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# **Erin Brockovich turns European : is there an interest for class actions?**

**Litigation/Antitrust/Distribution law Commissions**

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National Report of Belgium

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## **INTRODUCTION**

Class actions are often related and associated to the American legal culture, as it is illustrated by several movies including the famous “Erin Brockovich” picture.

However, the class actions or collective redress actions exist also in other jurisdictions, notably in Europe.

Precisely, the European Commission has recently given an accurate definition of collective redress and of its aim in its communication named “Towards a European Horizontal Framework for Collective Redress”<sup>1</sup>, accompanying its “Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law”<sup>2</sup>:

*“Collective redress is a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action. Collective redress facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law.”*

Although collective redress and class actions exist in several jurisdictions in the world, there are some differences arising from different legal and procedural cultures, notably between the Common Law and the Civil Law legal systems.

Thus, the purpose of this questionnaire is to identify such differences as well as the common points between the collective redress and class actions in various jurisdictions.

There is also a particular focus on class actions in the anti-trust field, which is one of the main areas for such actions, as shown by the recent proposal for an EU “Directive 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”<sup>3</sup>.

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<sup>1</sup> COM(2013) 401/2

<sup>2</sup> C(2013) 3539/3

<sup>3</sup> COM(2013) 404 final

## 1. Existence and scope of class actions/collective redress actions

*1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?*

Legislation is currently under discussion at the Parliament (*Doc. Parl.*, Ch., session 53, 3300/007). It is expected to be enacted in a few weeks.

A collective redress actions is defined as: “*the action aiming at the redress of a collective harm*”; where the “*collective harm*” is defined as “*all individual harms with a common cause, suffered by the members of a group*” and a “*group*” is defined as “*all consumers affected individually by the collective harm and represented in the collective redress action*” (article 1.21 of Chapter XIII of Title 2 of Book I of the Economical Code)

*1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law...)?*

Collective Redress Actions are limited to the cases of harm caused to consumers (article XVII.36).

Collective Redress Actions are only allowed (article XVII.36) when the cause of the harm is a (potential) infringement, committed by an undertaking, of (i) a contractual obligation or (ii) one of the European regulations or Belgian laws (or application decrees) listed in the article XVII.37.

[laws listed in article XVII.37: law regarding the protection of competition ; laws regarding competition and price changes; the law on the fair market practices and the protection of the consumer; the law regarding the the payment services and credit services, the law regarding the security of products and services; the laws regarding intellectual property rights, the law regarding the electronic economy; the law regarding drugs , the law on the transport of gas and other products through pipelines; the law regulating residential construction and sale of homes built or under construction; the law on the protection of the health of consumers regarding food and other products; the law on compulsory insurance against civil liability in respect of motor vehicles; the law concerning the liability for defective products; the laws regarding insurances; the law on marital brokerage firms; the data

protection laws; the law on the exercise and the organization of itinerant activities; the law on travel agreements; the EU regulation 2027/97; the laws on the organization of the electricity and gas markets ; some provisions of the laws on the control of the financial sector , the law on the amicable recovery of debts of consumers ; European regulations regarding the passengers rights (flight , train, road transportation , sea transportation ), the law regarding the sale of consumption goods to consumers , the law on electronic communications; the law regarding the protection of consumers in connection with broadcasting services; the law on the resale of event tickets].

*1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?*

It is allowed to bring a collective redress action on the ground of several statutes, as long as they are listed in the article XVII.37.

*1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?*

No.

*1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors (“injunctive relief actions”) and/or to claim compensation for damage suffered (“compensatory relief actions”)?*

The aim of the action is to obtain compensation for the damage suffered; however, the compensation may be a compensation “*in natura*”, which means that the unlawful practice will take an end.

*1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?*

All kind of harms.

*1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation*

*in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?*

The principles that are applicable to the determination of the quantum of the harm under general civil law remain applicable to collective redress actions: it is therefore not possible to obtain a compensation that exceeds the compensation that would have been awarded if the claim had been pursued by means of individual actions; no punitive damages.

*1.8 More particularly in the anti-trust field, how does the ‘passing on’ defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?*

No published case-law found.

On the basis of the general principles applicable, the validity of a passing-on defense should be assessed taking into consideration all elements of the case, including possible loss of sales due to the passing-on of the overcharge (which would lead to the rejection of the passing-on defence).

## **2. Standing and admissibility to bring class actions/collective redress actions**

*2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement (“collective actions”), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice (“representative actions”)?*

Collective redress actions may only be brought by an authorized representative.

*2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?*

Not applicable.

*2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated;*

*financial/human resources/legal expertise requirements...), and can the representative entities been sanctioned if they do not comply with such requirements?*

The possibilities to be a representative entity are very restricted (article XVII.39):

- An association for the defense of consumers rights, having legal personality, and being (a) a member of the Consumption Council or (b) authorized by the Ministry for Economical Affairs;
- A non-profit association whose object (as it appears from its articles of association) is in direct relation with the collective harm, which do not pursue an economical object, and which is authorized by the Ministry. Such association must have legal personality since at least 3 years on the day the collective redress action is filed;
- A specific department of the Ministry for Economical Affairs, to be created.

