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European Law Institute (ELI)-International Institute for the Unification of Private Law (UNIDROIT)

From Transnational Principles to European Rules of Civil Procedure

Presentation and discussion of the draft rules of the Working Group on 'Parties' (Collective Redress)

Please note that this document is a preliminary draft which has not yet been adopted by the ELI or UNIDROIT.

ELI-UNIDROIT European Rules of Civil Procedure [WORKING GROUP on Parties]

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Chapter [X]: Collective Redress

Introduction

This Chapter provides mechanisms for collective redress based on a broad, non-sectoral approach as indicated by the EU Commissions Recommendation 2013/396. The rules apply to any type of mass harm for which a collective action can be admitted under Rule X5. They are inspired by the principles set out in the Recommendation 2013/396 and by collective redress instruments already existing in national laws, e.g. in Belgium, France, England, Lithuania and Slovenia. In April 2018, the EU Commission published documents on a "New Deal for Consumers" which includes a proposal for a Directive on representative actions for the protection of collective interests of consumers – "EU Proposal" - (COM [2018] 184 final). In contrast to the Recommendation 2013/396 the proposal takes a narrower approach in terms of the scope of application of the proposed directive, most likely so as not to provoke a challenge of the European legislature's jurisdiction. The proposal restricts its scope of application to infringements by traders of provisions of Union law listed in Annex I of the proposed directive which includes 59 directives and regulations on EU consumer law. For model rules as proposed in this draft such a narrow approach does not seem appropriate.

The concept of this Chapter includes three pillars in order to deal with mass harm situations: (1) a collective redress action for the recovery of damages or other collective remedies or for a declaratory judgment (Rule X1- X14, X21-23), (2) a mechanism to declare binding a mass settlement entered into by the parties to a pending collective redress action (Rule X15-X20), and (3) proceedings to declare binding a collective settlement entered into outside a collective action Rules X24-X27).

(1) The collective redress action is based on an opt-in mechanism unless the court decides that an opt-out mechanism will be more effective in a particular case (Rule X8). This will allow cases with big and medium-sized individual damages to be treated differently from cases where individuals each suffered only minor harm and cannot be expected to become active due to 'rational inaction'. The approach taken here prefers opt-out proceedings for damages over instruments of 'skimming-off' of illegally gained profits from the perpetrator ('account of profits'), in order to offer victims a chance to receive compensation. The WG is, however, aware of the problem of distributing compensation funds in cases concerning very small individual damages. Depending on the individual case, courts may therefore accept cy-près solutions, but only in settlement contracts. Cy-près solutions imposed by the court in a judgment need a basis in substantive law (which is beyond the scope of this Chapter) whereas in a settlement the parties are free to agree on an alternative distribution of the settlement fund if it is fair and adequate to do so and the court has approved the settlement (Rule X18 and X27).

(2) For court approved settlement contracts entered into when a collective redress action was already pending, the mechanism depends on the nature of the action. In case of an opt-in mechanism the settlement will bind only those group members who have opted in (Rule X9). Where the collective redress action was based on an opt-out mechanism, the settlement will bind all group members who have not opted out within the period set by the court (Rule X20). These rules adopt a broad approach with respect to legal standing, but provide safeguards to protect defendants and group members from misuse. Legal standing to act as a "qualified claimant" is granted to individual group members, ad hoc interest groups or long-standing organizations authorized by national law to represent the interests of the group members in a particular field of law, such as consumer organisations or organisations representing investors. Qualified claimants must meet certain requirements (Rule X3). In order to prevent a "run to the court-house", the lead claimant acting on behalf of the group will not be identified on a "first come, first served" basis. Before making a collective redress order the court must allow other potential qualified claimants to apply to become the lead claimant (Rule X6 (2), (3) and it is finally up to the court to decide which applicant (if there are several) is the most appropriate to conduct the litigation for the group members. The court may also select more than one qualified claimant to act jointly in the best interest of the group.

(3) Similar rules apply with respect to legal standing to reach a settlement outside collective redress actions (and a subsequent application to declare such a settlement binding). Rule X2 (a) and (b) are applicable. As it is unlikely that an entity which is potentially liable for a mass harm will enter into settlement negotiations with a single individual member of the group this has not been included in Rule X25. In practice, only entities or organizations which can claim to represent a large number of group members will have the chance of negotiating a settlement.
The efficient handling of collective redress proceedings requires a court that has strong case management powers and can take into account the peculiarities of the particular case at hand. In addition to the general case management rules, this chapter therefore provides particular rules for the situation of complex mass damages.

Unlike the Recommendation 2013/396 and the EU Proposal 2018 this Chapter takes the position that, with respect to injunctive relief, the use of a collective action is not necessary. If even only a single claimant acting on his own behalf is successful in applying for a cease-and-desist order against the defendant, everybody will benefit from the result if the defendant complies with the order. In order to ensure that illegal behaviour can be stopped whenever necessary, a broad approach to legal standing for those actions is necessary, but also sufficient (Chapter Y).

Otherwise this Chapter proposes remedies which are very close to those which can be found in the EU Proposal 2018. The Commission's Proposal describes the measures that may be sought under the Directive within a representative action in its Articles 5 and 6. Although the proposal seems to have a primary focus on injunctive relief, it also includes, in Art. 5 (3), representative actions seeking measures eliminating the continuing effects of an infringement. Such redress measures as described in Art. 6 EU Proposal include e.g. compensation, repair, replacement, price reduction, contract termination, or reimbursement of a price paid to the trader. This has a parallel in Rule X4 (1) (e) according to which the collective action is not restricted to the recovery of damages, but includes all remedies as listed in Art. 6 (1) EU Proposal. Although Art. 5

(3) EU Proposal 2018 allows measures eliminating a continuing effect of an infringement only where a final decision establishing that a practice constitutes an infringement of consumer law has been given, in practice there will be no significant difference to this Chapter. In a collective redress action under this Chapter courts and parties will also often agree on a two-step proceeding and courts may give a partial judgment on the question of liability or infringement before deciding on amount of damages or other remedies. Likewise Art. 5 (4) obliges Member States to ensure that the court decision establishing that a practiced violated consumer law and measures to eliminate the effects of the infringement can be sought within a single representative action. Art. 6 (2) EU Proposal 2018 allows Member States to restrict representative actions to declaratory relief under certain circumstances, particularly in cases where the quantification of individual damages or redress is complex. Again there is no fundamental difference to this Chapter, because under Rule X5 (1) (d) courts may decide to not admit a collective action if it will not resolve the dispute more efficiently than a joinder of the group members' individual claims**.**

Furthermore, according to Art. 8 EU Proposal 2018 Member States must ensure that qualified entities and traders can jointly request a court to approve a settlement they have negotiated in the general interest of consumers. This has a parallel in the third pillar of this Chapter, collective settlements under Rules X24 – X27.

Part I: General Part

Rule [X1][1] Collective Redress Action

A collective redress action is an action which is brought by a qualified claimant on behalf of a group of persons who he claims are affected by an event giving rise to mass harm, but where those persons are not parties to the action ("group members").

Sources:

In General:

Recommendation 2013/396; similar instruments are available (scope of application and rules on legal standing vary) in: Belgium (2014: "L`action en réparation collective" [Livre XVII, Titre 2 Code de droit économique]); Bulgaria (Chapter 33 of the Code of Civil Procedure – Articles 379– 388); Denmark (2008: Law no. 181, 28/2/2007: Sec. 254a-k Administration of Justice Act); England/Wales (Consumer Act 2015 Schedule 8 "Private Actions in Competition Law", Sec. 47B Competition Act 1998); France (Law No. 2014-344 March 17, 2014 and Decree No. 2014- 1081 of September 24, 2014 inserted articles L. 423-1 to L.423-32 and R.623-1 to R.623-33 of the Consumer Code)"Action de groupe" [Code de consommation, Titre II, Chap. III]; Law No. 2016-41 January 26, 2016 and the Decree no. 2016-1249 of September 28, 2016 (inserted at articles L. 1143-1 to L. 1143-22, R. 1143-1 to R.1143-11 and R. 1526-1 of the Public Health Code), Finland (Class Action Act 444/2007); Germany (Sec. 606-614 CPC as of 1 November 2018), Hungary (CPC 2.12.2016, MK 2016 No. 190 p. 7878, Part 8, Chapter XLII); Italy ("*Azione di Classe*") introduced by Article 140*bis* of

[1] Rules will be re-numbered in a final version. In some respects the draft also still requires harmonization with the drafts of other Working Groups (e.g. cost, lis pendens…).

the Consumer Code by Law No. 244 of 24th December 2007, and subsequently amended by Law No. 99 of 23rd July 2009, and Law No. 27 of 24th March 2012.); Lithuania (Art. 441-1 to 441-17 Code of Civil Procedure); Norway (Chapter 35 Act relating to Mediation and Procedure in Civil Disputes 2008 ["Disputes Act]); Poland (2010: Law of Dec. 17, 2009 (Diziennik Ustaw no.7 pos. 4); Portugal (Law no. 83/95; Law no. 24/96); Spain (Art. 11 [2] CPC 2001); Slovenia, Law on Collective Actions, Official Journal of the Rep. of Slovenia No. 51/2017 ("ZKolT", in force since: March 2018); Sweden (2003: Group Proceedings Act, SFS 2002:599); Switzerland Tentative Draft (March 2018), Art. 89a Swiss CPC.
Drafts for collective redress instruments are under discussion in the Netherlands, in the Czech Republic and in Switzerland (since March 2018).

Scope of application:
(1) Broad scope of application: Recommendation 2013/396; Bulgaria; Denmark (Sec. 254a [2] Administration of Justice Act: except e.g. matrimonial matters, paternity or libel disputes); Lithuania; Slovenia (consumer law, competition law, securities law, labour law, anti- discrimination); Sweden (2003: Group Proceedings Act, SFS 2002:599); Switzerland Tentative Draft March 2018

(2) Sector-specific instruments: EU Proposal 2018 (Art. 2: consumer law); Belgium (Art. XVII.37: list of 33 laws and regulations, mostly from consumer law, product liability), England/Wales (competition law); Finland (consumer law), France (consumer law, health law), Germany (Sec. 606-614 CPC: consumer law; KapMuG: securities actions), Hungary (consumer law, labour law, infringements of health),Poland (consumer law)

Comments:

1. Scope of application

Rule X1 provides the basic rule for collective redress actions and explains that the group members do not become parties to the action, although the approved judgment or settlement is binding upon them. "Mass harm" as used in this Chapter is not restricted to particular fields of law and it can be any event which causes injury or damage to at least two persons (cf. Recommendation 2013/396: "mass harm situation' means a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons;...."). The threshold defined by the Recommendation is rather low, but any other minimum requirement for the size of the group seems arbitrary and numbers above the minimum threshold do not mean that the Chapter on collective redress actions will necessarily apply — e.g. for a traffic accident with two or three victims. Accordingly, the EU Proposal 2018 does not define "mass harm", but refers to an infringement that harms or may harm "the collective interest of consumers". This in turn is defined as the interest of "a number of consumers" (Art. 3 [3]).

A collective redress action is admissible only if it meets the requirements of Rule X5. Therefore, if a simple joinder of claims or a consolidation of the actions will protect the rights of the claimants adequately and will allow the court to manage the proceedings properly, no collective redress action is permitted. This should be decided on a case-by-case basis by the court seized, not by a fixed minimum number of victims of a mass harm. The English competition case *Walter Merricks v. MasterCard* (with a proposed group of 46.2 million people, collective redress order denied, CAT 21 July 2017) illustrates that courts will also have to consider the maximum number of claims to be dealt with in a collective action. Collective redress actions in many Member States have not implemented a minimum number of group members or assume that a minimum of two suffices (Bulgaria, England/Wales CAT Rules, rule 79 (1) (a)

"identifiable class"), Finland (§ 2 Class Action Act : "several claimants"); France [Articles L. 623-1 of the Consumer Code and L. 1143-1 of the Public Health Code use the plural : "*consumers*" and "*users of the health system*"]) ; see also Norway (Sec. 35-2 Disputes Act "several"). Exceptions apply in Poland (Art. 1 [1]: 10 group members); Lithuania (group actions require 20 natural or legal persons, Art. 441-3 [2] CCP) and Germany (German KapMuG: 10 investors; Sec. 606 (2) no. 2 CPC: 10 consumers).

