THE CLASS ACTIONS LAW REVIEW

SIXTH EDITION

Editor
Camilla Sanger

THE LAWREVIEWS

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CONTENTS

PREFACE

Class actions and major group litigation can be seismic events, not only for the parties involved but also for whole industries and parts of society. That potential impact means they are one of the few types of claim that have become truly global in both importance and scope, as reflected in this sixth edition of *The Class Actions Law Review*.

There are also a whole host of factors currently coalescing to increase the likelihood and magnitude of such actions. These factors include continuing geopolitical developments, particularly in Europe and North America, with moves towards protectionism and greater regulatory oversight. At the same time, further advances in technology, as well as greater recognition and experience of its limitations, is giving rise to ever more stringent standards, offering the potential for significant liability for those who fail to adhere to these protections. Finally, ever-growing consumer markets of increasing sophistication in Asia and Africa add to the expanding pool of potential claimants.

It should, therefore, come as no surprise that claimant law firms and third-party funders around the world are becoming ever more creative and active in promoting and pursuing such claims, and local laws are being updated to facilitate such actions before the courts.

As with previous editions of this review, this updated publication aims to provide practitioners and clients with a single overview handbook to which they can turn for the key procedures, developments and factors in play in a number of the world's most important jurisdictions.

Camilla Sanger
Slaughter and May
London
February 2022

Chapter 9

LUXEMBOURG

François Kremer and Ariel Devillers[1]

I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

While class actions are on their way to being introduced in Luxembourg, there is currently no defined legal framework applicable to class actions and group litigation. However, Bill of Law 7650 submitted on 14 August 2020 to the Luxembourg parliament (the Bill), which intends to introduce collective recourse procedures in consumer law, marks a significant step towards the adoption of a legal framework for class actions in Luxembourg. Among other things, the Bill was introduced in anticipation of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, which was published shortly afterwards.

Nonetheless, as a matter of principal under current Luxembourg procedural rules, a claimant can only sue for his or her own personal benefit to recover a loss personally suffered. There are, however, a few judgments that recognise that certain legal entities may be entitled to bring claims on behalf of their members. The District Court of Luxembourg, for example, held in 2005 that a legal entity would have standing to claim damages on behalf of its members on the condition that its constitutional documents authorise the entity to defend, through court proceedings, the interest of some or all of its members.[2] In another judgment, from the Court of Appeal and dating from 2007, it was held that unions are entitled to defend the interests of their members through court actions.[3] The law also authorises some limited organisations (especially in the areas of consumer protection, animal rights and environmental protection) to lodge claims for damages in criminal proceedings where the collective interests defended by these organisations are at stake. Other organisations are granted standing to bring legal claims in the general interest, but their ability to act effectively on behalf of multiple victims is still very limited.[4] In the absence of any constant stream of case law or approval from the Court of Cassation and as long as the Bill has not been adopted by the Luxembourg parliament, it seems difficult to argue that there is currently a general possibility of bringing class actions under Luxembourg law. There are, however, mechanisms available to manage group litigation that will be further discussed in this chapter. These tools aim to group mass claims and to test a defined single claim before all other claims are resolved.

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1 François Kremer is a partner and Ariel Devillers is a counsel at Arendt & Medernach.

2 DC Lux., 19 May 2005, docket No. 88227, BIJ 8/2005, p. 155.

3 Court of Appeal, 20 June 2007, docket No. 30686, 30687 and 30688.

4 G Ravarani, *La responsabilité civile des personnes privées et publiques*, 3rd ed., Pasicrisie Luxembourgeoise 2014, No. 1127 et seq., p. 1,108 et seq.

II THE YEAR IN REVIEW

In comparison with 2020, 2021 was a rather quiet year for developments concerning compensatory collective redress mechanisms. Nonetheless, since the publication of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law,[5] Luxembourg lawmakers have initiated efforts for the preparation of a collective redress mechanism in Luxembourg. The steady increase in efforts to lay the groundwork for the latter has culminated in the adoption of the Bill, in accordance with the promises of the 2018–2023 Coalition Agreement that was signed at the formation of the new government following the latest parliamentary elections in late 2018.[6]