If the representative does not comply with the statutory requirements to be a representative, the court will appoint another representative; if no other representative qualifies, the court must declare that the action has ended.

*2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?*

It is examined at an early stage, called “*admissibility phase*” (article XVII.42 and foll.).

*2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?*

No.

*2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?*

There are no limits to the number of claims that can be aggregated. All plaintiffs are represented by the representative.

*2.7 More generally, what procedural defences are available for defendants short of trial and therefore before the national court decides on the merits of a collective action?*

The defendants are party to the admissibility phase and can discuss the fact that the admissibility conditions for a collective redress action are met.

The admissibility conditions are (article XVII.36):

- The harm is caused by a (potential) infringement of (i) a contractual obligation or (ii) one of the European regulations or Belgian laws (or application decrees) listed in the article XVII.37, committed by an undertaking;
- The representative meets all statutory requirements and the court considers he is “adequate” to be representative;
- A collective redress action seems the more efficient action.

### **3. “Opt-in” vs “Opt-out” systems and information on the class action/collective redress action**

*3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed (“opt-in” principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group (“opt-out” principle)?*

Both systems are possible (both systems are defined in article I.21).

The representative proposes one of the system to the court and the reason why that system should be applied (article XVII.42).

The Court decides on the applicable system in the admissibility decision (article XVII.43).

If the harm to be redressed are physical damages or moral harm, the opt-in system is compulsory (article XVII.43).

*3.2 What are the effects of the judgment on the victims in the “opt-in” or “opt-out” system chosen in your jurisdiction?*

[article XVII.38]

#### Opt-out system

All consumer suffering harm and residing in Belgium are part of the group, unless they opt-out; consumer residing outside of Belgium are no part of the group.

The declaration of opt-out must be filed at the court's clerck office.

#### Opt-in system

The declaration of opt-in must be filed at the court's clerck office. Both consumer residing in Belgium or outside Belgium may opt-in.

Opt-out declarations and opt-in declarations must be filed within the term set in the admissibility decision; the term may not be less than 30 days and not more than 3 months as from the day after publication of the admissibility decision in the Official Gazette (article XVII.43).

All members of the group are bound by the decision on the merits/settlement, to the exception of the member who can demonstrate that he has no reasonable possibility to know the decision of admissibility during the period to opt-out (article XVII.49 and XVII.54).

*3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?*

No, the opt-in option (as well as the opt-out option) is definitive (article XVII.38).

By exception, a member of the claimant party may leave if he concludes an out-of-court settlement with the defendant.

*3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?*

The question is only relevant for the opt-in system.

In the opt-in system, the opt-in must be filed with the court's clerck office within the term set in the admissibility decision (see answer to question 3.2.).

*3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?*

The initial request for admissibility filed by the representative must contain a description of the claimant party and an estimate (as precise as possible) of the number



of consumers harmed (article XVII.42). The admissibility decision also contains that information (article XVII.43)

There is no specific statutory provision regarding the information of the defendant as to the composition of the claimant party and the number of persons that have opted-in, after the expiry of the opt-in term. However, there is a mandatory negotiation phase after the admissibility phase and it is very likely that the defendant will obtain that information during the negotiation phase.

*3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?*

The admissibility decision is published in the Official Gazette and on the website of the Ministry for Economical Affairs. The Court may impose additional publicity measures (article XVII.43).

No specific safeguards as to the protection of the reputation/company value of the defendant.

The same publicity measures apply to settlement agreements (article XVII.50) and to the decision on the merits (article XVII.55).

*3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?*

Publication on the website of the Ministry for Economical Affairs (see answer to question 3.6).

#### **4. Interplay of class actions / collective redress actions and public enforcement**

*4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law (“follow-on actions”) or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?*

Possible to start a stand alone action.

4.2 *Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?*

Both (but be reminded that collective redress actions are only possible for harm caused to consumers).

4.3 *In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?*

General rules on evidences apply (i.e. possibility to ask for disclosure of documents in the possession of the defendant, general principle that both parties should participate to the establishment of the facts).

No specific discovery procedure, unless in specific cases (e.g. infringement of IP-rights); possibility to ask for an expertise as preliminary measure.

4.4 *Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?*

No specific rules.

4.5 *Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in Masterfoods (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?*

Yes.

