

European Collective Redress and Compensation

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I- INTRODUCTION

European jurisdictions have long viewed class actions as “toxic cocktails”¹ that should be kept out of the civil law orbit. It is argued that importing class actions would lead to the adoption of a U.S.-style legal culture, which is perceived as characterized by excessive and frivolous litigation.² But this seems to be changing and some European countries have adopted procedures that share some characteristics of the U.S. class action.³ The frontrunners are the northern European countries (Sweden, Norway, Denmark and Finland).⁴ Besides a (quasi) class action suit that excludes monetary remedies, the Netherlands has a settlement-only class action.⁵ In 2014, Belgium and France adopted consumer class actions.⁶ The scope of the

1. EUROPEAN COMMISSION, “Green Paper on Consumer Collective Redress – Questions and Answers”, MEMO/08/741, November 27, 2008, online: <http://europa.eu/rapid/press-release_MEMO-08-741_en.htm>.
2. *Towards a Coherent European Approach to Collective Redress: Next Steps*, SEC (2010) 1192, October 5, 2010, online: <http://ec.europa.eu/competition/ecn/brief/01_2011/ec_redress.pdf>.
3. See, e.g., Stefaan VOET, “Cultural Dimensions of Group Litigation: The Belgian Case”, (2013) 41 *Ga. J. Int’L & Comp. L.* 433 [hereinafter “Voet, ‘Cultural Dimensions of Group Litigation’”] (discerning three categories of European jurisdictions: those having class action-like tools, those having (sometimes experimental) mechanisms offering collective redress and those having no adequate instruments to tackle mass cases).
4. See the “National Reports” on the *Global Class Actions Exchange Network* website, online: <<http://globalclassactions.stanford.edu/>> and the “National Reports”, in Paul G. KARLSGODT (ed.), *World Class Actions. A Guide to Group and Representative Actions around the Globe*, New York, OUP, 2012.
5. Jeroen FLEMING and Jaap J. KUSTER, “The Netherlands”, in Paul G. KARLSGODT (ed.), *World Class Actions. A Guide to Group and Representative Actions around the Globe*, New York, OUP, 2012, p. 286 and Marie-José VAN DER HEIJDEN, “Class Actions”, in J.H.M. VAN ERP and P.W. VAN VLIET (eds.), *Netherlands Reports to the Eighteenth International Congress of Comparative Law*, Antwerp, Intersentia 2010, p. 197. A proposal is pending in the Netherlands to extend the class action suit to monetary remedies, online: <<https://www.internetconsultatie.nl/motiedijksma>>.
6. Stefaan VOET, “Consumer Collective Redress in Belgium: Class Actions to the Rescue?”, (2015) 16 *EBOR* 121 [hereinafter “VOET, ‘Consumer Collective Redress

French class action regime was expanded to competition, health, discrimination, environment, privacy and data protection law.⁷ Other European countries, such as Slovenia, recently introduced a class action regime.⁸ In sum, while in the U.S. class actions seem to be on the decline,⁹ they are on the rise in Europe.

The three traditional goals of class action theory are the compensation of victims of alleged wrongdoing, deterrence of bad behaviour by defendants, and judicial economy and efficiency.¹⁰ While the last goal speaks for itself, the first two are more complicated and contentious. The primary goal of class actions is to enable large groups of claimants to recover damages or to obtain injunctive relief as a consequence of alleged wrongdoing by defendants.¹¹ Furthermore, deterrence is seen as an additional primary goal of class actions.¹² The magnitude of a class action procedure and the defendant's exposure to massive compensatory and punitive damages induce to refrain from future wrongful conduct.¹³

This chapter explores the compensation goal of European class actions. The aim is not to give a comprehensive analysis of whether they offer real and sufficient compensation, but rather to highlight how this goal is addressed from a policy perspective.

in Belgium"] and Frédérique FERRAND, "Collective Litigation in France: From Distrust to Cautious Admission" in Viktória HARSÁGI and Remco VAN RHEE (eds.), *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?*, Cambridge, Intersentia, 2014, p. 127 [hereinafter "FERRAND, 'Collective Litigation in France'"].

7. Alexandre BIARD, "Class Action Developments in France", August 2016, online: <<http://globalclassactions.stanford.edu/content/class-action-developments-france>> [hereinafter "BIARD, 'Class Action Developments in France'"].
8. Marko KETLER, "Slovenia Adopts Class Action Law", October 13, 2017, online: <<https://www.karanovic-nikolic.com/knviews/Pages/2017/10/Slovenia-Adopts-Class-Action-Law.aspx>>.
9. Robert G. BONE, "The Decline of Class Actions", (2013) 90 *Wash. U. L. Rev.* 729. Others argue that U.S. class actions are not dead, but that they are just badly done (Linda S. MULLENIX, "Ending Class Actions As We Know Them: Rethinking the American Class Action", (2014) 64 *Emory L.J.* 399, at 404 [hereinafter "MULLENIX, 'Ending Class Actions'"]).
10. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, at 617 (1997).
11. MULLENIX, "Ending Class Actions", *supra*, note 9, at 418.
12. See, e.g., Brian T. FITZPATRICK, "Do Class Action Lawyers Make Too Little?", (2010) 158 *U. Pa. L. Rev.* 2043, at 2047.
13. MULLENIX, "Ending Class Actions", *supra*, note 9, at 420.

II- SETTING THE STAGE: THE 2013 EC COLLECTIVE REDRESS RECOMMENDATION

To set the stage, a brief overview of the existing European collective redress framework is provided. In June 2013, the European Commission (EC) published its Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law.¹⁴ The goal was not to harmonize the national systems or to establish a uniform model, but rather, to identify general, common and non-binding principles relating both to judicial, compensatory and injunctive and out-of-court collective redress that Member States should take into account when crafting such mechanisms.¹⁵ The mechanisms should be fair, equitable, timely and not prohibitively expensive.¹⁶ By setting minimum standards, the Commission wants to facilitate access to justice and to enable victims of mass cases to obtain compensation, while at the same time providing appropriate procedural safeguards to avoid abusive litigation.¹⁷ Most of the national regimes have adhered to the principles below, in various degrees, but these details cannot be explored here for lack of space.

The Commission recommends that all Member States should have collective redress mechanisms in those areas where Union law grants rights to citizens and companies: consumer protection, competition, environmental protection, protection of personal data, financial services legislation, and investor protection.¹⁸ The principles set out in the Recommendation should be applied horizontally and equally in those areas but also in any other area where collec-

14. Recommendation 2013/396 of the European Commission of June 11, 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law (2013) O.J. (L 206) 60 (EU), online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32013H0396:EN:NOT>> [hereinafter Recommendation]. Together with the Recommendation, the Commission published a Communication Towards a European Horizontal Framework for Collective Redress in which the history of the collective redress issue is recounted and in which the Commission elucidates and justifies the enumerated common principles (COM (2013) 401 final (June 11, 2013), online: <<http://ec.europa.eu/transparency/regdoc/rep/1/2013/EN/1-2013-401-EN-F1-1.Pdf>> [hereinafter Communication]).