The Bill certainly marks the most important step concerning class actions and group litigation in Luxembourg taken to date: it sets out the legal framework for collective recourse procedures that can be initiated before the Luxembourg courts when the individual interests of several consumers in similar or identical situations are harmed and the damage to each was caused by the same professional.[7] The legal framework for class actions that the Bill wants to implement into Luxembourg law is limited to consumer damages. However, consumers may initiate the latter for all kinds of violations of the law by a professional, and not only for violations of provisions of the Luxembourg consumer code, with the exception of damages resulting from antitrust. The recent government amendments to the Bill, adopted in January 2022, provide that a class action may not only be initiated in the presence of national breaches committed by the professional, but also when cross-border breaches of the professional's legal obligations have been committed.[8] In this respect, the Bill provides that alleged breaches by a professional of its obligations to provide information to consumers, or of its contractual obligations towards them, may allow consumers to initiate a class action. It is also worth noting that the Bill excludes collective recourse by consumers against professionals supervised by Luxembourg's financial regulator, Luxembourg's insurance commission[9] or the European Central Bank.[10]

Furthermore, the Bill covers all types of damages already widely recognised under Luxembourg tort law: a consumer may claim compensation for material, non-material (moral) or physical damage suffered. The class action itself may not only be initiated by the affected consumers, but also by a 'qualified entity', including by non-profit organisations, whether they are national or approved in another Member State of the European Union or the European Economic Area.[11] The Bill provides for certain criteria to be met by the 'qualified entities' in order to initiate a class action, and in particular, its statutory purpose must show that it has

5 OJ L 201, 26.7.2013, pp. 60–65.

6 https://gouvernement.lu/dam-assets/fr/publications/accord-coalition/2018-2023/Accord-de-coalition-2018-2023.pdf.

7 Bill of Law No. 7650, Exposé des motifs, p. 5.

8 Bill of Law No.7650, Amendements gouvernementaux, 26 January 2022, coordinated version of the Bill, p. 55.

9 Bill of Law No. 7650, Exposé des motifs, p. 7.

10 Bill of Law No. 7650, Amendements gouvernementaux, 26 January 2022, coordinated version of the Bill, p. 86.

11 Bill of Law No.7650, Amendements gouvernementaux, 26 January 2022, coordinated version of the Bill, p. 56.

a legitimate interest to protect the interests of the consumers who have been harmed.[12,13] Also noteworthy is the fact that since the recently adopted government amendments to the Bill, the latter now provides that sectoral regulators such as the Luxembourg Civil Aviation Authority may also initiate class actions.

Moreover, the amended Bill now provides that an action for cessation or prohibition of the professional's breach may not only be initiated by certain sectoral regulators such as the national commission for data protection, but also by the Luxembourg Minister of Consumer Protection or the Luxembourg Minister for Health.[14]

One important particularity of the Bill introduced in August 2020 is that it endeavours to provide the necessary means for the protection of all interests involved; hence, the course of legal proceedings in a class action scenario is very precisely laid out. Three phases are provided for in the Bill.[15]

First, the court renders a judgment on the admissibility of the class action. Afterwards, as the case may be, it hands down either a judgement on the professional's liability or a judgment on the cessation or prohibition of the professional's misconduct, or both. The Bill thus aims to provide the Luxembourg courts with the means to do away with purely abusive class actions. If the class action is declared admissible by the court, the parties are encouraged to first consider an amicable resolution of their dispute (i.e., they have to attend a compulsory information meeting on mediation). If an amicable resolution of the dispute cannot be reached through mediation, and should a Luxembourg court find the professional liable for the alleged misconduct, the judges will proceed to define the group of consumers to be compensated and the damage they have suffered. They will also determine the applicable class membership system (i.e., 'opt-in' or 'opt-out'). In this regard, the judges are free to choose the most suitable membership system for each case individually. According to the Bill, the cross-border nature of a dispute must be taken into consideration by the court when defining the affected group of consumers. In fact, the Bill emphasises that, depending on the consumers' place of residence, it would be more appropriate to opt in rather than to opt out. Therefore, it provides that when affected consumers reside outside the Grand Duchy, only the opt-in system is to be applied, and foreign consumers are thus not automatically included in the collective recourse procedure.

The implementation of the judgment on the professional's liability is guaranteed, in particular, by the appointment of a liquidator and a supervising judge.

