CULTURAL DIMENSIONS OF GROUP LITIGATION: THE BELGIAN CASE

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[1] All translations of foreign materials cited in this Article are those of the author.

People assume that only the U.S. has class actions, and that assumption is increasingly wrong. The existence of mass harms with large numbers of claimants has created challenges for access to justice, judicial efficiency, and the enforcement of legal norms that make traditional individual litigation unworkable. Therefore, many European countries are struggling to craft procedural mechanisms to allow the resolution of group claims in a way that incorporates the helpful parts of U.S. class actions while avoiding its inefficiencies and potential abuses.

This Article will discuss the current debate in Belgium. It begins, in part I, by putting that debate in the European context and by describing the current Belgian dilemma. Part II sets out three proposals for a Belgian class action device, highlighting their common elements, as well as their difficulties. Part III analyzes those proposals in light of class action theory (class action goals, standing, funding and financing, remedies, and the role of the courts), arguing that none of the proposals have been sufficiently thought out and that each needs amendment or elaboration. Finally, part IV concludes by putting the civil class action in the larger context of processes for dealing with group harms and argues that a holistic approach is needed.

I. THE CURRENT SITUATION

A. European Background

In 2007, a prominent Dutch scholar wrote that resolving and administering mass cases in Europe is a priority. "It is clear that resolving mass cases must be prioritized, and that possible obstacles in the law must be cleared out, even when they have their foundation in important principles. It is clear that there is dynamism in this part of the law."[2]

In the European orbit, however, this dynamism differs significantly. Three categories can be discerned. First, some European countries have class action-like tools. With the exception of Iceland, the European frontrunners are the Scandinavian countries; Sweden, Norway, Denmark and Finland.[3] All of them have some sort of class action mechanism, although there are substantial differences from the American-style class action, particularly with respect to standing (with a preference for associations and public actors as class representatives), and opt-in versus opt-out (with a preference for opt-in).[4] Despite their clear power, or maybe because of it,

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[2] Ton Hartlief, *De twee werelden van massaschade*, 41 NEDERLANDS JURISTENBLAD 2595 (2007).

[3] STEFAAN VOET, EEN BELGISCHE VERTEGENWOORDIGENDE COLLECTIEVE RECHTSVORDERING 109–13 (2012).

[4] Generally, American class actions are initiated by a member of the class. *See* FED. R. CIV.

these class actions are rarely filed as lawsuits and primarily serve as big sticks to encourage large corporations to avoid certain behaviors or to settle. In 2007, the Finnish Consumer Ombudsman was given exclusive standing to bring an opt-in class action.[5] In 2009, the Finnish Consumer Agency assessed that "the mere presence of the shadow of class action gives the business sector an incentive for better legal compliance."[6] The same is true in Denmark, where a public enforcer, the Danish Ombudsman, has exclusive standing to bring an opt-out class action.[7] The Ombudsman uses the tool as a "nuclear bomb"[8] to compel wrongdoers into a settlement that includes behavior modification and restitution.

P. 23(a). Most Scandinavian countries, with the exception of Finland, also permit an individual group member to initiate a class action. *See* Section 4 of the Swedish Group Proceedings Act of 2002, English translation *available at* http://www.regeringen.se/content/1/c6/02/77/67/bcbe1f4f.pdf; Section 35-3(1)(a) of the Norwegian Dispute Act of 2005, English translation *available at* http://www.ub.uio.no/ujur/ulovdata/lov-20050617-090-eng.pdf; Section 254(c) of the Danish Administration of Justice Act of 1992. On the other hand, these jurisdictions also permit an ideological plaintiff (e.g., an association or an ombudsman), *see infra* Part III.*B.1*, to start a class action. *See* Sections 5 and 6 of the Swedish Group Proceedings Act; Sections 1-4 and 35-3(1)(b) of the Norwegian Dispute Act; Section 254(c) of the Danish Administration of Justice Act; Section 4 of the Finnish Act on Class Actions No. 444/2007, English translation *available at* http://www.finlex.fi/fi/laki/kaannokset/2007/en20070444.pdf.

American damages class actions are opt-out class actions. *See* FED. R. CIV. P. 23(c)(3)(B). Sweden and Finland have an exclusive opt-in system. *See* Section 14 of the Swedish Group Proceedings Act and Section 8 of the Finnish Act on Class Actions No. 444/2007. In Norway and Denmark, opt-in is the default. *See* Section 35-6 of the Norwegian Dispute Act and Section 254(e)(6) of the Danish Administration of Justice Act. Exceptionally, the judge can impose an opt-out system in certain circumstances (e.g., in small claims cases). *See* Section 35-7 of the Norwegian Dispute Act; Section 254(e)(8) of the Danish Administration of Justice Act.

[5] Act on Class Actions No. 444/2007, *supra* note 4; *see also* Petra Kiurunen, *Finland*, *in* WORLD CLASS ACTIONS. A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE 214 (Paul G. Karlsgodt ed., 2012); Mikko Välimäki, *Introducing Class Actions in Finland: An Example of Lawmaking Without Economic Analysis* (Dec. 13, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1261623; Klaus Viitanen, *Finland*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 209, 209 (2009). The complete version of this report is available at http://globalclassactions.stanford.edu/sites/default/files/documents/Finland_National_Report.pdf.

[6] Consumer Agency, *The Threat of Class Action Has Improved the Consumer's Position*, CURRENT ISSUES IN CONSUMER L. (Feb. 2009), http://www.kuluttajavirasto.fi/en-GB/050209_eng/.

[7] Danish Administration of Justice Act, *supra* note 4, Ch. 23(a); *see also* Trine Bogelund, *Introduction of Class Actions in Denmark*, Young Lawyers' Committee Newsletter (Int'l Bar Ass'n), Sept. 2007, at 24, *available at* http://www.lett.dk/Files/Filer/PDF/Young_Lawyers_newsletter_Sept_2007.pdf; Petra Kiurunen, Niklas Lindström & Michala Bylov Rath, *Denmark*, *in* WORLD CLASS ACTIONS. A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE 186 (Paul G. Karlsgodt ed., 2012); Justits Ministeriet, *New Rules on Class Actions under Danish Law* (Oct. 15, 2010), http://www.justitsministeriet.dk/fileadmin/downloads/rules.pdf; Erik Werlauff, *Class Actions in Denmark*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 202, 202 (2009).

[8] A term the Danish Ombudsman (Mr. Henrik Øe) has used at various conferences.

Second, various jurisdictions have created instruments (sometimes experimental) to achieve collective redress. Three examples are worth mentioning: England and Wales, Germany, and the Netherlands. Despite an ineffective and inactive representative action procedure,[9] England and Wales have a Group Litigation Order procedure as a management tool to coordinate the adjudication of individual procedures that give rise to common issues.[10] In November 2008, the Civil Justice Council proposed to introduce an opt-out class action applicable in all areas of the law.[11] The English Ministry of Justice was reluctant, and believes that class actions should only be considered in specific areas of the law, "only where there is evidence of need, and [only] following an assessment of economic and other impacts and consideration of alternative approaches."[12]

The 2005 German Act on Model Case Proceedings in the Capital Markets (KapMuG) established a model, or test case procedure, of which the core is to detect common issues of law in a multitude of individual cases, have them decided by a higher court, and resolve the previously suspended individual cases taking into account the outcome of the test case.[13] The KapMuG was

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[9] CIV. P.R. 19.6 (U.K.); *see also* ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE 509 (2d ed. 2006).

[10] CIV. P.R. 19.10–.15 (U.K.); *see also* Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions*, 11 DUKE J. COMP. & INT'L L. 249, 258 (2001); Laurel Harbour & John Evans, *The United Kingdom*, *in* WORLD CLASS ACTIONS. A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE 169 (Paul G. Karlsgodt ed., 2012); CHRISTOPHER HODGES, MULTI-PARTY ACTIONS 3 (2001); Christopher Hodges, *England and Wales*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 105, 109–10 (2009). The complete version of this report is available at http://globalclassactions.stanford.edu/sites/default/files/documents/England_Country%20Report.pdf; *see also* RACHAEL MULHERON, THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE 67–111 (2004) (describing the English approach to group litigation).

[11] CIVIL JUSTICE COUNCIL, IMPROVING ACCESS TO JUSTICE THROUGH COLLECTIVE ACTIONS: DEVELOPING A MORE EFFICIENT AND EFFECTIVE PROCEDURE FOR COLLECTIVE ACTIONS 5 (John Sorabji et al. eds., 2008), *available at* http://www.judiciary.gov.uk/JCO%2FDocuments%2FCJC%2FPublications%2FCJC+papers%2FCJC+Improving+Acccess+to+Justice+through+Collective+Actions.pdf; *see also* Laurel Harbour, John Evans, Erwan Poisson & Camille Fléchet, *Representative Actions and Proposed Reforms in The European Union*, *in* WORLD CLASS ACTIONS. A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE 156–59 (Paul G. Karlsgodt ed., 2012) (discussing the proposed reforms in the UK).

[12] MINISTRY OF JUSTICE, THE GOVERNMENT'S RESPONSE TO THE CIVIL JUSTICE COUNCIL'S REPORT: 'IMPROVING ACCESS TO JUSTICE THROUGH COLLECTIVE ACTIONS' (2009), *available at* http://www.lawcentres.org.uk/uploads/Government_Response_20th_July_2009.pdf; Christopher Hodges, *Response to Consultation on "Private Actions in Competition Law: A Consultation on Options for Reform"* (Centre for Socio-Legal Studies, Oxford University No. OX1 3UQ), *available at* http://www.csls.ox.ac.uk/documents/1207ResponsetoUKBISonConsultationonCompetitionPrivateActions.pdf.

[13] Kapitalanleger-Musterverfahrensgesetz [KapMuG] [Capital Markets Model Case Act], Oct. 2, 2011, ELEKTRONISCHER BUDESANZEIGER [eBAnz.] (Ger.). An English translation is available at http://www.bmj.de/cln_102/SharedDocs/Downloads/DE/pdfs/KapMuG_english.html; *see also*

an experimental act for five years. In 2012, the KapMuG was not only extended to 2020, but the German legislature also modified the procedure.[14] The most salient amendment, and one probably inspired by the Dutch Collective Settlements Act, is the possibility for the court to approve a settlement between the model claimant and the defendant that becomes binding on all parties, unless they opt-out.

The 2005 Dutch Collective Settlements Act provides for settlement-only class actions.[15] 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 Appeal, 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.[16] To date, six high

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Moritz Bälz & Felix Blobel, *Collective Litigation German Style: The Act on Model Proceedings in Capital Market Disputes*, *in* CONFLICT OF LAWS IN A GLOBALIZED WORLD 126, 135–38 (Eckart Gottschalk et al. eds., 2007); Peter Gottwald, *On the Extension of Collective legal Protection in German*, 26 CIV. JUST. Q. 484, 492–94 (2007); Hans-W. Micklitz & Astrid Stadler, *The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure*, 17 EUR. BUS. L. REV. 1473, 1485–88 (2006); Luidger Röckrath, *Germany*, *in* WORLD CLASS ACTIONS. A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE 241 (Paul G. Karlsgodt ed., 2012); Michael Stürner, *Model Case Proceedings in the Capital Markets: Tentative Steps Towards Group Litigation in Germany*, 26 CIV. JUST. Q. 250, 252–53 (2007).

[14] Gesetz zur Reform des Kapitalanleger-Musterverfahrensgesetzes [KapMuG] [Capital Markets Model Cast Act Amendment], Oct. 25, 2012, ELEKTRONISCHER BUNDESANZEIGER [eBAnz.] (Ger.). A full text version of the act is available at http://dipbt.bundestag.de/dip21/btd/17/101/1710160.pdf. For an analysis and suggestions for reform see Eberhard Feess & Axel Halfmeier, *The German Capital Markets Model Case Act (KapMuG): A European Role Model for Increasing the Efficiency of Capital Markets? Analysis and Suggestions for Reform* (Jan. 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684528.

[15] *See* Jeroen Fleming & Jaap J. Kuster, *The Netherlands*, *in* WORLD CLASS ACTIONS. A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE 286 (Paul G. Karlsgodt ed., 2012); Ruud Hermans & Jan de Bie Leuveling Tjeenk, *International Class Action Settlements in the Netherlands Since* Converium, *in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: CLASS & GROUP ACTIONS 2012, at 5–9 (2011); Ianika Tzankova & Daan Lunsingh Scheurleer, *The Netherlands*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 149, 149 (2009) ("Under the [Dutch Collective Settlements Act], parties that have agreed to settle a mass damage claim may request the Amsterdam Court of Appeal to certify the settlement, as a result of which it becomes binding on the group . . . unless they opt out."). The complete version of this report is available at http://globalclassactions.stanford.edu/sites/default/files/documents/Netherlands_National_Report.pdf. Marie-José van der Heijden, *Class Actions*, *in* NETHERLANDS REPORTS TO THE EIGHTEENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 197, 197 (J.H.M. van Erp & P.W. Van Vliet eds., 2010).

[16] The procedure is described in Articles 7:900–:910 of the BURGERLIJK WETBOEK [BW] [Dutch Civil Code] (Neth.) and Articles 1013–1018 of WETBOEK VAN BURGERLIJKE RECHTSVORDERING [Rv] [Dutch Judicial Code] (Neth.). An English translation of the Dutch Civil Code is available at http://www.dutchcivillaw.com/civilcodebook077.htm and an English translation of the Dutch Judicial Code is available at http://dutchcivillaw.com/legislation/civilprocedure033.htm.

profile cases have been treated under this act.[17] The most recent decision of the Amsterdam Court of Appeal in *Converium* appears to have had an impact on global securities class actions. In its November 2010 decision, the court ruled, based on the EEX and EVEX Regulations,[18] it had international jurisdiction to approve the settlement for non-U.S. class members, even though the class mainly consisted of non-Dutch class members.[19] In its final decision of January 2012, the court declared the settlement binding on all class members.[20] In a decision that surprised many European commentators, the court demonstrated it had no problem with the contingency fee arrangement for the American lawyers, which involved up to 20% of the amount of the settlement.[21] After the U.S. Supreme Court's decision in *Morrison v. National Australia Bank, Ltd.* invalidated class actions brought in the U.S. on behalf of foreign class members,[22] Amsterdam is poised to become the settlement hub for claims involving non-U.S. class members in mass securities cases.[23]

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[17] Hof – Amsterdam 17 januari 2012, JOR 2012, 51 m nt. BJ de Jong (Converium) (Neth.) [hereinafter *Converium II*]; Hof –Amsterdam 15 juli 2009, JOR 325 m nt. Scholten en Van Achterberg (In de zaak van Randstand Holding N.V.) (Neth.) [hereinafter *Vedior*]; Hof – Amsterdam 29 mei 2009, JOR 2009, 195 m nt. AFJA Leitjen (Shell Petroleum/Dexia Bank Nederland N.V.) (Neth.) [hereinafter *Shell*]; Hof – Amsterdam 29 april 2009, JOR 2009, 196 m nt. AFJA Leitjen (Neth.) [hereinafter *Vie d'Or*]; Hof – Amsterdam 25 januari 2007, JOR 2007, 71 m nt. AFJA Leitjen (Dexia Bank Nederland N.V./Stitching Platform Aandelenlease) (Neth.) [hereinafter *Dexia*]; Hof – Amsterdam 1 juni 2006, NJ 2006, 461 m nt. (Bayer AG/WXYZ) (Neth.) [hereinafter *DES*]. All decisions are available in Dutch at http://zoeken.rechtspraak.nl/default.aspx. The DES case was a pharmaceutical product liability case. All the other cases were securities cases.