This Chapter adopts the approach taken by the Recommendation 2013/396 which allows a "group" on the claimants' side only, but not on the defendant's side. In practice there is hardly a need for group actions on the defendant's side. In rare cases (e.g. in copyright infringement cases), where numerous defendants are sued at the same time, their number will normally not require particular procedural rules which go beyond the rules on joinder (Rule 8-10 General Part) which apply anyhow.

2. Lead claimant /plaintiff – terminology

The expression "qualified claimant" has been chosen in order to avoid the use of "representative". The rules also do not use "representative action" in the context of collective redress mechanisms although this is the terminology of the EU-Recommendation 2013/396 and it is used in the common law tradition. There are several reasons why the use of "representation" has been avoided. There might be a confusion with the representation of parties who lack litigation capacity (Rule 2, 3 General Part) and the possibility of representation by a lawyer. It avoids another possible confusion because in some European domestic procedures (Italian, French, etc.) "representative action" has a different meaning and, in particular, implies that the represented persons become parties to the action. The core idea of collective redress proceedings is, however, to have only one party (or a limited number of persons) on the claimant's side, in order to avoid complex litigation and to make the proceedings manageable for the court. The EU proposal 2018 definition statesexplains "'representative action" means an action for the protection of the collective interests of consumers to which the consumers concerned are not parties" (Art. 3 [3]) and it refers to qualified entities, as do these rules. It means that the qualified claimant does not represent, strictly speaking, the victims but is representative of the collective interest of victims.

Rule [X2] Claimants Qualified to Bring a Collective Redress Action

A "qualified claimant" to bring a collective redress action is:

- **(a) an organisation authorized in accordance with national law and whose purpose has a direct relationship with the event giving rise to the mass harm;**
- **(b) an entity which is solely established for the purpose of obtaining redress for group members and which meets the requirements of Rule [X3]; or**
- **(c) a person who is a group member and who meets the requirements of Rule [X3] a to c.**

Sources:

Legal standing of individual group members & representative entities: Recommendation 2013/96 no. 3a, d, 4; Bulgaria; Denmark (Sec. 254c Administration of Justice Act: group members, associations, public agencies); England/Wales (class member or representative: Sec. 47B [8] Competition Act 1998, CAT Rules, rule 78 (1)-(4); Hungary Sec. 571 (qualified or representative entities listed in Acts outside the CPC; Sec. 580 et seq. CPC; Lithuania (Art. 441-4 CCP); Norway (Sec. 35-3 Disputes Act);

Poland (Art. 4 (2): group members, local consumer representative); Sweden (Sec. 4-7 Group Proceedings Act).
(Consumer) associations or similar institutions only: EU Proposal 2018 (Art. 4 "qualified entities"), Belgium (Art. XVII.39), Denmark (in opt-out actions only public authorities can be authorized as class representative); France (Art. L.423-1), Finland (§ 4 Class Action Act: Consumer Ombudsman); Germany Sec. 606 CPC (as of 1 November 2018); Portugal, Slovenia (Art. 4 ZKolT 2018); Switzerland Tentative Draft March 2018 (non-profit organisations representing the interests of a particular group of persons)

Comments:

The broad approach on the issue of legal standing as taken in Rule X2 is in line with the EU Recommendation 2013/396 and several national laws. There are three types of potentially qualified claimants: long-standing organisations representing the interests of consumers, investors or other potential victims (sub para. a), ad hoc organisations or private entities (sub para. b) which are established to represent the victims of a particular mass harm event, and natural persons who are themselves a member of the group of victims (sub para. c). Under Rule X2 all three potential claimants have legal standing to initiate a collective redress action. Rule X2 (a) includes public regulators or public bodies which are authorized under national law to bring such actions. As such rules on legal standing will often not be found in civil procedure codes, but in other regulations or statutes, no further specifications are necessary here. Some Member States have taken a different approach and legal standing is given in these jurisdictions exclusively to certain long-standing entities like consumer associations or ombudspersons. The same applies to Art. 4 of the EU Proposal 2018. Such a concept is appropriate for collective redress instruments with a limited scope of application if, in the field where those instruments apply, representative associations exist and are considered to be able to bring such actions (for example consumer associations). As this chapter does not restrict the scope of application of collective redress actions, it cannot be taken for granted that there will always be a long-standing organisation which represents the interests of the victims or persons harmed by the event of mass harm (for example there is often no long-standing association representing the interests of investors or the victims of a price-fixing cartel, if they are not consumers). This is the reason why Rule X2 (b) also gives legal standing to ad hoc founded entities which meet the requirements of Rule X3. The rather broad term "entity" has been chosen in order to clarify that legal personality is not necessary.

Establishing an ad hoc entity may be difficult in some Member States. Therefore it seems necessary to give legal standing also to natural persons who are a group member themselves. In order to prevent lawyer-driven litigation Rule X3(d) excludes lawyers from becoming a qualified claimant in a collective redress action. This exception does not apply if a lawyer or anyone exercising a legal profession is himself a victim of mass harm and a group member. This is why Rule [X2] (c) refers to [Rule X3] sub paras. a to c, but not to sub para. d.

Rule [X3] Requirements for qualified claimants

A person or entity shall not be a qualified claimant unless:

(a) he shows that he has no conflict of interest with any group member;

(b) he has sufficient capability to conduct the collective redress action. The court shall take account of the financial, human and other

resources available to him. If appropriate, the court may require a security for costs;

(c) he is legally represented; and

(d) he is not a lawyer or exercising any legal profession.

Sources:

Recommendation 2013/396 no. 4c (Rule X3 [b]); England/Wales (Sec. 47B [8] [b] Competition Act 1998, CAT Rules, rule 78 [3] [b]); Denmark (Sec. 254c Administration of Justice Act); Sweden Sec. 11 Group Proceedings Act 2003 (Rule X3 [c]), Lithuania Art. 441-7 CCP (adequacy of representation, experience in group litigation, conflict of interests, financial capacity of representative); EU Proposal 2018 Art. 7 (2) (b) refers to a potential conflict of interests between a third party funder and the defendant.
Security for costs: Denmark § 254e Administration of Justice Act, Poland Art. 8 (2010: Law of Dec. 17, 2009 (Diziennik Ustaw no.7 pos. 4); no security for costs, but exceptions from the loser pays principle according to the discretion of the court: Switzerland Tentative Draft March 2018 Art. 107 (1) lit g, Art. 89a Swiss CPC.
Legal representation: Germany (KapMuG and Sec. 606-614 CPC – proceedings before Court of Appeals); Hungary Sec. 582 (2); Lithuania Art. 441-1 (3) CCP; Poland Art. 4 (4) (but the group representative himself can be a lawyer and in that case no legal representation is necessary).

Comments:

As sufficient safeguards against the misuse of collective redress actions should be in place (Recommendation 2013/396 recitals 13, 15, 21; EU Proposal 2018 Recital 4), both natural persons and legal entities must meet certain requirements in order to have legal standing to bring a collective redress action. Rule X3 protects the interests of the group members and the interests of the defendant(s). It does, however, not take the position that a strictly non-profit making character of the qualified entity is necessary to protect both interests (for such a requirement cf. e.g. Art. 4 EU Proposal 2018, Sec. 606 (1) CPC as of 1 November 2018, Switzerland Art. 89 tentative draft FCPC). Legislatures cannot expect private actors to become active in the enforcement of the interests of a group of persons affected by a mass harm event if all kinds of financial incentive are excluded.
Rule X3 (a): Conflicts of interests of the qualified claimant and group members are only relevant if they might have an influence on the claimant's conduct of the collective redress action or the negotiation of a settlement. In cartel cases for example, the group may consist of SMEs which all bought over-priced products from the defendants due to a price-fixing cartel. Although the SMEs may be competitors on the same market, there is not necessarily a conflict of interest in the sense of Rule X3 (a) if one of the SMEs acts as a qualified claimant. With respect to that particular action they all have a common interest. Conflicts may, however, occur e.g. in product liability or pharmaceutical cases if some group members who have already suffered damage from the mass harm event are interested to sue for the recovery of damages whereas another part of the group may suffer injury and damages in the future, but is currently only interested in a declaratory judgment. In such a situation it might be necessary to form sub-groups, each with their own qualified claimant.

Rule X3 (b): In order to conduct the collective redress action properly, the qualified claimant must have sufficient financial resources, but this is also important for the defendant(s) with respect to adverse cost orders (Art 7 [1] EU Proposal 2018 is based on the same idea).). Where the court has doubts with respect to sufficient resources

of the claimant it should be in the position to order security for costs, Rule X3 (b) (Denmark § 254e (2), (7) Administration of Justice Act [includes security for costs by group members]; Poland Art. 8). In collective redress proceedings high costs may be involved for both parties. As the "loser pays rule" applies [WG on Costs?], defendants face a risk that the qualified claimant cannot meet adverse cost orders. In order not to create a high threshold for access to justice, security for costs should not be a regular requirement for qualified claimants. When deciding whether security for costs is necessary, the court will balance the interests of the parties and assess the financial situation of the qualified claimant, but it may also take into account the prospects of the case on the merits. Where there is – based on a summary estimation of the court – a high probability of success for the group, no security should be requested as the defendant's risk with respect to an adverse cost order is low. There is also no need to protect the defendant(s), for example in follow-on actions in cartel cases, where there is already a binding decision of a cartel authority that the defendant(s) participated in the cartel.
Security for costs can for example be a deposit or a bank guarantee. Details can be provided in the court order.
Rule X3 (c): Given that collective redress actions always have a certain level of complexity legal representation should be mandatory.
Rule X3 (d): The broad wording of Rule X3 (d) intends to include not only lawyers or advocates, but also legal notaries, judges etc.

Rule [X4] Requirements for Collective Redress Claim

(1) The qualified claimant must include in his claim all relevant information available concerning
- **(a) the event of mass harm;**
- **(b) the group;**
- **(c) the causal connection between the event of mass harm and the loss suffered by the group members;**
- **(d) the similarity of the claims of the group members in law and fact;**
- **(e) whether compensation or other collective redress remedies are sought;**
- **(f) the financial and other resources available to the qualified claimant to pursue the collective redress action;**
- **(g) evidence of the qualified claimant's attempt to settle the group members' claims.**

(2) A defendant may not, at any time after he has been formally notified by a qualified claimant of the claimant's intention to negotiate a collective settlement under Rule X4(1)(g), commence an action against the qualified claimant or any group member in respect of the same mass harm event unless the defendant can show that good faith negotiations have irretrievably broken down.

Sources:

Rule X4 (1): Belgium (Art. XVII.42 § 1); Denmark § 254d Administration of Justice Act; Finland
§ 5 Class Action Act 444/07; Germany Sec. 606 (2), 607 (1) CPC (as of 1 November 2018), Lithuania Art. 441-3, 441-7 CCP; Slovenia Art. 26 ZkolT 2018 (14 elements to be mentioned in the application); Sweden Sec. 9 Group Proceedings Act.
Rule X4 (1) (e): EU Proposal 2018 Art. 6 (1)
Rule X4 (1) (f): Recommendation 2013/396 no. 14

Rule X4 (1) (g): Belgium (Art. XVII.43 § 2 no. 8, Art. XVII.45 § 1) – mandatory period for settlement negotiations at the beginning of the action, time period fixed by the court in the collective action order; France, Lithuania Art. 441-2, 441-3(4) no. 5.

