

The Globalization of Class Actions
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Belgian Report on Class Actions

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I. General procedural law

1. The Court system in general

(1) The Belgian legal system has basically one general court system of "ordinary courts" and apart from that some specific courts. The Court system and the Procedural Law is moreover basically an exclusive competence of the Federal authorities and not of the federated States¹.

1.1. Ordinary courts and proceedings

(2) Before the ordinary courts, there are basically two types of procedure:

- the "civil procedure", which is to be followed in civil matters, including commercial, labour, social security, administrative law and tax matters;
- the criminal procedure in criminal proceedings, but also relevant for plaintiffs joining their "private" claim with the criminal proceedings (as a so-called "civil party") (which is possible if the crime has caused damage to the plaintiff).

(3) There are important differences between both types of procedure: the criminal procedure is dominated by the principles of concentration, orality (not strict), immediacy, etc. and inquisitorial in its nature. The civil proceedings are not necessarily concentrated (esp. because evidential proceedings are intermediary), do not have a distinction between trial and pre-trial, are basically in writing with (only) a supporting role for oral pleadings and are defined by the procedural autonomy of the parties.

The rules on costs in civil proceedings have recently (2007) been changed, and the losing party now has to reimburse to a much greater extent the costs of the winning party than before. Contingency fees remain forbidden. In most procedures, parties do not have to be represented by a lawyer and can plead themselves. Lawyers appearing in court on the other hand, do not need a written power of attorney.

1.2. "Objective" litigation

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¹ State legislation can however enact rules on the representation by third parties of non-federal public authorities. Thus the Flemish Legislation on Communes and Provinces has granted the inhabitants of a Province the right to act for the collective provincial interest where the Provincial authority omits to do so (see Part III).

- (4) Outside the Court system, there is:
- the Administrative Division of the Council of State;
 - the Constitutional Court.

(5) The main competence of the Council of State concerns demands for annulment or provisional suspension of decisions of the executive and any administrative authorities, as well individual decisions as regulations. The Court has no exclusive competence as to the legality or constitutionality of such decisions: on the one hand, it can only annul the act and not condemn the authority to e.g. payment of damages; on the other hand, the ordinary courts can review "incidentally" the legality and constitutionality of any decision of administrative authorities (not having the rank of an Act of Parliament) in the course of proceedings before them in which the plaintiff has asked for a condemnation or an injunction based on its (alleged) subjective right.

The Constitutional Court has exclusive jurisdiction to review Acts of Parliament. Their constitutionality can be challenged either directly by any party having an interest (within 6 months after publication of the Act) or "incidentally", namely in the course of other proceedings where the validity of the challenged Act is relevant. In the latter case, the judge has to suspend proceedings and ask a preliminary ruling from the Constitutional Court.

(6) The procedure before both Courts is mainly a written procedure (oral pleadings have only a very minor role) and there is no recovery of fees by the winning party. The procedure before the Constitutional Court is gratuitous. Before the Council of state, there is obligatory representation by a lawyer and the plaintiff who loses has to pay the costs of 175 Euro for each plaintiff.

2. Actions which can be introduced in civil proceedings; flexibility of civil procedure.

2.1. Types of remedies and general requirements - civil proceedings

(7) On the condition that the plaintiff has an interest in obtaining such a decision, a plaintiff is entitled to institute proceedings (has "*ius agendi*" or *standing*) in order to obtain:

- either a condemnation of a defendant; the object can e.g. be the payment of money, restitution of assets, reparation in kind, or the specific performance of an obligation; it can also be a prohibition to continue the violation of a subjective right of or another duty (*injunctions*), or - in case of a sufficient threat - the prohibition to violate a duty (of which the violation has not yet taken place) (*actio ad futurum* or *preventive action*);
- or a declaration of right (*actio declaratoria*, incl. a declaration of the absence of right of the defendant - *actio negatoria*);
- or a modification of a legal relationship (modification which can either be seen as the effect of the decision or as the effect of an act of the plaintiff ratified by the decision) (e.g. avoidance of a contract, annulment of a contract clause, termination of a contractual relationship, etc.)
- as an accessory measure: publication of the decision against the defendant (at the costs of the defendant).

(8) The plaintiff must in principle either act for the exercise or recognition of a subjective right it holds itself or for the exercise or recognition of a subjective right of one or more other persons, for the exercise of which it has authority ("*hoedanigheid*" / "*qualité*"). We develop the latter question infra (3.).

2.2 Joining or starting criminal proceedings

(8) An important characteristic of the Belgian legal system is also that a party who has suffered damage from a tort which also constitutes a crime (*sensu lato*, a criminally sanctioned behaviour), can join the criminal proceedings started by the Public Prosecutor) as a "civil party" or even start the criminal proceedings itself². In such a case, the claims of the civil party (for damages, restitution, etc.) have to be judged according to the rules of criminal procedure.

2.3. Types of remedies and general requirements - Council of State and Constitutional Court

(9) Before the Council of State and the Constitutional Court, the proceedings can only aim at (suspension and) annulment of the attacked act or decision. In order to obtain a discussion on the merits, the plaintiff must show that such annulment would profit it. The defence lawyers of the public authorities have invented masses of arguments in order to disqualify such actions as "without sufficient interest" and the Council of State has unfortunately accepted some of these defences.

