2013, the European Parliament and the Council adopted a new alternative dispute resolution (ADR) Directive and an online dispute resolution (ODR) Regulation for consumers.[6] Both instruments may play a key role in out-of-court collective redress if they provide swift, cheap and effective access to justice for a large number of consumers who are confronted with the same or similar harmful behaviour. The ODR Regulation will establish a free and interactive ODR platform through which consumers and traders can initiate ADR in relation to disputes concerning online transactions (offline transactions are excluded). National ADR entities will receive the complaint electronically and seek to resolve the dispute through ADR. The ADR Directive promotes ADR by encouraging the use of approved ADR entities that ensure the following minimum quality standards: the entities should be impartial and provide transparent information, offer their services at no or nominal cost, and hear and determine complaints within 90 days of referral. The Directive applies to domestic and cross-border disputes concerning complaints by a consumer resident in the EU against a trader established in the EU. In Belgium, the ADR Directive was implemented by the Act of 4 April 2014 regarding the out-of-court resolution of consumer disputes.[7] The Act establishes a Consumer Ombudsman Service as a residual ADR entity that is competent to deal with disputes for the resolution of which no existing Belgian ADR entity is competent. The Act also transposes the minimum quality standards for ADR entities into national law.

On the other hand, the European and Belgian legislatures put forward judicial collective redress mechanisms. In June 2013, the European Commission published its Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law,[8] which will be the European leitmotif for the coming years. The Commission recommends that all Member States should have collective

[6] Directive 2013/11 of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, *OJ* 2013 L 165/63, and Regulation 524/2013 of the European Parliament and of the Council of 21 May 2003 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, *OJ* 2013 L 165/1. See Hörnle (2013) and Cortes and Lodder (2014).

[7] *Loi portant insertion du Livre XVI, 'Règlement extrajudiciaire des litiges de consommation' dans le Code de droit économique* [Act Regarding the Out-of-Court Resolution of Consumer Disputes] of 4 April 2014, *Moniteur Belge* [Official Gazette of Belgium] of 12 May 2014, p. 38262. See Voet (2014).

[8] Recommendation 2013/396 of the European Commission of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, *OJ* 2013 L 206/60 (herinafter: EC Recommendation). Together with the Recommendation, the Commission published the Communication 'Towards a European Horizontal Framework for Collective Redress' in which the history of the collective redress issue is recounted and the Commission elucidates and justifies the enumerated common principles, COM(2013) 401/2 (hereinafter: EC Communication). See Hodges (2013) and Silvestri (2013). See also Hess (2014).

redress mechanisms in those areas where Union law grants rights to citizens and companies: consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection. The principles set out in the Recommendation should be applied horizontally and equally in those areas but also in any other area where collective claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant. The goal is not to harmonise the national systems and to establish a uniform model, but rather to identify common, non-binding principles relating to both judicial (compensatory and injunctive) and out-of-court collective redress that Member States should take into account when crafting such mechanisms. The mechanisms should be fair, equitable, timely and not prohibitively expensive. By setting minimum standards, the Commission wants to facilitate access to justice, stop illegal practices and enable victims in mass cases to obtain compensation, and at the same time provide appropriate procedural safeguards to avoid abusive litigation.

In 2009 and 2010, three class action bills were proposed in Belgium.[9] All three failed because political consensus could not be reached. The first proposal came from the Minister of Consumer Affairs and was based on a double approach: a partially out-of-court settlement track (based on the Dutch Collective Settlements Act[10]) and a court-based litigation track (based on the Québec class action).[11] It would create a real opt-out class action. According to this proposal, the class representative could act on behalf of a class of unknown fellow-sufferers without the need for the class members to intervene in the lawsuit. Moreover, the settlement and the action would lead to a decision binding on all parties involved. The second proposal was drafted by the two Green opposition parties and suggested an opt-in class action consisting of two phases: a collective phase during which the common issues would be resolved and to which the individual class members would have to opt-in, and an individual phase during which the individual issues would be dealt with.[12] The third proposal came from the Flemish Bar Council.[13] According to this proposal, a class action would be brought before the district court, which in Belgium is a special tribunal serving as an arbitrator in jurisdictional disputes among all first instance courts. The district court would only certify the class action, and then refer the case to a competent first instance court that would have to decide the merits of the case.

In the 2011 coalition agreement, the Di Rupo government aimed to put in place a procedure of collective claim settlement for consumers. In mid-December 2013, the

[9] Taelman and Voet (2011), at pp. 325–342, and Voet (2013a), at pp. 448–455.

[10] The Dutch Collective Settlements Act provides for settlement-only class actions. An association (or special purpose) foundation, representing the victims of a mass harm, tries to reach an all-embracing settlement with the wrongdoer. This settlement is then approved by the Amsterdam Court of Appeals, which has exclusive jurisdiction. Class members who disapprove of the settlement can opt out. If not, they are bound by the court decision approving the settlement. See Tzankova and Lunsingh Scheurleer (2009) and Fleming and Kuster (2012).

[11] Puttemans (2010).

[12] Chambre des représentants de Belgique, *Proposition de loi modifiant le Code judiciaire en ce qui concerne l'instauration d'une procédure collective* [Proposal to Amend the Judicial Code to Introduce a Collective Procedure], 3e Session de la 53e législature, Doc. 2035/001, 6 February 2012, available at http://www.dekamer.be/FLWB/PDF/53/2035/53K2035001.pdf.

[13] Hofströssler (2011).

cabinet approved a draft act introducing an action for collective redress in Belgium. The proposal was submitted to Parliament at the beginning of 2014. The Act of 28 March 2014 introducing a consumer collective redress action in the Code of Economic Law was published in the Official Gazette on 29 April 2014 and entered into force on 1 September 2014.[14] According to the Minister of Consumer Affairs, this Act and the Act of 4 April 2014 regarding the out-of-court resolution of consumer disputes both aim to reinforce consumer rights.[15]

This paper critically analyses the new Belgian consumer class action scheme. It describes the three class action prerequisites (3), the exclusive competence of the Brussels court (4), the opt-in or opt-out regime (5), the class action procedure (6), the nature of collective redress (7) and the role of the collective claims settler (8). Where possible, a comparison is made with the EC Recommendation.