15. Recital (13) Recommendation, *supra*, note 14.

16. Art. 2 Recommendation, *supra*, note 14.

17. Recitals (10) and (13) and Art. 1 Recommendation, *supra*, note 14.

18. Recital (7) Recommendation, *supra*, note 14.

tive claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant.¹⁹

The EC favours parties other than individual class members in bringing class actions. Member States should, besides empowering public authorities,²⁰ designate or certify representative or ad hoc entities that satisfy certain minimum qualification criteria, to bring representative actions. These criteria are: (a) the entity should have a non-profit-making character; (b) there should be a direct relationship between the main objectives of the entity and the enforced rights, and (c) the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise.²¹

Opt-in is the default principle in the Recommendation. The class should be formed on the basis of express consent of natural or legal persons claiming to have been harmed.²² The opt-in device is seen as a superior means of preserving the autonomy of claimants given that it requires a positive act on their behalf before they are bound by the group proceeding, whilst under the opt-out device the result of inactivity on their part is that they are covered by the proceeding.²³ Opt-out class actions are allowed, but only by statute or court order, and when duly justified by reasons of “sound administration of justice”,²⁴ a concept that is not defined and open to multiple interpretations. In a footnote (!) in the Communication, two advantages of an opt-out system are pointed out:²⁵ facilitating access to justice for small damages claims, and offering more certainty and finality to the defendant.

In principle, the EC rejects contingency fees.²⁶ If Member States exceptionally allow for contingency fees in collective redress cases, appropriate national regulation must be provided, taking into account the right to full compensation of the members of the claimant party.²⁷ Besides the prohibition of contingency fees, the – well-established European – loser pays rule would apply to class actions.²⁸

19. *Ibid.*

20. Art. 7 Recommendation, *supra*, note 14.

21. Art. 4 Recommendation, *supra*, note 14.

22. Art. 21 Recommendation, *supra*, note 14.

23. Communication, *supra*, note 14, at 12.

24. Art. 21 Recommendation, *supra*, note 14.

25. Communication, *supra*, note 14, at 11 (footnote 37).

26. Art. 29 Recommendation, *supra*, note 14.

27. Art. 30 Recommendation, *supra*, note 14.

28. Art. 13 Recommendation, *supra*, note 14.

The plaintiff should declare to the court at the outset of the proceedings the origin of the funds that he or she is going to use to support the legal action.²⁹ The EC allows third-party litigation funding in collective redress litigation and partially regulates it by providing a series of safeguards, arguably necessary to avoid abusive litigation.³⁰

Currently (fall of 2017), the Recommendation is being evaluated.³¹ In September 2017, Mrs. Vera Jourova, the EU Commissioner for Justice, Consumers and Gender Equality announced that the 2009 Injunctions Directive³² might be an interesting avenue for consumers through representative actions by non-profit organizations or public authorities.³³

III- DETERRENCE AS A NO-GO ZONE: PRIVATE ENFORCEMENT SUPPLEMENTING PUBLIC ENFORCEMENT

It is important to underline that (most) European class actions *only* focus on compensation, judicial economy and efficiency. In theory, the deterrence goal is explicitly excluded.³⁴ It is a no-go zone. A question arises as to whether this is true in reality, and whether European class actions can truly be argued not to deter corporate defendants from future wrongful behaviour.

Contrary to the U.S., where private class actions are also viewed as regulatory enforcement mechanisms, intended to supplement or mitigate the failures of public enforcement,³⁵ European policymakers

29. Art. 14 Recommendation, *supra*, note 14.

30. Communication, *supra*, note 14, at 15. These safeguards are listed in Articles 15-16 Recommendation, *supra*, note 14.

31. See online: <http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59539>.

32. Directive 2009/22 of the European Parliament and of the Council of April 23, 2009 on Injunctions for the Protection of Consumers' Interests (2009) O.J. (L 110) 30 (EC).

33. Speech by Commissioner Jourova at the U.S. Chamber Institute for Legal reform, Brussels, September 28, 2017, online: <https://ec.europa.eu/commission/commissioners/2014-2019/jourova/announcements/speech-commissioner-jourova-release-us-chamber-institute-legal-reforms-consumer-public-opinion-poll_en>.

34. As an aside, it should be noted that the term "deterrence" itself is being criticized (see, e.g., Christopher HODGES, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics*, Oxford, Hart Publishing 2015 (putting forward the term "behavior modification")).

35. See, e.g., Robert BALDWIN, Martin CAVE and Martin LODGE, *Understanding Regulation: Theory, Strategy, and Practice*, 2d ed., Oxford, OUP 2011. This is

have traditionally adhered to a strict division of public and private enforcement.³⁶ As far as deterrence and punishment are concerned, public enforcement is considered to be superior to private enforcement.³⁷ Public enforcement, through its reliance on state power, benefits from more effective investigative and sanctioning powers, by comparison to private enforcement. Moreover, public enforcement has the advantage of allowing for better control in setting the optimal amount of the sanction.³⁸ Private actions for damages are driven by the private interests of the parties concerned, which may diverge from the general interest.³⁹ Private actions for damages are regarded as superior to public enforcement only with regard to the pursuit of corrective justice through compensation.⁴⁰

This approach is echoed in the policy on collective redress. The Recommendation points out that the collective redress mechanisms it envisages are not of a regulatory nature.⁴¹ It is a core task of public enforcement to prevent and punish the violations of rights granted under Union law.⁴² The possibility for private persons to pursue claims based on violations of such rights only supplements public enforcement.⁴³ The Communication makes it abundantly clear that:

... collective damages actions should aim to secure compensation of damage that is found to be caused by an infringement. The punishment and deterrence functions should be exercised by public enforcement. There is no need for EU initiatives on collective redress to go beyond the goal of compensation.⁴⁴

often termed the “private attorney general” role of class actions, see, e.g., William RUBENSTEIN, “On What a ‘Private Attorney General’ Is – and Why It Matters”, (2004) 57 *Vand. L. Rev.* 2129.

36. See, e.g., Willem H. VAN BOOM and Marco LOOS, *Collective Enforcement of Consumer Law. Securing Compliance in Europe through Private Group Action and Public Authority Intervention*, Groningen Europa Law Publishing, 2007.

37. Wouter P.J. WILS, “Should Private Antitrust Enforcement Be Encouraged in Europe?”, (2003) 26 *World Competition* 473 (the author is a member of the Legal Service of the European Commission).

38. Wouter P.J. WILS, “The Relationship between Public Antitrust Enforcement and Private Actions for Damages”, (2009) 32 *World Competition* 3, at 10-11.

39. *Ibid.* at 11-12.

40. *Ibid.* at 15.