For the actions based on cartel damages, it can be referred to the judgment of the Court of Justice in the case C-199/11 of 6 November 2012 (§§ 50 and foll. as well as §§ 65 and foll.):

*“When national courts rule on agreements, decisions or practices under, inter alia, Article 101 TFEU which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.*

*That rule also applies when national courts are hearing an action for damages for loss sustained as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 101 TFEU”*

*“65. Finally, a civil action for damages, such as the action before the referring court, requires, as can be seen from the order for reference, not only that a harmful event be found to have occurred, but also that loss and a direct link between the loss and that harmful event be established. Whilst it is true that, because of its obligation not to take decisions running counter to a Commission decision finding an infringement of Article 101 TFEU, the national court is required to accept that a prohibited agreement or practice exists, the existence of loss and of a direct causal link between the loss and the agreement or practice in question remains, by contrast, a matter to be assessed by the national court.*

*66. Indeed, even when the Commission has in its decision determined the precise effects of the infringement, it still falls to the national court to determine individually the loss caused to each of the persons to have brought an action for damages. Such an assessment is not contrary to Article 16 of Regulation No 1/2003”.*

## **5. Funding of the class actions / collective redress actions, attorney’s fees**

*5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?*

Yes, but the restrictions set for the designation of the representatives will limit these possibilities.

*5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?*

No.

*5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?*

No specific provision. This is unlikely to be taken into consideration by the court.

5.4 *Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?*

No.

5.5 *Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?*

Contingency or success fees are prohibited (Preparatory works, Doc. Parl., Ch., session 53, 3300/004, p. 17).

5.6 *Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party (“loser pays principle”), and in which proportion?*

Yes. The costs to be reimbursed are to be set by Royal Decree. It is very likely that the principle will be a reimbursement of fixed fees, as it is the case for other proceedings.

5.7 *More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?*

The restrictions set for the choice of representatives (see answer to question 2.3)

5.8 *Are the parties to an action able to insure against the cost risks?*

The draft of law remains silent as to this point. This should be possible, from a legal point of view.

5.9 *Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?*

Not foreseen in the draft of Act.

5.10 Are there (other) ethical of Bar rules in your country relevant with respect to class actions?

No.

## 6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

General international private law rules apply.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

Only the courts of Brussels will be competent for collective redress actions.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

The representative has to be authorized by the Ministry. Nothing would prevent a foreign entity to be authorized by the Ministry.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

The draft of Act contains no specific rules as to that point.

On the basis of the general rules regarding international private law, this should be possible, e.g. if the cause of damage is localized in Belgium.

## 7. Alternative dispute resolution

7.1 *In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trial and are the implications for refusing?*

There is no compulsory pre-trial mechanism of collective ADR.

There is however a specific and compulsory mechanism of collective ADR pending the proceedings, after the admissibility phase: the admissibility decision must mention a term (minimum three months and maximum six months; the term may be renewed for one time if both parties ask for a renewal) aimed at negotiating a settlement (article XVII.43).

The court may also appoint a mediator -if the parties agree with that measure- in order to facilitate the negotiations.

7.2 *Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction ?*

See answer to question 7.1.

7.3 *Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?*

No.

Suspension however applies in other specific cases (e.g. the limitation period is suspended as from the date of the decision of admissibility until the day of notification of the opt-out).

7.4 *Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?*

The draft of act contains no specific provision in that regard.

However, it is very likely that the act on collective redress action will be considered as mandatory law and, therefore, an arbitration clause would not get

effect (unless the defendant would be a foreign company established in another country of the European Union or in a country which has signed the New-York Convention on Arbitration).

## **8. Enforcement of the court decision**

*8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?*

Article XVII.55 provides for publicity measures for the decision on the merits: the court's clerk office sends a copy of the judgment to the Official Gazette, for publication (to be done within 10 days).

The judgment is also published on the website of the Ministry for Economical Affairs.

The court may also impose additional publicity measures, if it considers it necessary. The costs for such measures are to be borne by the losing party (article XVII.54).

*8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?*

The enforcement of the court order and the payment of the compensation are regulated (articles XVII.57 to XVII.62), as follows:

- A trustee is appointed by the Court (an attorney-at-law, a public officer, or a judiciary trustee ; the representatives are therefore *de facto* excluded from being trustee in the case they have won);
- The trustee drafts a provisional list of the members of the group and can mention that a member of the group does not meet the criteria set by the Court to get compensation and should therefore be deleted from the list.

The provisional list is sent to the representative and the defendant, and they may oppose to the admission/deletion of members on/from the provisional list.

The members of the group whose deletion has been proposed, are also informed.

The discussions regarding the admissions/deletions take place at a hearing to be set by the court (the whole process of contestation of admissions/deletions is supposed to take 3 months).

The Court then establishes the definitive list of persons entitled to compensation and informs the persons whose admission has been refused.

- The trustee controls the performance of the condemnation *in natura* by the defendant and/or receives the amounts to be paid by the defendant in case of condemnation to payment of amounts to the members of the group (in the latter case, he makes the payments to the beneficiaries).
- The trustee reports to the court quarterly.

*8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?*

There are no specific rules in the draft of act, but the general rules regarding penalties for non-compliance will apply: payment of a fixed amount for each day's delay is therefore possible.

The case may be sent back to the court in case of problems of performance of the judgment.