3 Class Action Prerequisites

3.1 Only Consumer Law

The first class action certification criterion is that the cause of action must be a possible[16] infraction by the defendant of his contractual obligations or of one of the 31 European or Belgian consumer regulations or acts that are specifically enumerated in the Act.[17] These regulations and acts relate to some provisions regarding competition law and banking, market practices, consumer protection, payment and credit services, product safety, intellectual property, privacy, electronic signature, prices, insurance and professional liability, travels, energy and transport of passengers.[18] The class representative has to base his claim on one or more of these regulations or acts.[19] The use of this limitative list was criticised,

[14] *Loi portant insertion d'un titre 2 'De l'action en réparation collective' au livre XVII 'Procédures juridictionnelles particulières' du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique* [Act Introducing a Consumer Collective Redress Action in the Code of Economic Law] of 28 March 2014, *Moniteur Belge* of 29 April 2014, p. 35201.

[15] Chambre des représentants de Belgique, *Projet de loi portant insertion du Livre XVI, 'Règlement extrajudiciaire des litiges de consommation' dans le Code de droit économique. Rapport* [Proposal to Introduce an Act Regarding the Out-of-Court Resolution of Consumer Disputes. Report], 5e Session de la 53e législature, Doc. 3360/004, 28 February 2014, available at http://www.dekamer.be/FLWB/PDF/53/3360/53K3360004.pdf (hereinafter: Report), at p. 3.

[16] This implies a difficult *prima facie* judgment on the merits of the case. 'Possible' does not mean certain. It means that, in all reasonableness, there has to be sufficient evidence showing a violation by the defendant.

[17] Art. XVII.36, 1° Code of Economic Law.

[18] Art. XVII.37 Code of Economic Law.

[19] Report, *supra* n. 15, at p. 46. The class representative cannot base his claim on general tort law (Article 1382 Belgian Civil Code: 'Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation'). He has to invoke the breach of one or more of the aforementioned regulations or acts.

since it will have to be adjusted in case of new legislation or when existing laws are amended.[20]

The Belgian class action procedure only applies to C2B (consumer-to-business) disputes. Amendments to expand the scope of the procedure, for example, to shareholder disputes, were rejected.[21] The Minister clarified that the Act is a modest first step. An evaluation is planned in 2017. If this turns out positive, the procedure might be expanded to other fields of substantive law.[22]

The European approach seems to tend towards trans-substantivity. The principles set out in the EC Recommendation are to be applied horizontally and equally in those areas where Union law grants rights to citizens and companies, and where, in other words, the European Commission wants Member States to introduce collective redress mechanisms: consumer protection, competition, environment protection,[23] protection of personal data, financial services and investor protection. These principles should also be applied horizontally and equally in any other area where collective redress mechanisms in respect of violations of the rights granted under Union law would be relevant.[24] This approach is intended to avoid the risk of uncoordinated sectorial EU initiatives and to ensure the smoothest interface with national procedural rules.[25] The exception is in the field of competition law, for which there is a sector-specific Directive regarding actions for damages.[26]

The question arises whether the limited scope of application of the Belgian class action device puts the access to justice principle at risk.[27] For consumer disputes there is now collective access to justice. Victims of mass accidents or securities cases,[28] who fall outside the scope of the law, only have individualised access to justice. The Belgian Constitutional Court could consider this exclusive field of application constitutional discrimination. The Minister declared that class actions are not suitable for mass accidents because they are of a completely different nature and much more complicated than small consumer disputes.[29] This is erroneous. Just

[20] Ibid., at p. 13.

[21] Ibid., at pp. 41, 51, 63, 66, 68, 69, 71, 72 and 75.

[22] Ibid., at pp. 16–17, 22, 40 and 42–43.

[23] See also Recital (23) EC Recommendation, *supra* n. 8: 'With regard to environmental law, this Recommendation takes account of the provisions of Article 9(3), (4) and (5) of the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) which, respectively, encourage wide access to justice in environmental matters, set out criteria that procedures should respect, including criteria that they be timely and not prohibitively expensive, and address information to the public and the consideration of assistance mechanisms.'.

[24] Ibid., Recital (6).

[25] EC Communication, *supra* n. 8, at p. 16.

[26] Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, PE-CONS 80/14 (on 10 November 2014, the proposal was accepted by the Council, see http://www.ec.europa.eu/competition/antitrust/actionsdamages/damages_directive_final_en.pdf).

[27] Verougstraete (2014).

[28] Some Belgian examples are mentioned in Sect. 1 of this paper.

[29] Report, *supra* n. 15, at p. 17.

like consumers, victims of mass accidents are confronted with the same or similar legal or factual issues that could and should be resolved, for reasons of procedural economy, in one procedure. The complexity of a mass case is not a reasonable and objective distinction criterion.

3.2 Standing to Sue

The second certification prerequisite is that the class action can only be brought by an adequate class representative.[30] Only authorised consumer associations and authorised non-profit organisations whose statutory aim corresponds with the collective harm have standing to bring a class action.[31] The Consumer Ombudsman Service only has standing to initiate a class action and to negotiate a collective settlement.[32] If a settlement cannot be reached, and the court has to decide the merits of the case, a consumer association has to step into continue the procedure.[33]

The fact that only authorised associations and organisations have standing was criticised because this could mean too much government dependency.[34] The possibility to initiate a class action would *de facto* depend on ministerial authorisation.[35] The Minister replied that there are legal conditions he has to obey and that in case of arbitrariness his decision could be annulled by the Belgian Council of State.[36]

The Belgian legislature chose for an associational plaintiff, who has no private cause of action or grievance against the defendant.[37] This choice can be applauded.[38] When such a plaintiff initiates a class action, the focus will, from the outset, be on the class and not on the personal claim of an individual class member.[39] The collective interests of the class members as a whole will be the motivating reason for initiating a class action. During the proceedings, these interests will always come first, not those of an individual representative class member or his attorney. Therefore, one may expect associational plaintiffs to pursue class actions more strongly, with more commitment and enthusiasm, which will benefit the class members. Moreover, time-consuming procedural problems will not

[30] Art. XVII.36, 2° Code of Economic Law.

[31] Art. XVII.39 Code of Economic Law.

[32] Art. XVII.39, 3° Code of Economic Law.

[33] Art. XVII.40 Code of Economic Law.

[34] Report, *supra* n. 15, at p. 13. Some noted that the procedure will mostly (exclusively?) be used by Belgium's biggest consumer association, Test-Aankoop/Test-Achats.

[35] Ibid., at pp. 11 and 14.