The second phase provided for in the Bill concerns the enforcement of the liability judgment. Pursuant to the Bill, the duties of the court-appointed liquidator will be to oversee and ensure the enforcement of the judgment until all consumers have been held harmless by the professional. More precisely, he or she is to get in contact with the affected group of consumers, who then either opt in or opt out.

The final phase provided for in the Bill is aimed at terminating the class action. According to the Bill, the liquidator should submit a report to the supervising judge, stating either that all consumers have been compensated, or that the professional has not yet fully

12 idem.

13 If the action is initiated by a 'qualified entity', the Bill aims in particular to ensure that the financing of the lawsuit is in no way in conflict with the interests of the affected group of consumers.

14 Bill of Law No. 7650, Amendements gouvernementaux, 26 January 2022, coordinated version of the Bill, p. 53.

15 Bill of Law No. 7650, Exposé des motifs, p. 5

fulfilled its obligation to compensate. In the first case, the supervising judge finds that all consumers have been effectively compensated. In the second case, the supervising judge refers the matter to the Luxembourg District Court. The Bill provides that the latter is to analyse the disputed compensations in detail and that it may render a judgment on these claims brought before the court by consumers who are still awaiting compensation. As the case may be, the District Court may order the forced execution of this judgment.

III PROCEDURE

i Tools for managing group litigation

Assignment of claims

To effectively manage mass litigation until the Bill on collective redress is adopted by the Luxembourg parliament, it might be appropriate to group all claims under the same claimant to simulate, to some extent, the effects of a representative action.

As in most jurisdictions, claims can be transferred in Luxembourg by means of an assignment according to Article 1689 et seq. of the Luxembourg Civil Code. To be effective, it is necessary either to notify the assignment to the debtor or to have the debtor specifically agree to the assignment.

Assuming Luxembourg law applies to a given assignment, it would seem paramount to consider Article 1699 of the Civil Code, which provides that in the case of an assignment of a litigious right against consideration, a debtor is allowed to exercise his or her right of withdrawal. Put simply, once a litigious right is transferred, a debtor is, in essence, entitled to extinguish the transferred claim by repaying the transfer price to the assignee with interest as from the date of the assignment. Such a right of withdrawal is contingent upon the right being litigious, which means, according to Article 1700 of the Civil Code, that court proceedings will have been initiated and that the right will have been challenged on the merits.

Thus, to enable the assignee to mitigate the effects of the right of withdrawal, it would seem necessary to assign the claim before any legal proceedings are initiated against the debtor.

Article 1701 nevertheless provides that the right of withdrawal does not apply where (1) the assignee is a co-heir or co-owner, (2) the assignment is in payment of a claim owed to the assignee, or (3) the litigious right is transferred to the possessor of an inheritance that is subject to the litigious right so transferred.

It would, in principle, be possible to constitute a special purpose vehicle to collect the various claims through different assignments and subsequently commence proceedings against the defendants.

The obvious advantage of assigning all claims to a single assignee is that the assignee is then able to bring all claims in a single lawsuit against the defendants.

Joinder of related proceedings

If group claims are nevertheless brought individually, it would still be possible to have them consolidated into a single judgment and a single set of proceedings by applying for a joinder based on Article 206 of the New Code of Civil Procedure.

According to case law, in the interest of the proper administration of justice, two or more isolated proceedings can be joined by a court of law if they are related, have a strong affinity, are closely correlated or are so interdependent that there may be a risk of disparity should the claims be tried and judged separately.

However, cases pending before different kinds of courts, under different procedures or in different instances cannot, as a rule, be joined. This applies, for example, to multiple claims brought separately before the commercial section of the civil courts either under the standard civil written procedure or the commercial oral procedure. Parties can, however, agree to adjourn the pleadings under the commercial oral procedure until the proceedings conducted under the standard written procedure reach the pleadings phase.

When faced with claims that are normally attributed to either the justice of the peace or the district court because of the amounts in dispute, it is theoretically possible to try and join all claims together, provided the various claims are filed before the same court. Article 18 of the New Code of Civil Procedure allows the parties to agree (either tacitly, or expressly through a signed joint declaration in court) to bring proceedings before the justice of the peace where the amount under dispute would normally cause the case to be allocated to the district court. The district court's jurisdiction in terms of value is considered to be a matter of public policy, but a lower value claim can exceptionally be brought before it where it concerns a claim falling under its own jurisdiction.[16]

It should also be highlighted that class actions can to some extent be hypothetically simulated through the use of joinder proceedings in conjunction with a principal claim brought by a representative organisation (as discussed in Section I).

