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Introduction to the class actions framework

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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 the EU Consumer Rights Directive[1], which was published shortly afterwards. The transposition deadline for the Directive was 25 December 2022 and the measures should apply from 25 June 2023[2].

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 its members[3]. 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[4]. 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[5]. 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.

1. The year in review

The year 2022 has been a rather active year in respect of compensatory collective redress mechanisms, as several amendments to the Bill have been submitted, notably to clarify certain topics and improve its overall readability.

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[6], 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[7].

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[8]. The legal framework for class actions that the Bill seeks to implement into Luxembourg law is limited to consumer damages. Under the Bill, consumers will be allowed to seek to recover damages for all kinds of breaches of contract or violations of the law by a professional, and not only for breaches of the Luxembourg Consumer Code. In a recent opinion, the Luxembourg Bar Association has criticised this rather broad definition of violations committed by professionals, arguing that it cannot be determined exactly which of the

1 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 (the Consumer Rights Directive).
2 Article 24 of the Consumer Rights Directive
3 DC Lux., 19 May 2005, docket No. 88227, BIJ 8/2005, p. 155.
4 Court of Appeal, 20 June 2007, docket No. 30686, 30687 and 30688.
5 G Ravarani, *La responsabilité civile des personnes privées et publiques*, 3rd ed., Pasicrisie Luxembourgeoise 2014, No. 1127 et seq., p. 1,108 et seq.
6 OJ L 201, 26.7.2013, pp. 60–65.
7 https://gouvernement.lu/dam-assets/fr/publications/accord-coalition/2018-2023/Accord-de-coalition-2018-2023.pdf.
8 Bill of Law No. 7650, Exposé des motifs, p. 5.

professional's obligations are being addressed, which is likely to cause legal uncertainty.
The government amendments to the Bill, adopted in January 2022, provide that a class action may be initiated not only in the event of national breaches committed by the professional but also when cross-border breaches of the professional's legal obligations have been committed[9]. In this respect, the Bill provides that alleged breaches by a professional of their obligations to provide information to consumers, or of their contractual obligations towards them, may allow consumers to initiate a class action. It is also worth noting that although, in principle, the Bill excludes collective recourse by consumers against professionals supervised by Luxembourg's financial regulator, Luxembourg's insurance commission [10] or the European Central Bank[11], the Bill provides an entire list of European directives and regulations aimed at those same professionals that may serve as a basis for collective redress if they are violated by the professional. Annexe 1 of the Bill notably includes Directive 2008/48/EC on credit agreements for consumers, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities, and Directive 2011/61/EU on alternative investment fund managers. Therefore, consumer disputes in relation to certain financial services may indeed lead to collective recourse procedures.
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. However, this has not been approved by all the professional bodies consulted. For instance, the Luxembourg Chamber of Commerce has demanded that only material damage shall be compensated, as non-material damage would be essentially individual and, therefore, not suitable for collective redress mechanisms.

The class action itself may be initiated not only 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[12]. The Bill provides for certain criteria to be met by the qualified entity to initiate a class action and, in particular, its statutory purpose must show that it has a legitimate interest to protect the interests of the consumers who have been harmed [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 provides that an action for cessation or prohibition of the professional's breach may be initiated not only 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. Following criticism by the Luxembourg Consumer Protection Association regarding this rule [16] , the Bill now provides that the judgment on admissibility shall be published fully and anonymously.
Afterwards, as the case may be, the court hands down a judgment on either the professional's liability or 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. Interestingly, the recent government amendments of September 2022 have introduced the option to 'split' the proceedings where one or more consumers disagree on the outcome of the proceedings (i.e., some wish to continue the court proceedings while others wish to engage in a potential out-of-court settlement)[17].
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

9 Bill of Law No.7650, Amendements gouvernementaux, 26 January 2022, coordinated version of the Bill, p. 55.
10 Bill of Law No. 7650, Exposé des motifs, p. 7.
11 Bill of Law No. 7650, Amendements gouvernementaux, 26 January 2022, coordinated version of the Bill, p. 86.
12 Bill of Law No.7650, Amendements gouvernementaux, 26 January 2022, coordinated version of the Bill, p. 56.
13 Idem. 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. 56.
15 Idem. 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.
16 Bill of Law No. 7650, Amendements gouvernementaux, 26 January 2022, coordinated version of the Bill, p. 53.
17 Bill of Law No. 7650, Exposé des motifs, p. 5.

the opt-in system is to be applied and, thus, foreign consumers are 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 are held to be remedied of any harm by the professional. More precisely, the liquidator is to contact 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 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 District Court of Luxembourg. The Bill provides that the latter is to analyse the disputed compensation 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.

2. Procedure

i. Types of action available

a. 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.
Nevertheless, Article 1701 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.

b. 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 under either 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[18].