41. Recital (6) Recommendation, *supra*, note 14.

42. *Ibid.*

43. *Ibid.*

44. Communication, *supra*, note 14, at 10.

The Commission adheres to the principle that the compensation awarded to natural or legal persons harmed in a mass harm situation should not exceed the compensation that would have been awarded if the claim had been pursued by means of individual action. Punitive damages, which might lead to overcompensation of the claimant for the purpose of deterrence, should therefore be banned.⁴⁵

On the other hand, the Commission recognizes that in fields where public enforcement plays a key role (*e.g.*, competition, environment, data protection or financial services) private enforcement can play an important compensatory function.⁴⁶ According to the Commission, private collective damages actions for victim compensation should follow on from infringement decisions adopted by public authorities and rely on them.⁴⁷ These are called “collective follow-on actions”. The *ratio legis* is that the public interest and the need to avoid abuse can be presumed to have been taken into account by the public authority as regards to the finding of a violation of Union Law.⁴⁸ The follow-on action only deals with the questions of damages and causation. If the proceedings of the public authority are launched after the commencement in court of a collective action, the court should avoid issuing a decision that would conflict with one contemplated by the public authority. To that end, the court may stay the collective redress action until the proceedings of the public authority have been concluded.⁴⁹ However, in the case of follow-on actions, the persons who claim to have been harmed should not be prevented from seeking compensation due to the expiry of limitation or prescription periods before the definitive conclusion of the proceedings by the public authority.⁵⁰

Collective follow-on competition actions are possible in France, among other countries.⁵¹ There, besides stand-alone consumer col-

45. Art. 31 Recommendation, *supra*, note 14. See, in general on punitive damages in Europe, Cedric VANLEENHOVE, *Punitive Damages in Private International Law. Lessons for the European Union*, Cambridge, Intersentia, 2016.

46. Communication, *supra*, note 14, at 12-13.

47. Art. 33 Recommendation, *supra*, note 14.

48. Recital (22) Recommendation, *supra*, note 14.

49. Art. 33 Recommendation, *supra*, note 14.

50. Art. 34 Recommendation, *supra*, note 14.

51. Art. L. 623-24-L. 623-26 *French Consumer Code*, online: <<https://www.legifrance.gouv.fr/>>. See also BIARD, “Class Action Developments in France”, *supra*, note 7 and Duncan FAIRGRIEVE and Alexandre BIARD, “National Report France”, British Institute of International and Comparative Law, Focus on Collective

lective actions, the Consumer Code allows competition collective actions, but only after a final decision from the French competition agency, the European Commission or a court.⁵² This decision is an irrebuttable presumption from which the court cannot depart.⁵³ In such a follow-on action, the court will exclusively focus on causation and damages. Such actions are only possible during a five-year period after the final decision of the competition agency.⁵⁴

IV- DATA GAP

Almost no European jurisdiction has reliable (public or private) sources on the number of class actions in the jurisdiction. This is despite the fact that the Recommendation requires the Member States:

... to establish a national registry of collective redress actions, which should be available free of charge to any interested person through electronic means and otherwise. Websites publishing the registries should provide access to comprehensive and objective information on the available methods of obtaining compensation, including out of court methods.⁵⁵

Moreover, the same Recommendation states that once the Member States have implemented collective redress mechanisms, they should collect reliable annual statistics on the number of out-of-court and judicial collective redress procedures and information about the parties, the subject matter, and the outcome of the case.⁵⁶ To date, this seems to be an idle statement.

The information collected in the table below is based on anecdotal information provided by scholars in the relevant jurisdictions. Exceptionally, there are public (*e.g.*, in Poland) or private (*e.g.*, in Italy) sources.

Redress, online: <<http://www.collectiveredress.org/collective-redress/reports/france/sectoralcollectiveredressmechanisms>>.

52. Art. L. 623-24 French Consumer Code, *supra*, note 51.

53. FERRAND, "Collective Litigation in France", *supra*, note 6, at 144.

54. Art. L. 623-25 French Consumer Code, *supra*, note 51.

55. Arts. 35-36 Recommendation, *supra*, note 14.

56. Art. 39 Recommendation, *supra*, note 14.

Jurisdiction	Year of introduction	Act	Number of cases
Portugal	1995	Law 83/95 of August 31, 1995 on the right to take part in administrative proceedings and the right of popular action	179 filed (2007 – 2015) 29 pending in 2015
Lithuania	2002	2015 Amendments to the Code of Civil Procedure (introduction of group legal actions)	– 3 dismissed – 2 pending (January 2015 – August 2017)
Sweden	2003	2003 Group Proceedings Act	17 (2003 – 2014)
the Netherlands	2005	2005 Dutch Collective Settlement Act	9 (2005 – November 2017)
Finland	2007	2007 Class Action Act	0
Denmark	2008	Chapter 23a (§254a-254k) Administration of Justice Act	– 66 decided cases before the district courts – 3 decided cases before the courts of appeal (2008 – 2016)
Italy	2010	2009 Law No. 99 – Article 140bis Italian Consumer Code	58 (January 2010 – November 2016)
Poland	2010	Class Actions Act of 17 December 2009	210 (2010 – 2016)
Belgium	2014	2014 Act Introducing a Consumer Collective Redress Action in the Code of Economic Law	– 1 settled – 1 withdrawn – 3 pending (September 2014 – November 2017)
France	2014	Articles L.623-1 <i>et seq.</i> and R.623-1 <i>et seq.</i> of the French Consumer Code (Code de la Consommation) and the similar procedures in health, discrimination, environment, privacy and data protection law	– 2 settled – 9 pending – 1 pending in appeal (October 2014 – November 2017)
England & Wales	2015	2015 Consumer Rights Act (Competition Class Action)	– 1 dismissed – 1 withdrawn (2015 – August 2017)

Based on this overview, we can conclude that it is difficult to assess whether European class actions offer (real and sufficient) compensation. There is insufficient and unreliable data about the number of class action procedures. Moreover, the data that is available usually does not reveal, in case the defendant had to compensate class members, how much compensation was paid, to whom compensation was paid, if all class members claimed compensation, whether class members received full compensation or thought that they were fully compensated, etc.