Test cases

Test cases are not provided for by law. In the event of mass claims, in order to save on time and expenses, test cases are used in practice, with the consent of both the litigating parties and the courts, to try one specific case and adjourn or suspend all other related claims pending the outcome of the elected test case.

Test cases have proven their effectiveness and have specifically been implemented during the Madoff scandal when custodian banks were sued massively in Luxembourg for restitution by the victims. However, formally speaking, res judicata rules do not apply from one case to another.

ii Damages and costs

Under Luxembourg law (from which the Bill does not depart), a claimant is only entitled to lawful, certain, direct and personal damages. Punitive and symbolic damages are generally excluded. If the suit is based on a breach of contract, the alleged damage needs also to have been foreseeable at the time of conclusion of the contract.

There is currently no exception foreseen in the case of mass claims or group litigation, meaning that each and every claimant should, in principle, demonstrate personal damage meeting these requirements. In that respect, Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law expressly states that consumers' compensation in the context of a collective redress shall not exceed the compensation they could have obtained when acting individually.[17]

16 T Hoscheit, Le droit judiciaire privé au Grand-Duché de Luxembourg, ed. Paul Bauler, No. 211, p. 147.

17 Bill of Law No. 7650, Exposé des motifs, p. 5 and point 31 of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

iii Settlement

Settlements are governed by Article 2044 et seq. of the Luxembourg Civil Code.

A settlement agreement will only be binding and have the effect of res judicata on the contracting parties. In the case of group litigation, it is possible to have all claimants settle their demands with the defendant in a single document. If the parties reach an out-of-court dispute resolution agreement, the Bill provides that the agreement must include commitments made on both sides.

It should be noted that a valid settlement requires mutual concessions that, in the case of a group settlement, need to be identifiable between each of the claimants and the defendant. In other words, a general concession by the group of claimants would likely not suffice in the current legal framework. It is, therefore, also advisable to include a severability clause in case any anyone tries to invalidate the settlement with one of the claimants at a later stage.

Court approval of a settlement does not generally apply, but there are some limited exceptions, such as when a bankruptcy receiver is settling. With regard to the Bill, however, it is provided that the out-of-court dispute resolution agreement must be approved by the president of the District Court.

IV CROSS-BORDER ISSUES

i Conflict of law and choice of law in group litigation

If a claim has an international aspect and is brought before the courts in Luxembourg, these will usually resort to the universally applicable Rome I[18] and II[19] Regulations to determine the governing law (unless the claim is not caught by, or is specifically excluded from, the scope of these Regulations).

In applying the rules under the Rome I and II Regulations, it is unlikely, but nevertheless possible, that claims will be governed by different applicable laws, even in similar factual circumstances. Disparities such as this may exist, for example, in instances where the claimants are of different jurisdictions or where the various contracts vary in terms of chosen governing laws. In practice, disparities in terms of governing laws will form an obstacle to grouping the claims together under the same proceedings, especially if this also implies differences in the laws applicable to evidence.

If a foreign law applies to a claim brought in Luxembourg, case law considers that the applicant bears the burden to prove the substance of the foreign law. Parties will usually rely on legal opinions issued by foreign practitioners. Luxembourg courts would also be able to rely on information on foreign law obtained in accordance with the European Convention on Information on Foreign Law of 7 June 1968.

18 Regulation (EC) No. 593/2008 of the Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

19 Regulation (EC) No. 864/2007 of the Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

With respect to the Bill, the newly adopted government amendments now provide that where alleged breaches by the professional harm or are likely to harm consumers in different Member States, collective proceedings may be brought before the Luxembourg Court by several qualified entities from different Member States of the European Union.[20]

ii Enforcement of foreign class action judgments

Whether or not it is caught by the Brussels Recast Regulation[21] or other international agreements,[22] recognition and enforcement of a class action judgment in Luxembourg may prove to be challenging.