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

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).

c. Test cases

Test cases are not provided for by law. In the event of mass claims, 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. Commencing proceedings

Judicial proceedings before a district court are commenced through the service of a court summons (i.e., an originating process introducing adversarial proceedings). A summons is always served on the defendants by a bailiff, and the deed of summons should indicate, in accordance with the law, the procedural rules that will govern the proceedings (whether the proceedings will be conducted according to the civil written procedure or the commercial oral procedure).
Once service has been successful, and subject to certain exceptions where the defendant resides abroad, the defendant is given 15 days to appear in court through a notice of appearance, which is filed with the claimant's lawyer by the defendant's lawyer when the civil written procedure is applicable.
Where the commercial oral procedure is applicable, the court summons indicates the introductory hearing at which the parties (or their representatives) should appear in person. During the introductory hearing, the court sets a date for the pleadings to take place.
The proceedings provided for by the Bill are governed by these same procedural rules. According to the Bill, a class action must always be introduced through a deed of summons. In addition to the information required under the New Code of Civil Procedure, the Bill provides for specific information that must appear in the deed of summons, such as the individual exemplary cases presented by the claimant in support of the class action.

iii. Procedural rules

The applicable procedural rules before a district court depend on the nature of the dispute at hand. Although commercial disputes generally lead to oral proceedings, the claimant can also elect for the civil written procedure, whereas purely civil disputes or disputes against non-commercial persons or entities must always be brought according to the civil written procedure.
In the case of civil written proceedings, once the case is filed with the court, arguments are made through an exchange of written submissions over a certain period. Once the briefing phase has come to an end, a hearing takes place for the parties to plead the matter orally based on their written submissions, after which judgment is handed down by the court.
In the case of oral proceedings, the matter is pleaded directly at the hearing set for such pleadings and the court issues its judgment once the pleadings have taken place. Parties are, nevertheless, allowed to file written pleading notes in support of their pleadings.
Representation by a qualified legal counsel is not mandatory if the litigation is conducted according to the oral procedure. In fact, the parties may choose to defend themselves directly or even be represented by certain persons who are not qualified lawyers.
According to the Bill, the commercial oral procedure applies by default to class actions, unless the claimants are willing to bear the additional cost and choose the civil written procedure.

iv. 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[19].

v. 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

[19] 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.

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 be unlikely to suffice in the current legal framework.
It is, therefore, also advisable to include a severability clause to guard against anyone trying 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. However, the Bill provides that out-of-court dispute resolution agreements must be approved by the president of the District Court of Luxembourg.

3. 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 [20] and II [21] 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 Rome 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.
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 District Court of Luxembourg by several qualified entities from different Member States of the European Union[22].

ii. Enforcement of foreign class action judgments

Whether or not it is caught by the Brussels Recast Regulation [23] or other international agreements [24], 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.

4. 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. 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 amendments.
The recent government amendments, published in September 2022, show that the implementation of collective redress into Luxembourg law is a difficult task.
Furthermore, in its most recent opinion, the Luxembourg Bar Association[25] expressed concerns regarding the lack of private international law provisions in the Bill, as the provisions contained in the Brussels Recast Regulation [26] and the Rome I Regulation [27] were not specifically tailored to collective redress mechanisms. The Luxembourg Bar Association argues that this could lead to fragmentation of class actions before the courts of several Member States and could potentially make such actions even more costly and difficult to implement.
The report submitted by the Luxembourg Bar Association, as well as reports submitted by the Chamber of Civil Servants and Public Employees

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20 Regulation (EC) No. 593/2008 of the Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.
21 Regulation (EC) No. 864/2007 of the Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.
22 Bill of Law No. 7650, Amendements gouvernementaux, 26 January 2022, coordinated version of the Bill, p. 57.
23 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 (recast).
24 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).
25 Opinion of the Luxembourg Bar Association, 14 September 2022, p. 4.
26 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 (recast).
27 Regulation (EC) No. 593/2008 of the Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

and the Luxembourg Consumer Protection Association[28], emphasise the need to ensure that funding does not compromise the class action in any way. In particular, the Luxembourg Consumer Protection Association has raised concerns about third-party financing of class actions, and about the fact that the Bill in its current form would not provide sufficient safeguards to prevent any influence being exercised in that respect. In the view of the Luxembourg Bar Association, the government amendments of January 2022 did not address this matter sufficiently.

The January 2022 government amendments to the Bill have, to some extent, taken note of the criticism expressed 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 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 if the court suspects a conflict of interest, it may request a financial overview from the applicant listing the sources of the funds used. Notably, the Luxembourg Bar Association criticises this 'safeguard' mechanism for lacking precision, as the government amendments do not indicate what the potential consequences would be, should the court indeed find there to be a conflict of interests with respect to the funding of the class action after the court has already declared the action admissible.

The Chamber of Employees, the Chamber of Civil Servants and Public Employees and the Luxembourg Consumer Protection Association further advocate the introduction of state aid dedicated to the financing of class actions, in accordance with Article 20 of the Consumer Rights Directive. However, the recent government amendments stipulate that specific state aid for collective redress is not necessary, as Luxembourg law already contains sufficient provisions to guarantee access to justice.

The various opinions published, however, also show that on some points the Bill has created divergent opinions. For instance, while the Luxembourg Consumer Protection Association has requested that the judgment on the admissibility of the class action should always be published, the Luxembourg Chamber of Commerce, representing the interests of professionals, requested the opposite in a recently published opinion. The Bill has prioritised consumer interests by making publication of the judgment on admissibility mandatory.

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.

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[28] Opinion of the Luxembourg Consumer Protection Association of 19 August 2020, 22 July 2021 and 2 February 2022; Opinion of the Chamber of Civil Servants and Public Employees of 12 October 2020.

[29] Co-authored by Francois Kremer