[18] Council Regulation 44/2001 Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) (EC) [hereinafter EEX Regulation]; Convention of Sept. 16, 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1659 U.N.T.S. 13 [hereinafter EVEX Convention].

[19] Hof – Amsterdam 12 november 2010, JOR 2011, 46 M nt. J.S. Kortmann (Converium) (Neth.) [hereinafter *Converium I*]. The Amsterdam Court of Appeals claimed jurisdiction based on Articles 2.2, 6.1, and 5.1 of the EEX Regulation, *supra* note 18.

[20] *Converium II*, *supra* note 17.

[21] Contingency fees are strictly prohibited in Europe because they violate public order and are incompatible with attorneys' professional ethics. *See infra* Part III.*C.2*.

[22] 130 S. Ct. 2869 (U.S. 2010).

[23] Jeroen Kortmann & Marieke Bredenoord-Spoek, *The Netherlands: A 'Hotspot for Class Actions'?*, 4 GLOBAL COMPETITION LITIG. REV. 13, 13 (2011); *see also* Tomas Arons & William H. Van Boom, *Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands*, 21 EUR. BUS. L. REV. 857 (2010) (describing the potential export value of the WCAM procedure); Bart Krans, *The Dutch Class Action (Financial Settlement) Act in an International Context: The* Shell *Case and the* Converium *Case*, 31 CIV. JUST. Q. 141–50 (2012) (noting the jurisdictional problems if other European countries do not recognize the Amsterdam court's decisions or reading of EEX regulations); HÉLÈNE VAN LITH, THE DUTCH COLLECTIVE SETTLEMENTS ACT AND PRIVATE INTERNATIONAL LAW (2011).

Third and finally, some European states have no adequate instruments to tackle mass cases. Although in June 2012 the new French Minister of Justice, Christiane Taubira, re-launched the idea of introducing class actions,[24] and in May 2013 a concrete proposal for a consumer class action was presented to the Council of Ministers,[25] France, for the moment, only has a joint representative action for consumers and investors (*action en représentation conjointe*).[26] Its scope is very limited.[27] Only national nonprofit organizations representing consumers or investors have standing.[28] Moreover, they work on an opt-in basis by soliciting for individual mandates. This can only be done through newspapers and magazines, but not via TV or radio.[29]

Belgium also belongs to this last category. Together with France, it is one of the last Mohicans in the European collective redress orbit.[30] As discussed hereafter, this is caused by the Belgian Supreme Court's rigorous interpretation of the existing standing rules and the deficient instruments to deal with mass cases.

B. Current Belgian Law

1. Rigorous Supreme Court Interpretation

Traditional Belgian requirements analogous to U.S. standing doctrine prevent the initiation of class actions. The bottom line is that, according to Belgian law and the Belgian Supreme Court, natural or legal persons have standing only to initiate an action in which they defend an existing,

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[24] Valérie Brioux et al., *Justice: Christiane Taubira Veut Autoriser les «Class Actions»*, Le Parisien, June 22, 2012 (Fr.), *available at* http://www.leparisien.fr/faits-divers/christiane-taubira-veut-autoriser-les-class-actions-22-06-2012-2060771.php; *see also* Harbour, Evans, Poisson & Fléchet, *supra* note 11, at 159–67 (discussing the proposed reforms in France).

[25] *Chasseurs d'ambulaces*, ECONOMIST, May 11, 2013, at 62.

[26] Véronique Magnier, *France*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 114, 116–18 (2009); Erwan Poisson & Camille Fléchet, *France*, *in* WORLD CLASS ACTIONS. A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE 323 (Paul G. Karlsgodt ed., 2012).

[27] *See* Magnier, *supra* note 26, at 117 (concluding that the current rules on soliciting class members "are not fitted for class actions initiated by lawyers and that many changes in ethics and the law would need to occur before group litigation could exist in France"). The complete version of this report is available at http://globalclassactions.stanford.edu/sites/default/files/documents/France_National_Report.pdf.

[28] *Id.*

[29] *Id.*

[30] *See generally* Piet Taelman & Stefaan Voet, *Belgium and Collective Redress: The Last of the European Mohicans*, *in* THE BELGIAN REPORTS AT THE CONGRESS OF WASHINGTON OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 305 (Eric Dirix & Yves-Henri Leleu eds., 2011).

immediate, personal, and direct interest.[31] They can neither defend the general (nor public) interest,[32] nor the interests of persons in a similar situation.

Any legal action in Belgium is subject to two preliminary legal requirements. Article 17 of the Judicial Code states that an action will not be admitted if the plaintiff lacks the required legal capacity.[33] This is the authority (the power), the basis of which allows an action to be initiated. Article 17 also requires that a party desiring to bring an action before court must show a legal interest.[34] If the party is unable to show an interest, the action will be inadmissible. The interest is any material or moral stimulus or incentive why an action is initiated.[35]

Article 18 of the Judicial Code expands upon the notion of interest: when the action is initiated, the interest must already exist and must be immediate.[36] There is one exception. An action will be admissible if it prevents the infringement of a right that is seriously threatened. This is called an *actio ad futurum* and permits a claim for declaratory relief.[37] Case law attaches a further condition to the interest prerequisite: it must be personal and direct. The pivotal case in that respect is the November 19, 1982 *Eikendael* case of the Belgian Supreme Court.[38] The Court stated that:

> Unless the law states otherwise, an action initiated by a natural or legal person is inadmissible if the plaintiff does not have a personal and direct interest. A general interest (i.e., the interest of a class of people) is no personal and direct interest. The personal and direct interest of a legal person is *only* that which

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[31] *See* CODE JUDICIAIRE [C.JUD.] [Belgian Judicial Code] arts. 17–18 (Belg.) and the *Eikendael* doctrine discussed *infra* note 38.

[32] *See* CODE JUDICIAIRE [C.JUD.] [Belgian Judicial Code] art. 138 (Belg.) (the public prosecutor ensures the protection of the public interest).

[33] *Id.* art. 17 ; *see also* GEORGES DE LEVAL, ÉLÉMENTS DE PROCÉDURE CIVILE 22 (2003) (defining capacity as "le pouvoir en vertu duquel une personne exerce l'action en justice"); ALBERT FETTWEIS, MANUEL DE PROCÉDURE CIVILE 48 (1985).

[34] *See* DE LEVAL, *supra* note 33, at 15 (defining interest as "tout avantage, matériel ou moral, effectif mais non théorique que le demandeur peut retirer de la demande au moment où il la forme"); FETTWEIS, *supra* note 33, at 48.

[35] JACQUES VAN COMPERNOLLE, LE DROIT D'ACTION EN JUSTICE DES GROUPEMENTS 383 (1972) ("L'utilité que présente pour celui qui agit la mesure qu'il sollicite.").

[36] CODE JUDICIAIRE [C.JUD.] [Belgian Judicial Code] art. 18, sec. 1.1 (Belg.).

[37] DE LEVAL, *supra* note 33, at 21; CHARLES VAN REEPINGHEN, VERSLAG VAN DE GERECHTELIJKE HERVORMING I 43 (1968).

[38] Cour de Cassation [Cass.][Court of Cassation], Nov. 4, 1982, PAS. 1983, I, No. 338 (Belg.) [hereinafter *Eikendael*]; *see also* Cour de Cassation [Cass.][Court of Cassation], Oct. 25, 1985, PAS. 1986, I, No. 219 (Belg.); Cour de Cassation [Cass.][Court of Cassation], Oct. 16, 1991, PAS. 1992, I, No. 129 (Belg.); Court de Cassation [Cass][Court of Cassation], Sept. 19, 1996, PAS. 1996, I, No. 830 (Belg.) (rulings that confirmed the *Eikendael* judgment).

> affects her existence or material or moral goods, especially her assets, honor and good name. The fact that a natural or legal person pursues a goal, even a statutory one, does not imply that she has a personal and direct interest.[39]

The Belgian Supreme Court could have allowed class actions through case law. However, on the basis of this strict precedent, it is generally acknowledged that collective and class actions are not admissible in Belgian civil courts, unless the legislature allows it expressly.[40]

2. Dealing with Mass Harms Without Class Actions

In Belgium, there are currently four ways to deal with mass harms: joinder of claims and claims in intervention, party representation, statutory collective actions, and, in criminal cases, the piggyback technique. Belgian law does not allow class actions for damages. This Article defines a class action as a representative action in which one person or association represents an unidentified class of people similarly situated, without them having to intervene as parties, but that are bound by the outcome of the procedure.

First, the Belgian Judicial Code and Civil Code contain some procedural techniques that are traditionally used for multi-party actions.[41] Joinder of claims allows several claims between two or more parties to be filed together (in one writ of summons or petition) when they are connected.[42] Claims are connected when they should be tried together in order to prevent contradictory decisions.[43] The technique of claims in intervention makes it possible for third parties to intervene in pending proceedings.[44] The intervention can take place voluntarily (by way of petition)[45] or coercively (by way of writ of summons).[46] In this context, and contrary to,

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[39] *Eikendael*, *supra* note 38. This translation is that of the author.

[40] VOET, *supra* note 3, at 32, 36.

[41] Piet Taelman & Emilie De Baere, *New Trends in Standing and Res Judicata in Collective Suits (Belgium), in* THE XIIITH WORLD CONGRESS OF PROCEDURAL LAW: THE BELGIAN AND DUTCH REPORTS 6 (A.W. Jongbloed ed., 2008); Taelman & Voet, *supra* note 30, at 323–25.

[42] CODE JUDICIAIRE [C.JUD.] [Belgian Judicial Code] art. 701 (Belg.). Article 701 of the Judicial Code. A distinction is made between objective accumulation (a party formulates different claims against another party in a single procedure), passive subjective accumulation (a plaintiff acts against several defendants in a single procedure), and active subjective accumulation (several plaintiffs act against one or several defendants in a single procedure). *See* VOET, *supra* note 3, at 23.

[43] CODE JUDICIAIRE [C.JUD.] [Belgian Judicial Code] art. 30 (Belg.).

[44] *Id.* arts. 15–16, 811–814.

[45] *Id.* art. 813, sec. 1.

[46] *Id.* art. 813, sec. 2.

for example, England and the U.S.,[47] it has to be underlined that a Belgian judge is not allowed to involve *sua sponte* parties in the proceedings.[48] When the judge comes to the conclusion that there are victims similarly situated to the plaintiff, he cannot instruct their intervention, nor can he ask (or force) parties to do so, nor can he suspend the proceedings in that respect.

Second, the most used technique to deal with mass harms is party representation, which makes it possible for a natural or legal person (the representative) to represent a group of individuals if he or she received an explicit mandate from each individual member of the group.[49] In such cases, only the class members who gave a mandate will be represented in court and considered a party to the proceedings. From a procedural point of view, the technique implies that as a result of a dispute over a substantive right, the holder of that right grants another (natural or legal) person the power to initiate the action resulting from a violation of that substantive right. The representative does not have to show a personal interest, but only show that the represented persons have an existing, immediate, personal, and direct interest.[50]

Third, the legislature has created limited statutory exceptions.[51] In implementing multiple European directives, the Belgian legislature created a series of statutory collective actions.[52] Collective actions are general interest actions "in which the individuals whose interests are involved cannot be identified because of the generality of the interest." They are to be distinguished from group actions "where some form of identification or demarcation is still possible."[53]

Belgian statutory collective actions have five common characteristics:[54]

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[47] CIV. P.R. 19.2(2) (U.K.); FED. R. CIV. P. 19 (only for an indispensable party).

[48] CODE JUDICIAIRE [C.JUD.] [Belgian Judicial Code] art. 811 (Belg.); *see also infra* Part III.*E.2* (discussing the active role of the class action judge).

[49] CODE CIVIL [C. CIV.] arts. 1984–2010 (Belg.); Hubert Bocken & Bernadette Demeulenare, *The Defence of Collective Interests in Belgian Civil Procedure*, *in* BELGIAN REPORT AT THE II INTERNATIONAL CONGRESS OF PROCEDURAL LAW 161 (1983); Matthias E. Storme & Evelyn Terryn, *Belgium*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 95, 97 (2009). The complete version of this report is available at http://globalclassactions.stanford.edu/content/belgium-report-class-actions.

[50] Hubert Bocken, *Schorsingsbevoegdheid milieuverenigingen*, *in* PROCEDEREN IN NIEUW BELGIË EN KOMEND EUROPA 134–35 (1991); VOET, *supra* note 3, at 26.

[51] The first words of the *Eikendael* decision are: "Unless the law states otherwise." *Eikendael*, *supra* note 38.

[52] For examples, see *infra* notes 59–64.

[53] Arons & Van Boom, *supra* note 23, at 862.

[54] VOET, *supra* note 3, at 44–46.

(1) they are an exception to the standing rules in Articles 17 and 18 of the Judicial Code;[55]
(2) they implement European directives;[56]
(3) only private professional, inter-professional, or public associations (or organizations) that satisfy certain legal criteria (e.g., having legal personality for some years, usually three), have standing to bring them;
(4) those associations or organizations can only institute an injunctive action (i.e. the cessation of an illegal practice) or a preventive action;[57] and
(5) the cause of action must correspond (overlap) with the statutory aim of the association or organization.