V- OUT-OF-COURT COMPENSATION

While Europe has opened the door for class actions, it continues to primarily encourage the out-of-court resolution of mass harms. The preferred policy is that the compensation goal should be realized out-of-court with courts facilitating, supervising and approving collective settlements.⁵⁷

The Recommendation states that Member States should ensure that the parties to a dispute in a mass harm situation are encouraged to settle the dispute about compensation consensually in or out of court, at the pre-trial stage or during or after a civil trial,⁵⁸ and either with the intervention of a third party or without such intervention.⁵⁹ In the Commission's view, collective ADR should depend upon the parties involved in the case.⁶⁰ Moreover, consensual collective resolution of disputes should not be a mandatory first step before going to court, because this could trigger unnecessary costs and delays and could, in certain situations, even undermine the fundamental right of access to justice. Collective ADR should therefore remain voluntary, although judges should not be prevented from inviting the parties to seek a consensual collective resolution of their dispute.⁶¹ Any limitation period applicable to the claims should be suspended during the period from the moment the parties agree to attempt to resolve the dispute by means of an ADR procedure until at least the moment at which one or both parties expressly withdraw from that alternative dispute resolution procedure.⁶² The legality of the binding outcome of a collective settlement should be verified by

57. Recital (16) Recommendation, *supra*, note 14.

58. Art. 25 Recommendation, *supra*, note 14.

59. Communication, *supra*, note 14, at 14.

60. Art. 26 Recommendation, *supra*, note 14.

61. Communication, *supra*, note 14, at 14.

62. Art. 27 Recommendation, *supra*, note 14.

the courts taking into consideration the appropriate protection of the interests and rights of all parties involved.⁶³

In some European jurisdictions the class action regime is strongly focused on the out-of-court resolution of mass harms (e.g., the *Dutch Collective Settlements Act*⁶⁴ and the Belgian consumer class action regime).⁶⁵ In other instances, the existing class action mechanism was amended to add an out-of-court resolution track (e.g., the German KapMuG).⁶⁶ In some of these systems, the court plays a role in proactively promoting collective settlements.⁶⁷

The Belgian consumer class action, which was introduced in 2014,⁶⁸ is a genuine representative procedure, albeit with an imposed conciliation phase.⁶⁹ The procedure stimulates and facilitates an out-of-court collective settlement. First, it is possible to reach a collective settlement before the class action is filed, in which case the parties can ask the court to approve the collective settlement.⁷⁰ Second, there is a mandatory negotiation phase after the class action has been certified.⁷¹ When the court certifies the class action, it will set a time limit during which the parties have to negotiate a collective settlement.⁷² This cannot be shorter than three months and not longer than six months.⁷³ During this mandatory negotiation phase, the parties can use an accredited mediator.⁷⁴ Third, and finally, in case the negotiation phase is unsuccessful, it is still possible to reach a collective settlement during the procedure on the merits of the case. In all scenarios, the court approves the collective settlement. There is no *pro forma* approval. The court can refuse approval (a) if the agreed redress is evidently unreasonable, (b) if the amount of time that the

63. Art. 28 Recommendation, *supra*, note 14.

64. Stefaan VOET, “European Collective Redress: A *Status Quaestionis*”, (2014) 4 *IJPL* 97, at 121-123.

65. VOET, “Consumer Collective Redress in Belgium”, *supra*, note 6, at 133-136.

66. Astrid STADLER, “Developments in Collective Redress: What’s new in the ‘new German KapMuG?’”, (2013) 24 *EBLR* 733 [hereinafter “STADLER, ‘Developments in Collective Redress’”].

67. The *Dutch Collective Settlements Act* will be discussed below, in chapter VI.

68. Arts. XVII.35 – XVII.69 *Belgian Code of Economic Law*, online: <<http://www.ejustice.just.fgov.be/loi/loi.htm>>.

69. VOET, “Consumer Collective Redress in Belgium”, note 6, at 133-136.

70. Art. XVII.42, §2 *Belgian Code of Economic Law*, *supra*, note 68.

71. Art. XVII.45 *Belgian Code of Economic Law*, *supra*, note 68.

72. Art. XVII.43, §2, 8° *Belgian Code of Economic Law*, *supra*, note 68.

73. *Ibid.*

74. Art. XVII.45, §2 *Belgian Code of Economic Law*, *supra*, note 68. This mandatory negotiation phase clearly runs counter to the EC Recommendation.

class members who will not opt out will have after the settlement approval to come forward in order to obtain individual compensation is evidently unreasonable, (c) if the additional forms of notice are evidently unreasonable, or (d) if the amount of costs that the defendant will pay to the class representative exceeds the real costs the latter has incurred.⁷⁵ If the settlement is approved, the court will appoint a collective claims settler,⁷⁶ who will distribute the funds.

To date (fall of 2017), five cases have been brought by Test-Achats,⁷⁷ Belgium's biggest consumer association. Below, in chapter VII, I will come back to the Thomas Cook Airlines Belgium case and the Belgian Rail case.

Defendant	Nature	Number of class members	Opt-in or opt-out	Status
Thomas Cook Airlines Belgium	Delayed airplane	183	Test-Achats asked for opt-out; the court imposed opt-in	Finished (certification decision on April 4, 2016 and final judgment (settlement) in July 2017)
Proximus (telecom company)	Misleading information about digital decoders (for watching digital TV)	+ 30.000 potential class members	Test-Achats asked for opt-out; the court imposed opt-out	Pending (certification decision on April 4, 2017; Proximus appealed)
Volkswagen & d'Ieteren (Belgian Volkswagen distributor)	Emissions-cheating software	+ 11.000 people registered, but + 400.000 cars are involved	Test-Achats asks for opt-out	Pending (certification hearing on October 30-31, 2017)
Various websites reselling concert tickets	Illegal reselling of concert tickets	2.650 people registered	Test-Achats asks for opt-out	Pending (introductory hearing on September 4, 2017)
Belgian Rail	Compensation for delayed trains (during strikes)	44.000 people registered		Case was withdrawn (most passengers were compensated and there was an agreement between Test-Achats and Belgian Rail allowing Test-Achats to help improve the existing compensation system)

75. Art. XVII.49, §2 *Belgian Code of Economic Law*, *supra*, note 68.

76. The claims settler is appointed by the court from a list drawn up by the general assembly of the Brussels Court of First Instance, the Brussels Commercial Court or the Brussels Court of Appeals. All these courts have exclusive jurisdiction in hearing class action cases. Only attorneys, ministerial public servants or judicial mandataries who are competent in settling claims can be appointed. See Art. XVII.57 *Belgian Code of Economic Law*, *supra*, note 68.

77. Online: <<https://www.test-achats.be/>>.

In 2005, Germany established the Act on Model Case Proceedings in the Capital Markets (KapMuG).⁷⁸ This is a model, or test case procedure; its principal aims are to: (a) detect common issues of law in a multitude of individual cases; (b) have them decided by a higher court and (c) facilitate resolution of the previously suspended individual cases taking into account the outcome of the test case.⁷⁹ The KapMuG was an experimental Act for five years.⁸⁰ In 2012, the KapMuG was not only extended to 2020, the German legislature also modified the procedure.⁸¹ The KapMuG now allows to reach an opt-out settlement between the model claimant and the defendant to be approved by the court.⁸² The involved parties can opt out if they do not wish to be bound by the settlement.⁸³ The settlement is binding unless more than 30% chose to opt out.⁸⁴

VI- DUTCH COLLECTIVE SETTLEMENTS ACT

As mentioned above, the Netherlands has settlement-only class actions.⁸⁵ The entire procedure is construed around, and stands or falls with, an out-of-court collective settlement. An association or (special purpose) foundation, representing the victims of a mass harm, attempts to reach an all-embracing settlement with the wrongdoer. This settlement is then approved by the Amsterdam Court of Appeal, which has exclusive jurisdiction.⁸⁶ If class members who disapprove

78. *Law on Model Proceedings in Capital Market Disputes* (KapMuG), online: <<http://www.buzer.de/gesetz/7414/index.htm>>.