[36] Ibid., at p. 18.

[37] Mulheron (2004), at p. 303 (referring to an ideological plaintiff).

[38] Voet (2013a), at pp. 458–459. Morabito suggests that popularity of limiting representation to associations or government authorities derives from the decline of confidence in individual representatives' ability to control class actions and the increased confidence in judges' willingness and ability to act as fiduciaries for the class, using active case management to protect the interests of absent class members (Morabito 2001, at pp. 493–498).

[39] This refers to the class-entity or class-as-client theory (Shapiro 1998).

occur when the individual claim of the class representative becomes moot or is settled by the defendant.

This is in line with the EC Recommendation, which favours parties other than non-individual class members in bringing representative actions, which are defined as actions brought by a representative entity, an *ad hoc* certified entity or a public authority on behalf and in the name of two or more natural or legal persons who claim to be exposed to the risk of suffering harm or to have been harmed in a mass harm situation whereas those persons are not parties to the proceedings.[40] According to the Commission, Member States should, besides empowering public authorities,[41] designate or certify, *ex ante*,[42] representative or *ad hoc* entities that satisfy certain minimum qualification criteria to bring representative actions.[43] These criteria are the following[44]: (a) the entity should have a non-profit making character[45]; (b) there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and (c) the entity should have sufficient capacity in terms of financial resources, human resources and legal expertise to represent multiple claimants acting in their best interest.

Belgian law explicitly, and correctly, states that the representative also has to be adequate. Standing has to be distinguished from adequacy of representation.[46] An association or organisation having class action standing is not automatically adequate to be a class representative in a specific case.[47] When multiple associations present themselves as class representative, the class action mechanism forces the court to determine which association or body is most adequate to represent the class in that particular case. There should be no 'first come, first serve' principle.[48] Therefore, the adequacy of representation test can obviate potential conflicts of interest. If it is clear from the beginning that the associational interests of the plaintiff prevail over the economic interests of the class, the judge can rule that the

[40] Art. 3(d) EC Recommendation, *supra* n. 8. This needs to be distinguished from group actions where the action can be brought jointly by those who claim to have suffered harm (ibid., Recital (17)). Representative and group actions are two types of collective actions.

[41] Art. 7, ibid.

[42] Art. 6, ibid.

[43] In its Communication, the European Commission rejects *ad hoc* certification (i.e., allowing the court to check the adequacy of the representative entity on a case-by-case basis). The *ex ante* governmental designation or certification is motivated by the fact that mass harm situations could span across the border. Therefore, representative entities originating from Member States other than the one where a representative action is brought should have the possibility to continue performing their role (EC Communication, *supra* n. 8, at p. 11).

[44] Art. 4, EC Recommendation, *supra* n. 8. The designated entity should lose its status if one or more of the conditions are no longer met (Art. 5, ibid.).

[45] See EC Communication, *supra* n. 8, at p. 10 ('It should therefore be ensured that the representative entity acts genuinely in the best interest of the group represented, and not for own profit').

[46] See Gidi (2013) and Micklitz (2007), at p. 21.

[47] For example, a Brazilian class action can be initiated by an association or governmental body. The mere fact that they have standing is sufficient. There is no additional inquiry into the adequacy of representation. According to Gidi, this is disturbing (Gidi 2013, at pp. 371–372).

[48] Micklitz (2007), at pp. 21–22.

plaintiff is not adequate as a class representative. If the conflict of interest occurs during the procedure, the judge can substitute the class representative at the request of a class member or even the defendant.

It is regrettable that Belgian law does not allow *ad hoc* associations, under the form of a legal entity and created after a specific mass case, to bring a class action. Amendments in that respect were rejected.[49]

3.3 Superiority

The third and final condition is that the class action should be more suitable than (or superior to) an individual civil action.[50] In assessing this condition, the court may take into account the following elements: the potential group size, the existence of individual damages in connection with the collective harm, the complexity and judicial efficiency of the class action mechanism, and the legal certainty for the group of consumers on whose behalf the action is brought. The size of the individual damages cannot be a decisive factor, in the sense that a judge cannot deny certification simply because the damages suffered by the class members differ while they all face the same or similar factual or legal issues.[51]

4 Brussels Courts

The courts in Brussels have exclusive jurisdiction to decide class actions that will be binding on the whole country.[52] In the first instance, the class action can be brought before the Brussels Court of First Instance or the Brussels Commercial Court.[53] On appeal, the case is brought before the Brussels Court of Appeals.

This will lead to specialised and experienced class action courts[54] and will pave the way for an efficient resolution of class actions.[55] Uniform and predictable case

[49] Report, *supra* n. 15, at p. 57.

[50] Art. XVII.36, 3° Code of Economic Law.

[51] Chambre des représentants de Belgique, *Projet de loi portant insertion d'un titre 2 'De l'action en réparation collective' au livre XVII 'Procédures juridictionnelles particulières' du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre I du Code de droit économique* [Proposal to Introduce an Act Introducing a Consumer Collective Redress Action in the Code of Economic Law], 5e Session de la 53e législature, Doc. 3300/001, 17 January 2014, available at http://www.dekamer.be/FLWB/PDF/53/3300/53K3300001.pdf (herinafter: Proposal), at pp. 8–9 and 21.

[52] *Loi portant insertion des dispositions réglant des matières visées à l'article 77 de la Constitution dans le livre XVII 'Procédures juridictionnelles particulières' du Code de droit économique et modifiant le Code judiciaire en vue d'attribuer aux cours et tribunaux de Bruxelles une compétence exclusive pour connaître de l'action en réparation collective visée au livre XVII, titre 2, du Code de droit économique* [Act Making the Brussels Courts Exclusively Competent Regarding Collective Redress Actions] of 27 March 2014, *Moniteur Belge* of 29 April 2014, p. 35197.

[53] The Brussels Justices of the Peace and the Brussels Labour Court have no jurisdiction.

[54] Choi (2004), at pp. 1517–18 ('Specialized judges may develop expertise in distinguishing between frivolous and meritorious claims and therefore become more willing to sanction frivolous suits'). This is also in the best interests of defendants.

[55] Voet (2013a), at pp. 471–472.

law will develop in a specialised area of the law. Moreover, a specialised and more experienced court will be able to deal with these cases more efficiently and swiftly. Because the total number of mass cases in European countries seems to be fairly limited, even in jurisdictions that already have class actions or class action-like tools,[56] it would be inefficient to give jurisdiction to multiple courts in a small country like Belgium. One competent court also avoids time-consuming litigation over jurisdictional issues, as well as the disadvantages of forum shopping.