These types of collective actions exist with respect to consumer protection, misleading advertising, unfair contract terms and long distance agreements, the amicable recovery of consumer debts, the environment, discrimination and racism, copyright, etc.[58] Some examples:

– The Act of March 24, 2003 on Essential Banking Services gives standing to professional, inter-professional, and consumer organizations that have legal personality, and either are a member of the Council for Consumption or have been approved by the Minister for Economic Affairs to bring an injunctive action before the President of the Commercial Court in order to stop any act or activity prohibited by the Act;[59]
– Pursuant to the Act of January 12, 1993 on the Collective Action for the Protection of the Environment, certain associations (i.e., non-profit organizations having legal

[55] *See supra* Part I.*B.1* (describing the significance of Articles 17 and 18).

[56] For example, the 2002 Act on Cross Border Injunctions implements Directive 98/27/EC on injunctions for the protection of consumers' interests; the Belgian anti-discrimination acts implement Directives 2000/43/EC on equal treatment between persons irrespective of racial or ethnic origin, 2000/78/EC on equal treatment in employment and occupation, and 2004/113/EC on equal treatment between men and women in the access to and supply of goods and services, etc. *See* VOET, *supra* note 3, at 44.

[57] Christine Dalcq, *Les actions "comme en référé," in* LE RÉFÉRÉ JUDICIAIRE 168–71 (Jacques Englebert & Hakim Boularbah eds., 2003); *see also* Pierre Ramquet & Valérie Jones, *Belgium*, *in* SUMMARY PROCEEDINGS 49 (Marc Jobert ed., 2000) (discussing collective actions with respect to consumer cases).

[58] For a detailed overview of the areas of law subject to these types of collective action suits see Taelman & Voet, *supra* note 30, at 319–22.

[59] Loi instaurant un service bancaire de base [Essential Banking Act] of Mar. 24, 2003, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], May 15, 2003, 26402.

personality for at least three years, having environmental protection as their statutory aim, and that are able to demonstrate they are active in protecting collective environmental interests) can bring an injunctive action before the President of the Court of First Instance to stop any act or activity that violates environmental regulations;[60]

- Under the Act of July 30, 1981 tending to Penalize Racist and Xenophobic Acts (Racism Act),[61] the Act of May 10, 2007 on Discrimination of Women and Men (Gender Act),[62] and the Act of May 10, 2007 on Certain Forms of Discrimination (General Non Discrimination Act),[63] anti-discrimination associations[64] have standing to initiate an injunctive action to stop any discriminatory behavior.

The procedural provisions for these collective actions are scattered in different statutes dedicated to substantive law. Several proposals have been submitted to Parliament to consolidate them into one procedural statute. The idea is to make a clean sweep and create one standardized legal ground, on the basis of which associations or organizations that satisfy certain legal criteria have standing to initiate a collective action to defend collective interests, so long as the cause of action corresponds with their statutory aim. The most recent proposal dates from July 14, 2011.[65] To date, this and all other similar proposals have not been enacted.[66]

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[60] Loi concernant un droit d'action en matiére de protection de l'environnement [Collective Action for the Protection of the Environment Act] of Jan. 12, 1993, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Feb. 19, 1993, 3769, *available at* http://environnement.walloni e.be/legis/general/acenv001.htm.

[61] Loi tendant á réprimer certains actes inspires par le racisme ou la xénophobie [Racism Act] of July 30, 1981, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 8, 1981, 9928.

[62] Loi tendant á lutter contre la discrimination entre les femmes et les homes [Gender Act] of May 10, 2007, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], May 30, 2007, 2d ed., 29031.

[63] Loi tendant à lutter contre certaines formes de discrimination [General Non Discrimination Act] of May 10, 2007, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], May 30, 2007, 2d ed., 29016.

[64] These include any organization that has legal personality for at least three years and has the protection of human rights or opposition to discrimination as its statutory aim. Some of these organizations include the Centre for the Equality of Chances and Opposition to Racism, the Institute for the Equality of Women and Men, representative employees' and employers' organizations, and institutions of public utility.

[65] Chambre des représentants de Belgique, *Proposition de Loi modifiant le Code judiciaire en vue d'accorder aux associations le droit d'introduire une action d'intérêt collectif* [Proposal to Amend the Judicial Code to Allow Collective Actions for Associations], 2e Session de la 53e legislature, Doc. 1680/001, July 14, 2011, *available at* http://www.dekame

Fourth and finally, there is the piggyback, or *partie civile*, technique for crime victims. In most common law systems, the victim is absent in a criminal trial. He or she can, and in most cases will, be called as a witness but is not a formal party to the criminal proceedings. The victim cannot claim his or her damages during the criminal trial, and may do so only in a separate civil case.[67] In Belgium and other European countries, such as France, this is different.[68] The victim is a formal party to the criminal proceedings, just as the Public Prosecutor and the defendant are formal parties. There is no jury. In most cases victims will bring their civil claims during the criminal proceedings.[69] After the criminal judge has dealt with

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r.be/FLWB/PDF/53/1680/53K1680001.pdf.

[66] Unlike in Belgium, this unification process was successfully done in the Netherlands, which have similar statutory collective actions. In 1994 under the influence of the Dutch Supreme Court's jurisprudence, all these actions were abolished and replaced by one uniform provision.

> 1. A foundation or association with full legal capacity that, according to its articles of association, seeks to protect specific interests may bring to court a legal claim that intends to protect similar interests of other persons. 2. A legal person filing a claim referred to in paragraph 1 is inadmissible if he, in the given circumstances, has made insufficient attempts to reach a settlement over the claim through consultations with the defendant. A period of two weeks after the defendant has received a request for such consultations, indicating what is claimed, shall in any event be sufficient to this end. 3. A legal claim referred to in paragraph 1 may be brought to court in order to force the defendant to disclose the judicial decision to the public, in a way as set by court and at the cost of the persons as pointed out by the court. It cannot be filed in order to obtain compensatory damages. 4. A legal action referred to in paragraph 1 cannot be based on specific behaviour as far as the person who is harmed by this behaviour opposes the action. 5. A judicial decision has no effect with respect to a person whose interests are protected by the legal action, but who has made clear that he does not want to be affected by this decision, unless the nature of the judicial decision brings along that it is not possible to exclude this specific person from its effect

BURGERLIJK WETBOEK [BW] [Dutch Civil Code] art. 3:305(a) (Neth.). *See* Arons & Van Boom, *supra* note 23, at 862–65 (describing the 1994 Act on Collective Action); Tzankova & Lunsingh Scheurleer, *supra* note 15, at 152 (discussing the history of collective actions in the Netherlands).

[67] Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation*, 32 J. LAW & SOC. 294 (2005).

[68] For a general overview of Belgian criminal procedure, see Brigitte Pesquié, *The Belgian System*, *in* EUROPEAN CRIMINAL PROCEDURE 81, 81–141 (Mireille Delmas-Marty & J.R. Spencer eds., 2002).

[69] STEPHEN O'MALLEY & ALEXANDER LAYTON, EUROPEAN CIVIL PROCEDURE 1171, 1183 (1989). *See* Section 4 of the Preliminary Title of the Belgian Code of Criminal Procedure. CODE D'INSTRUCTION CRIMINELLE [C.I.Cr.] ch. 1, § 4 (Belg.). For an analysis of the Belgian piggyback, or *partie civile*, technique see CHRIS VAN DEN WYNGAERT, STRAFRECHT, STRAFPROCESRECHT & INTERNATIONAAL STRAFRECHT (6th ed.) 780–803 (2006); RAF VERSTRAETEN, DIRK VAN DAELE, ANN BAILLEUX & JOOST HUYSMANS, DE BURGERLIJKE PARTIJSTELLING: ANALYSE EN TOEKOMSTPERSPECTIEF 19–76 (2012) (who also give an

the criminal aspect of the case and has convicted the defendant, he or she will rule upon the civil claims. In the event the judge acquits the defendant, he or she will not rule upon the civil claim. In that case, the victim can initiate a civil case based on another cause of action, such as negligence, if the defendant was acquitted of fraud. But, the victim is barred from bringing a civil claim on the cause of action on which the defendant was acquitted. The gain for the victim in bringing his or her claim during the criminal proceedings is that he or she can "piggyback" on the evidence brought forward by the Public Prosecutor, thus he or she only has to prove damages and causation. This technique may potentially have an important impact in mass cases. In principle, the criminal case may function as a de facto issue class action on the issue of liability.

3. Where That Leaves Belgium Right Now

The traditional procedural techniques, as well as the existing Belgian statutory collective actions and the piggyback technique, are deficient tools for the redress of collective harms.[70] Their main weakness is their opt-in feature, which means they do not work for small claims.

The techniques of joinder of claims and claims in intervention remain embedded in an individualistic context because they are exclusively designed for small party litigation. Their only added value is that they allow the intervention of a limited number of people. Furthermore, third parties have to intervene in the proceedings, and just like the initial plaintiff and defendant, they have to become formal parties to the proceeding.[71] This is also the case for party representation. The representative must be authorized by each individual member of the class on an opt-in basis.[72] This technique

interesting comparative overview of the technique in Belgium, France, the Netherlands and Germany). A victim can also choose not to piggyback on the criminal case, but rather initiate a civil case. Where a concurrent criminal case against the same defendant is pending, the civil judge will have to suspend the civil case until the criminal judge has ruled on the criminal case. This principle is phrased in the French adage: *"le criminel tient le civil en état."* It is also possible for a victim to use both tracks: bringing his or her civil claim during the criminal proceedings and piggybacking on the Public Prosecutor on the one hand, and initiating a separate civil case on the other hand. This is done frequently in big cases when the statute of limitations in the criminal case could be tolled. As a precaution, victims initiate civil proceedings as a backup; in case the criminal case is dismissed. In most cases, and because of the "*le criminel tient le civil en état*"-rule, these civil proceedings are suspended awaiting the outcome of the criminal case.

[70] Taelman & Voet, *supra* note 30, at 325.

[71] *See* sources cited *supra* notes 41–48 (describing claim and party joinder in Belgium).

[72] *See* sources cited *supra* note 49 (describing the requirements for party representation in Belgium).

involves laborious administration costs since the representative has to reach every member and obtain their written consent and authorization.

Statutory 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.[73] Associations and organizations also lack financial means to initiate them. As mentioned hereafter,[74] contingency fee arrangements are not possible in Belgium. Moreover, the judgments in these cases are not binding for the individual class members. If they want financial compensation, they must individually sue the defendant.[75] Since they were not party to the proceedings initiated by the association or organization, they cannot invoke the claim preclusive effect of that decision, or the issue preclusive effect, since issue preclusion does not exist in Belgium.

Most of the Belgian mass cases mentioned hereafter were criminal cases in which a combination of the piggyback, or *partie civile*, technique and party representation was used. The civil parties (e.g., the deceived shareholders) gave a mandate to an association or organization to bring, on their behalf, their civil claim before the criminal judge.[76] At first sight, one would think that the piggyback technique for class members only has advantages: it is easily accessible, informal, and cheap. The drawback however is that it remains an opt-in system and all claimants are treated as separate parties. All civil parties have to come forward and give a mandate to a representative. In mass criminal cases, this opt-in requirement is simply unmanageable.

II. PROPOSALS FOR A BELGIAN CLASS ACTION

A. Trigger-Effect

In most European countries, some tangible cases were a trigger for action.[77] For example, the *DES* case (a pharmaceutical product liability case) in the Netherlands led to the Dutch Collective Settlements Act.[78] The German KapMuG was created as a result of the *Deutsche Telekom AG* case

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[73] *See* sources cited *supra* note 57 (describing statutory collective actions and the type of relief they provide party members).

[74] *See infra* Part III.*C.2* (discussing financing of class actions by class counsel).

[75] VOET, *supra* note 3, at 46.

[76] *See* cases discussed *infra* Part II.

[77] VOET, *supra* note 3, at 49.

[78] *See* Tzankova & Lunsingh Scheurleer, *supra* note 15, at 155 (describing the legislative changes needed to effectuate the *DES* settlement). For a brief analysis of the *DES* case, with references, see John H. Wansink & Jaap Spier, *Joint and Several Liability of DES Manufacturers: A Dutch Tort Crisis?*, 1 INT'L INS. L. REV. 176 (1993).

(a securities case).[79] During the last decades, Belgium was also confronted with a number of high-profile mass cases.[80]

Some were single-incident mass torts involving personal injuries and death. On New Year's Eve 1994, a fire broke out in the Switel hotel in Antwerp. Fifteen people were killed and 164 injured. In June 1995, sixteen people died in a gas explosion of a road restaurant in Eynatten (in the province of Liège). In February 1996, ten were killed and eighty injured in a multiple collision on a highway in Kruishoutem. In the summer of 1997, a Jordan Falcon plane crashed during an air show in Ostend. Eight bystanders were killed and forty injured. On July 30, 2004, there was a gas explosion in the industrial zone of Ghislenghien (a small town in the province of Hainaut). Twenty-four people were killed, 132 were injured, 400 people suffered damages and insurance companies had to pay €28,5 million.[81] On February 15, 2010, two passenger trains collided in Halle (near Brussels). Eighteen people were killed and more than 100 were injured. In May 2013, a train transporting chemicals derailed in Wetteren. Dozens of people were injured. Hundreds could not go back to their houses for days.

Others involved financial harms to shareholders.[82] In 2001, Lernout & Hauspie Speech Products (L&H), a speech recognition technology company based in Ypres, went bankrupt due to overstated earnings, fictitious transactions, and improper accounting methodologies.[83] During the criminal trial in 2007, it took several days for the more than 15,000 piggybacking victims to bring their civil claims. After three years, in 2010 the court

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[79] Stürner, *supra* note 13, at 252. For an analysis of the *Deutsche Telekom AG* case, with references, see *id.* at 253. On May 2012, the Frankfurt Court of Appeal issued the model decision in the *Deutsche Telekom AG* case. The Court ruled in favor of Deutsche Telekom by deciding that there was no prospectus liability because there were no misrepresentations in Deutsche Telekom's prospectus. Oberlandesgericht [OLGZ] [Higher Regional Court – Civil Matters] May 16, 2012. The decision is available in German at http://sustainableprivatelaw.files.wordpress.com/2012/06/musterentscheid_olg_frankfurt_am_main_telekom.pdf.

[80] Most of these cases are analyzed in Taelman & Voet, *supra* note 30, at 325–27 and VOET, *supra* note 3, at 50–54.

[81] This case was decided in appeal by the Court of Appeal of Mons. Cours d'Appel [CA] [Court of Appeal] Mons, June 28, 2011, NR 2010/H/130.