2.4. Some relevant procedural rules in civil proceedings allowing forms of collective action

(10) Contrary to the "objective litigation" (i.e. not based on subjective rights) before the Council of State and the Constitutional Court, the civil procedure is rather flexible in many respects³. Thus, as long as there is a sufficient connection between them:

- a plaintiff can demand several measures in a single procedure ("objective cumulation");
- a plaintiff can act against several defendants in a single procedure even if the claims do not have the same basis ("passive subjective cumulation");
- a plaintiff can file in the course of proceedings additional demands on the sole condition that they are based on a fact or act mentioned in the introductory statement of claim (Art. 807 Judiciary Code);
- several plaintiffs can start proceedings together in a single act and against one or more defendants ("active subjective cumulation"; Art. 701 Judiciary Code requires a sufficient connection between the claims of these plaintiffs, but that is usually understood widely);
- where several actions have been introduced before the same Court, parties can ask to join them; even if they have been introduced before different Courts, joining is also possible by referring them all to a single Court;
- a plaintiff can file a demand at the same time in its personal capacity and as an agent for others (see below);
- counterclaims by defendants are largely possible;
- third parties can intervene in existing proceedings and introduce their own claims in these proceedings (on condition that this does not unreasonably delay the existing proceedings, Art. 814 Judiciary Code).

The procedure before the Council of State has been poisoned much more by procedural tricks. Fortunately, the Constitutional Court had adopted a more constructive and flexible approach.

² The last possibility does not exist for crimes, which have to be judged by a jury (the most serious crimes, press delicts and political delicts).

³ See on all these questions P. TAELMAN & Ph THION, "Bundeling van vorderingen", *TPR* 2003, 1489 ff.

3. Acting for the exercise or recognition of rights of third parties or of collective interests.

3.1 General requirements

(11) According to art. 17 and 18 Judiciary Code, a plaintiff is only entitled to a trial and a decision on the merits (has *standing* or *ius agendi*) if it has a sufficient personal interest and capacity.

The notion of personal interest (which has to be understood as procedural personal interest, i.e. interest in receiving the judicial decision one asks for) rarely causes problems when a party is acting for the defence of a pretended subjective right; if the plaintiff demands a condemnation for payment, restitution or any other performance in the hypothesis that it has a subjective right, it will by definition have an interest to obtain such condemning judgement, which constitutes an enforceable document. It may be different when the plaintiff asks for a declaratory judgement. For injunctions, there is a problem if the interest is deemed merely future, as in an action to prohibit actions that have not yet taken place and cannot be proven to be an imminent danger.

The existence of the alleged subjective right is evidently not a condition for the *ius agendi*, for the right to obtain a decision on the merits, it is only a condition to obtain a positive decision, i.e. the condemnation or other measure demanded.

(12) The notion of capacity covers three different conditions: 1° the capacity to be a party to a process (existence as a subject of rights); 2° the capacity to act (to make juridical acts); and 3° the authority to exercise the subjective right(s) invoked.

Ad 1°: the condition of capacity in that sense implies that only natural persons and incorporated bodies can start proceedings, not unincorporated bodies as such (but their members can).

Ad 2°: Persons who have no legal capacity to act themselves, i.e. to make valid procedural juridical acts, will have a personal representative, who can institute the legal proceedings in their capacity of representative ("*qualitate qua*")

Ad 3° The last question does in principle not rise when a plaintiff does only invoke subjective rights it pretends to have itself. It thus only rises when a party aims at exercising the subjective rights of third parties. The doctrine distinguishes in the latter case the "formal" party to the proceedings (the plaintiff acting) and the "material" party to the proceedings (the party for whose rights or interests the plaintiff acts). We discuss this in the following No.

3.2. Acting based on an authority to exercise the rights of third parties

(13) Although this is not practiced on a large scale, Belgian civil procedural law is very flexible as to the possibility of exercising in one's own name (as a formal party to the proceedings) the (alleged) rights of others, if one is authorised to exercise them either by contract (or another juridical act) or by law (incl. a court authorisation)⁴. Moreover, in many

⁴ For literature, See my "De bescherming van de wederpartij en van het dwingend recht bij middellijke vertegenwoordiging, m.b. naamlening, in het burgerlijk procesrecht, en de betwistbare verwoording daarvan in de cassatiearresten van 25 november 1993", *Proces & bewijs* 1994, 53-61 (*), <http://www.storme.be/nootcass25-11-93.html>; further K. BROECKX, "Vertegenwoordiging in rechte

cases the parties whose rights are exercised can remain anonymous or be identified by class only. This technique is the procedural version of "indirect representation" (acting in one's own name on account of a principal, in England usually called undisclosed agency). It is accepted in civil procedure and for civil parties in criminal procedure, but normally not before the Council of State and the Constitutional Court

(14) Some specially regulated cases will be mentioned *infra*, but the possibility is not limited to these specific cases. There are many examples based on an authority granted by the principal:

- the administrator of common investment funds (which are under Belgian law a form of joint ownership and not owned by the administrator as in e.g. an English or a Scottish trust) can exercise the joint rights of the joint owner in its own name, without having to disclose the identity of the joint owners⁵;
- where the co-owners of apartment buildings have not formed an association with legal personality (as is since 1995 mostly the case), the administrator appointed by them can institute legal proceedings in its own name on account of all co-owners;
- the "leading insurer" can act in its own name on account of the co-insurers;
- the insurer who has paid the insured victim - and is therefore subrogated in the rights of the latter - can "hide" behind the victim, in the sense that proceedings will be in the name of the victim although the insurer is the owner of the claim⁶;
- the assignor can act for an assignee;
- a security agent can act for the secured creditor;
- the administrators appointed by the members of an unincorporated association can act on account of all the members;
- an incorporated association can act for its members or other third parties;
- etc.

It is thus not necessary to assign one's rights to the formal party in order to let that party demand their recognition in proceedings. It is sufficient to grant authority. In such a case, the requirement of capacity (incl. authority) is to be verified for that formal party to the process, and the requirement of a personal interest is required for the represented (material) party.

Evidently, this rule permits class actions only on an opt-in basis (more precisely: on the basis of an authority to act in one's own name for the represented parties). An association does not automatically have authority to represent the individual rights of its members: it has to be authorised, but that authorisation can be part of the contract with its members (in some cases, such a contract clause is implied by law, e.g. health insurance funds; associations or co-owners of an apartment building, etc.).

A recent case where this technique of indirect representation *ad litem* was used, was the action of (former) shareholders of LHSP, who entrusted the exercise of their claims to Deminor, a firm specialised in the defence of interests of minority shareholders. Deminor joined a "private" claim with the criminal proceedings (as a so-called "civil party") against some of the former directors. The consumer organization Test-Aankoop assisted Deminor in

en naamgeving in het geding", *RW* 1994-1995, 248 ff.; P. TAELEMAN & Ph THION, "Bundeling van vorderingen", *TPR* 2003, 1489 ff.; E. DEBAERE, "Procederen in zaken van massaschade: naar een class action in het Belgische recht?", *TPR* 2007, No. 30 ff.

⁵ Commercial Court Brussels 10 September 1992, *JT* 1992, p. 719 ff.

⁶ This is very frequently the case and was already accepted in Cass. 6 May 1915, *Pasicrisie* p. 285 and Cass. 21 October 1948, *Pasicrisie* p. 585.

contacting the shareholders. Circa 11000 shareholders originally identified themselves. Of these 11 000 shareholders, only circa 5000 finally granted Deminor the authority required to represent them in the proceedings. To do so, a standard form was made available on the websites of Test-Aankoop and Deminor. 2000 were members of Test-Aankoop, and Test-Aankoop takes the costs of the proceedings at its expense. Only one out of three of the Deminor clients finally granted the requested authority. The Deminor clients had to advance a limited sum to cover the costs of the proceedings. As mentioned, contingency fees are prohibited under Belgian law. The fact that all shareholders had to be approached individually and had to be asked to share in the costs, was perceived as an obstacle to collective litigation by Deminor.⁷ The actual trial in these criminal proceedings only started this year (more than five years after the company went bankrupt), and this has also been mentioned as one of the reasons why only 5000 shareholders in the end granted Deminor the authority required.⁸

(15) Apart from authority based on contract, there are some cases of authority based on a statute. Sometimes, it is only the application of an authority, which is not limited to civil proceedings: thus Art. 1166 Civil Code, allows a creditor to exercise the rights of its debtor who omits to exercise them to the detriment of its creditors. In other cases, the authority is limited to actions in Court, such as the right of inhabitants to substitute themselves for local authorities (See *infra* Part III of this report).

(16) In most cases, the formal party will explicitly mention that it acts *qualitate qua*, this is in its capacity as representative of one or more third parties. It does not have to indicate the identity of the principals if a class identification is sufficient to protect the interest (the rights of defence) of the defendant.

3.3. Acting for collective interests which do not correspond to subjective rights (of either oneself or third parties)

(17) A second technique is much more disputed in the general law of procedure: the defence of diffuse (or so-called collective) interests by associations. On the basis of the aforementioned ordinary rules, associations can only exercise:

- their own subjective rights, and
- the (possibly bundled) subjective rights of third parties if they have obtained authority to exercise these in their own name as an agent on account of these third parties.

In the absence of a more specific legal rule granting specific standing to an association or other person (See *infra* II and III), an association can therefore, in order to defend more diffuse interest such as e.g. environmental protection, try:

- either argue that the association itself has a (corporate) subjective right to enforce environmental law;
- or argue that even without a subjective right, they have a sufficient "personal interest" to obtain the requested condemnation or other measure.

On the latter point, ordinary courts have been very restrictive. The Court of cassation has consistently ruled that a general or collective interest is in itself not a "personal" interest for

⁷ See De Standaard 12 november 2005, "Deminor wil collectieve wapens", <http://www.standaard.be/Artikel/Detail.aspx?artikelId=GQ2K7941&word=collectieve+wapens>.