Critics argue that an exclusively competent court can be very powerful and can hinder the development of the law.[57] It can also be perceived by class members as isolated, distant and inaccessible, which can trigger opt-outs because victims want to enforce their rights in a closer jurisdiction. These dangers are real but can be controlled by a number of safeguards. Class action cases can be allocated to a three-judge panel. This allows discussion and leaves room for development of the law. Class action judges must also be trained, as judicial education is essential. This training can be organised on a national and international level. A coordinating role can be reserved for the European Judicial Training Network.[58] Finally, the class action court can be made mobile and become a travelling class action court when the particularities of the class conflict requires the court to be closer to the place of harm, or closer to the class members.

5 Opt-In or Opt-Out

An important issue is the opt-in or opt-out feature of the class action device.[59] The opt-in principle is the default in the EC Recommendation: 'The claimant party [i.e., the class] should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed.'[60] Opt-in, which allows a class member to freely choose whether to participate in the proceedings or not, is seen as better preserving the party autonomy principle. According to the Commission, the value of the collective dispute is more easily determined in an opt-in system, since it would consist of the sum of all individual claims. The court is in a better position to assess

[56] To date, there have been eighty-five GLO (group litigation order) procedures in England and Wales (http://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders). Since the introduction of the Dutch Collective Settlements Act in 2005 (see *supra* n. 10), there have been seven cases (dossier.rechtspraak.nl). In Sweden, there were seventeen class action procedures between 2003 and 2013 (Ervo 2014).

[57] Safranek (1995), at pp. 1337–1338 (referring to a 1990 report of the Federal Courts Study Committee: 'The committee recognized that the shortcomings of specialized courts' are easy to list as the benefits: lack of cross pollination of legal theories, politicization, risk of capture by an interest group, isolation, and lack of conflicts allowing percolation of ideas').

[58] See http://www.ejtn.eu. The European Judicial Training Network is the most important European platform concerning the training of judges and the exchange of judicial knowledge and experience. The goal of the Network is 'to foster a common legal and judicial culture. [It] develops training standards and curricula, coordinates judicial training exchanges and programmes, disseminates training expertise and promotes cooperation between EU judicial training institutions'.

[59] Stuyck (2009).

[60] Art. 21 EC Recommendation, *supra* n. 8.

both the merits of the case and the admissibility of the collective action. The opt-in system also guarantees that the judgment will not bind other potentially qualified claimants who did not join.[61] In addition, it is stated that any class member should be free to leave the class at any time before the final judgment is given or the case is settled, subject to the same conditions that apply to withdrawal in individual actions, without being deprived of the possibility to pursue its claims in another form, if this does not undermine the sound administration of justice.[62] On the other hand, natural or legal persons claiming to have been harmed in the same mass harm situation should be able to join the class at any time, as long as this does not undermine the sound administration of justice.[63] The composition of the class and any changes therein should be notified to the defendant.[64]

Given the vigorous political opposition to 'American style' opt-out class actions, the European Commission surprisingly also provides for opt-out class actions, but only when this is allowed by law or court order and duly justified by reasons of sound administration of justice,[65] a vague concept that is not defined and that is open to multiple interpretations. In a footnote in the Communication, two advantages of an opt-out system are pointed out[66]: it facilitates access to justice for small damages claims and offers more certainty and finality to the defendant. This exception might be explained by a growing European tendency to accept the opt-out device. Besides the fact that there are jurisdictions that already allow opt-out class actions,[67] the argument that only opt-in class actions are compatible with Article 6 ECHR, since they alone allow class members to actively participate in the proceedings, is crumbling. In the Dexia case,[68] the Amsterdam Court of Appeals ruled that if class members are duly and individually notified and have the opportunity to object or to opt out in order to pursue their claim individually, their Article 6 rights are guaranteed. According to the British Civil Justice Council, it is clear that any individual who does not wish to take part in the proceedings has an adequate and proper opportunity to exercise his right of party autonomy by giving notice to the representative party or the court. Equally, party autonomy rights are protected insofar as settlement is concerned in a sophisticated opt-out action where the represented class is given the opportunity to opt out of any settlement.[69]

[61] EC Communication, *supra* n. 8, at p. 12.

[62] Art. 22 EC Recommendation, *supra* n. 8.

[63] Art. 23, ibid.

[64] Art. 24, ibid.

[65] Ibid.

[66] EC Communication, *supra* n. 8, at p. 11, footnote 37.

[67] For example, the Portuguese and Bulgarian class action regimes are opt-out schemes. See Gonçalves Borges and Serra Baptista (2012) and Katzarsky and Georgiev (2012). The Dutch Collective Settlements Act also is an opt-out scheme (see *supra* n. 10).

[68] Court of Appeals Amsterdam 25 January 2007, JOR 2007 p. 71 (*Dexia Bank Nederland NV/Stichting Platform Aandelenlease*).

[69] Civil Justice Council (November 2008) Improving Access to Justice Through Collective Actions. Developing a More Efficient and Effective Procedure for Collective Actions. Final Report. A Series of Recommendations to the Lord Chancellor, p. 137 (Recommendation 1), available at http://www.ucl.ac.uk/laws/judicial-institute/files/Improving_Access_to_Justice_through_Collective_Actions_-_final_report.pdf.