[82] In the context of an international research collaborative, led by Professors Deborah Hensler (Stanford Law School), Christopher Hodges (Universities of Oxford and Rotterdam), and Ianika Tzankova (University of Tilburg), I have conducted an empirical study of the L&H case. This case study (*The L&H Case: Belgium's Internet Bubble Story*) will be published in 2013 in a book.

[83] Because L&H had a second headquarter in Burlington, MA, the case also led to some class action settlements in the U.S. *See, e.g.*, *In re* Lernout & Hauspie Sec. Litig., 138 F. Supp. 2d 39 (D. Mass. 2001); *In re* Lernout & Hauspie Sec. Litig., 208 F. Supp. 2d 74 (D. Mass. 2002); Warlop v. Lernout, 473 F. Supp. 2d 260 (D. Mass. 2007) (granting defendants motion to dismiss the class action on *forum non conveniens* grounds where the class included mostly foreign investors who purchased L&H stock on the European Stock Exchange).

reached a criminal verdict, and the major administrators of L&H were convicted.[84] Dexia and KPMG, L&H's financial and accounting partners, were acquitted. The civil claims are still pending. In another example, as a result of the worldwide financial crisis in 2008, Fortis Bank, the crown jewel of the Belgian financial world whose main shareholder was the Belgian government, had to be sold to BNP Paribas to avoid bankruptcy.[85] This takeover led to several legal proceedings initiated by aggrieved minority shareholders. In some of these cases there were more than 2,000 plaintiffs.[86]

Triggered by those mass cases, three proposals were made public in 2009 and 2010 to introduce class actions in Belgium.[87] The proposals were launched by the former Ministers of Consumer Affairs and Justice,[88] the two Green opposition parties,[89] and the Flemish Bar Council.[90] At the moment, none of these proposals have been submitted to Parliament. In case the Belgian government decides to undertake action, it is most likely that the 2009 proposal by the government will be taken as a starting point, as was

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[84] Cours d'Appel [CA] [Court of Appeal] Ghent, Sept. 20, 2010, NR. 1/VR/07. The decision is available in Dutch at http://www.juridat.be/beroep/gent/index.htm.

[85] This case is briefly discussed in Adrienne Coleton, *Banking Insolvency Regimes and Cross-Border Banks – Complexities and Conflicts: Is the Current European Insolvency Framework Efficient and Robust Enough to Effectively Resolve Cross-Border Banks, Can There Be a One Size Fits All Solution?*, 27 J. INT'L BANKING L. & REG. 63 (2012) and John Goddard & Phil Molyneux, *The Financial Crisis in Europe: Evolution, Policy Responses and Lessons for the Future*, 17 J. FIN. REG. & COMPLIANCE 362 (2009).

[86] President of the Commercial Court of Brussels, Nov. 18, 2008 (A. et al. v. Fortis, SFPI & BNP Paribas), TIJDSCHRIFT VOOR BELGISCH HANDELSRECHT [TBH-RDC], at 902 (2008); President of the Commercial Court of Brussels, Nov. 18, 2008 (Deminor v. Fortis, SFPI & BNP Paribas), JOURNAL DES TRIBUNAUX [JT], at 703 (2008); Brussels Court of Appeal, Dec. 12, 2008 (A. et al. v. Fortis, SFPI & BNP Paribas), JOURNAL DES TRIBUNAUX [JT], at 62 (2009).

[87] For a thorough analysis of these proposals see Taelman & Voet, *supra* note 30, at 333–42 and VOET, *supra* note 3, at 169–75, 231–37, 295–98, 355–62.

[88] Andrée Puttemans & Hakim Boularbah, *Wetsontwerp betreffende de procedures tot collectieve schadeafwikkeling* [Draft Law on Collective Redress Procedures], Apr. 29, 2010, *available at* http://www.tijd.be/massaschade [hereinafter Government Proposal]; *see also infra* note 94 and accompanying text (discussing the government proposal).

[89] "Wetsvoorstel tot wijziging van het Gerechtelijk Wetboek wat het instellen van een collectieve rechtszaak betreft" (in Dutch) – "Proposition de loi modifiant le Code judiciaire en ce qui concerne l'instauration d'une procédure collective" (in French). *See infra* note 101 and accompanying text.

[90] Patrick Hofströssler & Philippe De Jaegere, *Wetsvoorstel tot invoering van Titel XXVI over de collectieve vorderingen in Boek IV van het gerechtelijk wetboek* [Bill Establishing Title XXVI of the Collective Actions in Book IV of the Judicial Code], *available at* http://www.advocaat.be/UserFiles/Positions/OVB-wetsvoorstel%20class%20actions%20website.pdf [hereinafter Flemish Bar Council Proposal]; *see also infra* note 104 and accompanying text (describing the proposal of the Flemish Bar Council).

announced in the media by the new Minister of Consumer Affairs in May 2012.[91]

B. Government Proposal

At the end of 2006, the Belgian Minister of Consumer Affairs, Freya Van den Bossche (a Flemish socialist), set up a working group to reflect on a possible class action in consumer affairs.[92] Because it was not clear in the beginning what kind of action she wanted, the first outcome was a questionnaire containing detailed questions that had to be answered before a proposal could be drafted.[93] At the end of 2007, Van den Bossche had to resign and Paul Magnette, a Walloon socialist, took over. The class action idea received little attention for some time, but was resuscitated in early 2009. In a short period of time a proposition was made public in September 2009.[94] Immediately, the idea of American-style class actions made business associations shiver.[95] The Federation of Enterprises in Belgium declared that it was going to do everything to prevent this kind of legislative initiative in times of economic crisis.[96] Because of the Belgian political crisis[97] and the

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[91] Marjan Justaert, *Slachtoffers straks in groep naar de rechter: Collectieve schadeclaims en groepsvorderingen in stroomversnelling*, DE STANDAARD, May 3, 2012, http://www.standaard.be/artikel/detail.aspx?artikelid=4S3PI01B.

[92] Question de M. Dylan Casaer à la vice-première minister et minister de la Justice sur "les 'class actions,' " No. 14614 11 April 2007, *available at* http://www.lachambre.be/doc/CCRI/pdf/51/ic1269.pdf.

[93] This questionnaire was written by academics from the University of Ghent (Professor Piet Taelman, Professor Reinhard Steennot, and myself).

[94] Government Proposal, *supra* note 88. For an analysis of the proposal by its authors, *see* Hakim Boularbah, *Des actions groupées vers l' action de groupe: Quelle valeur ajoutée pour l'avocat?*, *in* LA VALEUR AJOUTÉE DE L'AVOCAT 33 (2011) and Andrée Puttemans, *L'introduction d'une forme d'action collective en droit belge*, *in* L'ACTION COLLECTIVE OU ACTION DE GROUPE: SE PREPARER À SON INTRODUCTION EN DROIT FRANÇAIS ET EN DROIT BELGE 24 (A. Legendre ed., 2010).

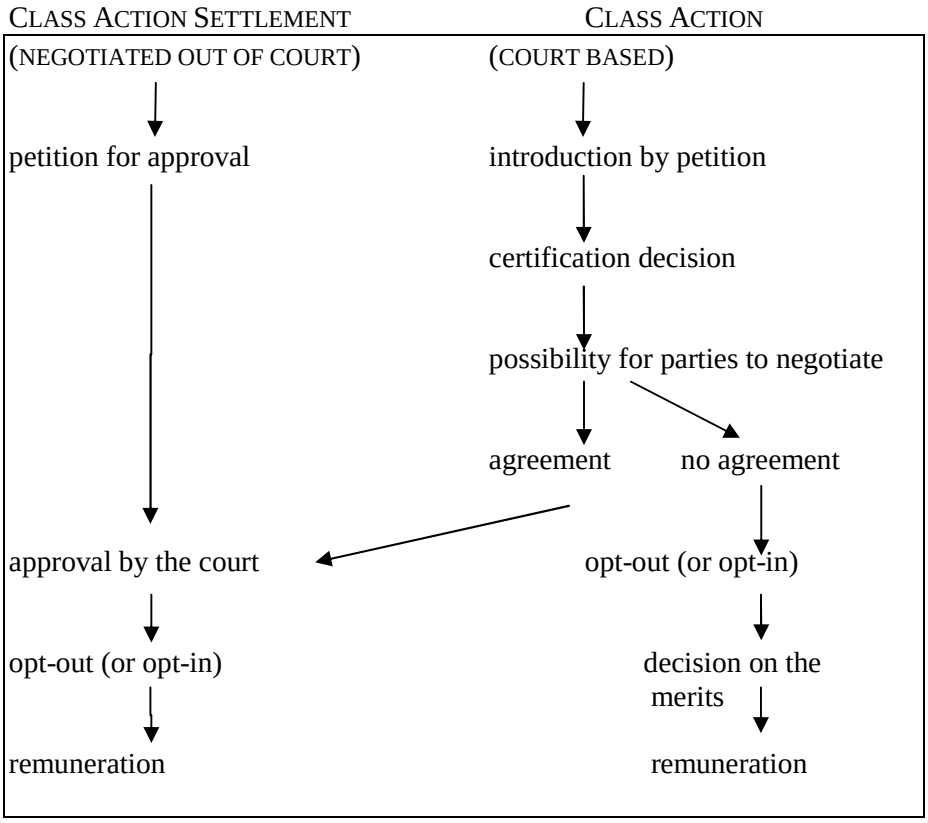
[95] *Bientôt une « class action » en Belgique* [Soon a "Class Action" in Belgium], L'ECHO, Sept. 16, 2009; *Rel over nieuwe wet massale schadeclaims* [Agitation over New Law on Mass Claims], DE MORGEN, Sept. 16, 2009; *België krijgt wet op 'class action suits'* [Belgium Gets New Law on "Class Action Suits"], DE TIJD, Sept. 16, 2009.

[96] Storme & Terryn, *supra* note 49, at 103 n.26.

[97] After five state reforms (in 1970, 1980, 1988–89, 1993, and 2001), Belgium became a federal state, composed of three cultural communities (the Flemish Community, the French Community, and the German-speaking Community) and three economic regions (the Flemish Region, the Brussels Capital Region, and the Walloon Region). *See* JOHAN VANDE LANOTTE & GEERT GOEDERTIER, OVERZICHT PUBLIEKRECHT 869–916 (2003). The 2007–2011 political crisis was rooted in the increasingly conflicting views between the Flemish and the Walloons about a new state reform—the Flemish wanted to devolve more powers to the communities and the regions; an idea opposed by the Walloons—and the existence of the controversial electoral district of Brussels-Halle-Vilvoorde (BHV) that had to be divided. After the June 2010 elections a consensus could not be reached, which led to a period of 541 days of

absence of a federal government for more than 500 days after the June 2010 elections, the class action idea faded into the background. In May 2012, the new Minister for Consumer Affairs, the Flemish socialist Johan Vande Lanotte, announced his interest in reviving the proposal.[98]

The core of the proposal is a double pathway: a partially out-of-court settlement track (based on the Dutch Collective Settlements Act)[99] and a court-based litigation track (based on the Quebecian class action).[100] The double pathway is summarized in this scheme:



government formation. For a good understanding of the differences between the Flemish and the Walloons *see* Robert Mnookin & Alain Verbeke, *Persistent Nonviolent Conflict with No Reconciliation: The Flemish and Walloons in Belgium*, 72 L. & CONTEMP. PROBS. 151 (2009).

[98] Justaert, *supra* note 91.

[99] *See* Government Proposal, *supra* note 88, arts. 17–24 (describing the proposed settlement track).

[100] *See id.* arts. 25–38 (describing the litigation track).

Both are real representative actions. The class representative can act on behalf of a class of unknown fellow-sufferers without them having to intervene or opt-in. Moreover, the settlement and the action lead to a decision that is binding on all parties involved.

C. Opposition Proposal

A second proposal was made by the two Green opposition parties, Ecolo and Groen.[101] The explanatory memorandum of the proposal makes clear that the mass disasters mentioned above illustrate the need for class actions in Belgian civil procedure. After giving an overview of the different types of mass disasters (mass disaster accidents and mass exposure accidents), the point of departure of the Opposition Proposal with the Government's is the deficiency of Belgian law to offer collective redress. The memorandum recites the traditional advantages of class actions—access to justice, equality of procedural arms, procedural economy and efficiency, an enhanced settlement environment, the deterrence effect, etc.—and compares the Belgian *status quaestionis* with the recent legislative initiatives in the Netherlands, Germany and Sweden.

The proposal suggests a collective procedure, consisting of two phases:[102] a collective phase, during which the common issues are resolved and the individual class members have to opt-in,[103] and an individual phase during which the individual issues are dealt with. Three justifications are invoked for this division. First, during a long opt-in period, the class can be formed, meanwhile, and without any delay, the common questions can be resolved. Second, at the end of the first phase, the class will be formed and the common questions answered. This enhances the possibility of reaching a settlement. And third, a separate phase focusing only on the individual aspects of the damages, gives the individual victim his or her day in court.

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[101] Opposition Proposal, *supra* note 89. The proposal was re-submitted on February 6, 2012 and is available at http://www.dekamer.be/FLWB/PDF/53/2035/53K2035001.pdf [hereinafter Re-Submitted Opposition Proposal].

[102] Opposition Proposal, *supra* note 89.

[103] The members of a class opting-in must deposit a declaration at the court registry. This declaration must contain the identity of the individual, his or her contact information, documents that prove the individual falls within the scope of application as determined by the judge in the certification decision, a detailed statement of his or her damages, and documents proving those damages. The declaration, which is irrevocable, must be done within the time limit imposed by the judge. All declarations deposited after the time limit has expired are inadmissible. *See* Re-Submitted Opposition Proposal, *supra* note 101, art. 1237/4 (describing the proposed requirements and procedure for opting-in).

D. Proposal of the Flemish Bar Council

A third and final proposal was made by the Flemish Bar Council.[104] According to this proposal, a class action must be brought before the district court. A Belgian district court is a special court composed of the President of the Court of First Instance, the President of the Labor Court, and the President of the Commercial Court.[105] The district court only decides jurisdictional disputes between different courts of first instance.[106] The Flemish Bar Council wants to provide this court with a pivotal role in deciding class actions, but only in the certification and potential settlement phase. If the class action is certified, the district court will refer the case to a competent first instance court that will decide the merits of the case.[107] If a settlement is reached during the procedure, the parties have to go back to the district court for approval of the settlement. The standard is low. The court will only verify that the settlement is not clearly unreasonable for the victims.[108] An important detail is that the non-binding advice of the Public Prosecutor is needed to approve the settlement. With respect to the individual distribution of damages, the proposal allows the court to appoint a judicial claim settler or special master for that purpose.[109]

E. Main Characteristics

The main characteristics of the three Belgian class action proposals are summarized in the table below:

[104] Flemish Bar Council Proposal, *supra* note 90. For an analysis of the proposal by one of its authors, see Patrick Hofströssler, *Waarom een 'class action' in België? Krijtlijnen van het voorstel van de Orde van Vlaamse Balies* [Why Class Actions in Belgium?: Chalk Lines of the Proposal of the Flemish Bar Association], 54 ORDE VAN DE DAG 95 (2011) and Patrick Hofströssler, *Een Belgische class action: de OVB schrijft*, *in* LIBER AMICORUM JO STEVENS 353 (Veerle Allaerts et al., eds. 2011).