⁸ E. DEBAERE, "Procederen in zaken van massaschade: naar een class action in het Belgische recht?", *TPR* 2007, No. 34.

an association or other group⁹; associations can therefore only act for the defence of either their own subjective rights or those of members or other third parties they represent. The Council of State has been more flexible on this point (which was by the way the more necessary because of the inflexibility of the procedure and other hindrances, such as the fact that fees are due to the Council for every plaintiff, whereas in civil procedure it does not make any difference in this respect that there is more than one plaintiff).

(18) In my personal view (M.E.S.), it is more coherent and effective to strive for the recognition of collective subjective rights, such as the right to a clean/healthy environment as a common right of all citizens concerned and the associations they form¹⁰ (i.e. going further than the less problematic case of a subjective right of citizens or legal persons owning land in the neighbourhood¹¹).

Unfortunately, the pressure groups themselves as well as the legislator have more often chosen the other path. Thus, the rules of Articles 17 and 18 remained intact and received a rather restrictive interpretation on this point, but a series of exceptions were introduced by special Acts of Parliament in order to grant certain associations legal standing despite the absence of a proper subjective right or an authority to act for others (these provisions use the formula "*Derogating from art. 17 and 18 Judiciary Code,*"). These are discussed in Part II.

(19) Standing to defend collective interests is on a broader scale accepted for public authorities. Important examples are local communities (see also *infra* Part III) and professional societies of public law such as the Bar (Order of Advocates) - these have an authority - granted by Statute law - to defend the professional interests of the profession as a whole.

⁹ The main precedent is the Eikendael decision, Cass. 19 Nov. 1982, *Arr. Cass.* 1982-83, p 372 = *RW* 1983-84, 2029 note J.LAENENS

¹⁰ E.g. Court of Appeal Brussels 2 Nov. 1989, *JLMB* 1989, 1475, cited by H. BOCKEN, "Schorsingsbevoegdheid van milieuverenigingen", in *Procederen in nieuw België en komend Europa*, nr. 8

¹¹ For an example of the latter, Court of Appeal Antwerpen 20 Dec. 2000, *Tijdschrift Milieurecht* (TMR) 2001, 407.

II Specific regimes derogating from the general principles of procedural law

(20) There are a number of specific Acts that derogate from these general principles and that allow introducing actions in the collective interest or that allow organisations to introduce actions to defend the individual interests of their members. Without being exhaustive, the most important provisions are briefly set out below:

1. In the area of unfair competition and consumer protection

1.1 Overview

(21) The 1991 Act on Unfair Commercial Practices and Consumer Protection ('UCP Act')¹², provides for an action for injunction that can be introduced against acts that constitute an infringement of the UCP Act.¹³ The persons that are allowed to introduce such an action include – apart from parties with a sufficient interest and the Minister of Economic Affairs or the Director General of the Economic Administration : professional or inter-professional organizations with legal personality and consumer organizations with legal personality that are members of the Council for Consumption or that have been approved by the Minister.¹⁴ The article further explicitly mentions that – as a derogation to articles 17 and 18 of the Judiciary Code – these organizations can bring actions in the collective interest as described in their articles of association.

Our 1991 UCP Act replaces the 1971 Act on unfair commercial practices that had similar provisions and that was in turn based on a 1934 Royal Decree that mainly sought to tackle unfair commercial practices from business to business. Consumer organisations were first granted standing under the 1971 Act. In the 1971 Act, the explicit derogation from articles 17 & 18 of the Judiciary Code had not been included, and there was considerable discussion in the literature as to the conditions under which organizations could be considered to have a 'sufficient interest' as required by article 17 Judiciary Code. The Cour de Cassation only accepted a sufficient interest to introduce an action for injunction by a professional or inter-professional organisation if the (direct or indirect) members of the organization had a proper interest in such action and if the organization had the defence of such interests more in general as its statutory aim.¹⁵ This case law continued to make it difficult for organizations to introduce actions for an injunction in the collective interest. An explicit derogation from articles 17-18 Judiciary Code was therefore introduced in the 1991 UCP Act. A further peculiarity of art. 98 UCP Act is that it also provides for the possibility to introduce actions for injunction against multiple defendants in case of unfair contracts term. Such action can be introduced against several sellers in the same economic sector or their organisations that use or recommend the use of identical or similar contractual clauses. The specific procedural

¹² B.S. 29 augustus 1991.

¹³ Cf. art. 95 et seq. of the act. The fact that actions for injunction are regulated differently in various specific acts without any general rules in the Procedural Code has been subject to criticism, cf. J. LAENENS, "De vordering tot staken" in J. Stuyck, P. Wytinck, *De nieuwe wet handelspraktijken*, 1992, Antwerpen, Kluwer, 151 et seq.

¹⁴ Art. 98 Unfair Trade Practices Act. 15 consumer organizations are members of the Council for Consumption.

¹⁵ Cass. 1 February 1990; *T.B.H.* 1990, 221, *R.W.* 1989-90, 1261 and Cf. J. LAENENS, "De vordering tot staken" in J. Stuyck, P. Wytinck, *De nieuwe wet handelspraktijken*, 1992, Antwerpen, Kluwer, 163.

rules of the UCP Act have later also been referred to in other consumer protection legislation,¹⁶ or have been copied in fairly similar wording in other acts.