Contrary to the EC Recommendation, there is no default rule in Belgium. In its certification decision, the Belgian court can freely choose between an opt-in or opt-out system.[70] The court will make the decision in light of the underlying facts and claims of the case. For example, in small consumer damages claims, an opt-out system will be most suitable. In some (limited) cases, the court must impose an opt-in system: when the class members are not residing in Belgium[71] and when physical or moral damages are claimed.[72] The fact that opt-out is possible is to be applauded. Most mass consumer disputes are small claims disputes, for which an opt-in system is not suitable. Because of rational apathy, class members will not come forward. In the consumer context, the goal of the procedure (collective access to justice) is best achieved by an opt-out system. This argument was invoked by the Minister to justify an exception to the opt-in system as prioritised by the European Commission.[73]

In order for class members to make an informed decision whether to remain in the class or opt out, they should be notified of the key decisions, including about certification and the merits of the case. The EC Recommendation vaguely pays attention to the information on a collective redress action and the appropriate notice requirements. The Member States should ensure that it is possible for the representative entity or for class members to disseminate information about a claimed violation of rights granted under Union law and their intention to seek injunctive or compensatory relief. The same possibility for the representative entity, *ad hoc* certified entity, a public authority or for class members should be ensured as regards the information on ongoing compensatory actions.[74] The Recommendation does not specify the dissemination methods. It only clarifies that they should take into account the particular circumstances of the mass harm situation concerned, the freedom of expression, the right to information, and the right to protection of the reputation or the company value of a defendant before its responsibility for the alleged violation or harm is established by the final judgment of the court.[75] The rationale is to strike a balance between the right to access information and the protection of the reputation of the defendant.[76]

In Belgium, the certification decision and other key decisions (judicial approval of a collective settlement, decision on the merits of the case and the decision closing the procedure) are published in the Official Gazette of Belgium (*Moniteur Belge*) and on the website of the Federal Public Service Economy, SMEs,[77] Self-employed

[70] Art. XVII.43, §2, 3° Code of Economic Law. The preparatory works of the Act of 28 March 2014 do not offer the court specific criteria to impose the opt-in or opt-out system.

[71] Art. XVII.38, §1, 2° Code of Economic Law.

[72] Art. XVII.43, §2, 3° Code of Economic Law.

[73] Proposal, *supra* n. 51, at p. 30.

[74] Art. 10 EC Recommendation, *supra* n. 8.

[75] Art. 11, ibid. The dissemination methods are also without prejudice to the Union rules on insider dealing and market manipulation (Art. 12, ibid.).

[76] EC Communication, *supra* n. 8, at p. 12.

[77] Small and Medium Enterprises.

and Energy.[78] In exceptional cases, the court can order other forms of notice (e.g., in newspapers, magazines or on websites), including individual notice.[79]

The consumer has to opt in or opt out after the certification decision has been notified.[80] This choice is irrevocable. If a consumer has opted in or has not opted out, and afterwards disagrees with a collective settlement or the decision on the merits of the case, he will be bound by the *res judicata* effect of that settlement or decision. It allows to determine the definite size of the group at an early stage of the proceedings, which can facilitate and encourage a collective settlement. The legislature also wants to avoid that class members make their opt-in or opt-out decision in function of the result of the procedure.[81] All this could have the possible adverse effect that class members will simply not opt in or will opt out because their choice will be final. It is regrettable that there is no second opt-in or opt-out round, for example, after a collective settlement is approved. At least the court should have the discretionary power to order a second opt-out. An amendment allowing class members to opt out at any stage of the proceedings was rejected.[82]

6 Procedure

6.1 Focus on Settlement

Although Europe and Belgium have opened the door to judicial collective redress mechanisms, they are also encouraging out-of-court resolution of mass harms. The EC Recommendation states that Member States should ensure that the parties to a dispute in a mass harm situation are encouraged to settle the dispute about compensation consensually in or out of court, at the pre-trial stage or during or after civil trial,[83] and either with the intervention of a third party or without such intervention.[84] Reference is made to the 2008 Mediation Directive,[85] which is odd since the Directive only applies to cross-border disputes in civil and commercial matters. In the Commission's view, collective ADR should require the consent of the parties involved in the case.[86] Mandatory schemes could trigger unnecessary costs and delays and may undermine the fundamental right of access to justice.[87] Any limitation period applicable to the claims should be suspended during the

[78] Arts. XVII.43, §3, XVII.50, XVII.55 and XVII. 62 Code of Economic Law.

[79] Arts. XVII.43, §2, 9° and XVII.54, §1, 6° Code of Economic Law.

[80] Art. XVII.38, §1 Code of Economic Law.

[81] Proposal, *supra* n. 51, at pp. 23 and 31.

[82] Report, *supra* n. 15, at p. 52.

[83] Art. 25 EC Recommendation, *supra* n. 8.

[84] EC Communication, *supra* n. 8, at p. 14.

[85] Directive 2008/52 of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, *OJ* 2008 L 136/3. See recently Esplugues (2014).

[86] Art. 26 EC Recommendation, *supra* n. 8.

[87] EC Communication, *supra* n. 8, at p. 14. See in this regard the debate in Italy on whether out-of-court mediation should be mandatory or strictly voluntary (Silvestri and Jagtenberg 2013).

period from the moment the parties agree to attempt to resolve the dispute by means of an ADR procedure until at least the moment at which one or both parties expressly withdraw from that alternative dispute resolution procedure.[88] Third and finally, the legality of the binding outcome of a collective settlement should be verified by the courts taking into consideration the appropriate protection of interests and rights of all parties involved.[89] The latter involves the merits of the settlement. The Directive on Antitrust Damages Actions likewise focuses on consensual dispute resolution. It contains provisions regarding the suspensive effect and the effect of consensual settlements on subsequent actions for damages.[90]

The same is true for the Belgian class action act. The Belgian legislature prioritises and facilitates the out-of-court resolution of mass consumer harms.[91] A settlement is possible in each phase: before the proceedings (in which case the parties can ask the court to approve the collective settlement)[92] (6.2), during the mandatory negotiation phase after the class action has been certified[93] (6.3) or during the procedure on the merits of the case[94] (6.3).

6.2 Settlement Before the Proceedings

If the parties reach a collective settlement before the start of the proceedings, they jointly submit it to the court to have it approved (homologated).[95] The agreement has to contain the following information[96]: a detailed description of the collective harm; a description of the class; information about the class representative and the defendant(s); the extent and the forms of collective redress; the reasons for using the opt-in or opt-out system; in case of an opt-out system, the amount of time the class members who will not opt out will have after the settlement approval to come forward to obtain individual compensation; the amount of costs the defendant(s) will pay to the class representative; which party will pay the costs of notice; a possible revision procedure; additional forms of notice and the text of the collective settlement as it will be notified to the class members. If one of these elements is missing or unclear, the court will send the agreement back to the parties, who will

[88] Art. 27 EC Recommendation, *supra* n. 8.

[89] Art. 28, ibid.

[90] Arts. 18 ('Member States shall ensure that the limitation period for bringing an action for damages is suspended for the duration of any consensual dispute resolution process') and 19 ('Member States shall ensure that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement of competition law inflicted upon the injured party') Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, *supra* n. 26.

[91] Report, *supra* n. 15, at p. 26.