Comments:

According to Rule X4 the claimant must disclose all relevant information which the court needs to make a collective redress order under Rule X6.
Rule X4 (1) (a)-(d): The claimant must describe the event of mass harm underlying the collective redress action and the group of persons who have allegedly been affected by the mass harm event. If possible, the claimant must state in the claim the names and addresses of all members of the group. If the group consists of unidentified persons, the claim must give sufficient detail to describe the group exactly.
Rule X4 (1) (e) assumes that the qualified claimant may seek any court order /remedy which is available in regular proceedings. This includes actions for the recovery of damages, but also e.g. the reimbursement of a price paid, the repair of goods purchased, the replacement of defective products etc. Therefore any other performance by the defendant can be sought. This has a parallel in the broad scope of remedies suggested in Art. 6 (1) EU Proposal 2018. Collective redress remedies may also be in the form of a declaratory judgment or a cease-and-desist order. Any combination of those remedies is also possible. For injunctive relief see also Chapter Y for rules on standing of qualified claimants.

Rule X4 (1) (f): As only the qualified claimant (not the individual group member) is potentially liable for an adverse cost order, it is very likely that the action needs third-party funding (TPF) or public funds. The qualified claimant must provide information on the financial sources of the claimants' side, particularly on third-party funding (Recommendation 2013/396 no. 14; EU Proposal 2018 Art. 7 [1]). According to the Commission's Report (COM [2018] 40 final, p. 9-10) this part of the Recommendation has not been implemented so far in any of the MS. With the exception of Slovenia (new class action law 2018) there is a general reluctance to regulate TPF at all, but no MS has explicitly banned TPF. Nevertheless, due to the risks involved in using TPF some basic information duties on the claimant's side seem necessary. The information can be restricted to the fact of existing TPF and the identity of the funder. No details on the funding terms should be given to the defendant in order to avoid him building his procedural strategy on that information. If the claimant has insufficient resources to meet any adverse cost order, the court may require security for costs from the qualified claimant (Rule X3 [b]). In contrast to Recommendation 2013/396 para. 32 and EU Proposal 2018 Art. 7 (2), this chapter does not provide any restrictions on TPF [Working Group on Costs ?]. TPF could be an important element of collective redress and should not be banned. Nevertheless, in the long run it may not be acceptable to leave the market for TPF completely unregulated. It may become necessary to limit success rates in TPF agreements or to prevent law firms from using TPF to avoid the prohibition of contingency fees. Details are beyond the scope of this project.

Rule X4 (1) (g): In order to prevent a "race to the courthouse" and public commencement of unnecessary actions, any potentially qualified claimant should contact the allegedly liable person(s) before filing a collective redress action and make an attempt to settle the case out-of-court. Information and evidence on such an attempt should be included in the later collective claim if the settlement negotiations are not successful. For time limits see Rule X5 (1) (d) below. However, this system may, in

turn, increase the risk of "torpedo actions" filed by the potential defendant who becomes aware of a possible collective redress action and may file an action for a declaratory judgment in a 'friendly' or slowly working court. This is most likely to happen in a cross-border setting, but it cannot be excluded in domestic cases as well. Several options are available to prevent such a situation. Anti-suit injunctions are one of them, but according to the European Court of Justice's case law these injunctions issued by courts of a MS are not permitted. Another solution could be a consolidation of parallel proceedings. The rules on lis pendens in Ch. # are, however, not applicable to collective redress actions. Therefore a separate solution is provided in sub-paragraph (2).

It prohibits the defendant from bringing an action with respect to the event of mass harm once a qualified claimant has prepared a collective redress action and has officially invited the potentially liable party ("defendant") to negotiate a settlement. The defendant must be formally notified of the intention to negotiate, but it may not be appropriate for the potential claim to be made public at that point, so inclusion on the electronic register (Rule X[4bis]) should not be mandatory at this stage in the resolution of the collective dispute. Valid notification under the law of the forum is sufficient. The defendant should be restricted from bringing actions against the qualified claimant or the group members for as long as the negotiations are being conducted in good faith: it will be for the court seised by the defendant to decide how to enforce this obligation using remedies available in its law — the defendant's claim may be dismissed or stayed. The burden of showing that the negotiations have broken down should, however, be on the defendant to avoid multiple applications to commence individual proceedings against the qualified claimant or the group members. It should also be open to the court asked either to approve the resulting collective settlement or to hear the collective redress action (if the negotiations are not successful) to sanction a defendant through costs orders or other means if it has not complied with this Rule.

For Rule X4 (d) see comment on Rule X5 (c).

Rule [X4bis] Registration of Collective Redress Actions

(1) Upon receipt of a claim for a collective redress action as defined under Rule X1 the court must enter the claim into a publicly accessible electronic register.

(2) After registration of a claim any other court must dismiss any collective action against the same defendant(s) in respect of the same mass harm event and in the interest of the same group.

Sources:
Class Action Register (in various forms): Recommendation 2013/396 no. 10-12; Germany: KapMuG and Sec. 609 CPC (as of 1 November 2018), Netherlands, similar Norway (Sec. 35-6 Dispute Act), Slovenia Art. 10 ZKolT
Rule X4bis (2): Numerous national rules have implemented rules which exclude parallel or subsequent collective redress proceedings against the same defendant based on the same mass harm event or allow a consolidation of proceedings: Belgium Art. XVII.54 § 5 and Art. XVII.69, France (Art. L-423-23), Germany (Sec. 610 CPC as off 1 November 2018); Hungary Sec. 576, 591 CPC; Slovenia Art. 7 ZKolT; Switzerland Art. 127 (1) tentative draft FCPC.

Comments:

Art. X4bis provides a tool of information. The easiest way to provide information on pending collective redress actions is a (partly) publicly accessible electronic register. It can be consulted by all potential "qualified claimants", lawyers, group members etc.
The effect of registration is, however, not restricted to information. Art. X4bis (2) helps to prevent parallel collective redress actions in respect of the same mass harm event. Traditional *lis pendens* rules cannot preclude a second collective redress action filed against the same defendant by another "qualified claimant" because the parties to the actions will be different. In small MS, one court may have exclusive jurisdiction to try collective redress actions, but in other MS it is necessary to have a rule which prevents parallel actions within the same country. The Chapter on Lis pendens does not apply to collective redress actions. Therefore sub-paragraph (2) provides a rule of its own.
For the protection of the defendant in collective redress proceedings, Rule [X4bis] (2) bars any other collective redress action against the same defendant with respect to the same mass harm event provided that the actions are filed on behalf of the same group members. Rule X4bis (2) does not prevent parallel proceedings e.g. of different qualified claimants which act on behalf of a class of group members with different interests.
An obvious counter-argument to (2) would be that such a rule encourages a "race to the court house" by qualified claimants. This is however not true in the context of these Model rules. Any qualified claimant who is interested in leading the existing (pending) collective redress action may apply to be nominated for that position based on the "beauty contest" provided for in Rule X6 (2) and (3). Furthermore, qualified claimants must make an attempt to settle the dispute out of court before filing a collective redress action: Rule [X4] (1) (g).
The register to be established for the use of Rule X4bis can basically be the same electronic platform described in Rule X13. The platform may be divided into publicly accessible sections and sections which are only accessible for the parties to the litigation and the group members. The electronic register could also be established at the European level and be used to register collective redress actions in all MS of the EU.

Part II: Admissibility of Collective Redress

Actions Rule [X5] Conditions of Admissibility

(1) The court may admit a collective redress action, if:
- **(a) the collective action will resolve the dispute more efficiently than a joinder of the group members' individual claims;**
- **(b) all of the claims made in the action arise from the same event or series of related events causing mass harm to the group members;**
- **(c) the claims advanced in the collective redress action are similar in law and fact; and**
- **(d) except in cases of urgency, the qualified claimant has allowed the defendant(s) at least three months to respond to the qualified claimant's settlement proposal.**

(2) Upon application, the court may order any action to continue as a collective redress action.

Sources:

Recommendation 2013/396 recital 20, 21

Rule X5 (1) (a): Recommendation 2013/396 recital 21, no. 8; Belgium (Art. XVII.36 [3]); Lithuania Art. 441-7; Norway Sec. 35-2 (1) (c) Disputes Act; Sweden Sec. 8 Group Proceedings Act.
Rule X5 (1) (b) and (c): Recommendation 2013/396 no. 23; England/Wales Sec. 47B [6] Competition Act 1998 and CAT Rules, rules 79 [1] [b], 73 [2]; Finland § 2 Class Action Act 444/07; France Art. L.423-1 (2014); Lithuania Art. 441-7; Sweden Sec. 8 Group Proceedings Act
Rule X5 (1) (d): Belgium Art. XVII.43 § 2 no. 8; French Art. 62 statute 18 Nov. 2016 (where the delay is 4 months in general or 6 months in the health collective redress action); Lithuania (pre-court dispute resolution procedure, at least 30 days to respond to the group members claims, Art. 441-2 CCP)
Rule X5 (2): Sweden Sec. 10 Group Proceedings Act

Comments:

1. Appropriateness of court decision to admit collective action

In any collective redress action the court must make a separate decision on the admissibility of the action (Recommendation 2013/396 recital 20; England/Wales Sec. 47B (4) Competition Act 1998; Norway Sec. 35-4 Dispute Act; Sweden Sec. 13 Group Proceedings Act). The court decision should be subject to appeal (Working Group on Judgments/Appeal?).
Rules X4 and X5 provide criteria to be taken into account when making this decision. The court will in particular consider the number of group members and whether individual actions on matters arising from the mass harm event (if likely to be filed) will be manageable. Rule X5 (1) (a) therefore requires a "superiority test" which is common standard for almost all collective redress mechanisms.
When making a decision on the grounds of the good administration of justice, the court should take into account the complexity of the case and the availability of general court management powers. It may consider in particular the likely cost to group members of pursuing their claims individually and the value of each group member's claim for compensation. Group members will not be liable for procedural costs because they are not parties to the collective redress action (Rule X37 [1] below, also e.g. Finland § 17 Class Action Act 444/07; Sweden Sec. 33-36 Group Proceedings Act). Individual actions will therefore be more expensive and may not be a realistic option, in particular if the amount of potential compensation for each group member is low.

2. Claims arising from same event/similarity of claims

Furthermore a collective redress action is admissible only if all the claims arise from the same event and therefore raise common questions of fact and or law. The "same event" could be a so-called "single event mass harm" (mass accidents such as a plane crash, the explosion of a chemical plant, etc.) or claims may result from a series of related events, a so-called "single cause mass harm" (use of unfair contract terms, product liability cases, liability for misleading information in capital market brochures, etc.).
Rule X5 (1) (c) provides a requirement which is familiar to most EU collective redress mechanisms. The rule deliberately does not indicate what degree of closeness is required. Most EU collective redress mechanisms use 'similar' claims with some extending to 'related' claims (England/Wales Sec. 47B [6] Competition Act 1998 and CAT Rules, rules 79 [1] [b], 73 [2]: "same, similar or related issues of fact or law"; France: Art.L-423-1 "une situation similaire ou identique"). But claims which are related might still warrant collective redress. The court will have to decide on a case-by-case basis what degree of closeness suffices. Similarity of the claims may arise from the same facts underlying each claim, but also from the applicable law. In any

case, this requirement should not be interpreted too narrowly and is not intended to mean "identical" or "same". The experience in some MS which have such a strict requirement has demonstrated that it can be fulfilled only under extraordinary circumstances and would reduce the number of cases to which these Rules apply considerably — in turn reducing the availability of redress for group members. In cases in which according to the conflict-of-laws rules different sets of substantive law apply, but all claims are based on the same event, the collective redress action should be admissible in principle (Rule [X31]). The court may, however, divide the group in sub-categories according to the applicable law (Rule X11 [d]).
Rule X5 (1) (d): A period of negotiation of at least 3 months imposed before bringing the action could allow a settlement. This rule exists in different systems (Belgium Art. XVII.43 § 2 no. 8: 3-6 months for negotiations after filing the collective redress action; France).

Rule [X6] Collective Action Order

(1) An order made under Rule X5 must include the following information:
- **(a) the name and address, and other relevant contact details of the qualified claimant**
- **(b) a concise description of the event of mass harm giving rise to the collective redress action;**
- **(c) the names or a description of all of the persons allegedly affected by the mass harm. The description must contain sufficient detail to enable any person allegedly affected by the mass harm event to know if he is within the group or not;**
- **(d) the type of collective redress action under Rule X8(1) or (2).**

(2) Before making an order under Rule X5 the court shall advertise a draft of the order and set a deadline for any other potential qualified claimants to apply under Rule X1.