[105] CODE JUDICIAIRE [C.JUD.] [Belgian Judicial Code] arts. 74–75 (Belg.).

[106] *Id.* art. 642.

[107] Flemish Bar Council Proposal, *supra* note 90, art. 1385-5.

[108] *Id.* art. 1385-9.

[109] *Id.* art. 1385-10.

	PROCEDURES – LEGISLATIVE FRAMEWORK	STRUCTURE	INITIATOR	COURT	PREREQUISITES	OPT-IN/OPT-OUT	NOTICE TO THE CLASS	FUNDING
GOVERNMENT PROPOSAL	two collective procedures (class action settlement – class action) outside the Judicial Code	*settlement*: petition, approval, opt-out(in), remuneration *action*: petition, certification, negotiation, if no agreement: opt-out (in), decision on the merits, remuneration	associations, all of which the statutory aim corresponds with the object of the settlement or the claim	Brussels Court of First Instance and Brussels Court of Appeal	certification if procedure (a) tends to redress mass disputes and (b) is initiated by a class representative	opt-out (exceptionally opt-in) for Belgian residents, opt-in for non-Belgian residents	register for collective procedures	funding by the associations; if damages fall under a certain threshold, these will not be distributed and could fee a government fund that will finance future procedures
OPPOSITION PROPOSAL	one procedure (collective procedure) in the Judicial Code	a collective phase (for the common issues) and an individual phase (for the individual issues)	individual party (can ask that his individual procedure will be pursued as a collective procedure)	every court	(not really clear) the concrete mass disaster, the common legal questions, the suitability of a collective procedure	opt-in, but opt-out when a settlement is reached	(not really clear) the judge will decide in the certification decision and there will be notice through the court registry	calling in an existent government fund; financed by the government and required contributions of members who opt-in
PROPOSAL OF THE FLEMISH COUNCIL	one procedure (collective actions) in the judicial code	a certification phase before the district court; a phase on the merits of the case before the competent first instance court; an individual phase (distribution of compensations) potentially out of court (with a judicial claim settler)	any interested individual party (a natural person, a legal person, an association, a government, etc.)	certification phase: every district court; after that: the competent first instance court	certification of 1° traditional procedural techniques are insufficient, 2° there are common legal and factual questions and common questions with respect to the evidence, 3° the case at hand is representative, 4° preference has to be given to a collective action	opt-in or opt-out (both are possible) decided by the judge)	the judge will decide (in a discretionary matter) in the certification decision	partially through a fund (of which the name and the modalities are unclear); the judge can decide that the members of the class have to make a contribution to this fund (after certification or after winning the case); if the class loses the case, the winning party can obtain a composition out of the fund (but not from individual class members)

III. WHAT SHOULD A BELGIAN CLASS ACTION LOOK LIKE?

A. Purposes of the Class Action Device and Why the Current Situation is Inadequate

The traditional objectives of class actions are access to justice, judicial economy, and behavior modification.[110] The first objective is fundamental. "Class actions can enhance access to justice by opening the 'doors' of our courts to those with individually non-recoverable claims or whose claims would not have led to individual proceedings because of social or psychological barriers."[111]

At first sight, the Belgian procedural techniques (joinder of claims, claims in intervention, party representation, and the piggyback, or *partie civile*, technique in criminal cases) attempt to enhance judicial economy. This was surely the ambition of the Royal Commissioner Charles Van Reepinghen in 1967, when he drafted the Judicial Code. The techniques of joinder of claims and claims in intervention allow all interested parties to deal with all of their claims in one single procedure, thereby avoiding multiple and sequential proceedings.[112] Closer analysis reveals a more sober image. As mentioned above, the techniques require class members to actively intervene (opt-in) in the proceedings. Consequently, they do not work for small claims. Because of the rational lack of interest and the negative cost-benefit analysis, class members will simply not intervene or come forward to give a mandate to a representative. Moreover, the techniques require all class members to be aware of the proceedings before they can intervene, which requires broad notice.[113] Therefore, these techniques will offer no collective redress at all.

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[110] These objectives were saliently summarized in the Canadian decisions of *Western Canadian Shopping Centres, Inc. v. Dutton*, [2001] 2 S.C.R. 534 (Can.); *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (Can.); *Hollick v. Toronto City*, [2001] 3 S.C.R. 158 (Can.); *see also* MULHERON, *supra* note 10, at 47–66 (describing the objectives of class action regimes). John Kleefeld recently noted that "[b]ehaviour modification or deterrence . . . tend to be viewed as by-products of access to justice or as related to their effects on the ability to aggregate low-value claims. If you like, access to justice and judicial economy are the elder siblings; behaviour modification is the junior one – or even the poor cousin." John C. Kleefeld, Homo Legislativus*: Missing Link in the Evolution of 'Behaviour Modification'?, in* ACCESSING JUSTICE: APPRAISING CLASS ACTIONS TEN YEARS AFTER *DUTTON*, *HOLLICK* AND *RUMLEY* 170, 171 (Jasminka Kalajdzic ed. 2011).

[111] Vince Morabito, *Ideological Plaintiffs and Class Actions: An Australian Perspective*, 34 U. BRIT. COLUM. L. REV. 459, 502–03 (2000–2001).

[112] VAN REEPINGHEN, *supra* note 37, at 327.

[113] VOET, *supra* note 3, at 24. The limitations of these procedural techniques are also recognized in the U.S. *See* FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 644 (5th ed., 2001) ("Class actions, aside from involving many people, differ from such traditional disputes in many ways: flexibility of remedy,

But even in cases of larger claims, the aforementioned techniques do not fully achieve their judicial economy objective. The fact that all class members have to intervene can lead to an uncoordinated and fragmented, and therefore inefficient and uneconomical, completion of the case. This can cause an overloaded, even disrupted, judicial system. Moreover, this mode of operation will trigger a race to the courthouse in cases involving a defendant with limited funds.

Belgian statutory collective actions are injunctive or preventive actions.[114] Only the cessation or prevention of an illegal practice can be claimed. It is not possible to claim damages for class members. Therefore, the exclusive objective of these actions is behavior modification. An individual victim of an illegal practice is not a party to the proceeding, and is not bound by its outcome. If victims want compensation, they must initiate individual proceedings without being able to invoke the preclusive effect of the decision.[115] Statutory collective actions do not offer victims easier access to justice or judicial economy.

What is clearly missing is a tool offering optimal access to justice for victims of mass cases. Neither the traditional procedural techniques, nor the statutory collective actions create credible access to justice for a victim of a mass harm. Both the proposal of the government and the proposal of the Flemish Bar Council want to correct this problem by introducing an opt-out class action.[116]

B. Who Should Represent the Class?

1. Ideological Plaintiff as Class Representative

The existing, but limited, statutory collective actions in Belgium can only be initiated by associations or organizations that satisfy certain legal criteria (e.g., having legal personality for some years, usually three). Moreover, the statutory aim of these associations or organizations must correspond or overlap with the cause of action.[117]

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predominance of administrative problems, an expanded judicial role, lawyers who must strive to protect many clients whose interests may diverge, and a greater concern with litigation's effects on the real world.").

[114] Dalcq, *supra* note 57, at 168–71; Ramquet & Jones, *supra* note 57, at 49.

[115] The claim preclusive effect of a decision only extends to the parties that were involved in the proceedings. CODE JUDICIAIRE [C.JUD.] [Belgian Judicial Code] art. 23 (Belg.).

[116] Government Proposal, *supra* note 88, art. 4; Flemish Bar Council Proposal, *supra* note 88, art. 1385-8, sec. 2. Both proposals allow the judge to impose an opt-in system when this would be more appropriate. The proposal of the Green opposition parties is based on an opt-in system. Opposition Proposal, *supra* note 90, art. 1237/4.

[117] *See supra* Part I.*B.2* (discussing the prerequisites for an association or an organization to bring a representative action on behalf of class members).

Contrary to the proposals of the two Green opposition parties and the Flemish Bar Council, the Government's proposal only gives standing to associations or organizations to initiate a class action. The proposal puts forward an ideological plaintiff as having:

> [N]o private cause of action or grievance against the defendant; [he/she] is permitted to commence a class proceeding on the basis that the class members' interests will be represented properly and adequately; is expected to possess "special ability, experience or resources that would allow it to be an appropriate and adequate class representative"; and need not be a class member.[118]

Contrary to the U.S., no standing is given to an individual class member.

The choice of an ideological plaintiff (an association, organization, or governmental body, such as an ombudsman) is a good one for three reasons. First, when an ideological plaintiff initiates a class action, the focus from the outset will be on the class and not the personal claim of an individual class member. This refers to the class-entity or class-as-client theory.[119] The collective interests of the class members as a whole will be the decisive and motivating reason to initiate a class action. During the proceedings, these interests will always come first, not those of an individual representative class member or his or her attorney. Therefore, one may expect ideological plaintiffs to pursue class actions more strongly, with more commitment and enthusiasm, which will benefit the class members. In other words: "The interests of the class are here likely to be much better served by an ideological plaintiff."[120] Moreover, time-consuming procedural problems

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[118] MULHERON, *supra* note 10, at 303 (citing Arthur L. Close, *British Columbia's New Class Action Legislation*, 28 CAN. BUS. L.J. 271, 274 (1997)); *see also* Morabito, *supra* note 111, at 493–98 (providing a historical evolution of the ideological plaintiff).

[119] David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917–18 (1998) ("The notion of the class as entity should prevail over more individually oriented notions of aggregate litigation."); *see also* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 379 (2000); Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 26–32 (1996); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1058–60 (2002); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1588–97 (2007) (describing the class entity theory).

[120] South African Law Commission, *The Recognition of a Class Action in South African Law* ¶ 5.5 (Working Paper No. 57, 1995).

will not occur when the individual claim of the class representative becomes moot or is settled by the defendant.[121]

Second, when an ideological plaintiff initiates a class action, no individual class member needs to come forward. Thus, there is no danger of stigmatization and possible retaliation by the defendant.[122] One should not forget that a class action is a complex event, not only because it deals with large-scale and sometimes well-publicized cases, but also because of the importance of the interests of the absent class members. These members have to rely on the class representative, who therefore has a burdensome task.[123] The complexity and psychological impact of a class action can easily scare off potential class representatives, or can hamper the procedure. This is particularly important in cases of discrimination or violations of constitutional or civil rights, where class members are in an inherently vulnerable position. Examples of vulnerable class members include employees, prisoners, members of a minority class, asylum seekers, minors, or victims of sexual abuse.[124] All these problems are largely avoided, or can be more easily dealt with, when the class representative is an ideological plaintiff.

Finally, and perhaps most importantly, when the class representative is an association or governmental body, it will be easier to finance the litigation. This will be discussed further.[125]

2. Burns' "Decorative Figurehead"

The traditional U.S. idea that a class representative with a personal interest is in the best position to advance the interests of fellow class members is no longer convincing.[126] A number of class action authorities agree that ideological plaintiffs are preferable to plaintiffs with a personal

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[121] *See* Jean Wegman Burns, *Standing and Mootness in Class Actions: A Search for Consistency*, 22 U.C. DAVIS L. REV. 1239 (1989) (analyzing mootness in a class action context); David H. Donaldson, Jr., Comment, *A Search for Principles of Mootness in the Federal Courts: Part One – The Continuing Impact Doctrines*, 54 TEX. L. REV. 1289, 1296–1300 (1976).

[122] ONTARIO LAW REFORM COMMISSION, 1 REPORT ON CLASS ACTIONS 128–32 (1982).

[123] Pierre-Claude Lafond, *Consumer Class Actions in Quebec to the Year 2000: New Trends, New Incentives*, 8 CONSUMER L.J. 329, 332 (2000) ("The responsibility involved in carrying a class action is very heavy – inordinately heavy for an isolated individual. Alone against Goliath, the modern David of the judicial forum cannot share the burden he carries with anyone except his lawyer. This burden constitutes one of the factors underlying the difficulty in finding a representative.").

[124] *See, e.g.*, Stanley D. Davis & Kathy Perkins Brooks, *The Employment Class Action: Recent Developments and Ideas for Discussion*, 2 SEDONA CONF. J. 109, 114 (2001).

[125] *See infra* Part III.*C*.

[126] Morabito, *supra* note 111, at 496.

stake. An initial argument is that these individual plaintiffs do not actually control or direct the litigation.[127] They are "merely a 'key' that the attorney needs to open the courtroom doors."[128] Although the U.S. Congress has made an effort to minimize the role of the lead plaintiff,[129] class actions still remain lawyer-driven.[130]

Second, it is argued that the fictional participation of individual plaintiffs introduces artificial and unnecessary issues of commonality, typicality, and adequacy of representation. In a pioneering paper from 1990, Jean Wegman Burns labeled the U.S. class representative as a "decorative figurehead."[131] From a theoretical point of view, and partially caused by the dual jurisprudence of the U.S. Supreme Court, the role of the class representative is ambiguous.[132]

> Apart from filling a space on the caption of the complaint, the purpose served by the named plaintiff's presence remains a largely unanswered question. . . . [T]here is a general recognition that the named plaintiff is largely a figurehead who plays little or no part in the initiation and prosecution of the class claim. . . . The time has come to think about the unthinkable: eliminating the class representative. He serves no function in the actual prosecution of the class action. Yet his presence engenders confusion and the proliferation of phantom issues in class action jurisprudence. Furthermore, having a

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[127] John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); Mary Kay Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385 (1987); Jonathan R. Macey & Geoffrey P. Miller, *Auctioning Class Action and Derivative Suits: A Rejoinder*, 87 NW. U. L. REV. 458 (1993).

[128] Antonio Gidi, *Class Actions in Brazil: A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 369 (2003).