Consumer organisations thus already had certain rights to bring actions to defend the collective interests of consumers under the Belgian unfair commercial practices legislation before the implementation of the European consumer protection directives. Most of the European directives that required member states to allow actions to protect collective interest of consumers have been implemented through amendments of the UCP Act. This is i.a. the case for the Directive on Misleading advertising, which was one of the first directives that required ‘Member States to ensure that adequate and effective means exist for the control of misleading advertising in the interests of consumers as well as competitors *and the general public*’.¹⁷ Further directives requiring Member States to allow organizations to bring actions in the collective interest (such as the Unfair Contract Terms Directive 93/13/EC, the Distance Selling Directive 97/7/EC and recently the Unfair Commercial Practices Directive 2005/29/EC) were also implemented through amendments of the UCP Act. The actual use of the action for injunction under the UCP Act is discussed below.

As the liberal professions are also fall under the scope of application of these directives, but are excluded from UCP Act, the Belgian legislator has adopted parallel legislation dealing with misleading and comparative advertising, unfair contract terms and distance selling in the relationship between liberal professions and their clients¹⁸; with similar rights for professional and inter-professional organisations and consumer organisations to file actions for an injunction in case of infringement of this act.¹⁹ To our knowledge, no actions for injunction filed on the basis of this act have been published so far.

(22) The 98/27/EC Injunctions Directive was implemented in a separate Act,²⁰ that grants the right to file an action for injunction to all qualified entities that are included in the list of qualified entities established by the European Commission when the interests the qualified entity is protecting are infringed by an act originating in Belgium and having effects in another Member State.²¹ If these conditions are met and the foreign organisation appears as a qualified entity on that list, the president of the Brussels Commercial Court (that has exclusive jurisdiction in case of cross border injunctions) has to accept such entity has the legal capacity to bring the action, but retains the right to examine whether the statutory aim of the qualified entity justifies it taking action in a specific case.²² The Act furthermore clarifies that - as an

¹⁶ Such as e.g. the 1992 Consumer Credit Act. The number of actions for injunction that have been brought under this act is however, very limited.

¹⁷ ‘Such means shall include legal provisions under which persons or organizations regarded under national law as having a legitimate interest in prohibiting misleading advertising may: (a) take legal action against such advertising; and/or (b) bring such advertising before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.’ Art. 4 Directive 87/450/EC.

¹⁸ Act of 2 August 2002 betreffende de misleidende en vergelijkende reclame, de onrechtmatige bedingen en de op afstand gesloten overeenkomsten inzake de vrije beroepen, B.S. 20 november 2002.

¹⁹ Artt. 18 et seq.

²⁰ Act of 26 May 2002 on cross border injunctions (W. 26 mei 2002 betreffende de intracommunautaire vorderingen tot staking op het gebied van de bescherming van de consumentenbelangen, B.S. 10 juli 2002.

²¹ Art. 7 Act of 26 May 2002.

²² Art. 7 Act of 26 May 2002.

explicit derogation from articles 17-18 Judiciary Code - such qualified entities have the right to bring an action to defend the collective consumer interests.

To our knowledge, the implementation of the Injunctions Directive has so far only led to one specific case that was brought by the OFT against a Belgian mail order company before the Brussels commercial court. The mail order company against whom the case was brought, was established in Belgium, but active in the UK, and it had engaged in misleading advertising in the UK. The OFT obtained an injunction order from the commercial court, which was confirmed by the court of appeal. Although the decision can be criticized in that Belgian law was applied to determine whether the company had actually engaged in misleading advertising as opposed to English law, the fact that the OFT, as a foreign qualified entity, was able to obtain an injunction order from a Belgian court, thus facilitating enforcement of the order, illustrates that the directive has at least to some extent contributed to the easier enforcement of consumer protection legislation in cross-border situations.²³

(23) Apart from the Acts mentioned, there are several more specific instruments that grant organisations the right to defend collective consumer interests, including:

- The 4 December 1990 Financial Transactions and Financial Markets Act²⁴ provides for an action for injunction of illegal canvassing practices that can be brought by consumer associations that are members of the Council for Consumption and have legal personality;

- The 20 December 2002 Act on the Amiable Collection of Consumer Debts provides that – as a derogation from articles 17-18 Judiciary Code - professional or inter-professional organizations with legal personality and consumer organizations with legal personality that are members of the Council for Consumption or that have been approved by the Minister are allowed to bring an action for injunction in the collective interest as described in their articles of association.²⁵ So far, no decisions on the basis of such actions have been published;

- The 24 March 2003 Act on Essential Banking Services, also grants the right to bring an action for injunction to professional or inter-professional organisations with legal personality and to consumer organizations under the same conditions as the 20 December 2002 Act. Again, it is explicitly provided that actions in the collective interest are possible, as a derogation from arts. 17-18 Judiciary Code.²⁶ To our knowledge, no such actions have been brought to date;

- Similar provisions can be retrieved in the Consumer Sales Act, the 2002 Act on Electronic Payment Instruments, the 2003 Electronic Commerce Act ...