(3) The court shall determine which of several applicants shall become the qualified claimant on the basis of the criteria in Rule X3. Where more than one qualified claimant is selected they must act jointly.

(4) The collective action order shall be advertised in a manner which the court considers will best bring it to the attention of any person likely to be affected by the mass harm event on which the collective redress action is based. The advertisement shall invite such persons to opt-in to the collective redress action and shall give information on how to do so.

Sources:

Necessity to verify admissibility: Recommendation 2013/396 no 8, 9; Commission's Report (COM [2018] 40 final) p. 5-7; numerous national rules
Rule X6 (1): Belgium (Art. XVII.43 § 2); England/Wales Sec. 47B (7) Competition Act 1998; Hungary Sec. 585; Lithuania Art. 441-3 (4); Poland Art. 11; Slovenia Art. 28, 29 ZKolT; Sweden Sec. 13 Group Proceedings Act
Rule X6 (2), (3): Art. 1018c (3) and Art. 1018d (1) of the Dutch Code of Civil Procedure (new), if implemented by the Draft Dutch Collective Damages Action 2016.
Rule X6 (4): Belgium (Art. XVII.43 § 2 no. 7); Finland § 6, 7 Class Action Act; Norway Sec. 35- 5 Class Action Act; Lithuania Art. 441-3 (4); Poland Art. 11 (3); Sweden Sec. 13 Group Proceedings Act (notification of the proceedings to the group members);

Comments:

To admit the collective redress action a court order is necessary. It must clearly identify

the key information as set forth in (1). This is particularly important for the group members in order to make a decision on an opt-in or opt-out declaration later in the proceedings. Collective redress actions shall normally be based on an opt-in mechanism, but according to Rule X8 (2) the court may decide to use an opt-out mechanism instead.

Rule X6 (2) and (3) are based on the experience in the Netherlands where, under the WCAM, in some mass events a large number of ad hoc foundations competed for the support of the victims. This resulted in situations in which it was difficult for the group members to decide whom to support and for the defendant to choose with whom he wanted to enter into settlement negotiations. According to the new draft in the Netherlands, a claimant must register the collective action in a central register of collective actions within two days after initiating proceedings. After that registration, a period of three months will start to run, in which other claimants can submit a collective action for the same (mass harm) events. If more claimants submit a collective action, then the judge will appoint the most suitable claimant as an 'exclusive representative' (Art. 1018e (1) of Code of Civil Procedure [new]). The court will take into account the criteria in Rule X3, but may also consider other criteria.

In the common law class action systems and existing group action regulations in Europe, there are different approaches to identify the "lead plaintiff". It is mainly either a "first come, first served" concept, which gives priority to the qualified claimant who is the first to file a collective redress action, or a selection made by the court. The first concept may lead to a race to the courthouse and there is no guarantee that the best qualified claimant acts for the group members. The rules proposed here therefore combine both concepts. The collective redress action can be instituted by any qualified claimant who meets the requirements of Rule X2. However, as there may be other entities which are equally or even better qualified to act on behalf of the group members, the court will invite other entities to apply and it is finally up to the court to select the best qualified claimant. If there is more than one, it may also authorize more than one entity to act on behalf of the group. Under the proposal for a new collective action in the Netherlands, the other claimants will remain as party in the procedure, but it's the "exclusive representative" in principle that will carry out the procedural actions (Art. 1018e (3) of Civil Procedure [new]). If needed in a specific circumstance, the judge can choose more than one "exclusive representative" (Art. 1018e (4) of Civil Procedure [new]), as is also the case in Rule X2.
The court is under an obligation to publish the collective redress order. It may choose any method of publication which it considers will best notify all persons likely to be affected. If the group members are identified and their names and addresses are available, there can be either a personal notification of each group member depending on the size of the group or an advertisement via the secure electronic platform under Rule X13. In case of an opt-out mechanism Rule X8 (2)-(4) applies.

Rule [X7] Obligation of Qualified Claimant

A qualified claimant must at all times act in the best interests of the whole group or of the sub-group.

Sources:
National rules, e.g. Lithuania Art. 441-4 (5) No. 1; Norway Sec. 35-9 (1) Disputes Act;

Slovakia Art. 35 ZKolT; Sweden Sec. 17 (1) Group Litigation Act

Comments:

It is one of the core ideas behind collective redress proceedings that the claimant who represents the group or acts on behalf of the group and in the interests of the group at all times. Rule X7 provides an explicit rule in this respect and thus allows that the court may impose sanctions in case of violations.
Rules on collective redress, in general, must provide safeguards against misuse. Three potential conflicts of interests can be identified in a collective redress situation: (1) conflicts within the group, (2) conflicts between the qualified claimant and the group as a whole (3) conflicts between the group and/or the qualified claimant on the one side and the lawyer who represents the claimants on the other side. The first possible conflict can be solved by establishing sub- categories according to Rule X11 (d). The second conflict is addressed in Rule X7 which explicitly states an obligation of the qualified claimant to act in the interest of the group or sub-group. As the group members are "absent" from the proceedings it is necessary that the court supervises the qualified claimant to some extent and that it has the power to step in if the qualified claimant does not act (or no longer acts) in the best interests of the group or sub-group. The court may then substitute the qualified claimant according to Rule X11 (a). Finally, the third conflict must be addressed by the general rules on costs (e.g. by a prohibition of contingency fee arrangements) and by the necessity of a court approval of a proposed settlement (including the costs arrangements in the settlement).

Rule [X8] Types of Collective Redress Action

(1) A collective redress action shall use the opt-in system unless the court makes an order under (2).
(2) The court may decide that the collective redress action will include those group members who have not opted out of the action under paragraph (3) if the court considers:

- **(a) that the group members' claims cannot be made in individual actions because of their small size; and**
- **(b) that a significant number of group members would not opt-in to the collective redress action.**

(3) The court shall set a deadline for group members to notify the court that they wish to opt-out. In exceptional circumstances the court may permit opting out after the deadline.

Sources:

Opt-in mechanism as a general rule: Recommendation 2013/396 no. 10, 11, 21; more open EU Proposal 2018 Art. 6 (1): "Member States may require the mandate of the individual consumers concerned before a declaratory decision is made or a redress order is issued". Commission's Report [COM[2018] 40 final) p. 13-15; France (Art. L.423-5: opt in system after the judgment on liability); Denmark § 254e (2) Administration of Justice Act; Finland § 8 Class Action Act 444/07; Lithuania Art. 441-3 (2) CCP; Poland Art. 6 (2), Art. 12-13, Sweden Sec. 14 Group Proceedings Act 2003; Italy, Spain
Opt-in/Opt-out to be decided by the court for each action at hand: Belgium (Art. XVII.43); England/Wales (CAT Rules, rule 79 [1], 79.3); Norway Sec. 35-7 Disputes Act; Slovenia Art. 29 (2) no. 4 ZKolT.
Opt-out as an exceptional mechanism: Recommendation 2013/396 no. 21; EU Proposal 2018 Art. 6 (3) (b) (): in cases where "consumers have suffered a small amount of loss and it would be disproportionate to distribute the redress to them");"; Denmark § 254e (8) Administration of Justice Act; Norway (Sec. 35-7 Disputes Act); France (2014,

R.432-8 C. cons. which is a simplified group action when all the victims are known by a list)
Opt-out as a general rule for collective redress actions: Belgium Art. XVII.38 § 1 [2] opt-in for non-Belgium residents; Art. XVII.43 § 2 no. 2: opt-in in case of personal injury, moral damages; Bulgaria; England/Wales (Sec.47A [11] [b], non UK-residents), Portugal.

Comments:

1.Opt-in v. opt-out
For many years, one of the most controversial issues in debates about collective redress proceedings has been the question whether to use the traditional class action opt-out mechanism or an opt-in system — where the group is made up of those victims who have expressly joined the action (se Rule X9) — which allows group members to better control how their claim will be enforced against the defendant (or not). Against the background of a strong principle of party autonomy governing European civil procedure rules, collective redress actions must normally be based on an opt-in mechanism (Recommendation 2013/396 no 21). Thus, group members will be bound by the outcome of the proceedings only if they have notified the court (directly or through the qualified claimant) that they have joined the collective redress action. Notifications can be made by using the secure electronic platform under Rule X11, but the court may also choose other methods (Rule X9).
Opt-in is, however, not an adequate solution for cases in which the group members have suffered only minimal loss and due to their rational inaction cannot be expected to become active and to opt-in to the action. For the sake of an efficient enforcement of liability rules, which is a public good, exceptions from the opt-in principle must be put in place. It is therefore in the interests of justice to enable a collective action on an opt-out basis where this is the most cost-efficient way of organizing the group and where – according to insights from behavioural economics –a larger group compared to an opt-in system will be offered effective redress. An often raised argument against opt-out systems is the allegedly higher potential for misuse and frivolous claims. However, in practice, many Member States which have already implemented opt-out group proceedings — such as Belgium, Bulgaria, Denmark, Portugal, or (outside the EU) Norway — have not experienced an excessively large number of those claims. Provided that safeguards like the "loser pays rule" are in place and punitive damages are not available, unmeritorious collective redress actions will be not be excessively promoted by an opt-out mechanism.

A concern which carries more weight is, however, that the rational inaction of group members will often prevent them even from claiming compensation from a fund which has been established as a result of an opt-out collective redress action. The distribution of compensation funds may therefore become difficult. In order to avoid this problem, an alternative solution could be the establishment of actions for skimming-off illegally gained profits from the defendant(s) or disgorgement of profits to public or private entities instead of opt-out collective redress proceedings. EU Proposal 2018 Art. 6 (3) (b) – differently from the EU Recommendation 2013 – takes into account that distribution of small amounts of redress may be disproportionate. The conclusion drawn in the Proposal is that the redress shall be directed to a public purpose serving the collective interest of consumers. Thus, although the proceedings suggested in the Proposal are not disgorgement proceedings, Art. 6 (3) (b) explicitly accepts cy-près solutions. DDisgorgement proceedings have the advantage that it is not necessary to distribute a compensation fund to the group members as they

are not an instrument to compensate the victims of an event of mass harm. The money paid by the defendant will normally not go to the members of the group - in order to avoid enormous administrative efforts to distribute small amounts of money - but will be paid to state budgets (cf. Sec. 10 German Unfair Competition Act), to charity or special purpose funds (cy-pres).

Compared to disgorgement proceedings collective redress actions based on an opt-out mechanism at least offer a chance to compensate some of the group members. Proposed settlements may include cy-près solutions, allowing the unclaimed part of a compensation fund not to be paid back to the defendant, but instead to be given to non-profit institutions for a special purpose (such as consumer protection, funding of future public interest or collective interest actions …..). Different jurisdictions have different solutions for this issue which is also a question of substantive law. Therefore we do not propose a firm solution here. Such settlements must be carefully scrutinized by the court under Rule X17 and X 18. In doing so the court may also take into account that, depending on the nature of the mass harm, the group members may not claim compensation because they may have difficulties in proving that they are actually members of the group and entitled to compensation (e.g. in cartel cases consumers will often not possess documents or receipts proving that they have bought an over-priced product during the relevant period). For these cases it may be considered an adequate solution if the money paid by the defendant is used in a way which is close to a compensation of the individual group members. EU Proposal 2018 Art. 6 (3) (b) now also implies an obligation ("shall") on Member States to allow courts "direct the redress to a public purpose serving the collective interests of consumers" where distribution to the class members would be disproportionate.

2.Court decision

The decision of whether opt-in or opt-out is an adequate mechanism depends on the amount of the claims involved and an estimation of whether the group members have sufficient incentives to opt-in. The decision is best made by the court on a case-by-case basis which can take into account the features of the particular case such as the estimated amount of individual damages, the size of the group and the chance of notifying all or almost all group members etc. The court should also consider whether group members have a realistic chance of bringing individual actions.

Rule [X9] Opt-in System

(1) Under the opt-in system group members shall notify the court if they wish to join the collective redress action in the manner laid down by the court.
(2) The court shall ensure that the notifications of group members are properly recorded in a public register, which may be set up in accordance with Rule X13.