79. See, e.g., Michael BAKOWITZ, “The German Experience with Group Actions – The Verbandsklage and the Capital Markets Model Case Act (KapMuG)”, in Viktória HARSÁGI and Remco VAN RHEE (eds.), *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?*, Cambridge, Intersentia, 2014, p. 153; Hans-W. MICKLITZ and Astrid STADLER, “The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure”, (2006) 17 *EBLR* 1473 and Luidger RÖCKRATH, “Germany”, in Paul G. KARLSGODT (ed.), *World Class Actions. A Guide to Group and Representative Actions around the Globe*, New York, OUP, 2012, p. 241.

80. Art. 9 KapMuG, *supra*, note 78.

81. *Capital Markets Model Case Act Amendment*, online: <<http://dipbt.bundestag.de/extrakt/ba/WP17/412/41261.html>>.

82. STADLER, “Developments in Collective Redress”, *supra*, note 66.

83. *Ibid.*

84. Eva LEIN, “National Report Germany”, British Institute of International and Comparative Law, Focus on Collective Redress, online: <<http://www.collectiveredress.org/collective-redress/reports/germany/financialmarketlaw>>.

85. Arts. 7:900-:910 *Dutch Civil Code* (online, in English: <<http://www.dutchcivillaw.com/civilcodebook077.htm>> and arts. 1013-1018 *Dutch Judicial Code*).

86. Art. 1013.3 *Dutch Judicial Code*.

of the settlement do not opt out, they are bound by the court's decision approving the settlement. In case no settlement is reached, the procedure does not apply and there is no collective redress.⁸⁷

In 2013, the Dutch legislature introduced two settlement-facilitating mechanisms. The 2013 *Dutch Collective Settlements Act Amendment* introduced a pre-trial hearing.⁸⁸ The association or foundation and the alleged wrongdoer(s), can, jointly or at the request of either party, make an appeal to the judge to convene a pre-trial hearing to explore whether a settlement is possible.⁸⁹ Parties must appear; if not, they can be ordered to pay the costs of the appearing party.⁹⁰ During the hearing, the parties and the judge can discuss a possible settlement track.⁹¹ Another Act allows courts⁹² to submit a direct request to the Dutch Supreme Court for an interlocutory (“prejudicial”) decision on questions of law, if the answer to the question is of central importance to the case.⁹³ The Act explicitly refers to the situation of a multitude of claims based on the same or similar issues of fact or law.⁹⁴ Although the Act has a broader application than class settlements, it is expected to enhance reaching such settlements as it will enable parties to obtain swift clarification on questions of law.

In 2016, Tillema published the following overview of seven collective settlements that were approved by the Amsterdam Court of Appeal.⁹⁵

87. A consequence that has drawn criticism outside the Netherlands (e.g., Antonio GIDI, “The Recognition of U.S. Class Action Judgments Abroad: The Case of Latin America”, (2012) 37 *Brook. J. Int'l L.* 893, at 926).

88. *Collective Settlements Act Amendment* [Wet tot wijziging van de Wet collectieve afwikkeling massaschade], June 26, 2013, Staatsblad 2013, 255.

89. Art. 1018a *Dutch Judicial Code*.

90. Art. 1018a.3 *Dutch Judicial Code*.

91. Article 1018a.4 *Dutch Judicial Code*.

92. With the exception of the Amsterdam Court of Appeal when it rules on a request to approve a collective settlement.

93. *Act on Prejudicial Questions to Supreme Court* [Wet prejudiciële vragen aan de Hoge Raad], February 9, 2012, Staatsblad 2012, 65. The Act introduced the articles 392-394 in the *Dutch Judicial Code*.

94. Art. 392.1 *Dutch Judicial Code*.

95. Ilja TILLEMA, “Tien jaar WCAM: een overzicht”, (2016) 3 & 4 *MvO* 90, at 91-92.

Case	Year	Nature	Number of class members	Funding	Settlement	Fee for association
Des	2006 2014	Product liability	N/A (17.000 registered)	Subsidies & donations	€ 38 mil	N/A
Dexia	2007	Financial product	300.000 (25.000 opt-outs)	€ 45 Contribution per class member	€ 1 bil	N/A paid by Dexia
Vie d'Or	2009	Financial product	11.000	Funding by regulator	€ 45 mil	€ 8,5 mil (max) paid by regulator
Shell	2009	Securities	500.000	Funding by Shell	\$ 448 mil	\$ 12 mil (association) \$ 47 mil (U.S. lawyers)
Vedior	2009	Securities	2.000	Contributions	€ 4 mil	€ 212.000 (maximum)
Converium	2012	Securities	12.000	Funding by defendants	\$ 58 mil	€ 1,6 mil \$ 11,6 mil (U.S. lawyers)
DSB Bank	2014	Financial product	345.000 (300 opt-outs)	Funding by DSB Bank	€ 500 mil (maximum)	N/A paid by DSB Bank

The *Dutch Collective Settlements Act* has also had a significant impact on global securities class actions, and hence on the compensation of foreign (non-Dutch) shareholders.⁹⁶ In *Converium*, the Amsterdam Court of Appeal ruled it had international jurisdiction to approve a settlement of all non-U.S. claims, even though the class mainly consisted of non-Dutch class members.⁹⁷ After the U.S. Supreme Court's decision in *Morrison*,⁹⁸ which precluded class actions brought in the U.S. on behalf of foreign class members who did not purchase shares on the U.S. stock exchange, Amsterdam has

96. See, e.g., Xandra E. KRAMER, "Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries", (2014) 27 *Pac. McGeorge Global Bus. & Dev. L.J.* 235 and Bart KRANS, "The Dutch Class Action (Financial Settlement) Act in an International Context: The Shell Case and the Converium Case", (2012) 31 *CJQ* 141.

97. Amsterdam Court of Appeal, November 12, 2010, ECLI:NL:GHAMS:2010:BO3908 (*Converium I*) and January 17, 2012, ECLI:NL:GHAMS:2012:BV1026 (*Converium II*). These decisions are available online: <<http://zoeken.rechtspraak.nl>>.

98. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (U.S. 2010).

presented itself as a settlement hub for claims involving non-U.S. class members in mass securities cases.⁹⁹

Although this goes beyond the scope of the present chapter, the transnational context to mass harm cases should be emphasized. It is a given fact that many mass harm situations are of a cross-border nature (*e.g.*, PIP breast implants case, the Volkswagen case, the Fortis case, the Apple case, etc.). The Recommendation stipulates that the Member States should ensure that where a dispute concerns natural or legal persons from several Member States, a single collective action in a single forum is not prevented by national rules on admissibility or standing of the foreign groups of claimants or the representative entities originating from other national legal systems.¹⁰⁰ Any representative entity that has been officially designated in advance by a Member State to have standing to bring representative actions should be permitted to seize the court in the Member State having jurisdiction to consider the mass harm situation.¹⁰¹ The Commission believes that in transnational or cross-border cases, the current rules on judicial cooperation in civil matters are satisfactory to initiate a single collective action in a single forum.¹⁰² National rules on admissibility or standing may not prevent this. According to the Commission, the European rules on jurisdiction, recognition and enforcement of judgments in civil and commercial matters¹⁰³ and the rules on the applicable law (*i.e.*, the Rome I and II Regulations)¹⁰⁴ are suitable and applicable in cross-border mass cases, and there is no need for specific rules.¹⁰⁵

99. Thomas ARONS and Willem H. VAN BOOM, "Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands", (2010) 21 *EBLR* 857.