[129] For example, the Private Securities Litigation Reform Act (PSLRA) placed restrictions on which injured class members can serve as lead plaintiff. "[T]he court shall adopt a presumption that the most adequate plaintiff in any private action arising under [the PSLRA] is the person or groups of persons that . . . in the determination of the court, has the largest financial interest in the relief sought by the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I); *see also* Kendra S. Langlois, *Putting the Plaintiff Class' Needs in the Lead: Reforming Class Action Litigation by Extending the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 44 WM. & MARY L. REV. 855 (2002) (extrapolating the lead plaintiff provision of the PSLRA to other types of class action litigation).

[130] Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 432–33 (1999).

[131] Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165 (1990).

[132] *Id.* at 168–202.

> named plaintiff tends to obscure the fundamentally nontraditional nature of the class action and to divert courts from addressing directly the peculiar problems inherent in group litigation.[133]

Third, the fiction of individual plaintiffs can undermine the goals of the class action device, in the sense that it can lead to conflicts of interest between the class representative and the class. This issue is considered by the South African Law Commission.

> In fact the self-interest of the representative may very well defeat the interests of the class, as has happened in the United States when the defendant hastily settles the plaintiff's claim, leaving the class without a representative. There is a real probability that many plaintiffs with a self-interest prosecute their claims as class actions in the hope of pressurizing the defendant to offer a settlement more favorable than might have been forthcoming had an individual action been brought. The interests of the class are here likely to be much better served by an ideological plaintiff.[134]

Just like Burns, the Commission considers a class member as class representative as a mere fiction:

> Where redress is sought in the interests of [groups who are unable to initiate proceedings] it will usually be at the instance of some organization which has the interests of the community at heart, or possible some concerned individual. Where this is the case there is no sense at all in requiring the concerned organization or individual to find a member of the group to act as nominal representative. Such a nominal representative might be incapable of playing a meaningful role as representative for the group and one then has the situation where the concerned organization or individual is in fact driving the litigation but a pretence is kept up that the instructions derive from the named representative. This presents the court with a fiction and forces the players into situations which are often not entirely honest and sometimes unethical. There is nothing to be gained by insisting on a

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[133] *Id.*

[134] South African Law Commission, *supra* note 120, para. 5.5.

> nominal plaintiff. It the party driving the litigation is allowed to be the representative party despite the absence of a personal interest the court will know exactly where the various parties stand and will be able to make a valid assessment of the situation.[135]

3. Adequacy of Representation

The question that arises is what if an ideological plaintiff, just like a natural plaintiff, does not pursue its own ideological interest, and whether that could be detrimental to the economic interests of the class. Issacharoff and Miller observe that:

> [E]ven dedicated and idealistic people may not act as faithful champions when their guiding principles do not overlap with the interests of those they are assigned to represent. . . . The interests of nonprofit consumer organizations may reflect ideological considerations that may not necessarily coincide with the economic interests of consumers.[136]

They suggest allowing associations and organizations to represent only their own members rather than all persons injured by the challenged product or practice.[137] It is dubious whether it has to come to that, as long as certain safeguards are provided, since this restriction would limit the class action device that aims to offer access to justice and legal protection for *all* class members.

First, standing has to be distinguished from adequacy of representation.[138] An ideological plaintiff having class action standing is not automatically

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[135] *Id.*

[136] Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 194 (2009). They provide the following example:

> Suppose, for example, that an organization empowered to act as a class representative is committed to environmental protection – a noble aspiration, but not one necessarily consonant with the interests of a class of consumers who desire competitively priced products. If this organization selects cases and litigation strategy on the basis of environmental considerations – going easy, let's say, on companies that donate money to Greenpeace while vigorously pursuing companies that produce genetically modified crops – the enforcement of consumer interests would be skewed in ways that do not necessarily reflect the interests of consumers as a whole, who might prefer cheaper prices to greener products.

Id. at 194.

[137] *Id.* at 195.

[138] *See* Hans-W. Micklitz, *Collective Private Enforcement of Consumer Law: The Key Questions*, *in* COLLECTIVE ENFORCEMENT OF CONSUMER LAW: SECURING COMPLIANCE IN

adequate to act as a class representative in a specific case.[139] For example, a Brazilian class action can be initiated by an association or governmental body.[140] The mere fact that they have standing is sufficient; there is no additional inquiry into the adequacy of representation.[141] According to Gidi, this is disturbing.

> It is generally feared that civil-law judges may not have the power, the inclination or the professional ability needed to examine adequacy of representation on a case-by-case basis. Although difficult to assess, control of adequacy over the representation of absentee's interests may not be left completely beyond judicial scrutiny. The role performed by civil law judges may differ, perhaps substantially, from that performed by common law judges. It does not necessarily mean, however, that civil law judges are incapable of exercising some control of adequacy of representation, especially if they are supported by other devices.[142]

By contrast, when, as a result of a mass case, multiple associations present themselves as a class representative, the class action mechanism should force the court to determine which association or body is most adequate to represent the class in that particular case.[143] There should be no first come, first serve principle.[144] In other words, the adequacy of representation test can obviate potential conflicts of interest. If it is clear from the beginning that the ideological interests of the plaintiff prevail over the economic interests of the class, the judge can rule that the plaintiff is not adequate as a class representative. If the conflict of interest occurs during

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EUROPE THROUGH PRIVATE ACTION AND PUBLIC AUTHORITY 11, 21 (Willem van Boom & Marco Loos eds., 2007) (discussing the importance of the judge's role in finding a plaintiff that is suitable to represent the class's interests).

[139] Issacharoff & Miller, *supra* note 136, at 194.

[140] CODIGO DE PROTEÇAO E DEFESA DO CONSUMIDOR [C.D.C.] art. 82 (Braz.).

[141] Gidi, *supra* note 128, at 367.

[142] *Id.* at 371–72 (adding that "[a] proposed class action bill at one time would have given Brazilian judges the power to control adequacy of representation on a case-by-case basis. This approach was never enacted, but it offered a more adequate solution to the inherent problems of representative actions than the statute that was ultimately adopted by the legislature.").

[143] The court should verify if the interests of the association are sufficiently aligned with those of the class, the association has sufficient resources and willingness to use them to make the litigation succeed, the association will persist when it is in the class's interest, despite the dangers of a loser-pays fee shift, the lawyer the association has chosen is sufficiently skilled and well-staffed to represent the class, etc.

[144] Micklitz, *supra* note 138, at 21–22.

the procedure, the judge can substitute the class representative at the request of a class member or even the defendant.

Second, attention should be drawn to the positive experiences with existing associations and foundations in the aforementioned Belgian mass cases,[145] where they acted via the technique of party representation[146] as representatives for deceived shareholders. For example, in the L&H case more than 15,000 shareholders were represented by Belgium's biggest consumer association and a large association defending minority shareholders.[147] The general perception by all actors involved was that these associations vigorously defended the interests of their clients in the criminal case.[148] Also, the fact that one of the associations financed the litigation proves that she prioritized the economic interests of her clients, over her own ideological interests.[149]

Third, conflicts of interest can be restrained by self-regulating mechanisms that regulate the role and the behavior of special purpose associations in mass cases. An example can be found in the Netherlands. The negative behavior of some special purpose associations in some mass cases,[150] led to a Claim Code containing principles on the responsibilities and governance of such associations.[151] The aim was to make those associations more transparent with respect to, for example, internal decision making processes, financial policies, and the composition and operating procedures of boards of directors.[152]

C. How Should Class Action Litigation Be Financed?

With respect to the funding and financing of class action litigation, three options can be discerned: financing by the class representative, financing by the class counsel, and financing by a third party. The three Belgian class

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[145] *See supra* Part II.*A*.
[146] *See supra* Part I.*B.2*.
[147] *See supra* notes 83–85 and accompanying text (describing the L&H case).
[148] *See* the empirical case study on the L&H case mentioned *supra* note 82.
[149] *Id*.
[150] *See, e.g.*, COMMISSIE CLAIMCODE, CLAIMCODE, 2011 (Neth.), *available at* http://www.consumentenbond.nl/morello-bestanden/716993/compljuniclaimcodecomm2011.pdf (appending J.H. Lembstra & R.W. Okhuijsen, *Consultatiedocument 'Zelf-regelering Claimstichtingen*, TIJDSCHRIFT VOOR FINANCIEEL RECHT, June 2010 at 158, 159–61 (discussing the Lipsick Effect Case, Hof – Amsterdam 7 oktober 2004, JOR 2004, 329 (Stichting Lipstick Effect/ABN AMRO) (Neth.), where two lawyers set up an association for the purpose of initiating a legal procedure against a bank, and the Woekerpolis affair, where concerns were raised about the revenues of the acting associations)).
[151] In June 2010, a commission 'Claim Code' was set up by a lawyer and a communication advisor. After a large consultation round, the Code was presented in June 2011. *Id.*
[152] *Id*.

action proposals ignore this issue, or deal with it in a fragmented and unclear manner. A clear and comprehensive vision is lacking. The only thing they all agree on is funding by a government fund.

1. Financing By the Class Representative

One possibility to fund a class action is requiring the class representative to fund and finance the litigation. This is already the case with the existing Belgian statutory collective actions.[153] If the class representative is an individual class member, this means there will be no funding at all. This will certainly be the case for small claims, but also for individually recoverable claims. In those cases, funding a class action will come down to a personal and unprofitable investment, which no one will want to make. If at the end of the procedure the class member runs the risk of also having to pay the costs of the defendant,[154] there is "a disincentive to bringing grouped proceedings, and [this] might in fact create yet another barrier to access to legal remedies of the kind which the recommended procedure itself aims to overcome."[155]

Theoretical methods for creating greater incentives or pooling class member resources seem unlikely to succeed. It would be possible to reward the class member who stands up as a class representative with a financial bonus, which would be an impetus to act. Mulheron pertinently points out however, that this could lead to conflicts of interest.

> Where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is undoubtedly an appearance of a conflict of interest between the representative plaintiff and the class members. This view holds that a class action should not be viewed as a method by which persons can seek to receive personal gain over and above any damages or other remedy to

[153] VOET, *supra* note 3, at 147.

[154] *See, e.g.*, Garry D. Watson, *Class Actions: The Canadian Experience*, 11 DUKE J. COMP. & INT'L L. 269, 274–77 (2001) (describing fee shifting in Ontario). "The Ontario costs rule is problematic and causes difficulties because it raises the issue of who, properly advised, would agree to become a representative plaintiff." *Id.* at 275.

[155] Australian Law Reform Comm'n, *Grouped Proceedings in the Federal Court* 107 (Report No. 46 1988).

> which they would otherwise be entitled on the merits of their claims.[156]

It would also be possible to allow the class representative to solicit other class members for financial contributions.[157] This would be challenging, however, because the class representative would act on behalf of an unknown group of class members, who would be difficult to reach, and sometimes, to identify. In cases of small claims, it would be hard to persuade them to pay for the litigation. Therefore, Mulheron observes that this technique:

> is unlikely to be much utilised because of the disincentive to class member participation which up-front funding would entail. In any event, . . . the practicalities are that any potential benefit is surely a bit remote at the time that this request for contributions is normally made, at such an early stage of the proceedings.[158]

If the class representative is an ideological plaintiff, such as an association or governmental body, funding will be easier, because ideological plaintiffs, at least the successful ones, have more financial resources, such as membership contributions, subsidies, and other income.[159] Moreover, they do not pursue a personal interest, but only the interests of the class. Because class interests overlap with their statutory aim, the class action goes to the heart of their existence.[160] Ideological plaintiffs will therefore act as gatekeepers, because they likely will not invest in frivolous or meritless cases with the objective of profit.

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[156] MULHERON, *supra* note 10, at 466; *see also In re* Gould Sec. Litig., 727 F. Supp. 1201, 1209 (N.D. Ill. 1989) ("If class representatives expect routinely to receive special awards in addition to their share of the recovery, the representative may be tempted to accept sub-optimal settlements at the expense of the class members whose interests they are appointed to guard."). Under the American PSLRA, such awards are prohibited 15 U.S.C. § 78u-4(a)(2)(A)(vi) (2012).

[157] *See* Vince Morabito, *Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs*, 21 MONASH U. L. REV. 231, 236 (1995) (discussing a proposal to have class representatives solicit other class members for financial contributions). *See, e.g.*, Class Proceedings Act, R.S.B.C. 1996 c. 50, s. 19(7) (Can. B.C.) ("With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements.").

[158] MULHERON, *supra* note 10, at 465.

[159] *See* Issacharoff & Miller, *supra* note 136, at 199 (comparing difficulties with individual class representative financing to organizational plaintiff financing).

[160] *See id.* at 193–94 (discussing ideological loyalty of organizational plaintiffs).

That Belgian associations and organizations are possibly willing to finance this kind of litigation is illustrated by the L&H case.[161] One consumer association, acting on behalf of its 4,000 members, did not charge anything. The members pay an annual €150 contribution. They were not charged an extra fee for the L&H case. The legal support in the case was offered as a free service. The only condition the association imposed was that their members had to retain their membership until the end of the proceedings, which made it a perfect excuse to work at customer relations.

2. Financing By the Class Counsel

A second option to address the issue of class action funding is allowing the class attorney to fund and finance the litigation on the basis of a contingency fee agreement. The attorneys' fees could either be paid by the losing defendant (in countries that adopt a fee shifting rule) or by the prevailing class (in countries that do not).[162] Contingency fees are strictly prohibited in Belgium because they violate public order and are incompatible with attorneys' professional ethics.[163] However, intermediate forms of contingency fee arrangements are possible. An agreement, by which the attorneys' fees partially depend on the outcome of the case, is allowed.[164]

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[161] *See supra* Part II.*A* and the empirical case study of the L&H case, *supra* note 82.

[162] *See* UGO A. MATTEI, TEEMU RUSKOLA & ANTONIO GIDI, SCHLESINGER'S COMPARATIVE LAW: CASES, TEXT, MATERIALS 691–95 (7th ed. 2009).

[163] CODE JUDICIAIRE [C.JUD.] [Belgian Judicial Code] art. 446*ter* (Belg.) (forbidding a fee arrangement linked to the outcome of the dispute); *see also* Michael Faure, Fokke Fernhout & Niels Phillipsen, *No Cure, No Pay, and Contingency Fees*, *in* NEW TRENDS IN FINANCING CIVIL LITIGATION IN EUROPE: A LEGAL EMPIRICAL AND ECONOMIC ANALYSIS 33, 42 (Mark Tuil & Louis Visscher eds., 2010) (discussing contingent fees in Belgium). For a general overview of litigation costs in Belgium see Vincent Sagaert & Ilse Samoy, *Belgian*, *in* THE COSTS AND FUNDING OF CIVIL LITIGATION: A COMPARATIVE PERSPECTIVE 217–38 (Christopher Hodges et al. eds., 2010). *See also* COUNSEL OF BARS AND LAW SOCIETIES OF EUROPE, CODE OF CONDUCT FOR EUROPEAN LAWYERS, art. 3.3 (2006), *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.

