



**THE INTRODUCTION
OF CLASS ACTIONS
IN BELGIUM**



Consumer collective redress for Belgian and European consumers

Ivo Mechels
Spokesperson for Test-Achats

I. Legal “state of play” in Belgium

- Each personally interested party should be involved individually
 - ⇒ No collective damage action.
 - ⇒ Representative actions by consumer organisations limited to injunctions
- The “res judicata” of a judgement applies only to the parties involved in the trial (≠ no test case)
- Damages have to be proved for each separate individual
 - ⇒ The initial burden of proof is on the plaintiff
 - ⇒ Court order only if serious suspicions that the document exists and contains proof of a relevant fact (art. 871 JC).
(≠ *inter partes disclosure*)
- A settlement is not binding to victims/ persons who are not part of it (art. 1165 Civil Code).

II. Current tools used by TA

A. Injunction procedures

i. Examples of cases

- Actions against the websites and contractual conditions of three airlines for incompatibility with Belgium's fair trading legislation
 - ⇒ *Cases Ryanair / Brussels Airlines / Easyjet: 2010*
- Action against terms and conditions of Banks .
 - ⇒ *Dexia: Cour d'appel of Liege 26/01/2007*
- Unfair terms in health and hospital insurance
(*unilateral modification terms, violation of medical confidentiality, breach of privacy ,...*).
 - ⇒ *Fortis AG, DKV and ING: Cess. Bxl 14/7/03*
- Cases against illegal increase of health insurance premiums.
 - ⇒ *Pending case (DKV)*

II. Current tools used by TA

A. Injunctions procedures

ii. Merits and limits

- ☺ Broad scope : violations of any legal provision in the course of a business
 - ⇒ unlawful terms, practices or any other law infringements.
- ☺ Stop illegal practices in long term contracts
 - ⇒ Insurance contracts, bank services, telecom, energy
- ☹ Only persuasive effect for third parties (≠ no test case)
- ☹ No compensation for the harm suffered

II. Current tools used by TA

B. Individual procedures financed by TA

i. Observation

- Test-Achats regularly assists individual consumers in legal proceedings to establish favorable law cases.

ii. Examples

- Ten individual actions brought to claim damages against the CREG

II. Current tools used by TA

C. Settlements for a group of claimants

- Agreement with Jetair to compensate passengers for cancelled flights (2007)
- Electrabel and rising gas prices (June 2007)
- Lehman Brothers : “safe and capital guaranteed” products

D. Grouped individual actions managed by TA

- Lernout & Hauspie: Test-Achats together with Deminor are representing 13,800 small shareholders in the proceedings. Test-Achats covers the legal costs of its 4,040 members.

II. Current tools used by TA

C. Settlements / D. Grouped individual actions

Barriers to compensation ?

- Part of the victims complete the formalities required to join the procedure / settlement
- Difficulty of collecting evidence required to establish the prejudice for each individual investor
- Extremely difficult to establish the causal link between each fault or misconduct and damages.
- Only parties who filed claims will be bound by the outcome of the case.

III. Obstacles to collective redress

- **INJUNCTION:**

- ☹️ No compensation available

- **BUNDLE OF INDIVIDUAL DAMAGE ACTIONS**

- ☹️ Totally deficient: require a mandate from each victim which is costly, much too slow and often ineffective because only a fraction of the victims complete the formalities.

- ☹️ Not for small value claim

- **NO COLLECTIVE SETTLEMENT MECHANISM**

- ☹️ No collective judicial action

- ☹️ Settlement not binding for an entire group of victims

⇒ **Both collective settlement and action procedures are required !**

IV. The introduction of a group action procedure in Belgian law:

A necessity for consumers

The advantages of group action:

1. Access to justice would be improved
2. Save resources
3. Prevent contradictory decisions
4. Preventive effect
5. The market would function better

IV. The introduction of a group action procedure in Belgian law:

A necessity for consumers

Key issues:

- Foresee use of the opt-out system for constituting the group
 - > The “opt-out” provides considerably better protection for consumers
 - > Portugal: Telecom (PT) - DECO
 - Language courses - DECO
- Only opt-in system if appropriate and after decision of judge
- Wide scope

IV. The introduction of a group action procedure in Belgian law:

A necessity for consumers

Key issues:

- Costs of procedures
 - > Full compensation for suffered damages
 - > the prohibition of contingency fee arrangements
 - > the awarded amounts have to be fully and exclusively refunded to the victims
 - > amounts unclaimed and not distributed should be paid into a fund for supporting collective redress procedures
- Capacity of consumer organisations to engage in group actions

VI. The way forward

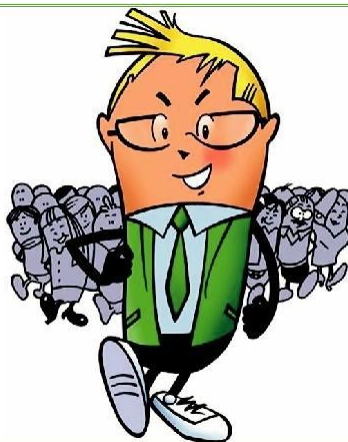
- o Commission consultation:
‘Towards a Coherent European Approach to Collective Redress’
Launched 4 February, will run until end of April 2011
- o Follow-up to the consultation - only non-legislative measures in COM work program for 2011
- o In Belgium: need for collective redress to be put into the governmental agreement of the next government

V. Conclusion: Ten golden rules (BEUC)

- 1) Wide scope - all sectors of consumer protection
- 2) Aim at obtaining compensation
- 3) Allow for standing of consumer associations
- 4) Cover national and cross border cases
- 5) Give the court discretion over admissibility of the claim
- 6) Foresee opt-out procedure (subsidiary: opt-in if appropriate and after decision of judge)
- 7) Be accompanied by information measures directed to consumers
- 8) Homologation on out-of-court settlement
- 9) Allow compensation to be distributed fairly
- 10) Foresee efficient funding mechanisms

Thank you for your attention

Collective



Redress