100. Art. 17 Recommendation, *supra*, note 14.

101. Art. 18 Recommendation, *supra*, note 14.

102. Communication, *supra*, note 14, at 14.

103. Regulation 1215/2012/EU of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (2012) O.J. (L 351) 1 (EU), online: <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215>>.

104. Regulation 593/2008/EC of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (2008) O.J. (L 177) 6 (EC), online: <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008R0593>> and Regulation 864/2007/EC of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (2007) O.J. (L 199) (EC) 40, online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007R0864>>.

105. Communication, *supra*, note 14, at 14.

The last statement is simply not true. The coordination of cross-border collective relief has not been sufficiently addressed by the Recommendation, and the Brussels Recast Regulation is not satisfactorily flexible for the effective enforcement of mass claims:

... cross-border uniformity is a remote prospect; indeed the Recommendation's limited provisions on cross-border standing raise the prospect of discrimination between representative entities from different Member States, forum shopping, and complex legal arguments over jurisdiction and applicable law, all of which will constitute additional barriers to justice for consumers.¹⁰⁶

Besides the procedural efficiency rationale, such coordination could fend off forum shopping, especially in the light of the Dutch case law claiming international jurisdiction.

VII- CLASS ACTIONS AS A TRIGGER FOR COMPENSATION

In most European jurisdictions, some noticeable cases were a trigger for legislative action.¹⁰⁷ For example, the DES case (a pharmaceutical product liability case) in the Netherlands led to the *Dutch Collective Settlements Act*.¹⁰⁸ The German KapMuG was created as a result of the Deutsche Telekom AG case (a securities case).¹⁰⁹ During the past few decades, Belgium has had some high-profile mass harm cases. Some were single-incident mass torts involving personal injuries and death. Others involved financial harms to shareholders.

106. Rebecca MONEY-KYRLE, "Legal Standing in Collective Redress Actions for Breach of EU Rights: Facilitating or Frustrating Common Standards and Access to Justice?", in Burkhard HESS, Maria BERGSTRÖM and Eva STORSKRUBB (eds.), *EU Civil Justice. Current Issues and Future Outlook*, Oxford, Hart Publishing, Oxford, 2016, p. 251. See also Mattheus W.F. BOSTERS, *Collective redress and private international law in the European Union. Issues regarding jurisdiction and the recognition and enforcement of judgements in cross-border mass disputes relating to financial services*, Wolf Legal Publishers, 2015 and Duncan FAIRGRIEVE and Eva LEIN, *Extraterritoriality and Collective Redress*, Oxford, Oxford University Press, 2012.

107. VOET, "Cultural Dimensions of Group Litigation", *supra*, note 3, at 448.

108. Ianika TZANKOVA and Daan LUNSINGH SCHEURLEER, "The Netherlands", (2009) 622 *Annals Am. Acad. Pol. & Soc. Sci.* 149, at 155 (describing the legislative changes needed to effectuate the DES settlement).

109. Michael STÜRNER, "Model Case Proceedings in the Capital Markets: Tentative Steps Towards Group Litigation in Germany", (2007) 26 *CJQ* 250, at 252.

In 2001, Lernout & Hauspie Speech Products, (L&H), a speech recognition technology company based in Ypres, went bankrupt, mainly because of overstated earnings, fictitious transactions, and improper accounting methodologies.¹¹⁰ During the criminal trial in 2007, it took several days for the more than 15,000 victims to bring their civil claims.¹¹¹ After three years, in 2010, the court reached a criminal verdict, and the major administrators of L&H were convicted.¹¹² 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 shareholders were the Belgian and Dutch governments, had to be sold to BNP Paribas to avoid bankruptcy.¹¹³ This takeover led to several legal proceedings initiated by aggrieved minority shareholders. In May 2016, a collective settlement was reached and the *Dutch Collective Settlements Act* was used to have it approved.¹¹⁴ In June 2017, the Amsterdam Court of Appeal denied approval and required the parties to amend the Fortis settlement by mid-October 2017.¹¹⁵

Similar mass harm cases in other European Member States have likewise triggered legislative action, in the sense that class action bills, or other procedural tools to deal with these cases more efficiently, were adopted.¹¹⁶ The subsequent question that arises is whether the mere existence of these mechanisms, in turn, causes an increase in plaintiffs' recoveries via out-of-court collective settlements. Although to date strong empirical evidence is lacking, there might be some indications supporting this view, at least when looking at the Belgian context. The Thomas Cook Airlines Belgium case

110. For a case study see Stefaan VOET, "The L&H case: Belgium's internet bubble story", in Deborah HENSLER, Christopher HODGES and Ianika TZANKOVA (eds.), *Class Actions in Context. How Culture, Economics and Politics Shape Collective Litigation*, Cheltenham, Edward Elgar, 2016, p. 299.

111. *Ibid.*, at p. 306.

112. Ghent Court of Appeal, September 20, 2010, online: <<http://www.juridat.be/beroep/gent/index.htm>>.

113. "BNP Paribas set to take control of Fortis", *Financial Times*, March 7, 2009, online: <<https://www.ft.com/content/2f9bde3a-0a50-11de-95ed-0000779fd2ac>>.

114. See for the petition, online: <<https://www.rechtspraak.nl/Uitspraken-en-nieuws/Bekende-rechtszaken/WCAM-Verzoekschrift-Ageas-SA-NV>>.

115. Amsterdam Court of Appeal, June 16, 2017, ECLI:NL:GHAMS:2017:2257 (*Fortis – Ageas*), online: <www.derechtspraak.nl>. See Ianika TZANKOVA, "Dutch court temporarily derails WCAM Settlement", June 17, 2017, online: <<https://www.linkedin.com/pulse/dutch-court-temporarily-derails-wcam-settlement-ianika-tzankova>>.