[92] Art. XVII.42, §2 Code of Economic Law.

[93] Art. XVII.45–48 Code of Economic Law.

[94] Art. XVII.56 Code of Economic Law.

[95] Art. XVII.42, §2 Code of Economic Law.

[96] Art. XVII.45, §3, 2°–13° Code of Economic Law.

have to complete it within 8 days.[97] The joint petition must contain evidence that the certification criteria are met.[98]

The court must make a decision within 2 months.[99] If it refuses to approve the settlement, the procedure will end; it will not proceed as a litigation class action. There is no *pro forma* approval. The law states that the court will refuse approval if the agreed redress is evidently unreasonable.[100] Approval will also be refused if the amount of time that the class members who will not opt out will have after the settlement approval to come forward in order to obtain individual compensation is evidently unreasonable; if the additional forms of notice are evidently unreasonable; or if the amount of costs that the defendant(s) will pay to the class representative exceed the real costs the latter has incurred. Again, and if necessary, the court can send the agreement back to the parties to have it amended on one or more of these grounds.[101] If the settlement is ultimately approved, the court will appoint a collective claims settler.[102] Neither the collective settlement nor the judicial approval decision implies a recognition of liability by the defendant.[103] The approval decision and the complete text of the settlement will be published in the Official Gazette of Belgium and on the website of the Federal Public Service Economy, SMEs, Self-Employed and Energy.[104]

6.3 No Settlement Before the Proceedings

If the parties have not reached a collective settlement, the class action procedure will be initiated by the class representative, who will submit a petition to the clerk of the court. The complaint must contain the following information[105]: evidence that the certification criteria are met; a description of the collective harm; a detailed description of the class; and the reasons for using the opt-in or opt-out system. If one of these elements is missing or unclear, the court will send the petition back to the class plaintiff, who will have to complete it within 8 days.[106]

The court has to make a certification decision within 2 months.[107] If the class action is not certified, the lawsuit will be dismissed without prejudice. Otherwise,

[97] Art. XVII.42, §3 Code of Economic Law.

[98] See Sect. 3. The cause of action is a possible infraction by the defendant of his contractual obligations or of one of the 31 European or Belgian consumer regulations or acts that are enumerated in the Act, the class action is brought by an adequate class representative and is more suitable than (or superior to) an individual civil action.

[99] Art. XVII.44, §1 Code of Economic Law.

[100] Art. XVII.49, §2 Code of Economic Law.

[101] Ibid. There are no indications in the preparatory works of the Act of 28 March 2014 that the court could ask the parties to amend the agreement on grounds other than those mentioned in Art. XVII.49, §2 Code of Economic Law.

[102] Art. XVII.49, §3 Code of Economic Law. See Sect. 8.

[103] Arts. XVII.46 and XVII.51 Code of Economic Law.

[104] Art. XVII.50 Code of Economic Law.

[105] Art. XVII.42, §1 Code of Economic Law.

[106] Art. XVII.42, §3 Code of Economic Law.

[107] Arts. XVII.43, §1 and XVII.44, §1 Code of Economic Law.

the court renders a certification decision that has to contain the following elements:[108] a description and the cause of the collective harm; the applicable opt-in or opt-out system and its modalities (including the opt-in or opt-out period); a detailed description of the class; information about the class representative and the defendant(s); the period during which the parties have to negotiate a collective settlement; and additional forms of notice.[109] The certification decision will be published in the Official Gazette of Belgium and on the website of the Federal Public Service Economy, SMEs, Self-Employed and Energy.[110]

In its certification decision, the court must set a time limit during which the parties have to negotiate a collective settlement.[111] This cannot be shorter than 3 months and not longer than 6 months.[112] The court can prolong the time limit once by a maximum of 6 months.[113] During this mandatory negotiation phase, the parties can use an accredited mediator.[114] If a settlement is reached, the approval procedure as described above[115] will apply.

If a settlement cannot be reached within the allotted time frame, the procedure will continue so that the court can decide the merits of the case.[116] Within a month after the court has been notified of the fact that no collective settlement could be reached, it will order a hearing, where the parties agree on a procedural calendar or one is imposed by the court.[117] If the parties reach a collective settlement during the procedure on the merits of the case, they can ask the court to approve it and the procedure as described above will apply.[118] If no settlement is reached, the court will decide the merits of the case. If it finds the class claim valid, the decision will contain the same elements as a collective settlement.[119] The court will also appoint a collective claims settler.[120] The decision will be published in the same manner as the approval decision.[121]

[108] Art. XVII.43, §2 Code of Economic Law.

[109] See Sect. 5.

[110] Art. XVII.43, §3 Code of Economic Law.

[111] Art. XVII.45, §1 Code of Economic Law. This time limit cannot be shorter than 3 months and not longer than 6 months (Art. XVII.43, §2, 8° Code of Economic Law). The court can prolong the time limit once by a maximum of 6 months (Art. XVII.45, §1 Code of Economic Law).

[112] Art. XVII.43, §2, 8° Code of Economic Law.

[113] Art. XVII.45, §1 Code of Economic Law.

[114] Art. XVII.45, §2 Code of Economic Law. On mediation in Belgium and the accreditation of mediators, see Traest (2012).

[115] See Sect. 6.2.

[116] Art. XVII.52 Code of Economic Law.

[117] Art. XVII.53 Code of Economic Law.

[118] Art. XVII.56 Code of Economic Law.

[119] Art. XVII.54, §1 Code of Economic Law. See Sect. 6.2.

[120] See Sect. 8.

[121] Art. XVII.55 Code of Economic Law.