1.2. Actual use

(24) The main Belgian consumer organisation – Test-Aankoop - does regularly introduce actions for injunction on the basis of the UCP Act but – due to budgetary constraints – the number of actions is very limited. Over the last years, on average about five cases per year

²³ Court of Appeal Brussels 8 December 2005.

²⁴ W. 4 december 1990 op de financiële transacties en de financiële markten, *B.S.* 22 december 1990 (art. 220 et seq..)

²⁵ W. 20 december 2002 betreffende de minnelijke invordering van schulden van de consument, *B.S.* 29 januari 2003 (art. 10).

²⁶ W. 24 maart 2003 betreffende de basisbankdienst, *B.S.* 15 mei 2003 (art. 10 et seq.).

have been introduced. It is very rare that actions are introduced for e.g. misleading practices. The actions that have been introduced recently mainly concerned unfair contract terms. The reason for the limited number of actions introduced by consumer organisations is mainly the limited funding. Consumer organisations like Test-Aankoop are almost entirely financed by the contributions of their members.

The fact that it is not possible to claim damages in the existing collective procedures is also felt as a lacuna. The organisation e.g. recently found out that certain banks had been charging their consumers a higher interest rate than allowed under Belgian law when using overdraft facilities. Test-Aankoop used the press and public opinion pressure as a means to force Dexia to reimburse the illegally charged interests to the consumers. Dexia finally agreed to do, but if they would have refused, the organization felt there were no means available to claim damages on behalf on the affected consumers in a collective action. Obtaining authority from the individual consumers to act on their account was not considered to be a practicable option. The damage suffered by the individual consumers was too low (often lower than 20 EUR per consumer) to be worth individual actions.

The actions provided for in other, more specific consumer protection legislation, have been used even less frequently by consumer organizations.

(25) From time to time professional organisations also introduce actions for injunction on the basis of the UCP Act but the number of such actions also remains limited.

2. In the area of environmental protection

(26) An Act of 12 January 1993²⁷ grants certain organisations a right to file an action for injunction of acts that infringe environmental regulations or constitute a serious threat of infringement of such regulation. Such action is open to non profit organizations that have had legal personality for at least three years and that have the protection of the environment as their statutory aim and that are able to demonstrate that they are active in the protection of the collective environmental interests.²⁸

The same right is granted to the local authorities (*commune, gemeente*). As will be indicated below, this is important because the right can then be exercised also - under certain conditions - by the inhabitants of that community.

3. In the area of anti discrimination

(27) Belgian anti discrimination law has recently been amended,²⁹ i.a. in order to correctly implement the anti discrimination directives.³⁰ These Acts also provide for actions for

²⁷ Wet van 12 januari 1993 betreffende een vorderingsrecht inzake bescherming van het leefmilieu B.S. 19 februari 1993.

²⁸ Cf. art. 2 Act 12 January 1993.

²⁹ See the Wet van 10 mei 2007 ter bestrijding van bepaalde vormen van discriminatie, B.S. 30 mei 2007 ('General Non Discrimination Act'); Wet van 10 mei 2007 ter bestrijding van discriminatie tussen vrouwen en mannen, B.S. 30 mei 2007 ('Gender Act'); Wet van 10 mei 2007 tot wijziging van de wet van 30 juli 1981 tot bestraffing van bepaalde door racisme of xenofobie ingegeven daden, B.S. 30 mei 2007 ('Racism Act') and the Wet van 10 mei 2007 tot aanpassing van het Gerechtelijk Wetboek aan de wetgeving ter bestrijding van discriminatie en tot bestraffing van bepaalde door racisme of xenofobie ingegeven daden, B.S. 30 mei 2007.

injunction that can i.a. been introduced by the Centre for the Equality of Chances and Opposition to Racism (in case of infringement of the ‘General Act’ and ‘Racism Act’), the Institute for the Equality of Women and Men (in case of infringement of the ‘Gender Act’) or by one of the organisations that meet the conditions set out in these acts.³¹ These are – apart from representative employee and employers’ organisations, all institutions of public utility or all organisations that have enjoyed legal personality for at least three years and have as their statutory aim the protection of human rights or the opposition to discrimination.³²

4. In other areas

(28) The 30 June 1994 Copyright Act,³³ as recently amended provides that professional or inter-professional organisations with legal personality and consumer organisations with legal personality that are members of the Council for Consumption, or that have been approved by the Minister, can ask the Court to order specific measures to ensure that the beneficiaries of exceptions to the copyright of the author can actually enjoy their rights. This Act also explicitly mentions that – as a derogation to artt. 17-18 Judiciary Code - these organizations can bring actions to defend the collective interests described in their articles of association.³⁴

The 2 August 2002 Act on combating late payment in commercial transactions³⁵ grants – in accordance with Directive 2000/35 – i.a. professional and interprofessional organisations with legal personality the right to bring an action for injunction so as to prevent to further use of grossly unfair contract terms. Once more, its is expressly stated that – as a derogation to articles 17-18 Judiciary Code - these organizations can bring actions to defend the collective interests described in their articles of association. So far, to our knowledge no such actions have to our knowledge been brought.