116. VOET, "Cultural Dimensions of Group Litigation", *supra*, note 3, at 448.

ended with a settlement where each class member received € 400 in compensation. Starting just before and ending just after the case was brought (more specifically after the certification decision),¹¹⁷ the defendant voluntarily completed the process of compensating all the passengers.¹¹⁸ Consequently, the mandatory negotiation phase did not deal with how to compensate the passengers. It only dealt with the costs of the procedure, including the costs and fees of the group representative. A similar observation can be made about the Belgian Rail case. At one point, the case was withdrawn because Belgian Rail offered Test-Achats the opportunity to work with them to improve the existing compensation rules about delayed trains. Moreover, and similar to the Thomas Cook Airlines Belgium case, Belgian Rail had compensated most of the 44.000 passengers.¹¹⁹

VIII- CALCULATION AND DISTRIBUTION OF DAMAGES

The compensation goal of European class actions is mainly achieved through traditional and old-style methods of calculating and distributing damages used in one-on-one settings. Contrary to most common law jurisdictions, most European civil law jurisdictions lack a tailor-made and apt appropriate normative framework to deal with these issues in a collective setting.

In Belgium, any collective settlement and decision on the merits of the case will have to determine the extent and forms of collective redress.¹²⁰ This redress can be in kind (*e.g.*, replacement of a defective product) or by monetary payment.¹²¹ Common Belgian liability law applies,¹²² in the sense that the guiding principle remains that full and individual compensation of the damages suffered be awarded. It is by no means the intention of the legislature to introduce punitive damages that could lead to overcompensation.¹²³

117. Brussels Court of First Instance, April 4, 2016, 2015/4019/A, *Moniteur Belge* June 28, 2016, 39.309, online: <<http://www.ejustice.just.fgov.be/cgi/welcome.pl>>.

118. See <<https://www.test-aankoop.be/familie-prive/reizen/nieuws/eerste-groepsverdering-in-belgie-tegen-thomas-cook>>.

119. See online: <<https://www.test-aankoop.be/action/pers%20informatie/persberichten/2017/nmbs>>.

120. Arts. XVII.45, §3, 6° and XVII.54, §1, 7° *Belgian Code of Economic Law*, *supra*, note 68.

121. *Ibid.*

122. Which was underlined in the *Proximus* case (Brussels Court of First Instance, April 4, 2017, 2016/4461/A).

123. See also Art. 31 Recommendation, *supra*, note 14.

However, under Belgian law, the amount to be paid by the defendant to the class can be determined on an individual basis, meaning that the defendant(s) will have to pay an individualized amount of money to every consumer coming forward, or, when this is impossible or impracticable, on a global basis.¹²⁴ Every consumer wanting to be compensated must come forward, even in an opt-out system. In case of a low take-up rate, the court will determine the allocation of the residual funds.¹²⁵ The court has a wide range of options: the funds can flow back to the defendant or the defendant can be ordered to set up a *cy-près* scheme (e.g., an invoice discount or the distribution of coupons or a free product). Future cases will have to show whether courts are willing to use these mechanisms.

IX- ALTERNATIVE FORMS OF COMPENSATION

Finally, alternative forms of compensation exist.¹²⁶ On the one hand, there is CDR: consumer dispute resolution.¹²⁷ CDR uses the traditional ADR techniques but within the context of a dispute resolution structure that is entirely separate from the courts.¹²⁸ The CDR architecture encompasses a number of possible structures: arbitration, complaint functions within public regulatory authorities, private sector ombudsmen, statutory ombudsmen, etc.¹²⁹ CDR gained momentum in 2013 when the European Parliament and the Council adopted a new Consumer ADR Directive.¹³⁰ The Directive promotes CDR by encouraging the use of approved CDR-entities that ensure the following minimum quality standards: the entities

124. Arts. XVII.45, §3, 6° and XVII.54, §1, 7° *Belgian Code of Economic Law*, *supra*, note 68.

125. Art. XVII.61, §2 *Belgian Code of Economic Law*, *supra*, note 68.

126. See e.g., Christopher HODGES, “Mass Collective Redress: ADR and Regulatory Techniques”, (2015) 5 2 829 [hereinafter “HODGES, ‘Mass Collective Redress’”].

127. See, e.g., Naomi CREUTZFELDT, “The origins and evolution of consumer dispute resolution systems in Europe”, in Christopher HODGES and Astrid STADLER (eds.), *Resolving Mass Disputes. ADR and Settlement of Mass Claims*, Cheltenham, Edward Elgar, 2013, p. 223.

128. Christopher HODGES and Stefaan VOET, “Consumer Dispute Resolution Mechanisms: Effective Enforcement and Common Principles”, in Burkhard HESS and Xandra E. KRAMER (eds.), *From Common Rules to Best Practices in European Civil Procedure*, Baden-Baden, Nomos, 2017 (forthcoming) [hereinafter “HODGES and VOET, ‘Consumer Dispute Resolution Mechanisms’”].

129. *Ibid.*

130. Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (2013) O.J. (L 165) 63, online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0011>>.

should be impartial and provide transparent information, offer their services at no or nominal cost, and hear and determine complaints within 90 days of referral.¹³¹ The Directive applies to domestic and cross-border disputes concerning complaints by a consumer resident in the EU against a trader established in the EU.¹³² In the meanwhile, almost all Member States have implemented the Consumer ADR Directive.¹³³ In some States, CDR thrives well. In Belgium, the Directive was implemented in 2014.¹³⁴ A residual ADR-entity, the Consumer Mediation Service, was created dealing consumer disputes in the absence of a sectoral ADR-entity.¹³⁵ This table shows the results of 2016.¹³⁶

Total number of treated cases	7.105
Total number of cases for which the Consumer Mediation Service was competent	4.342
Total number of cases for which the Consumer Mediation Service was not competent	2.763
Total number of cases that were referred to another ADR entity	2.374
Total number of cases that could not be transferred to another competent entity (<i>e.g.</i> , for non C2C cases)	389

CDR has two added values. First, although not particularly designed for this, many CDR regimes have the potential of processing mass harms. They are capable of identifying and processing multiple (similar or identical) claims and have developed aggregation techniques – similar to how courts aggregate bulks of claims – that deliver consistency of outcomes. Second, if well designed, CDR can go beyond mere dispute resolution. Its additional functions are consumer advice, aggregation/publication of data, feedback to traders/sectors and improving market behaviour.¹³⁷

131. Arts. 6 (impartiality), 13-15 (information), 8(c) (free of charge), 8(e) (90 days) Directive on consumer ADR, *ibid.*

132. Art. 2.1 Directive on consumer ADR, *ibid.*

133. For an overview, see Pablo CORTÉS (ed.), *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford, OUP, 2016.

134. Arts. XVI.1-XVI.28 *Belgian Code of Economic Law*, online: <<http://www.ejustice.just.fgov.be/loi/loi.htm>> (as introduced by the Act of 4 April 2014).

135. Art. XVI.6, 3° *Belgian Code of Economic Law*, *ibid.* The (English) website of the Consumer Mediation Service is online: <<http://www.consumerombudsman.be/en>>.

136. The 2016 data comes from the 2016 annual report, online: <<http://www.consumerombudsman.be/en>>.

137. Christopher HODGES, “Consumer Redress. Implementing the Vision”, in Pablo CORTÉS (ed.), *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford, OUP, 2016, pp. 353-354.