Sources:

See Rule X8; Belgium Art. XVII.38 § 1 no. 1b, Art. XVII43 § 2 no. 8; Lithuania Art. 441-3, Art. 441-5 (2); Norway Sec. 35-6 Disputes Act; Poland Art. 12; Sweden Sec. 14 Group Proceedings Act

Comments:

With respect to the res judicata effect of a judgment in a collective redress action (Rule X21) and the binding effect of a court approved settlement (Rule X20), it

must be very clear who opted-in to the action. This can become particularly relevant in case of a subsequent individual action by a group member, but it is also relevant for the distribution of damages. Therefore the court may provide different ways for group members to notify the court that they wish to join the collective redress action (e.g. written statements submitted to the court, registration on the secure electronic platform, notification through a representative or the qualified claiamnt). If the qualified claimant has invited group members to register with him in preparing the collective redress action, such a list of registrations may also be submitted to the court and be an equivalent to an opt-in declaration, if the entity had informed the group members in this respect before registration. In any case the court must ensure that there is a register which identifies the group members who opted-in.

Rule [X10] Individual Actions

(1) Group members who have opted in under Rule X9 or who have not opted out under Rule X8 (3) cannot bring an individual court action in respect of the same event of mass harm against a defendant to the collective redress action.
(2) In cases under Rule X8 (2) any group member who brings an individual action against a defendant to the collective redress action during the opt-out period shall be treated as having opted-out of the collective redress action.
(3) Any time limit provided in national law for individual actions to be brought by a group member in respect of loss caused by the event of mass harm shall be suspended from the date of the commencement of the collective redress action.
The period of suspension shall end when
(a) the collective redress action is withdrawn or dismissed; or
(b) the group member opts out under Rule X8 (2)-(4).
(4) Where (3) (a) or (b) apply, the remaining limitation period for individual claims will start six months after the withdrawal, dismissal or opting-out.

Sources:

Rule X10 (1): e.g. Belgium Art. XVII.69; Germany Sec. 610 (3) CPC; Lithuania Art. 441-10; Poland Art. 13 (2); Solvenia Art. 7 ZKolT
Limitation period: EU Proposal 2018 Art. 11; Belgium Art. XVII.63; Germany Sec. 608 CPC and Sec. 204 no. 1a Civil Code; England/Wales Sec. 47E (4) Competition Act 1998; France Art. L.423-20; Slovenia Art. 8 ZKolT.

Comments:

In order to protect the defendant(s) from parallel proceedings arising from the same mass harm event Rule X10 bars individual actions of the group members. It is necessary to have an explicit rule because according to general rules on *lis pendens* individual actions may not be automatically inadmissible (e.g. as the parties to the actions will not be the same) especially as group members are not parties to the collective redress action. The Chapter on pendency is not applicable to collective redress actions and it permits only a stay of proceedings where actions are "related", but for collective redress actions a stricter rule seems adequate in order to protect the defendant from multiple actions and to save resources of the judicial system. Parallel individual actions are barred for group members who have opted-in (regular mechanism for collective redress actions). They can bring individual actions only if they leave the collective action. In case of an opt-out group action under Rule X8 (2) the group members will not be personally known to the qualified claimant or the court seized of the collective action. If

they file individual actions without having opted-out of the collective action, the defendant(s) will realize that the claimant is part of the group as described in the collective action and may inform the court. As a consequence the claimant to the individual action shall be treated as having opted-out of the collective redress action.

According to Rule X10 (3) time limits are suspended. This rule refers to the "commencement" of the "action" which can either be the filing of the claim or the service of the documents instituting the proceedings (Rule 7 Chapter on pendency).
Rule X10 (4): When the collective redress action is withdrawn or dismissed, or if a group member opts-out of the collective redress action, the time limit for the prescription of the individual claims must be restarted. However, to avoid a situation where an individual may have very little time left to assert his individual claims, the paragraph applies a minimum six month period.

Part III: Case Management of Collective Redress Actions

Rule [X11] Case Management Powers

The court shall have the following additional case management powers in a collective redress action:

- **(a) to remove a qualified claimant if he no longer satisfies the conditions in Rule X2 and Rule X3 or he does not act in the interest of all group members. This paragraph also applies for a removal of the qualified claimant of a sub-group;**
- **(b) to authorize a new qualified claimant with his agreement;**
- **(c) to modify the description of the group;**
- **(d) to divide a group into sub-groups and to authorize a qualified claimant for each sub-group with his agreement;.**
- **(e) to dismiss the collective redress action if there is no longer a qualified claimant**
- **(f) to direct the correction of the group register (Rule X9 [2], X13).**

The court may hear any person it considers has an interest in the management of the case before making any case management order under this rule.

Sources:

Rule X11 (a), (b): Recommendation 2013/396 no. 5; Belgium Art. XVII.40; Denmark § 254e (3) Administration of Justice Act; France (Art. 81 Statute 18 Nov. 2016); Lithuania Art. 441-4 (6); Norway Sec. 35-9 Disputes Act; Poland Art. 18 (upon application of more than 50% of the group members); Sweden Sec. 21-22 Group Proceedings Act
Rule X11 (c): England/Wales Sec. 47B (9) Competition Act 1998 (general rule); Norway Sec. 35-4 (3) Disputes Act; Sweden Sec. 18 Group Proceedings Act (court may allow plaintiff to extend the group)
Rule X11 (d): Belgium Art. XVII.38 § 2; England/Wales CAT Rules, rule 79 (1); Finland § 14 Class Action Act 444/2007; Poland Art. 20, 21 (2010: Law of Dec. 17, 2009 (Diziennik Ustaw no.7 pos. 4); Sweden Sec. 20 Group Proceedings Act

Comments:
This rule is based on the assumption that the qualified claimant is identified by filing a collective redress action and by fulfilling the requirements under Rule X2 and Rule X3. The court will, however, supervise the activities of the qualified claimant in the

interest of the absent group members (particularly in case of opt-out proceedings where group members have not explicitly joined the action) and it is within the court's management power to substitute the qualified claimant if he is no longer qualified or if he does not act in the best interests of the group members (Rule X7).
Rule X11 grants a wide power to the court in the interest of the absent group members and it requires that the court must supervise the activities of the qualified claimant in this respect. This does not necessarily collide with the neutral and independent role of the judge, although the court is in a different position compared to normal two-party-proceedings. The situation of the absent group members requires a stronger involvement of the court. As the group members will normally not be in a position or not be willing to supervise the qualified claimant themselves, the court may substitute the qualified claimant ex officio. It is also not necessary that another qualified claimant applies for the substitution. This power of the court is adopted from rules in several MS.

If the qualified claimant is a natural person and a member of the group (Rule X2 [c]), he will, for example, no longer satisfy the requirements under Rule X2 if he assigns or transfers his claims during the proceedings. As he has no longer a personal interest in the outcome of the litigation it cannot be assumed that he will act in the interest of the group any more.
In order to prevent the collective action collapsing the court must be able to admit a new qualified claimant. The new qualified claimant may be admitted only if he complies with the requirements in Rules X2, X3. If the group (or the lawyer representing the group) cannot find a new qualified claimant the action has to be dismissed. The same applies with respect to the substitution of a qualified claimant of a sub-group.

Rule [X12] Advertisements

(1) In a collective redress action the court shall advertise or shall require advertisement

- **(a) when a qualified claimant is removed or authorized;**
- **(b) when the description of the group is modified or the group is divided into sub-groups;**
- **(c) when a collective redress settlement is offered;**
- **(d) when any order or judgment is made;**
- **(e) of information about the electronic platform under Rule X13; and**
- **(f) if the collective redress action is dismissed or withdrawn.**

(2) The advertisement shall be placed in a manner which the court considers will best attract the attention of any person likely to be affected by the event causing mass harm and in sufficient time to allow affected persons a reasonable opportunity to participate in the collective redress action as they see fit.

Sources:

Recommendation 2013/396 no. 24, 35, 36; England/Wales competition collective proceedings rules; Finland §§ 6, 12 Class Action Act 444/07

Comments:

Some basic information on the collective redress action should be available to the public and to unidentified group members. Rule X12 therefore provides a mandatory

rule on advertisements to be made by the court. It is within the management powers of the court to decide the manner in which advertisements should be made. The court may also use the secure electronic platform (Rule X13) for public announcements.

Rule [X13] Communication – Secure Electronic Platform

The court must create or must authorize the creation of a secure electronic platform for the efficient management of the collective redress action.

Sources:

Recommendation 2013/396 no. 35, 36 (national registries for collective redress actions – not for the internal communication during proceedings); Germany Sec. 12 (2) KapMuG, Sec. 609 CPC; Slovenia Art. 10 ZKolT.

Comments:

Rule X4bis requires registration of a collective redress claim. The same register can be used as a secure electronic platform under Rule X13. Thus it can also be an easy and cost-efficient way of communication between the court and the parties and/or the group members. It can be a tool used in addition to public advertisements under Rule X12 (such as publications in newspapers and on the internet or other media) and access can be restricted to the parties and the group members if necessary. The platform should enable the court and the parties to know and to identify the group members. In particular, the platform can be used to provide information for the group members such as pleadings submitted by the parties, the announcement of court hearings, court orders, etc. It can also be used for opt-in or opt-out declarations of the group members.
Traditions in the Members States with respect to the responsibility for distributing information during court proceedings may vary. Therefore the responsibility for operating the platform and for the content provided on it could either lie with the court or, upon authorization of the court, with the qualified claimant.

Rule [X14] Settlements
The court shall use its case management powers to facilitate the settlement of the collective redress action using appropriate methods of alternative dispute resolution.

Sources:
Recommendation 2013/396 no. 26; Commission's Report (COM [2018] 40 final) p. 14-15

Comments:
Depending on the general rules provided in the "obligations" part, this Rule can possibly be deleted in a final version.

Part IV: Settlements in Collective Redress Actions Already Commenced

Rule [X15] Court Approval

A group member will not be bound by any agreement settling a collective redress action in whole or in part unless that agreement is approved by the court.

Sources:

Recommendation 2013/396 no. 28; EU Proposal 2018 Art. 8 (2); national rules, e.g. Belgium Art. XVII.47, XVII.49; Denmark § 254h Administration of Justice Act; England/Wales Sec. 49A Competition Act 1998; Germany § 18 KapMuG; Sec. 611 CPC; Lithuania Art. 441-6 (3); Norway Sec. 35-11 (3) Disputes Act; Slovenia Art. 36; Sweden Sec. 26 Group Proceedings Act.

Comments:

It is a general standard of collective redress actions that settlements need court approval. Settlements negotiated by the qualified claimant and the defendants are not a normal settlement contract between the parties because they intend to also bind the group members who are not involved in the negotiation process. Therefore court approval is necessary to protect the interests of the group members and to provide a safeguard against conflicts of interests within the group or between the group and qualified claimants or the lawyer representing the qualified claimants.

Court approval is necessary only if there is a collective settlement made in the interest of the group or a sub-group. If a single group member enters into an individual settlement contract with the defendant(s) there is no need for court approval. This applies also if the qualified claimant, who is a group member, negotiates a settlement only for himself.

Rule [X16] Application for Approval

(1) A party to a proposed settlement agreement may make an application to the court for approval under Rule X15.

(2) The application for approval shall include:

- **(a) the description of the group whose members will the bound by the settlement;**
- **(b) a copy of the proposed settlement agreement. In a collective redress action for compensation, the proposed agreement shall include the total amount of compensation payable, and the criteria for distributing the compensation to each group member;**
- **(c) the proposed administration of the compensation fund and method of distributing the compensation payment to group members; and**
- **(d) a concise statement of reasons showing why the terms of the settlement agreement are fair and adequate.**

Sources:

EU Proposal 2018 Art. 8; Belgium Art. XVII.45 § 3; England/Wales Sec. 49A (2), (3) Competition Act 1998; Denmark § 254h Administration of Justice Act; Germany § 18 KapMuG; Sec: 611 (3) CPC; Lithuania Art. 441-6 (3); Slovenia Art. 36 and Art. 12 et seq. ZKolT; Sweden Sec. 26 Group Proceedings Act

Comments:

With respect to the binding effect of the approved settlement it is important to have a clear description of the group. The court can evaluate whether the settlement is fair and adequate only if it receives at least the information listed in Rule X16. According to Rule X17(1) (a) the court may use any other sources of information.