7 Collective Redress in Kind or by Monetary Payment

Any collective settlement and decision on the merits of the case will have to determine the extent and forms of collective redress. This redress can be in kind (e.g., replacement of a deficient product) or by monetary payment.[122] The amount of payment can be determined on an individual basis, meaning that the defendant(s) will have to pay an individualised amount of money to every consumer coming forward, or, when this is impossible or impracticable, on a global basis.[123]

Every consumer wanting to be compensated has to come forward, even in an opt-out system. In case of a low take-up rate, the court will determine the allocation of the residual funds. The court has a wide range of options: the funds can flow back to the defendant or the defendant can be ordered to set up a *cy-près* scheme (e.g., an invoice discount or the distribution of coupons or a free product).[124]

Common Belgian liability law applies,[125] in the sense that the guiding principle remains full and individual compensation of the damages suffered. It is by no means the intention of the legislature to introduce punitive damages that could lead to overcompensation.[126] This approach is echoed in the EC Recommendation, which poignantly points out that the collective redress mechanisms it envisages are not of a regulatory nature. It is a core task of public enforcement to prevent and punish the violations of rights granted under Union law. The possibility for private persons to pursue claims based on violations of such rights only supplements public enforcement.[127] The Communication makes very clear that collective damages actions should aim to secure compensation of damage that is found to be caused by an infringement. The punishment and deterrence functions should be exercised through public enforcement. According to the Commission, there is no need for EU initiatives on collective redress to go beyond the goal of compensation.[128] The Commission adheres to the principle that the compensation awarded to natural or legal persons harmed in a mass harm situation should not exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions. Punitive damages, theoretically leading to overcompensation of the damage suffered in favour of the claimant party, and that intend to serve a deterrent goal, should therefore be banned.[129]

[122] The new class action procedure exclusively focuses on compensatory relief. To obtain injunctive or declaratory relief the injunctive or declaratory collective actions as mentioned in Sect. 1 should be used.

[123] Arts. XVII.45, §3, 6° and XVII.54, §1, 7° Code of Economic Law.

[124] Proposal, *supra* n. 51, at p. 42. On *cy-près*, see Mulheron (2006).

[125] Proposal, *supra* n. 51, at p. 37.

[126] Ibid.

[127] Recital (6) EC Recommendation, *supra* n. 8.

[128] EC Communication, *supra* n. 8, at p. 14. See in general on punitive damages in Europe Koziol (2008) and Rouhette (2007).

[129] Art. 31 EC Recommendation, *supra* n. 8.

8 Enforcement Phase—Collective Claims Settler

Finally, there is a phase during which the settlement or the decision on the merits of the case is enforced under the supervision of a collective claims settler.[130] The claims settler is appointed by the court from a list drawn up by the general assembly of the Brussels Court of First Instance, the Brussels Commercial Court or the Brussels Court of Appeals. Only attorneys, ministerial public servants or judicial mandataries who are competent in settling claims can be appointed.[131]

The enforcement procedure is very complicated and governed by short time limits. In case of an opt-out system, the court determines a term during which the class members who have not opted out have to come forward before the clerk of the court in order to obtain individual compensation. In case of an opt-in system, consumer class members have already opted in with the clerk of the court. Based on the information received from the clerk of the court, and within a reasonable time, the claims settler draws up a provisional list of class members who will receive compensation. When a member does not meet the class description, this is mentioned on the list.[132] The claims settler sends the list to the judge, the class representative, the defendant and the class members he proposes to exclude. Within 30 days, the class representative or the defendant can challenge the inclusion or exclusion of a class member on the provisional list with the clerk of the court. No more than 14 days later, the clerk informs the concerned class members and the claims settler. Within 14 days, the class representative, the defendant(s), the class members whose enlistment is challenged and the claims settler have an opportunity to communicate their views to the clerk of the court.[133] Within 30 days, the court orders a hearing. The claims settler, the class representative, the defendants and the class members concerned are heard, after which the court creates the final list of class members entitled to compensation.[134] This list is notified to all parties.

In case conflicts occur during the enforcement phase, the parties and the claims settler can always request the court to resolve them.[135] Every 3 months, the claims settler reports to the judge.[136] When the settlement or the decision are fully enforced, he deposits a final report, a copy of which is sent to the class representative and the defendant(s). The final report contains all the necessary information for the court to decide on the closure of the procedure. The final report gives an overview of the funds that were not distributed among the class members

[130] Art. XVII.57, §2 Code of Economic Law.

[131] Art. XVII.57, §1 Code of Economic Law. There are no detailed legal criteria to determine this competence.

[132] Art. XVII.58, §1 Code of Economic Law.

[133] Art. XVII.58, §3 Code of Economic Law.

[134] Art. XVII.58, §4 Code of Economic Law. The question arises whether an excluded class member can challenge the decision that excludes him. Because he is no party to the proceedings, he cannot appeal the decision. The fact that the class member concerned is heard by the court, does not make him a party.

[135] Art. XVII.60 Code of Economic Law.

[136] Art. XVII.59, §1 Code of Economic Law.

and contains a detailed outline of the costs and fees of the claims settler.[137] In its final decision, the court determines the allocation of the residual funds[138] and approves or reduces the costs and fees of the claims settler. By approving the final report, the court definitely ends the enforcement phase. Based on that decision, the claims settler can claim his costs and fees from the defendant.[139] The decision is published in the Official Gazette of Belgium (*Moniteur Belge*) and on the website of the Federal Public Service Economy, SMEs, Self-Employed and Energy.[140]

9 Evaluation

9.1 Holistic Approach

The Act of 28 March 2014 introducing a consumer collective redress action in the Code of Economic Law makes Belgium one of the European front-runners regarding consumer collective redress. The new procedure, which is limited to consumer law, largely complies with the EC Recommendation on common principles for injunctive and compensatory collective redress mechanisms. The Act, which entered into force on 1 September 2014, will be evaluated in 2017. Possibly, the procedure might be expanded to other fields of substantive law.

What is missing is a holistic approach. Optimal collective redress can only be achieved by a matrix of intertwined models.[141] It is unwise to put all the eggs in the private litigation basket. Especially with respect to small consumer claims, the potential of other redress mechanisms and models has to be underlined. Moreover, priority has to be given to an ADR model that encompasses direct negotiation, conciliation, mediation and arbitration by ADR agencies.[142] In addition, the significance of regulation and possible regulatory oversight of collective restitution and restoration (especially in the fields of consumer policy, medicine, financial services, telecommunication and energy) cannot be underestimated.[143] To date, this is still largely unexamined. Nevertheless, and to complete this set of collective redress tools, the private litigation model should include a class action device.[144] In that sense, the Belgian consumer class action should be viewed as a legal protection tool that juxtaposes the new consumer ADR scheme set up by the Act of 4 April 2014.

[137] Art. XVII.61, §1 Code of Economic Law.

[138] See Sect. 7.

[139] Art. XVII.61, §2 Code of Economic Law.

[140] Art. XVII.62 Code of Economic Law.

[141] See also Hodges (2014), forthcoming.

[142] Hodges et al. (2012).

[143] For examples in the field of competition law, see Hodges (2006).

[144] Voet (2013a), at pp. 478–479, and Voet (2013b).