On the other hand, regulatory redress, ordered or brought about by the intervention of public enforcers, is energy in Europe.¹³⁸ Its strength is the combined weight of public/regulatory enforcement tools and civil/compensatory tools.¹³⁹ The advantage, and coincidentally the incentive, is that all aspects of a (mass) harm situation are resolved in one process, thereby avoiding sequential public (criminal and/or regulatory) and private procedures and costs. It goes without saying that in order for regulatory redress to work, there must be sufficient resources and more importantly, safeguards to protect the independence of the public enforcement agencies (such as publication of enforcement policies, fair procedural rules, a predictable and transparent process, ministerial and stakeholder oversight, the possibility for courts to impose more serious sanctions and a mechanism for appeals, etc.).¹⁴⁰

A leading example is the UK's six Penalty Principles, developed by Professor Macrory in 2006, which are designed to underlie a modern regulatory sanctioning system.¹⁴¹ The two most important principles are that the purpose of a regulatory sanction is not to punish per se but to get the business back into compliance, and that a sanctioning system should ensure that no financial profit is made from non-compliance.¹⁴² All major UK regulatory authorities have been required to issue enforcement policies that conform to and take account of the Macrory Principles.¹⁴³ For example, the

138. HODGES and VOET, "Consumer Dispute Resolution Mechanisms", *supra*, note 128.

139. Egelyn BRAUN, *Collective alternative dispute resolution (ADR) for the private enforcement of EU competition law*, 2016, online: <<http://cadmus.eui.eu/handle/1814/44324>>.

140. HODGES, "Mass Collective Redress", *supra*, note 126, at 870-871.

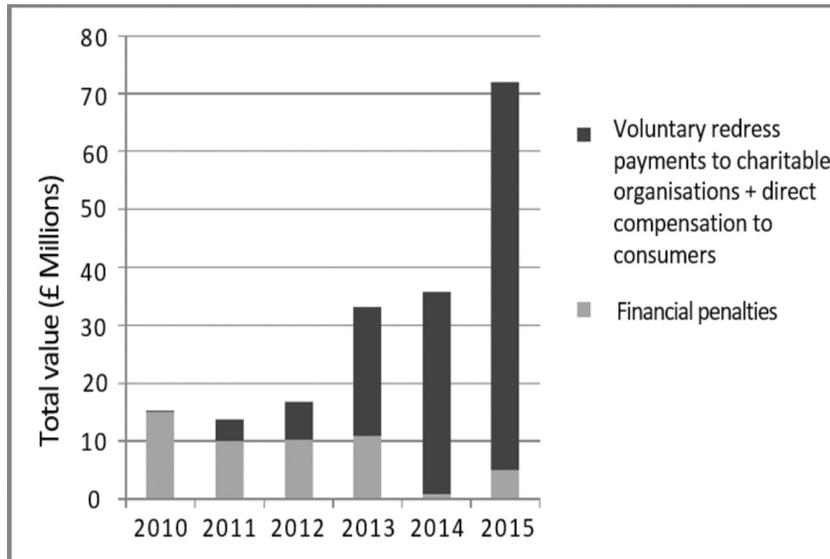
141. Richard B. MACRORY, *Regulatory Justice: Making Sanctions Effective, Final Report*, November 2006, online: <<http://webarchive.nationalarchives.gov.uk/20121212135622/http://www.bis.gov.uk/files/file44593.pdf>>.

142. *Ibid.*: "Six Penalties Principles. A sanction should: (1) Aim to change the behaviour of the offender; (2) Aim to eliminate any financial gain or benefit from non-compliance; (3) Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction; (4) Be proportionate to the nature of the offence and the harm caused; (5) Aim to restore the harm caused by regulatory non-compliance, where appropriate; and (6) Aim to deter future non-compliance".

143. *Regulatory Enforcement and Sanctions Act 2008*, online: <<http://www.legislation.gov.uk/ukpga/2008/13/contents>>; *Legislative and Regulatory Reform Act 2006*, online: <http://www.legislation.gov.uk/ukpga/2006/51/pdfs/ukpga_20060051_en.pdf> and Regulators' Code, online: <<https://www.gov.uk/government/publications/regulators-code>>.

Regulatory Enforcement and Sanctions Act 2008 gave regulators the possibility to apply for extended powers to impose civil sanctions, which can include fixed or variable monetary penalties, compliance notices (requiring the offender to come back into compliance), restoration notices (requiring the offender to take steps to put right any damage caused as a result of the non-compliance and address any harm), stop notices and enforcement undertakings (legally binding voluntary agreements offered by those who may have committed an offence and accepted by the regulator).¹⁴⁴ A 2015 recodification of enforcement powers has extended policy and powers on securing redress and changes in behaviour, giving enforcers extensive powers and discretion to fashion the appropriate redress to the particular situation.¹⁴⁵

Ofgem, the gas and electricity regulator,¹⁴⁶ frequently applies the regulatory redress technique.¹⁴⁷ The graph below shows that the number of fines has decreased, while the orders to redress have exponentially increased.



144. Part 3 (Civil sanctions) of the *Regulatory Enforcement and Sanctions Act 2008*, *ibid.*

145. *Consumer Rights Act 2015*, online: <www.legislation.gov.uk/ukpga/2015/15/contents/enacted>.

146. Online: <<https://www.ofgem.gov.uk/>>.

147. HODGES and VOET, “Consumer Dispute Resolution Mechanisms”, *supra*, note 128.

X- CONCLUSION

This chapter explored the compensation goal of European class actions. Because of the insufficient and undetailed data both about the number of European class actions and about their compensation features, it is not possible to answer the question whether they offer real and sufficient compensation. We can, however, discern some general trends.

First, European class actions *only* focus on the compensation goal. The deterrence goal of class action theory is a no-go zone. The general policy is that the possibility for private persons to collectively pursue claims based on rights violations can only supplement public enforcement. Collective follow-on actions, for example in competition law cases, are an illustration of this.

Second, the compensation goal is mainly achieved via out-of-court resolutions and settlements, with courts playing a facilitating, supervising and approving role. The textbook example is the *Dutch Collective Settlements Act*, which is constructed around an out-of-court collective settlement, approvable by the Amsterdam Court of Appeal. Most of the settlements brought under this procedure are securities cases. The liberal case law of the Amsterdam Court of Appeal has had a significant impact on global securities class actions, and hence, on the compensation of foreign shareholders.

Third, emerging Belgian class action law shows that the mere existence of a class action procedure could be a trigger for (out-of-court) compensation. In two of the five cases, defendants voluntarily compensated class members after the procedure was brought.

Fourth, the compensation goal is achieved through traditional methods of calculating and distributing damages. In most European jurisdictions there is no appropriate normative framework to address these issues.

Fifth, and perhaps most controversially, there are alternatives to private class actions. CDR and regulatory redress, if well designed, can offer effective and swift compensation. However, this debate should not get bogged down to which model is better or superior. The focus should be on exploring and optimizing *all* options for compensation of mass harms to form an integrated framework.