THE INTRODUCTION OF CLASS ACTIONS IN BELGIUM
Consumer collective redress for Belgian and European consumers

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I. Legal “state of play” in Belgium

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

A. Injunction procedures

i. Examples of cases

- Actions against the websites and contractual conditions of three airlines for incompatibility with Belgium's fair trading legislation
  - Cases Ryanair / Brussels Airlines / Easyjet: 2010

- Action against terms and conditions of Banks.
  - Dexia: Cour d’appel of Liege 26/01/2007

- Unfair terms in health and hospital insurance (unilateral modification terms, violation of medical confidentiality, breach of privacy,..).
  - Fortis AG, DKV and ING: Cess. Bxl 14/7/03

- Cases against illegal increase of health insurance premiums.
  - Pending case (DKV)
II. Current tools used by TA

A. Injunctions procedures

ii. Merits and limits

😊 Broad scope: violations of any legal provision in the course of a business
   ⇒ unlawful terms, practices or any other law infringements.

😊 Stop illegal practices in long term contracts
   ⇒ Insurance contracts, bank services, telecom, energy

😢 Only persuasive effect for third parties (≠ no test case)

😢 No compensation for the harm suffered
II. Current tools used by TA

B. Individual procedures financed by TA

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

ii. Examples

- Ten individual actions brought to claim damages against the CREG
II. Current tools used by TA

C. Settlements for a group of claimants

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

D. Grouped individual actions managed by TA

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

C. Settlements / D. Grouped individual actions

Barriers to compensation?

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

- **INJUNCTION:**
  - 😞 No compensation available

- **BUNDLE OF INDIVIDUAL DAMAGE ACTIONS**
  - 😞 Totally deficient: require a mandate from each victim which is **costly**, **much too slow** and often **ineffective** because only a fraction of the victims complete the formalities.
  - 😞 Not for small value claim

- **NO COLLECTIVE SETTLEMENT MECHANISM**
  - 😞 No collective judicial action
  - 😞 Settlement not binding for an entire group of victims

⇒ Both **collective settlement** and **action procedures** are required!
IV. The introduction of a group action procedure in Belgian law:

A necessity for consumers

The advantages of group action:

1. Access to justice would be improved
2. Save resources
3. Prevent contradictory decisions
4. Preventive effect
5. The market would function better
IV. The introduction of a group action procedure in Belgian law:
A necessity for consumers

**Key issues:**

- Foresee use of the opt-out system for constituting the group
  - The “opt-out” provides considerably better protection for consumers
  - Portugal: Telecom (PT) - DECO
    - Language courses - DECO
- Only opt-in system if appropriate and after decision of judge
- Wide scope
IV. The introduction of a group action procedure in Belgian law:
A necessity for consumers

Key issues:

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

- Capacity of consumer organisations to engage in group actions
VI. The way forward

- Commission consultation:
  ‘Towards a Coherent European Approach to Collective Redress’
  Launched 4 February, will run until end of April 2011

- Follow-up to the consultation - only non-legislative measures in COM work program for 2011

- In Belgium: need for collective redress to be put into the governmental agreement of the next government
V. Conclusion: Ten golden rules (BEUC)

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