5. Common characteristics of the specific legislation allowing actions in the collective interest

(29) At this moment, a general legal basis for actions in the collective interest is lacking. Apart from the possibilities under ordinary civil procedure (See supra I), specific legislation is necessary to allow organisations to bring actions in the collective interest. The exact requirements under which such actions can be brought vary considerably. The requirements set out in the specific legislation that derogates from the general principles set out in our Judiciary Code have to be interpreted strictly according to the Court of Cassation³⁶.

³⁰ Directive 2000/43/EC on equal treatment between persons irrespective of racial or ethnic origin; Directive 2000/78/EC on equal treatment in employment and occupation and 2004/113/EC on equal treatment between men and women in the access to and supply of goods and services.

³¹ Art. 30 General Non Discrimination Act, art. 35 Gender Act en art. 32 Racism Act.

³² Under the 2003 act – a five year term was required. This has been reduced to three years following an letter of formal notice by the European Commission for failure to implement the directive. The Commission considered a five year term was too long and constituted a unjustified restriction for the organisations concerned to bring actions (Explanatory Memorandum, 35).

³³ W. 30 juni 1994 betreffende het auteursrecht en de naburige rechten *B.S.* 27 July 1994, art. 87*bis*, §2, 3° en 4 (as amended by the W. 10 mei 2007 (*B.S.* 10 mei 2007, tweede uitg., *err. B.S.* 14 mei 2007)).

³⁴ Art. 87*bis*, §2.

³⁵ W. 2 augustus 2002 betalingsachterstand handelstransacties, *B.S.* 7 augustus 2002.

³⁶ Cass. 1 February 1990, *Arr. Cass.* 1989-90, 714; *Jaarboek Handelspraktijken* 1990, 556, noot P. BOGAERT; *Pas.* 1990, I, 641; *R.W.* 1989-90, 1261 en *T.B.H.* 1990, 221, noot H.R. en Cass. 17

The conditions the organizations or entities need to satisfy differ depending on the acts concerned: they are either (private) professional or inter-professional organizations, organizations having the defence of the interests at stake as their statutory aim, but it can also be public entities (e.g. Banking Finance and Insurance Commission, Centre for Equal Opportunities and Opposition to Racism). The additional requirements the private organizations have to meet, again vary depending on the acts concerned: legal personality may be required, a certain length of existence with regard to the interests at stake may be required, they may need to be approved or they may need to demonstrate that they have been actively defending the interests at stake in the action brought.

The remedies that can be claimed are also strictly circumscribed in the specific legislation. The following remedies or actions are usually available:³⁷

- actions for injunction: the judge orders the cessation of the illegal practice. In such a procedure, the judge also has the power to declare that the practice was illegal, thus giving its decision a declaratory character;
- preventive actions or *actio ad futurum*: the judge prohibits an illegal practice that has not yet been carried out but is imminent;
- (as an accessory measure) publication of the decision: most legislation that grants certain parties the right to bring an action for injunction or a preventive action, also provides for the possibility for the judge to order the publication of the judgment if such publication can contribute to the cessation of the illegal practice or the prevention of an imminent illegal practice;
- (as an accessory measure) 'dwangsom / astreinte': forfeiture of a fixed sum in case of non compliance with the judgment.

What is generally absent in this specific legislation, is a possibility to claim monetary damages.

October 1986, *Arr. Cass.* 1986-87, 217; *Pas.* 1987, I, 200; *R.C.J.B.* 1988, 327, noot P. DE VROEDE en *R.W.* 1986-87, 1033.

³⁷ For more details: J.F. Van Drooghenbroeck, *Les actions en cessation*, CUP Liège, 2006, 32 et seq.

III The right of substitution of citizens

(30) A technique, which has become important in recent years, especially in the field of environmental disputes, is the right of substitution of inhabitants of a local community.

Local communities have by their very nature standing to act for the collective interests of their inhabitants. In principle, the institution of legal proceedings in the name of the local community is a matter for the local authority, the Board of Mayor and Aldermen of a *commune*, or the Permanent Deputation of a *province*. However, in case of omission by these authorities, any inhabitant of a commune can give notice to the local authority demanding them to act in court. Where the authorities refuse or do not respond within a reasonable time, the inhabitant can start the procedure in its own name "as representative" of the commune.

This possibility exists in principle since the *Loi communale* of 1836 (Art. 271 in the 1988 numbering of Articles, Art. 150 in the 1836 numbering) but was for a long time rarely used, also because the inhabitants originally needed approval of the provincial authority. Not only has this last requirement been abolished, but at least in the state of Flanders the possibility has been broadened to include also the substitution for the provincial authority by any inhabitant of that province and the substitution for the communal of provincial authority by legal persons having their seat in the commune c.q. province (Art. 187 of the Flemish Provinces Statute of 9 December 2005 and Art. 194 Flemish Statute of Communes of 15 July 2005).