Id.

[164] Faure, Fernhout & Phillipsen, *supra* note 163, at 42.

This comes down to a permissible enhancement of the attorneys' fees based on success in the litigation.

The fundamental problem with contingency fees and success fees in a class action context is that the class attorney acquires a personal interest in the outcome of the case, which is a breeding ground for conflicts of interest between the class and its attorney. The class members are absent in the class procedure, but bound by its outcome.[165] Therefore, the adequacy of the class attorney and the class representative is vital. The class members are forced to almost blindly rely on the way the class attorney administers, deals, and settles the case. The class attorney must also serve as a gatekeeper for the defendant, who has to be protected against frivolous claims and blackmail settlements. In other words, the class attorney serves a semi-public role.[166] A personal financial interest in the case can hinder, and even impede, this task.

3. Financing By a Third Party

Finally, third parties can finance and fund class action litigation. This is possible through legal expenses insurance,[167] such as before-the-event-insurance,[168] legal aid,[169] a government fund,[170] or more recently, third party

[165] Issacharoff & Miller, *supra* note 136, at 206.

[166] VOET, *supra* note 3, at 141–42, 222–23.

[167] In this context, one has to refer to the *Eschig* decision of the European Court of Justice in which the Court ruled that Article 4(1)(a) of Council Directive 87/344 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance must be interpreted as not permitting the legal expenses insurer to reserve the right to select the legal representative of all the insured persons concerned, where a large number of insured persons suffer loss as a result of the same event. Case C-199/08, Eschig v. UNIQA Sachversicherung, AG, 2009 E.C.R. I-08295; *see also* Jason Rowley, *Eschig v UNIQA Sachversicherung AG (C-199/08): Legal Expenses Insurance – Legal Expenses Insurance Regulations 1990*, 1 J. PERS. INJ. LAW C32 (2010) (detailing the *Eschig* case).

[168] Before-the-event-insurance (BTE) is taken out by those wishing to protect themselves against potential litigation costs that could be incurred following a usually hypothetical future event. BTE insurance is generally paid on an annual basis to an insurance company. After-the-event-insurance (ATE) is taken out after an event to insure the policyholder for disbursements, as well as any costs should they lose their case. *See* Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 CARDOZO J. INT'L & COMP. L. 343, 353 (2011); Francis Regan, *The Swedish Legal Services Policy Remix: The Shift From Public Legal Aid to Private Legal Expense Insurance*, 30 J.L. & SOC'Y 49, 50 n.4 (describing the two basic forms of legal expenses insurance: before-the-event and after-the-event).

[169] *See, e.g.*, HODGES, *supra* note 10, at 177–202 (discussing public funding for class action litigation in England and Wales).

[170] *See* MULHERON, *supra* note 10, at 454–59 (describing the special public fund in Australia and Ontario's Class Proceedings Fund). The best example can be found in Québec with the *Fonds d'aide aux recours collectifs*. More detailed information is available at http://www.farc.justice.gouv.qc.ca/.

funding.[171] If class actions are to be introduced in Belgium, it is highly uncertain the Belgian government would provide funds for legal aid or a government fund. If it is willing however, this financial intervention by the government will work better with an ideological plaintiff than with a class member as class representative. An ideological plaintiff does not pursue a personal interest, but the collective interests of the group. For a government fund or a third party funder, this can be a decisive and legitimizing factor in deciding whether to intervene. The fund's intervention will have a public, and therefore more acceptable, dimension. Moreover, because of their experience and expertise with existing statutory collective actions, associations and governmental bodies have become serious interlocutors.[172] Compared to individual class members, they will be in a much better position to monitor and criticize third party funders in a way that will benefit all class members.

Funding and financing of class actions by ideological plaintiffs or third parties are not ideal solutions. The icing on the cake could be one-way cost shifting:[173] when the ideological plaintiff wins the procedure, the losing defendant has to pay the plaintiff's attorneys' fees and costs. In case of a government fund, these costs could flow to this fund to finance future class action litigation.[174] If the defendant wins the procedure, the ideological plaintiff is exempted from paying attorneys' fees and costs. This dispensation could be justified by the public interest in class actions as a legal protection tool.

D. What Remedies Should Be Allowed?

Belgian statutory collective actions, as they are currently regulated, can only be used to obtain injunctive or preventive relief. For example, the 1993

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[171] *See, e.g.*, de Morpurgo, *supra* note 168, at 352; Deborah Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306 (2011); Michael Legg & Louisa Travers, *Necessity Is the Mother of Invention: The Adoption of Third-Party Litigation Funding and the Closed Class in Australian Class Actions*, 38 COMMON L. WORLD REV. 245 (2009); Rachael Mulheron & Peter Cashman, *Third Party Funding: A Changing Landscape*, 27 CIV. JUST. Q. 312 (2008) (providing summaries and examples of third party funding). It is important to underline that 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 receive a percentage (usually between 25% and 40%) of the compensation. If the case is lost, they do not get anything.

[172] Lafond, *supra* note 123, at 337–39 (considering associations as repeat players); VOET, *supra* note 3, at 151.

[173] *See e.g.*, Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 DUKE J. COMP. & INT'L L. 125 (2003) (discussing cost shifting in a class action context).

[174] For example, in Québec, the winning class has to turn the legal costs paid by the losing defendant over to the *Fonds d'aide aux recours collectifs*. *See supra* note 170.

Act on the Collective Action for the Protection of the Environment gives standing to non-profit organizations to bring an action to stop acts that violate environmental regulations.[175] The non-discrimination acts give standing to anti-discrimination associations to initiate an action to stop any discriminatory behavior.[176] In neither example is it possible to claim damages on behalf of the harmed victims. If class members want compensation, they have to initiate individual proceedings.

The three Belgian class action proposals all allow claims for monetary relief as well. In that sense, they enhance access to justice. The government proposal contains a remarkable provision. The class settlement or court decision can stipulate that amounts under a certain threshold will not be distributed amongst the class members, due to high distribution costs compared to the amount each class member is entitled to receive.[177] This cy-près-like technique[178] is particularly important in small claims class actions. The proposal suggests depositing the non-distributed money in a government fund to finance future class actions. This idea should be applauded because it allows taking away the illegal profit from the offender and using the money efficiently to finance other class actions. Another useful and efficient tool can be found in the proposal of the Flemish Bar Council. The proposal contains a provision that allows the judge to appoint a special master (judicial claim settler)[179] to deal with the individual claims of class members out of court.[180]

E. What Role Should the Court Play?

1. Which Court?

A preliminary question that arises concerning judicial involvement in future Belgian class actions is: which court(s) should have jurisdiction?

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[175] *See supra* note 60.

[176] *See supra* notes 61–64.

[177] *See* Government Proposal, *supra* note 88, art. 44 (describing the stipulation against distribution of monetary awards to class members).

[178] *See* RACHAEL MULHERON, THE MODERN CY-PRÈS DOCTRINE: APPLICATIONS & IMPLICATIONS (2006); Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Près Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010); Frances Howell Rudko, *The Cy Près Doctrine in the United States: From Extreme Reluctance to Affirmative Action*, 46 CLEV. ST. L. REV. 471 (1998) (summarizing the cy-près doctrine).

[179] For more on the use of special masters in class actions see David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695 (1989) and Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986).

[180] Flemish Bar Council Proposal, *supra* note 90, art. 1385-5.

According to the government proposal, the Brussels Court of First Instance and the Brussels Court of Appeal will have exclusive jurisdiction to deal with *all* Belgian class actions and class action settlements.[181] The government proposal partially copies the Dutch Collective Settlements Acts, which makes the Amsterdam Court of Appeal exclusively competent to approve all class action settlements.[182]

This will lead to a specialized and experienced class action court,[183] and will pave the way for an efficient resolution of class actions. A uniform and predictable jurisprudence will develop in a specialized area of the law (e.g., class action prerequisites and notice methods). Moreover, a specialized and more experienced court will be able to deal with these cases more efficiently and swiftly.[184] 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,[185] it would be inefficient to give jurisdiction to multiple courts. One competent court also avoids time-consuming litigation over jurisdictional issues and forum shopping.

Critics argue that an exclusive, competent court can be very powerful and hinder the development of law. It can also be perceived by class members as isolated, far, and inaccessible, which can lead to opt-outs because victims want to enforce their rights in a closer jurisdiction. These dangers can be curtailed by a number of safeguards. First, class action cases can be allocated, in first instance and in appeal, to a three-judge panel. This allows discussion,[186] and leaves room for development of the law. Second, these class action judges must be trained. Judicial education is essential.

> Judges need to be told that damage class actions are *not* just about problem solving, that the rights of plaintiffs *and*

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[181] *See* Projet de loi relative aux aspects judiciares des procédures de réparation collective [Proposal Relating to the Procedural Aspects of Collective Procedures], *available at* http://economie.fgov.be/fr/binaries/Class%20actions_Loi_modifiant_le_Code_judiciaire_avec_appe_tcm326-77473.pdf.

[182] BURGERLIJK WETBOEK [BW] [Dutch Civil Code] art. 1013.3 (Neth.).

[183] *See* Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1517–18 (2004) ("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.

[184] *See id.* ("Litigants faced with the same set of repeat judges may also obtain a higher degree of predictability of judicial outcomes, leading to a greater probability of settlement.").

[185] To date, there have been seventy-five GLO procedures in England and Wales. Since the introduction in 2005 of the Dutch Collective Settlements Acts, there have been six cases. *See* cases cited *supra* note 17. In Sweden, there were eleven class action procedures between 2003 and 2007.

[186] VOET, *supra* note 3, at 310 (and references in nt. 1541). Belgian law does not have dissenting opinions.

> defendants are at stake, that responsibility for their outcomes lies *not* just with the class counsel and defendant but with the judge as well, and that what is deemed acceptable in one case sends important signals about what will be accepted in another.[187]

This training can be organized on a national and international level. A coordinating role can be reserved for the European Judicial Training Network that was established in 2000. It 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 European culture. [It] develops training standards and curricula, coordinates judicial training exchanges and programmes, disseminates training expertise and promotes cooperation between EU judicial training institutions."[188]

Finally, the exclusive class action court can be made mobile and become a traveling class action court.[189] However, this is practicable only in small countries, such as Belgium,[190] Switzerland, or the Netherlands. It would be less convenient in larger European countries, such as France, Spain, Italy, or Germany.

2. Active Role of the Class Action Judge

In this context, the adversarial character of Belgian civil procedure is relevant.[191] The autonomous role of the parties in starting and ending a civil case on the one hand, and the active role of the judge on the other, are two important facets of this principle. The parties autonomously set the limits of the dispute brought before the court.[192] First, this implies that the plaintiff

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[187] DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 497–98 (2000) (emphasis in original).

[188] EUROPEAN JUDICIAL TRAINING NETWORK, http://www.ejtn.net/About/About-EJTN/.

[189] For more on judge mobility see Randall D. Lloyd, Leonard B. Weinberg & Elizabeth Francis, *An Exploration of State and Local Judge Mobility*, 22 JUST. SYS. J. 19 (2001) and George Pring & Catherine Pring, *Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment*, 11 OR. REV. INT'L L. 301, 328 (2009) (suggesting the creation of traveling courts and judges to realize access to environmental justice).

[190] Belgium covers an area of 30,528 Km^2 (11,787 mi^2), and it has a population of about 10.4 million people. Cent. Intelligence Agency, *CIA World Fact Book: Belgium*, Mar. 15, 2013, https://www.cia.gov/library/publications/the-world-factbook/geos/be.html.

[191] *See* Jean Laenens & George Van Mellaert, *The Judicial System and Procedure*, *in* INTRODUCTION TO BELGIAN LAW 83 (Hubert Bocken ed., 2001); Taelman & Voet, *supra* note 30, at 309–11 (describing Belgium's adversarial judicial system).

[192] Paul Lefebvre, *Belgium*, *in* INTERNATIONAL CIVIL PROCEDURE 76 (Shelby R. Grubbs ed., 2003).

delimits the object of the proceedings. The judge is limited, but at the same time obliged, to decide the case as determined by the plaintiff. Furthermore, a judge is not allowed to involve parties in the proceedings other than those designated by the plaintiff. This is important.[193] When the judge ascertains that there are victims similarly situated to the plaintiff, he or she cannot instruct their intervention.

Another feature is the active role of the judge.[194] Once the parties have delineated the contours of the proceedings, the judge plays an active role with respect to the orderly evolution of the proceedings. This means that the procedural rules should be respected and that a judgment should be rendered within a reasonable time. Second, in case parties do not succeed in producing sufficient evidence, the judge is obliged to order a complementary inquiry consisting of, for example, the submission of certain documents, witness testimony, an official visit to the scene of the facts, and the personal appearance of the parties in the court. There is no discovery in Belgian law.[195] The judge is the key figure in the gathering of evidence.

As his common-law counterpart, the civil-law judge is becoming more and more like a case manager. This is an encouraging development because:

> the procedural treatment of a case should not be driven by the parties' strategies, but should be taken in hand and controlled by the court. It is the court that bears responsibility for the swift and efficient administration of justice, and therefore has to steer to case through the procedure . . . . The term [case management] suggests a new understanding of the judge's role in civil litigation, his mission being not only to decide the case as the parties present it to him, but also to manage the caseload that confronts his court in a way that every procedure is dealt with in the most efficient manner. It is clear that this implies a significant increase in the judge's powers.[196]

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[193] *See supra* Part I.*B.2*.

[194] Lefebvre, *supra* note 192, at 76, 85; Paul Van Orshoven, *Powers of the Judge: Belgium*, *in* EUROPEAN TRADITIONS IN CIVIL PROCEDURE 291, 292 (2005).

[195] Lefebvre, *supra* note 192, at 84 ("Belgian law does not contemplate preliminary disclosures, expert disclosures or pretrial disclosures, or written questions addressed by one party to the other. At the most, a party can, in its written submissions, direct questions challenging the other party openly to respond, attempting by so doing to steer the debate and influence the court. Lastly, Belgian law does not contemplate depositions for discovery.").