There are no detailed rules on the administration of a compensation fund in this

Chapter. It is up to the parties to the settlement agreement to provide rules in this respect. In complex cases it may be appropriate to establish a board for the administration of the compensation fund which includes at least one legal and one economic expert (as in the Netherlands). Rule X16 (2) (b) and (c) should not be interpreted so as to prevent cy près solutions or similar proposals on how to proceed with the residue of a compensation fund in opt-out proceedings. Sec. 47C (5) Competition Act 1998, for example, provides that "damages not claimed by the represented persons within a specified period must be paid to the charity".

Rule [X17] Procedure for Approving Settlements

(1) Before approving a settlement the court may
- **(a) make any order necessary to obtain further information in order to assess the fairness of the proposed settlement;**
- **(b) appoint an expert to assist the court.**

(2) The court must
- **(a) advertise the proposed settlement according to Rule X12, ensuring that it is clear that the court has not reached a conclusion on the fairness of the settlement;**
- **(b) fix a period within which any comments may be made; and**
- **(c) consider all comments made by the group members and the parties**.

(3) The court may consider all other relevant comments received.

Sources:

Germany Sec. 611 CPC (as of 1 November 2018); England/Wales CAT Rules, rule 94; Netherlands WCAM: Art. 1013 (4 and 5) of Civil Procedure; see also Art. 1013 (8) and Art. 1016 (1) of Civil Procedure; Slovenia Art. 36 and Art. 15 et seq. ZKolT.

Comments:

Rule X17 (1) allows the court to obtain further information which it considers useful or necessary to assess the fairness of the proposed settlement. Court orders may e.g. include the production of documents by the parties or by group members, etc. In particular the court may hold an oral hearing ("fairness hearing") with the parties and group members. The court may also ask expert opinions e.g. by an economist or an accountant to assist the court in assessing the settlement. Even a technical expert could be necessary in some cases to assess the adequacy of a settlement (e.g. in the "Volkswagen Dieselgate" US settlements VW entered into the commitment to replace the cheat software without any drawback to the engine's power, but it was not clear whether that is technically possible). The court shall make its decision on an approval of the proposed settlement only after the group members had a chance to submit comments. Therefore when advertising the proposed settlement the court must indicate that there is not yet court approval in order to not mislead the group members. All group members should have a fair chance of submitting comments on the proposed settlement. The court may use the secure electronic platform (Rule X13) for the submission of statements. No legal representation by a lawyer or counsel should be mandatory to submit statements. Statements may also be made by any organisation or interest group whose purpose has a close relationship with the event giving rise to the mass harm (amicus curiae: Rule 15 General Rules on Parties).

Rule [X18] Settlement Approval Orders

The court shall not make an order approving the settlement agreement where

(a) the amount of compensation agreed for the group or any sub-category is manifestly unfair;
(b) the terms of any other undertaking by a defendant are manifestly unfair;
(c) the settlement is manifestly contrary to *ordre public*; or
(d) the terms, whether contained in the proposed settlement agreement or not, as to the payment of legal and other associated costs of the action are manifestly unreasonable.

Sources:

Belgium Art. XVII.49 § 2; England/Wales Sec. 49a (5) Competition Act 1998: "just and reasonable"; Netherlands Art. 7:907 (3b and 3e) of Civil Code: "the compensation is not reasonable"/"the interests of group members are insufficiently guaranteed"; Slovenia Art. 36 and Art. 17, 18 ZKolT; Sweden Sec. 26 Group Proceedings Act: "..not discriminatory against particular members of the group and in another way manifestly unfair"; Damages Directive (104/2014) recital 48

Comments:

It is a common standard in collective redress litigation that settlements can be court approved only if the court considers the contract terms to be fair and adequate for the group members. Settlements must also not violate public policy. Nevertheless it is difficult for the court to assess the terms of the settlement. The qualified claimant and the defendant once having reached a settlement will not provide arguments against approval and the group members will often not be able to make an assessment themselves (without consulting a lawyer) or will not be interested to become active in this respect if the individual compensation is small. The court must therefore have the possibility to use all relevant sources of information to identify possible conflicts of interests or unfair settlement terms (Rule X17).
Rule X18 (a): The amount of compensation can be manifestly unfair considering the potential outcome of the pending litigation (with respect to which the court should only make a summary assessment based on the situation at the time of the settlement) or due to a collusion between the qualified claimant and the defendant.
Rule X18 (b): Settlement terms may for example have effects on the market in general or on the competitors of the defendant (s) (e.g.: defendant agrees in the settlement to fix the prices of a product for a certain period). Particularly with respect to so-called coupon settlement or cy près solutions offered in the settlement the court may consult economic experts on the consequences of the settlement. Rule X18 adopts corresponding rules existing for example in The Netherlands, Israel and other jurisdictions.

Rule X18 (d): In case of small individual claims it would normally be considered unfair for the settlement to require the payment of costs by the group members.
If the court comes to the conclusion that the settlement as proposed by the parties is not fair and adequate or does not meet the requirements of Rule X18, before dismissing the application the court shall let the parties know its concerns and may set a time limit for the parties to present another proposal.

Rule [X19] Approved Settlements in Opt-in Actions

The approved settlement binds all group members who have opted in at the time the approval order is made.

Sources:

Belgium Art. VII.45 § 4; Denmark § 254h Administration of Justice Act; England/Wales Sec. 49A Competition Act 1998; Norway Sec. 35-11 Disputes Act; Slovenia Art. 36 and Art. 20 ZKolT; Sweden Sec. 26, 29 Group Proceedings Act

Comments:

Where the proceedings are based on an opt-in mechanism it is a logical consequence that also a settlement negotiated during the litigation will be only on behalf of the group members who have opted in and will have a binding effect only upon them.
The WG considered having a more flexible rule and to allow the court to set a deadline for another opt-in for group members who have not opted-in so far. This would increases the preclusive effect of the settlement, but it has other disadvantages. Such a rule seemed not appropriate as it may destroy incentives to opt-in at the beginning of the litigation and, furthermore, additional opt-ins will alter the basis on which the defendant has negotiated the settlement. In particular if the settlement provides a fixed sum for the compensation of the group members, additional group member who opt-in at that stage of the proceedings will benefit from the settlement and those who have opted-in earlier will receive less compensation.

Rule [X20] Approved Settlements in Actions under Rule X8 (2)

The approved settlement binds all group members unless they have opted out of the collective redress action by the time the approval order is made.

Sources:
England/Wales Sec. 49A (10) Competition Act 1998 (opt-in for persons not domiciled in the UK); Germany (KapMuG Sec. 17-19; Sec. 611 CPC ([as of 1 November 2018])

Comments:

Where the proceedings are based on an opt-out mechanism a settlement approved by the court will have a binding effect on all group members who have not opted-out. It does not seem adequate to offer a second chance for opting-out of the settlement. Such a rule would not allow the defendant to calculate the risks of a settlement, and there is a need for legal certainty for the defendant with respect to the scope of claims which will be finally settled. The best way to protect the interests of the group is not a second opt-out but the necessity of court approval for the settlement and a broad range of instruments available to the court in order collect all the information which is necessary to assess the fairness of the settlement.
For the binding effect of settlements in a cross-border setting see Rule X30 (2).

Part V: Collective Redress Judgments

Rule [X21] Effect of Final Judgments

(1) The final judgment of the court in a collective redress action binds
- **(a) all of the parties, and all group members who have opted in to the collective redress action; or**
- **(b) in a collective redress action under Rule X8 (2) all of the parties, and all of the group members resident in the forum state who have not opted-out within the period set by the court.**

(2) No other collective redress action may be admitted in respect of any claims determined in the final judgment of the court.

(3) The final judgment may be enforced by the qualified claimant. If the qualified claimant does not enforce the final judgment within reasonable time any group member may enforce the final judgment with the permission of the court.

Sources:

Belgium Art. XVII.54 § 5; Denmark § 254f (2) Administration of Justice Act; England/Wales Sec. 47B (12) Competition Act 1998; Germany Sec. 613 CPC as of 1 November 2018; Finland § 16 Class Action Act 444/2007; France (Art. 78 [2016]); Lithuania Art. 441-9; Slovenia Art. 41; Sweden Sec. 28-29 Group Proceedings Act.

Comments:

Rule X21(1) prevents the parties and the group members who opted-in or did not opt-out from bringing a new action or a subsequent individual action on the same grounds. The general rules on res judicata may not allow such an effect (WG on lis pendens and res judicata?). Rule X21
(1) (b) restricts the binding effect of the judgment in 'opt-out' cases to the group members in the forum state who have not opted-out. Rule X30 sets out that with respect to foreign group members an opt-in mechanism must apply even in an opt-out case.
Rule X21(2) is necessary to protect the defendant from other collective redress actions filed by another qualified claimant based on the same mass harm. Again, general res judicata rules may not suffice for such a preclusive effect because the parties to the subsequent action will not be the same. Where the collective redress action was based on an opt-in mechanism a subsequent collective redress action may be filed by a different qualified claimant in the interest of those group members who have not opted-in.
Rule X21 (3) clarifies who should be entitled to enforce a judgment against the defendant. This is first of all the qualified claimant who was a party to the litigation. If the qualified claimant fails to enforce the judgment the court may decide whether and when an individual group member can enforce their individual judgment or the collective judgment for the whole group.

Rule [X22] Separation of Judgments and Partial Judgments

(1) The court may, in a collective action for compensation, give separate final judgments on the liability of some or all of the defendants and on the amount of compensation payable.
(2) Both judgments shall bind the persons as specified in Rule X21(1).

Sources:

France (Art. 66 [2016]), general rules in MS civil procedure codes

Comments:

In some collective redress actions it may be appropriate to decide on the liability of the defendant(s) in a first step, because settlement negotiations may have a better prospect of success once the court has decided on liability or because it allows a

period of time to assess the individual amount of compensation in each sub-category. Judgment on liability should be final in terms of appeal. This separation into two judgments exists in certain countries (Sweden, Italy, France); if there are claims both for a declaration of liability and for compensation the court can split them.
[Structure Group: This rule may be deleted if the chapter on judgments provides a general basis for partial judgments.]

Rule [X23] Amount of Compensation

The final judgment of the court which sets the amount of compensation in a collective redress action shall include

(1) the total amount of compensation payable in respect of the group or sub-group. If an exact calculation of this amount is impossible or excessively difficult, the court may estimate the amount;
(2) the criteria for distributing the compensation to each group member, and the method of administration of the compensation fund.

Sources:

Belgium Art. XVII.54 § 1; England/Wales Sec. 47C (1) Competition Act 1998 (prohibition of exemplary damages); Slovenia Art. 40 ZKolT.

Comments:

In collective redress proceedings courts often cannot adjudicate on the individual claims of each group member, but depending on substantive law will fix only general criteria for the distribution of an amount to be paid by the defendant. As a consequence, Rule X23 merely requires that a judgment sets the total amount of compensation to be paid, the criteria for distributing it to the group members and the method of distribution. This may include the nomination of one or several persons as administrators of the compensation fund, but courts may also impose particular obligations on the qualified claimant as the administrator of the fund, such as the supervision by the court, a public regulator, or a legal or economic expert. Rule X23(2) thus gives broad discretion to the court with respect to the administration of the compensation fund (by contrast Belgium Art. XVII.54, Art. XVII.57-62 provide detailed rules on the distribution of funds). In case of a settlement it is up to parties to the settlement contract to negotiate rules on the administration and method of distribution, which will need to be approved by the court.
National rules often allow the court to estimate the amount of damage. Such a rule should also apply in collective redress cases (cross-reference to a similar rule in the "evidence" part- WG on Evidence?).