9.2 Procedural Bottlenecks

The new class action procedure has some bottlenecks that could undermine its efficiency. Two can be mentioned briefly here. First, there is the possibility to appeal the certification decision.[145] According to Belgian law,[146] when a decision is appealed, all the (factual and legal) issues that were not decided by the first court are transferred to the appellate court that will decide them. There is no referral back to the court of first instance in case the appellate court affirms the decision. There are some exceptions to this rule. For example, when the appellate court affirms, on the same grounds, an investigative measure ordered by the first court, it will refer the case back to the first court. This exception does not apply when the Brussels Court of Appeals affirms a class action certification decision. In that case, the Court of Appeals has jurisdiction to deal with the rest of the procedure. Because the stakes in class action procedures are so high, the certification decision will almost always be appealed. This means that the procedure in first instance will be *de facto* limited to the certification issue. It will be the Brussels Court of Appeals that will approve a collective settlement reached after certification or that will render a decision on the merits of the case. Because of the backlog in this court—currently, it takes sometimes 4 or 5 years to have an individual lawsuit decided—consumers will have to wait for years to get compensated.

Second, there is the very complicated phase during which the settlement or the decision on the merits of the case is enforced under the supervision of a collective claims settler. This complexity, and particularly the cascade of short time limits, threatens to undermine the efficiency of the procedure.

9.3 Funding and Financing

The biggest obstacle to the effectiveness of the Belgian class action seems to be the funding and financing issue.[147] The Belgian legislature assumes that the procedure can and will be financed in the same way as individual procedures.[148] Bringing a consumer class action will therefore depend exclusively on the financial willingness and power of a consumer association or the Consumer Ombudsman Service. The question arises how financially willing they will actually be. Regarding the (public) Consumer Ombudsman Service, class action litigation will be funded by the taxpayer. The danger also exists that this public body could be captured by political imperatives or the interests of particular stakeholder groups, which raises concerns regarding real access to justice for victims of mass harms.

Without appropriate and clear funding rules, class actions are simply not viable. In principle, the European Commission rejects contingency fees. As a general rule, and contrary to the US, Member States should ensure that lawyers' remuneration

[145] Although this is not explicitly mentioned in the Act, the possibility to appeal the certification decision can be derived from the fact that the Brussels Court of Appeals has jurisdiction.

[146] Art. 1068 Belgian Judicial Code.

[147] See Voet (2015). See also Arts. 29–32 EC Recommendation, *supra* n. 8.

[148] Report, *supra* n. 15, at p. 25.

and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties.[149] In most Member States, including Belgium, contingency fees are also considered to violate public order and to be incompatible with attorneys' professional ethics.[150] The EC Recommendation states that if Member States exceptionally allow for contingency fees in collective redress cases, appropriate national regulation must be provided, taking into account the right to full compensation of the class members.[151]

Just like the Belgian legislature, the European Commission does not state how collective redress mechanisms should be funded.[152] In order to strike a balance between access to justice and avoiding abusive litigation,[153] the Commission only sets out some principles that form a normative framework. Besides the prohibition of contingency fees, the loser-pays rule would apply to class actions, posing a significant obstacle to potential class representatives, including associations.[154] If at the end of the procedure the class representative runs the risk of also having to pay the costs of the defendant, because of the loser-pays rule, there will be a disincentive to bring class actions, which could create a barrier to access to legal remedies of the kind which the procedure itself aims to overcome. Public funding is rejected by the Commission since it considers collective redress procedures as civil (private) procedures, with deterrence only being a side effect.[155]

A significant recommendation is that at the outset of the proceedings the plaintiff should declare to the court the origin of the funds that he is going to use to support the legal action.[156] In other words, the representative plaintiff is subject to full financial disclosure.

A new kind of litigation funding that has come to the fore is third party litigation funding (TPLF), in and outside the context of class actions.[157] Third party funders who take the risk of funding the litigation work on a contingency fee basis. If the case is won or settled, they will receive a percentage (usually between 25 and 40 %) of the awarded compensation. If the case is lost, they will not be paid. The EC

[149] Art. 29 EC Recommendation, *supra* n. 8.

[150] See Art. 3.3. Code of Conduct for European Lawyers (available at http://www.oa.pt/upl/%7B2f103317-16f3-4f86-9f8e-6d93d82312d9%7D.pdf): 'A lawyer shall not be entitled to make a *pactum de quota litis*. By "*pactum de quota litis*" is meant an agreement between a lawyer and the client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter. "*Pactum de quota litis*" does not include an agreement that fees be charged in proportion to the value of a matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of the Competent Authority having jurisdiction over the lawyer'.

[151] Art. 30 EC Recommendation, *supra* n. 8.

[152] EC Communication, *supra* n. 8, at p. 9: 'The European Parliament is not in favour of setting out conditions or guidelines for the private funding of damages claims at EU level'.

[153] Ibid., at p. 15.

[154] Art. 13 EC Recommendation, *supra* n. 8. The rule is subject to the conditions provided for in the relevant national law.

[155] EC Communication, *supra* n. 8, at p. 15.

[156] Art. 14 EC Recommendation, *supra* n. 8.

[157] de Morpurgo (2011), Kalajdzic et al. (2013) and Mulheron and Cashman (2008).

Recommendation allows TPLF in collective redress litigation and partially regulates it by providing a series of safeguards in order to avoid abusive litigation.[158] On the one hand, Member States should ensure that in cases where an action for collective redress is funded by a private third party it is prohibited for the private third party[159]: (a) to seek to influence procedural decisions of the claimant party, including on settlements; (b) to provide financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependent; and (c) to charge excessive interest on the funds provided. On the other hand, the court should be allowed to stay the proceedings if in the case of use of financial resources provided by a third party[160]: (a) there is a conflict of interest between the third party and the claimant party and its members; (b) the third party has insufficient resources to meet its financial commitments to the claimant party initiating the collective redress procedure; or (c) the claimant party has insufficient resources to meet any adverse costs should the collective redress procedure fail. In addition to these general principles of funding, the Member States should ensure that for cases of private third party funding of compensatory collective redress, it is prohibited to base remuneration given to or interest charged by the fund provider on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties.[161]

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[158] EC Communication, *supra* n. 8, at p. 15.

[159] Art. 16 EC Recommendation, *supra* n. 8.

[160] Art. 15, ibid.

[161] Art. 32, ibid.

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