[196] Benoît Allemeersch, *Civil Case Management: The Belgian Debate and Reforms*, in THE XIIITH WORLD CONGRESS OF PROCEDURAL LAW: THE BELGIAN AND DUTCH REPORTS 237 (A.W. Jongbloed ed., 2008).

Even more than in one-on-one litigation, class actions need judges as real case managers, for the simple reason that they have a public role in protecting the interests of absent class members and defendants.[197]

Especially in the U.S., where class actions are still largely lawyer-driven, the judge plays a crucial and supervisory role in the relationship between the class and the class attorney.[198] If the judge, acting as an active case manager, can safeguard the interests of class members and defendants, he or she can create public confidence in the proper use of class actions.

3. Keeping the Litigation Moving Forward

A class action judge has two vital roles in class action law. On the one hand, he or she is responsible for keeping the litigation moving forward. To be able to act as case manager, the judge needs a range of management tools. The Belgian procedural tools that are used in individual litigation can be utilized in active management and steering of class actions: the possibility of imposing a binding procedural calendar,[199] the possibility of undertaking a complementary inquiry *sua sponte*, the opportunity of having an interactive debate with the parties,[200] and the possibility of imposing a fine in case of misuse or abuse of procedure.[201] When class actions are introduced in Belgium, the utility of those management tools will have to be verified. Possibly, they will have to be adapted to be properly used in a class action context. On the other hand, and this is vital, the Belgian class action judge will also need new customized tools, like his common-law counterpart.

> [T]he Court has been vested with the power to order the discontinuance of a class proceeding, to substitute a representative plaintiff who is not adequately representing the interests of the class members, and to establish . . . a sub-group and appoint a person to be the sub-group representative party

[197] Catherine Piché, *Judging Fairness in Class Action Settlements*, 28 WINDSOR Y.B. ACCESS JUST. 111, 111–12 (2010) ("Judges involved in class action cases have a tremendous responsibility toward class members and toward the public in general. They are asked to adjudicate the rights of numerous plaintiffs; importantly, the rights of absent or unnamed ones, according to their presumed interests.").

[198] Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997); Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747 (2002).

[199] CODE JUDICIAIRE [C.JUD.] [Belgian Judicial Code] art. 747, § 2 (Belg.).

[200] *Id.* art. 756ter.

[201] *Id.* art. 780bis; *see also* Piet Taelman, *Abuse of Procedural Rights: Regional Report for Belgium – The Netherlands*, *in* ABUSE OF PROCEDURAL RIGHT: COMPARATIVE STANDARDS OF PROCEDURAL FAIRNESS 125–49 (Michele Taruffo ed., 1998) (discussing the abuse of procedural rights in Belgium).

> on behalf of the sub-group members. The Court needs to give its approval before a class action can be settled or discontinued . . . . Further examples of the interventionist role which the Federal Court is expected to assume are provided by [law] which allows [additional notice] . . . . But perhaps the most important provision . . . empowers the Federal Court to make "any order . . . [it] thinks appropriate or necessary to ensure that justice is done in the proceedings."[202]

The three Belgian class action proposals disregard the utility of existing management tools. They all start from the rather naïve idea that the existing management tools can simply be transposed in a class action context. This is not the case. Moreover, the proposals overlook specific class action management tools. None pay attention to the possibility of additional notice, imposing additional conditions on the class representative or class attorney, or allowing individual class members to be involved in the procedure. Only the government proposal contains a poorly formulated sub-classing provision.[203] The possibility of limiting or expanding the scope of the class can only be found in the proposal of the Green opposition parties.[204]

4. Approving Class Action Settlements

On the other hand, the class action judge is responsible for evaluating and approving any class action settlement. This is the case in the U.S., [205] and the Dutch Collective Settlements Act.[206] The Amsterdam Court of Appeal does not approve the settlement pro forma. The Court can refuse approval if: (a) the agreement does not comply with the legal provisions;[207]

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[202] Morabito, *supra* note 111, at 494–95; *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21 (2004).

[203] *See* Government Proposal, *supra* note 88, art. 12 (providing for sub-classes in cases of mass loss).

[204] Re-Submitted Opposition Proposal, *supra* note 101, art. 1237/5, §§ 2, 3.

[205] FED. R. CIV. P. 23(e).

[206] *See supra* Part I.*A*.

[207] BURGERLIJK WETBOEK [BW] [Dutch Civil Code] art. 7:907.2 (Neth.) ("The agreement must in any case include: (a) a description of the group or groups of persons on whose behalf the agreement was concluded, according to the nature and the seriousness of their loss; (b) the most accurate indication possible of the number of persons belonging to the group or groups; (c) the compensation that will be awarded to these persons; (d) the conditions which these persons must meet to qualify for the compensation; (e) the procedure by which the compensation will be established and can be obtained; [and] (f) the name and domicile of the person to whom the written notification . . . can be sent.").

> (b) the amount of the compensation awarded is not reasonable having regard, *inter alia*, to the extent of the damage, the ease and speed with which the compensation can be obtained and the possible causes of the damage; (c) insufficient security is provided for the payment of the debt-claims of persons on whose behalf the agreement was concluded; (d) the agreement does not provide for the independent assessment of the compensation to be paid pursuant to the agreement; (e) the interests of the persons on whose behalf the agreement was concluded are otherwise not adequately safeguarded; (f) the foundation or association [that concluded the settlement] is not sufficiently representative with regard to the interests of persons on whose behalf the agreement was concluded; (g) the group of persons on whose behalf the agreement was concluded is not large enough to justify a declaration by the court that the agreement is binding; [and] (h) there is a legal person who will provide the compensation pursuant to the agreement and he is not a party to the agreement.[208]

If one or more of these conditions are not met, the judge can ask the parties to complete or alter the settlement.[209] The Court can also appoint an expert to give an advice on the settlement.[210] In the pending proposal to amend the Dutch Collective Settlements Act, the Dutch legislature wants to expand the role of the court. The idea is to allow parties, before any approval procedure is launched, to summon the other party before the court when no settlement can be reached, in which case the court can act as a settlement facilitator.[211]

The three Belgian class action proposals also pay attention to the role of the class action judge in approving a class action settlement. In the proposal of the Green opposition parties, this role overlaps with the role the judge plays today in individual litigation. He or she blindly approves the settlement, without the possibility of assessing the content of the settlement. Only when rules of public order are violated (e.g., a settlement in a custody

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[208] *Id.* art. 7:907.3.

[209] *Id.* art. 7:907.4.

[210] WETBOEK VAN BURGERLIJKE RECHTSVORDERING [Rv] [Dutch Judicial Code] art. 1016 (Neth.).

[211] Staten-Generaal, *Wijziging van het Burgerlijk Wetboek, het Wetboek van Burgerlijke Rechtsvordering en de Faillissementswet teneinde de collectieve afwikkeling van massavorderingen verder te vergemakkelijken* [Act Amending the Act on Collective Settlement of Mass Damage] Dec. 22, 2011, *available at* https://zoek.officielebekendmaking en.nl/dossier/33126/kst-33126-2?resultIndex=19&sorttype=1&sortorder=4. The proposal also suggests making the Dutch Collective Settlements Act applicable in bankruptcy cases.

case), can the judge refuse approval.[212] The two other class action proposals are similar to the Dutch Collective Settlements Act. The judge, who plays a more active role, can refuse approval if certain conditions are not met, although the standards are not as high as in the Netherlands.[213] According to the proposal of the Flemish Bar Council, the court only has to verify that the settlement is not clearly unreasonable for the victims.[214] Nevertheless, this more active role should be applauded because of the public role class action judges play in protecting the interests of absent class members and defendants.[215]

IV. CONCLUSION

The three class action proposals seem to indicate that on the political level, and within the bar, there is a consensus on the need for class actions in Belgium. The question arises whether this is really the case. Before answering that question, it is vital to distance oneself from the procedural issue. Before proper procedures can be determined, the economic, social, and political course to deal with mass cases must be set out. Looking at foreign examples, most legislators first thoroughly reflect on the broader context in which they want to embed a possible collective procedure. Commissions, working groups, think tanks, and the like are set up to conduct that reflection, to map all possibilities, and to list the desirable and undesirable consequences of all options.[216] Only when a policy consensus is reached by all relevant actors, can the procedural issue be addressed.

Although a working group was set up and the 2009 government proposal was written under its auspices, this reflection exercise was insufficient. For example, it is regrettable that nothing was done with the preliminary questionnaire, not a single report or study was drafted, and there was no scientific and broad debate including all relevant actors. Instead, a tentative proposal was made public. The same conclusion can be drawn with respect to the proposals of the opposition parties and the Flemish Bar Council.

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[212] *See* Opposition Proposal, *supra* note 89.

[213] *See* Government Proposal, *supra* note 88; Flemish Bar Council Proposal, *supra* note 90.

[214] *See supra* Part II.*D*.

[215] *See supra* Part III.*E*.*2*.

[216] In Denmark, there was Recommendation No 1468/2005 of the Permanent Committee for Civil Procedure (*Retsplejerådet*). Werlauff, *supra* note 7, at 203, n.8. In Finland, three preliminary commission reports were published before an act was written. Arto Lindfors & Leena Kerppilä, *Introducing Class Actions in Finland?*, *available at* http://www.gala-marketlaw.com/pdf/classactions.pdf. In Sweden, the Commission for Collective Actions issued an elaborate report in 1995; and in Canada, the Ontario Law Reform Commission published three volumes of research on class actions in 1982. ONTARIO LAW REFORM COMMISSION, *supra* note 122.

Except for the traditional general observations, a thorough reflection on the broader policy is lacking.

This course of events is symptomatic of Belgian civil procedure and Belgian politics overall. Unfortunately, the most interesting discussions on civil procedural topics, and the broader policy in which they are embedded, always take place after new, and usually impulsive, legislation becomes effective, as was illustrated in 2007 when three major procedural reforms were enacted.[217] The fact that five years later, two out of three acts have been "repaired,"[218] is revealing.

In addition, a holistic approach is required to tackle mass harms. It is unwise to put all the eggs in the private litigation basket. As already mentioned by Cappelletti,[219] optimal collective redress can only be achieved by a matrix of intertwined models.[220] Especially with respect to small claims, the potential for other redress mechanisms and models has to be underlined. Moreover, priority has to be given to an alternative dispute resolution (ADR) model that encompasses direct negotiation, conciliation, and arbitration by ADR agencies.[221] In addition, the significance of regulation and possible regulatory oversight of collective restitution and

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[217] Loi relative à la répétibilité des honoraires et des frais d'avocat [Act on Attorneys' Fees] of Apr. 21, 2007, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], May 31, 2007, 2d ed., 29541; Loi modifiant le Code judiciaire en vue de lutter contre l'arriéré judiciaire [Act on New Procedural Rules] of Apr. 26, 2007, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], June 12, 2007, 31626; Loi modifiant le Code judiciaire en ce qui concerne l'expertise et rétablissant l'article quater du Code pénal [Act on Reforming Rules on Expert Witnesses] of May 15, 2007, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 22, 2007, 43898.

[218] *See* Stefaan Voet, *Over de berg die een muis baarde: De (Belgische) wet van 26 april 2007 'tot wijziging van het Gerechtelijk Wetboek met het oog op het bestrijden van de gerechtelijke achterstand' en de nieuwe regelen betreffende de instaatstelling*, *in* THE FRENCH CODE OF CIVIL PROCEDURE (1806) AFTER 200 YEARS: THE CIVIL PROCEDURE TRADITION IN FRANCE AND ABROAD 315, 315–22 (Remo van Rhee et al. eds., 2008).

[219] As extensively quoted by Gidi, *supra* note 128, at 324, n.22.

[220] *See* Christopher Hodges, *Collective Redress in Europe: The New Model*, 29 CIV. JUST. Q. 370 (2010); CHRISTOPHER HODGES, THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS: A NEW FRAMEWORK FOR COLLECTIVE REDRESS IN EUROPE 235 (2008) (suggesting a ranking of the different options: first voluntary settlement; then regulatory oversight; and finally judicial supervision, which includes private enforcement tools as class actions). Also, in the U.S. some authors note there are public legal protection tools as valuable alternatives for class actions, especially in small claims cases. *See, e.g.*, Steven B. Malech & Robert E. Koosa, *Government Action and the Superiority Requirement: A Potential Bar to Private Class Action Lawsuits*, 18 GEO. J. LEGAL ETHICS 1419 (2005); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71 (2003); *see also* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT (2007).

[221] *See* CHRISTOPHER HODGES, IRIS BENÖHR & NAOMI CREUTZFELDT-BANDA, CONSUMER ADR IN EUROPE: CIVIL JUSTICE SYSTEMS (2012) (presenting such an ADR model).

restoration[222] cannot be underestimated, especially in Europe. Nevertheless, and to complete this set of collective redress mechanisms, the private litigation model should include a class action device.

In that sense, possible Belgian class actions should be viewed as *additional* legal protection tools. From a procedural point of view, this will emerge in the superiority inquiry.[223] Contrary to the U.S. counterpart, a European, and specifically a Belgian, civil-law judge will more easily accept the existence of other available methods for adjudicating the controversy, such as ADR and regulatory mechanisms. Unlike the U.S., priority must be given to these alternatives, particularly with respect to small claims.

Shaping class actions as additional legal protection tools comes down to a continuous quest for safeguards to level the playing field and correct the procedural imbalance inherent in group conflicts. On one hand, the absent class members have to rely on the class representative to enforce their rights. On the other hand, the defendant has to be protected against the power of the group. Belgian class actions will be shaped differently than U.S.-style class actions because they will be embedded in a different procedural culture with different rules on standing, funding and financing litigation, and court involvement.[224] Contrary to U.S.-style class actions, Belgian class actions must be initiated by an ideological plaintiff, cannot be funded on a contingency or success fee basis, and must be dealt with by one competent court. Nevertheless, Belgian class actions will achieve the same objectives as U.S.-style class actions and will offer claims for injunctive and monetary relief.

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[222] For examples in the field of competition law see Christopher Hodges, *Competition Enforcement, Regulation and Civil Justice: What Is the Case?*, 43 COMMON MKT. L. REV. 1381 (2006) and Albert A. Foer & Evan P. Schultz, *Will Two Roads Still Diverge? Private Enforcement of Antitrust Law Is Getting Harder in the United States. But Europe May Be Making It Easier*, 3 GLOBAL COMPETITION LITIG. REV. 107 (2011).

[223] *See* FED. R. CIV. P. 23(b)(3).

[224] Gidi, *supra* note 128, at 312–15.