This technique is even more interesting when it can be combined with one of the special rules on standing, such as in the case of the abovementioned actions for environmental injunctions (Act of 12 January 1993). But the technique is also regularly used to institute summary proceedings (which, contrary to the special environmental injunction procedure, only lead to provisional measures), preventive actions, actions for annulment before the Council of State and even the Constitutional Court. The technique is less suitable for actions for compensation of damage, as the payment will have to be made to the local community itself and not to the plaintiffs (who can only recover their procedural costs).

There is no similar possibility for citizens to substitute themselves for the State or Federal authorities.

IV Proposals for reform

1. General action in the collective interest

(31) A general legal basis allowing organisations to introduce actions in the collective interest is lacking. In the past, several bills have been introduced to counter this problem, but none of these proposals has thus far been adopted.³⁸ These proposals mainly purport to amend the articles 17 and 18 of the Judiciary Code so as to introduce a right for organisations with legal personality to introduce actions in the collective interest they purport to defend according to their statutory aim. The latest proposal purports to add a paragraph to art. 17 Judiciary Code stating: “*Notwithstanding the admissibility of the actions introduced in accordance with more specific legislation, all actions introduced by legal persons are admissible if these actions are introduced in order to defend an interest that is part of their statutory aim.*”

This proposal has been criticized as insufficiently precise and too wide. It is for example not clear how that ‘interest’ is to be defined, and what conditions these legal persons need to satisfy. It is also not specified what forms of relief may be pursued – actions for injunction? declaratory actions? Or also actions for damages?³⁹ Similar provisions that allow collective interest actions were e.g. introduced in Dutch law (art. 3:305a-c CC that entered into force on 1 July 1994) and all forms of relief can be pursued, except actions for monetary damages.

2. Collective actions for damages in consumer matters

(32) Parallel to these proposals, the former Minister of Consumer Affairs is investigating the possibilities to go beyond actions in the collective interest of consumers and to introduce actions that allow to defend the individual interests of consumers collectively. Such procedure should allow consumers that have suffered similar harm to claim damages in one action. The former Minister of Consumer Affairs referred to the class actions procedure in the US and Canada and stressed the need for a mechanism that allowed dealing with multiple low value claims, that are currently not brought to court by consumers.⁴⁰ Absent a new government, it is of course hard to tell what the policy of such future government in this regard will be. There are no concrete proposals at this point in time. As the current rules of civil procedure already allow organizations to act in their own name on account of individual

³⁸ See S. Voet, S. Lust, “De voorwaarden van de burgerlijke rechtsvordering (inzonderheid het belang) als breekijzer(s) voor een collectief vorderingsrecht□”, draft text for the conference on ‘class actions in Belgian law’ Louvain-la Neuve 7 December 2007 with reference to wetsvoorstel van 11 juli 2006 tot wijziging van het Gerechtelijk Wetboek teneinde verenigingen een vorderingsrecht toe te kennen ter verdediging van collectieve belangen, *Parl. St.* Kamer 2005-2006, nr. 2620/001 en wetsvoorstel van 7 maart 1988 tot erkenning van het recht om in rechte op te treden voor verbruikersorganisaties en leefmilieuverenigingen ter verdediging van hun collectieve belangen, *Parl. St.* Kamer 1988, nr. 242/1; Wetsvoorstel tot wijziging van de gecoördineerde wetten op de Raad van State, teneinde verenigingen een vorderingsrecht toe te kennen ter verdediging van collectieve belangen, *Parl. St.* Senaat, 2006-2007, 1953/1; Wetsvoorstel tot aanvulling van artikel 17 van het Gerechtelijk Wetboek en artikel 3 van de voorafgaande titel van het Wetboek van strafvordering, met het oog op de instelling ten voordele van de verenigingen van een rechtsvordering ter verdediging van collectieve belangen, *Parl. St.* Kamer 2007, nr. 0109/001.

³⁹ Cf. S. Voet, S. Lust, “De voorwaarden van de burgerlijke rechtsvordering (inzonderheid het belang) als breekijzer(s) voor een collectief vorderingsrecht□”, draft text for the conference on ‘class actions in Belgian law’ Louvain-la Neuve 7 December 2007.

⁴⁰ See Question de M. Dylan Casaer à la vice-première ministre et ministre de la Justice sur “les ‘class actions’” (n° 14614 11 April 2007).

consumers, *provided* they were granted the authority to do so by the individual consumers, such a new procedure should then probably work on an opt-out basis or provide for different rules with regard to the costs of the procedure, in order to be an improvement on the current rules of procedure.

As could be expected, the plans to introduce a ‘class action’ were received critically by the Federation of Belgian Enterprises, and positively by consumer organizations.⁴¹ In their memorandum for the federal elections in June 2007, the main Belgian consumer organisation Test-Achats pleaded - mainly inspired by the discussions that were then ongoing in France - for a action that would solely be open for consumer organizations and that would allow these organisations to start a collective procedure in case of unfair competition or unfair commercial practices or other infringements of consumer law. Once a decision would have been taken by the court, consumers that would have suffered harm should be allowed to join the proceedings to obtain damages at no or at a limited cost.

⁴¹ Memorandum of the FBE for the Federal Elections (p 6) and Memorandum of TestAchats for the Federal Elections (point 9.1.).