Part VI: Collective Settlements outside Collective Actions

Sources:

Recommendation 2013/396 no. 26; EU Proposal 2018 Art. 8; Commission's Report (COM [2018] 40 final) p. 14-15; England/Wales Consumer Rights Act 2015 – Sec. 49B Competition Act 1998 and Sec. 49C Competition Act 1998 (Approval of redress schemes by the CMA); CAT Rules, rule 96; France Art. 75-76 [2016]; Netherlands WCAM 2005; Slovenia (Art. 12-25 ZkolT 2018); Swiss Tentative Draft (March 2018): Art. 352a-352k Swiss CPC.

Comments:

In the event of a mass harm the potentially liable party or parties should be able to settle the case without contentious court proceedings. Where a potential defendant admits his liability in principle, it should not be necessary to initiate a collective redress action with the mere objective of settling the case. For these situations a special procedural mechanism is necessary which provides safeguards for the interests of the group members, but which allows for the binding effect of the proposed settlement in a simplified procedure. In the Netherlands, the Act on Collective Settlements (WCAM) which came into force in 2005 turned out to be successful. The Dutch model has now been adopted in the UK, in Belgium, and in Slovenia. It is also proposed in a tentative draft of March 2018 in Switzerland. The Dutch model is therefore also a role model for the following rules. However, whereas existing settlement proceedings are mostly based on an opt-out procedure, according to Rule X25 and Rule X26 here, the settlement is not necessarily an opt-out mechanism, but it is up to the parties to the settlement to agree which mechanism should be used. The suggestion is subject to court approval. Out-of-court settlements can be reached based on autonomous negotiations between the qualified claimant and the defendant, but also with the help of a mediator or ADR institutions. This Chapter deals only with the proceedings for court approval of such a settlement agreement and not the conduct of the ADR process itself.

Rule [X24] Standing to Reach Settlement

(1) Any entity fulfilling the requirements in Rule X2 (a) and (b) to be a qualified claimant may reach a collective settlement agreement for a group even where a collective action order has not been made.

(2) Any such collective settlement agreement shall be negotiated in good faith for the benefit of all group members.

Sources:

England/Wales Sec. 49B (5) (a) Competition Act 1998; Netherlands WCAM Art. 7:907 (1) Dutch Civil Code; Slovenia (Art. 12-25 ZKolT 2018); Swiss Tentative Draft (March 2018) Art. 352a Swiss CPC.

Comments:

The Dutch WCAM allows long-standing and ad hoc founded associations to negotiate a settlement agreement with persons or entities that are potentially liable for a mass tort. The WCAM of 2005 did not specify the requirements of 'representativity' of the associations negotiating on behalf of the tort victims without having an explicit mandate to do so. It is up to the Amsterdam Court of Appeal which must approve the settlement, to decide whether the association indeed represented the interests of the mass tort victims adequately. Due to the missing specifications in Dutch law, in practice the so-called "Claims Code" often applies. It was drafted by a group of lawyers and currently provides rules for the structure and governance of the associations and foundations. It is, however, an instrument which applies on a voluntary basis. It is a key issue in the current reform process in the Netherlands to establish stricter legal requirements for entities which have legal standing for WCAM proceedings and collective redress actions. Against the background of this experience Rule X24 refers to the criteria provided in Rule X2. Therefore any person, public regulator or private entity which intends to negotiate a collective settlement in the interest of group members must meet the same requirements as a qualified claimant.
Rule X24 does not authorize natural persons who are group member (Rule X2 [c]) to

negotiate an out-of-court settlement because there is a certain risk that defendants select a group member in order to negotiate a "cheap settlement". Apart from these cases of clear misuse it is not very likely anyhow that potential defendants will enter into settlement negotiations with individuals. They will prefer to settle the case with an entity or association described in Rule X2 (a) and (b) which will be supported by a large number of group members.

Rule [X25] Application for Approval of Collective Settlement

An application to the court for approval of the collective settlement agreement must be made by all of the parties to it. The application shall include all of the information required under Rule X16 (2). The application shall also specify whether the settlement proposes the use of an opt-in or an opt-out system.

Sources:

Belgium, England Sec. 49B (2) Competition Act 1998; France: Art. 76 loi du 18 nov. 2016; Netherlands: WCAM Art. 7:907 (1) of Civil Code: "joint application of these foundations, associations and other parties"; Swiss Tentative Draft (March 2018) Art. 352a (2), 352b Swiss CPC.

Comments:

Rule [X25] allows a joint application to be made by the parties to the settlement which will normally be a potential qualified entity and the potentially liable party or parties. The application must provide all information listed in Rule X16.
In many national systems the procedure for court approval is based on an opt-out mechanism. This offers the chance that a large number of group members (or even all of them) will participate and finally be bound be the settlement. With an opt-in mechanism the number of group members will normally be smaller and a settlement thus becomes less attractive for the potential defendants who are interested "to buy global peace" and get the claims off their books. Nevertheless Rule X25 follows a different approach (according to the one taken in Belgium) and leaves it to the parties to the settlement to specify whether they want an opt-in or opt-out mechanism to be applied. There might be good reasons to prefer an opt-in mechanism in international cases where the defendant may fear that the preclusive effect of the settlement will not be recognized abroad if the proceedings were based on an opt-out mechanism.
Difficulties in giving notice to all group members by public announcements may also be an argument to prefer an opt-in mechanism.
Defendants will, however, often prefer an opt-out mechanism in order to extent the binding effect to as many group members as possible. If the court takes a different position and considers an opt-in mechanism as more appropriate, the court may deny approval and give the parties the chance to submit a new settlement.

Rule [X26] Approval Procedure

The court must follow the procedure set out in Rule X17 in order to approve a collective settlement following an application under Rule X25.

Sources: Slovenia Art. 36, Art. 12 et seq ZKolT.

Comments:

The same rules which apply for the approval of a settlement negotiated during a pending collective redress action should be applied. Therefore the court must make any effort necessary to obtain information in order to assess the fairness of the proposed settlement. The proposed settlement must advertised according to Rule X12 and a period fixed within which comments may be made (Rule X17 [2]). When advertising the proposed settlement the court must ensure that is clear that the court has not reached a conclusion on the fairness of the settlement. Otherwise group members may be misled and refrain from making comments or raising objections against the settlement.

Rule [X27] Approval Order and Procedure for Opting in or Opting out

(1) The court must approve the proposed collective settlement on the basis of Rule X18.

(2) If the court does not approve the proposed collective settlement it must give reasons and must remit the agreement to the parties.

(3) The court must advertise the approved collective settlement in accordance with Rule X12 (2), give information on whether the settlement shall be binding based on an opt-in or opt-out procedure, and fix a period of at least three months for the group members to opt-in or opt-out. The court must decide to whom and how all notifications to opt-in or to opt-out shall be given. If the terms of the settlement require a fixed number or percentage of group members to accept the settlement before any compensation is paid this must also be clearly communicated.

(4) After expiry of the period fixed for opt-in or opt-out notifications and, where applicable, if the necessary number or percentage of group members have opted-in or have not opted-out, the court must declare the approved settlement binding. Otherwise the court must declares the proceedings under Part VI terminated without a binding settlement.

(5) The approved settlement shall bind all of the persons who have opted in, in the case of an opt-in proceeding or who have not opted out, in the case of an opt-out proceeding.

Sources:

Rule X27 (1): Germany KapMuG Sec. 17-19; Sec. 611 CPC as of 1 November 2018 ("adequate"); Netherlands WCAM: Art. 7:907 (3) of Civil Code – "the compensation is not reasonable"; England/Wales Sec. 49B (8) – "terms are just and reasonable"; Slovenia (Art. 17 ZkolT 2018).
Rule X27 (4): England/Wales Sec. 49B (10); Germany KapMuG Sec. 19, Sec. 611 (5) CPC (as of 1 November 2018); Netherlands WCAM: Art. 7:908 (2) of Civil Code

Comments:

The approval of the settlement follows the same criteria as set out for a collective settlement negotiated with a collective redress action pending in Rule X18. If the proposed settlement does not meet the requirements of Rule X18, before dismissing the application the court shall let the parties know its concerns and may set a time limit for the parties to present another proposal. Otherwise the application must be dismissed. This applies also if the court considers the suggested opt-in or opt-out procedure not appropriate or fair for the case at hand.

Only after the court has approved the terms of the settlement, will the group members who are to be bound by the settlement be required decide whether they want to accept the settlement or not. Therefore the approved settlement must be published, giving all the necessary information on the compensation to be paid in total and to be paid to individual victims or groups of victims, and the mechanism of distributing the funds. If group members or victims are identified by their names and addresses, the court shall ensure that they are individually notified of the relevant information. The persons to be bound by the settlement shall have at least three months to decide whether they wanted to accept the settlement or not.

Some national rules define a particular threshold for the settlement to become binding in terms of a minimum number of group members or a percentage of group members who must accept the settlement (either by opting in or by not opting-out), e.g. the German KapMuG requires that less than 30% of the group members opt-out (Sec. 17 KapMuG; Sec. 611 [5] CPC). Such a regulation and the particular percentage applicable for the settlement can, however, be left to the parties of the settlement and requires no specification in this rules. Defendants in particular will have an interest in a large number of group members accepting the settlement and may propose a provision for the settlement accordingly. If there is such a minimum requirement for the settlement to become binding it can be important for the decision of individual group members to know about it and it should be explained clearly.

Finally, after expiry of the period for opt-in or opt-out notifications the court must declare the settlement binding or not binding, taking in account whether a minimum threshold requirement of the settlement has been met or not. If the court finds that he conditions in the settlement are not met at the end of the period fixed for group members to participate, the 'out-of-court' collective settlement process is terminated. This should not prevent a litigated collective redress claim against the same defendant(s) in relation to the same mass harm event being brought by the qualified claimant under Rule X5 .

Part VII: Cross Border Issues

SECTION 1 Within the European Union

Rule [X28] Recognition of Qualified Claimant

The recognition of a claimant as a qualified claimant by a court in an order made under Rule X6 (1) (a) binds every other court in the Member States without the need for further application for recognition in relation to actions arising from the same mass harm event.

Sources:

Injunctions Directive 2009/22/EG Art. 3 (mutual recognition of "qualified entities"); EU Proposal 2018 Art. 16

Comments:

Following the principle set out in the Injunctions Directive 2009/22/EG and EU Proposal 2018 (intended to replace the Injunctions Directive) Rule X28 requires the mutual recognition of qualified claimants at least where one national court has already

admitted a qualified claimant for a particular litigation arising from a mass harm event. In case of proceedings in several MS arising from the same mass harm event Rule X28 prevents the requirements for the qualification of a qualified claimant being interpreted differently and thus avoid conflicting judgments on admissibility or recognition of collective redress actions.

Rule [X29] Judicial Coordination

(1) When the mass harm has cross border effects, the registry entries for each collective redress claim shall be made available on the European e-justice platform.
(2) Courts must use their best effort to coordinate collective actions in different Member States in order to avoid irreconcilable judgments or settlement approvals.

Sources:

Recommendation 2013/396 no. 10-12; Commission's Report (COM[2018] 40 final) p. 7-8.

Comments:

Dissemination of information on pending collective redress actions can be very useful for group members and other potential qualified claimants in other MS. On the other hand, spreading information on collective redress actions disclosing the name of the defendant may potentially have an adverse effect on the situation of the defendant whose liability has not yet been established (Commission's Report, p. 7). Therefore these Model Rules require publication of collective redress actions which have already been filed, intended collective redress actions cannot be registered. Furthermore, before filing a collective redress action the qualified claimant must try to settle the case out-of-court. Defendants thus have a chance of avoiding the action. Courts or those persons or institutions that are responsible for the register must also take care that the dismissal of a collective redress action is published in the same way as the filing of the action.
Rule X29 (2) requires coordination of parallel collective redress proceedings where necessary. An even better way to cope with parallel proceedings arising from the same mass harm event would be a consolidation of the proceedings. As long as procedural rules (particularly on evidence and on costs) differ considerably across Europe, consolidation, particularly irrespective of jurisdictional rules, in collective redress cases seems not possible. Even consolidation only for the purpose of evidence taking following the principles of the US Judicial Panel on Multidistrict Litigation (28 USC § 1407) is an instrument for the future.