Depending on the architecture of the class action lawsuit at stake, concerns of Luxembourg international public policy (in its mitigated application) may become a hurdle to effective recognition and enforcement of a class action judgment in Luxembourg. Issues may arise, for example, in relation to the applicable opt-in or opt-out mechanism, which may, to some extent, affect the rights of defence as conceived in Luxembourg. Other problems may exist when non-strictly compensatory damages have been awarded, such as punitive damages.

V OUTLOOK AND CONCLUSIONS

At this stage, it is not yet clear when the new Bill introducing collective redress into Luxembourg consumer law is likely to be adopted by the Luxembourg parliament. At the moment, the Bill is still being discussed, and it appears from the currently available opinions submitted by various participants to the legislative process that some topics, including financing and availability of information to consumers, will require further clarification and possible amendment.

Reports submitted by the Chamber of Civil Servants and Public Employees and the Luxembourg Consumers Union[23] emphasise the need to ensure funding that does not compromise the class action in any way. In particular, the Luxembourg Consumers Union raises concerns about third-party financing of class actions, and the fact that the Bill in its current form would not provide sufficient safeguards to prevent any influence being exercised in that respect.

The recent government amendments have, to some extent, taken note of the expressed criticism in relation to the financing of class actions. With respect to the third parties such as non-profit organisations that may initiate class actions, the recent government amendments to the Bill state that the latter must be independent and not be influenced by anyone other than consumers. It has even been added to the Bill that the court may request, if it suspects a conflict of interest, a financial overview from the applicant listing the sources of the funds used. However, it is not clear at this time whether these new provisions will remedy the criticisms regarding the funding of class actions.

20 Bill of Law No. 7650, Amendements gouvernementaux, 26 January 2022, coordinated version of the Bill, p. 57.

21 Regulation (EU) No. 1215/2012 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.

22 Such as the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (Hague Enforcement Convention).

23 Opinion of the Union Luxembourgeoise des Consommateurs of 19 August 2020 and 22 July 2021; Opinion of the Chambre des Fonctionnaires et des Employés Publics of 12 October 2020.

The Chamber of Employees,[24] the Chamber of Civil Servants and Public Employees and the Luxembourg Consumers Union further advocate the introduction of state aid dedicated to the financing of class actions.

In its additional opinion dated 14 January 2021,[25] the Luxembourg Consumers Union called for a number of amendments to the Bill: in particular, that it should provide that the court decision declaring the class action admissible shall always be published, which was not the case in the original version of the Bill. This criticism has been addressed, however, and the Bill as amended earlier this year now provides that the decision on the admissibility of the class action shall always be published.[26] It is also anticipated that the introduction of class actions in Luxembourg will probably have an effect on analyses of whether foreign class action judgments will be recognised and enforced in Luxembourg.

24 Opinion of the Chambre des Salariés of 18 November 2020.

25 Amended additional opinion of 14 January 2021 of the Union Luxembourgeoise des Consommateurs.

26 Bill of Law No. 7650, Amendements gouvernementaux, 26 January 2022, coordinated version of the Bill, p. 58.

Appendix 1

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François Kremer is a partner in the litigation and dispute resolution practice of Arendt & Medernach. He specialises in international litigation, in particular in the fields of asset tracing, white-collar crime and corporate disputes. François Kremer is the outgoing chair of the Luxembourg Bar until 2022, having served as chair and as vice chair. He has been a member of the Luxembourg Bar since 1988. He previously served as chair of the Disciplinary Council of the Luxembourg Bar, and as a member of the Luxembourg Bar Council. He is approved as a mediator at the Civil and Commercial Mediation Centre. He is also Honorary Consul General of Thailand in Luxembourg.

François Kremer holds a Maîtrise en Droit des Affaires from the University of Paris I Panthéon-Sorbonne (France) as well as a master of laws degree (LLM) from the London School of Economics and Political Science (UK).

In the *Chambers Europe* legal guide, interviewees hold François Kremer in high regard for his litigation skills, with one source painting him as 'one of the best litigators in Luxembourg' with a 'very strong track record and reputation'. He is also considered to be a 'superb' team head by clients in *The Legal 500* guide.

He speaks English, French, German and Luxembourgish.

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Ariel Devillers is a counsel in the dispute resolution practice of Arendt & Medernach. He specialises in civil and commercial law, advising domestic and international clients on corporate, commercial and financial disputes. He has been a member of the Luxembourg Bar since 2012 and serves on the subcommittee on economic law focusing on class actions.

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