Rule [X30] Group Members outside the Forum State

(1) The court shall ensure that group members outside the forum state are informed of the collective redress action in accordance with Rule X12.
(2) No order made under Rule X8 (2) binds group members outside the forum state.
(3) Group members outside the forum state must be allowed to opt-in.
(4) Sub-paragraphs (1) – (2) also apply to collective settlement proceedings under Part VI.

Sources:

Collective redress rules in Belgium (Art. XVII.38 § 1 [2] opt-in for non-Belgium residents); England/Wales (Sec.47A [11] [b], non UK-residents); Commission's Report (COM[2018] 40 final), p. 13-14.

Comments:

Sub-paragraph (1) should remind the court that collective redress actions or settlement proceedings with group members outside the forum state may require additional efforts to inform those persons. Rule X30 (1) does not specify the way information is disseminated. Where the group members can be identified and their addresses are available personal notification or even formal service of a notification is recommendable, but where the group consists of unidentified persons any kind of publication (on websites, in newspapers or other media) which gives the best possible information may be used. Sub-paragraph (1) also leaves it open whether the court itself takes care of informing the group members outside the forum or whether this is considered to be an obligation of the qualified claimant.
Sub-paragraphs (2), (3): As opt-out proceedings are still a controversial issue and information of the absent group members might be more difficult if parts of the group are residing outside the forum state, these rules have adopted the principle that the opt-out mechanism should apply only for group members within the forum state. For those living in another MS, a collective redress judgment has no binding effect unless they have opted-in (Rule X21, Rule X30 [2]). Against this background, the court must ensure that all group members outside the forum have a chance to opt-in.
Sub-paragraph (4): The same principles should apply if there is no collective redress action, but only a proceeding for declaring a settlement binding under Part VI of this Chapter. According to Rule X25 it is up to the parties to the proposed settlement to propose whether the approval procedure should be based on an opt-in or an opt-out mechanism.
Within the European Union, recognition of a collective settlement approval orders follows from the Brussels Ia Regulation and there is no need for further specification here. One of the most important legal consequences of a collective settlement is the preclusive effect for all group members bound by the settlement. They cannot bring individual actions against the defendant in order to receive a higher compensation. In a European cross-border setting all types of collective settlement approval orders (those made in the course of a collective redress action and those made under Part VI) qualify as a court settlement under Art. 2 (b) Brussels Ia Regulation and will be recognized in the Member States of the European Union. According to Art. 58 and 59 only a public policy objection can be raised in the Member State of recognition.
Where a collective redress action was pending, and a settlement agreement was approved by the court, Rule X30 (2) clarifies that group members residing outside the forum state (at the commencement of the action) are not bound by the settlement even if the whole action is based on an opt-out system following a court order under Rule X8(2). Nevertheless, for group members residing *in the forum state* the settlement will have a preclusive effect under the Brussels Ia Regulation if they try to sue the defendant in another MS unless the public policy objection applies. Thus they cannot bring individual actions in another MS in order to obtain a higher compensation than provided in the approved settlement. The same applies in case of a collective settlement without a collective redress action pending.

Rule [X31] Multiple Substantive Laws

(1) Even if the claims of group members are subject to different substantive

laws, this does not in itself prevent those group members from participating in a single collective action.

(2) In this case, the court may divide the group into sub-groups.

Sources:

For sub-groups in general see Belgium Art. XVII.38 § 2; Finland § 14 Class Action Act 2007; Poland Art. 20, 21(2010: Law of Dec. 17, 2009 (Diziennik Ustaw no. 7 pos. 4); Sweden Sec. 20 Group Proceedings Act

Comments:

Mass harm events are often cross-border cases and according to the Rome I and Rome II Regulations different sets of substantive law may apply to the claims of the group members. Therefore multi-state collective redress cases can be very complex. Courts may therefore take the position that a collective redress action is not admissible because the claims of the group are not "similar" as required in Rule X5 (1) (c). Rule X32 (1) points out that the application of different substantive laws as such should not be a sufficient ground for the dismissal of a collective redress action. Courts should instead consider dividing the group into sub-groups.

SECTION 2 Outside the European Union

Rule [X31a] Group Members outside the EU

Rules [X 30] and [X 31] apply also with respect to cases having cross-border effects outside the European Union.

Sources: -

Comments:

Whereas Rules [X28] and Rule [X29] should only apply within the European Union where mutual recognition and mutual assistance of courts have some tradition, the protection provided by Rule [X30] for group members outside the forum state must apply irrespective of whether these group members live in another MS or in a third state. The same is true for Rule [X31] which aims to prevent that courts dismiss applications for collective redress actions right from the beginning because of the multiple substantive laws applicable without considering sub-groups. Again, it is not important whether the applicable substantive laws are those of an EU Member State or of a third state.

Part VIII. Costs, Expenses and Funding

Rule [X32] Funding of Collective Actions

(1) Qualified claimants may use third party litigation funding.

(2) Qualified claimants must disclose the source of funding.

(3) Upon the court's or on a party's request, disclosure of the details of any funding agreement may be made in confidence to the court.

Sources:
Recommendation 2013/396 no. 32 (third party funding allowed in principle), no. 14 (disclosure of third party funding)

Comments: see Rule X33.

Rule [X33] Costs and Expenses of Collective Actions

(1) Only the qualified claimant is liable for costs and expenses if the collective redress action is unsuccessful.
(2) If the action is successful, the total amount of compensation received by the qualified claimants shall form a common fund.
(3) Costs and expenses must be paid from the common fund before any distribution of compensation to group members.

Sources:

Recommendation 2013/396 no. 13 (loser pays principle); common fund doctrine applied in the Netherlands, UK, Australia

Comments:

Part VIII is based on the assumption that the Working Group on Costs will not present particular rules on costs for collective redress litigation. If so, this part should be reconsidered.
Rule X32 sets out the principle that third party funding as such should not be prohibited, which is also the approach taken in the EU Recommendation 2013/396. However, the qualified claimant must disclose the fact that he uses TPF and the identity of the funder at the beginning of the litigation. Details of the funding agreement are often confidential and should therefore be only disclosed upon the court's request and should not automatically be available to the public or the defendant (for details see Comments on Rule X3 (b).
Rule X33 is based on the assumption that the loser pays principle will apply in general (Recommendation 2013/396 no. 13). As a consequence only the qualified claimant as a party will be liable for costs (sub-paragraph [1]), not the individual group members. Nevertheless if the action is successful all group members must accept that the litigation costs of the qualified claimant are paid from the "common fund" before any distribution to the group members takes place. In order to prevent costs from 'eating up' the common fund unfairly, the agreed costs will need to be approved by the court before the qualified claimant (or his lawyers) are able to claim them.

ELI-UNIDROIT European Rules of Civil Procedure [WORKING GROUP on Parties]

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Chapitre X: Action de groupe en réparation.

Partie I: Partie générale

Règle [X1] Action de groupe en réparation
Une action de groupe en réparation est une action engagée par un demandeur qualifié en lieu et place d'un groupe de personnes n'étant pas parties à la procédure ("les membres du groupe") considérées comme affectées par un évènement ayant causé un dommage de masse.

Règle [X2] Demandeurs qualifiés pour exercer l'action de groupe en réparation.
Le demandeur qualifié à exercer l'action de groupe en réparation est:

(a) Une organisation autorisée selon la loi nationale et dont l'objet a un lien direct avec l'évènement ayant causé le dommage de masse; ou
(b) Une entité établie exclusivement pour obtenir la réparation du dommage causé aux membres du groupe et qui remplit les exigences prévues par la Règle [X3]; ou bien
(c) Un membre du groupe qui remplit les conditions prévues par la Règle [X3] a, b et c.

Règle [X3] Exigences concernant le demandeur qualifié
Une personne ou entité ne peut être demandeur qualifié qu'à condition de:

(a) Justifier ne pas avoir de conflit d'intérêt avec l'un quelconque des membres du groupe;
(b) Avoir une aptitude suffisante pour mettre en oeuvre une action de groupe en réparation. Le tribunal tient compte de ses ressources disponibles en particulier ses ressources financières et humaines. Au besoin, le tribunal peut exiger une garantie pour frais de justice.
(c) Etre représentée en justice par un avocat; et
(d) Ne pas être avocate elle-même et n'exercer aucune profession juridique.

Règle [X4] Condition de la demande en réparation collective

(1) Le demandeur qualifié précise dans sa demande toutes les informations pertinentes et disponibles concernant
  (a) l'évènement ayant causé le dommage de masse,
  (b) le groupe ;
  (c) le lien de causalité entre l'événement à l'origine du dommage de masse et le préjudice souffert par les membres du groupe ;
  (d) la similarité entre les réclamations des membres du groupe en droit et en fait
  (e) les dommages et intérêts réclamés ou les autres formes de réparation recherchées ;
  (f) les ressources financières et autres dont dispose le demandeur qualifié pour mener l'action de groupe en réparation ;
  (g) la preuve de la tentative de transaction en faveur des membres du groupe.

(2) Après avoir reçu la notification de l'intention formelle du demandeur de négocier une transaction selon la règle X4 (1)(g), le défendeur ne peut plus, à aucun moment, engager une action contre le demandeur qualifié ou contre un membre du groupe en relation avec le même évènement ayant causé le dommage de masse à moins qu'il ne puisse montrer que les négociations menées de bonne foi ont été irrémédiablement rompues.

Règle [X4bis] Enregistrement de l'action de groupe en réparation

(1) Dés la réception de la demande de réparation visée à l'article X1 le tribunal l'inscrit sur un registre électronique publiquement accessible.
(2) Après l'enregistrement de la demande, tout autre tribunal saisi doit considérer comme irrecevable une autre action en réparation collective portant sur le même événement ayant causé le dommage de masse et engagée dans l'intérêt du même groupe.

Partie II: Recevabilité de l'action de groupe en réparation

Règle [X5] Conditions de recevabilité

(1) Le tribunal considère comme recevable l'action de groupe en réparation si :
   (a) l'action de groupe est susceptible de résoudre le litige avec plus d'efficience que la jonction des procédures individuelles des membres du groupe ;
   (b) toutes les demandes formulées dans le cadre de l'action de groupe en réparation concernent le même dommage de masse ou la même série de dommages de masse corellés causé aux membres du groupe ;
   (c) Les demandes de réparation formulées dans l'action de groupe sont similaires en droit et en fait; et
   (d) Excepté en cas d'urgence, le demandeur qualifié a laissé au défendeur un délai d'au moins trois mois pour se prononcer sur un projet de transaction ;

(2) A la demande d'une partie, le tribunal peut ordonner qu'une procédure individuelle se poursuive sous la forme d'une procédure d'action de groupe en réparation.

Règle [X6] Le jugement de recevabilité concernant l'action de groupe en réparation

(1) Un jugement de recevabilité rendu en application de la Règle X5 comprend les informations suivantes :
   (a) le nom, l'adresse et les autres informations pertinentes concernant le demandeur qualifié ;
   (b) une description concise de l'évènement ayant causé un dommage de masse et qui est à l'origine de l'action de groupe en réparation;
   (c) Les noms et caractéristiques de toutes les personnes ayant, selon le demandeur qualifié, subi le dommage de masse. Ces caractéristiques doivent être suffisamment précises pour permettre à toute personne estimant avoir subi le même dommage de déterminer si elle appartient au groupe ou non ;
   (d) le type d'action de groupe en réparation au sens de la Règle X8 (1) ou (2).
(2) Avant de rendre un jugement de recevabilité en application de la Règle X5, le tribunal doit procéder à une publicité du projet de jugement et fixer un délai pour permettre à tout autre potentiel demandeur qualifié au sens de la Règle X1 de déposer une demande.
(3) Le tribunal détermine quel demandeur peut être qualifié pour exercer l'action de groupe en réparation sur la base des critères fixés par la Règle X3. Si plusieurs demandeurs qualifiés sont sélectionnés, ils doivent agir de concert.
(4) Le jugement de recevabilité doit donner lieu à une publicité considérée par le tribunal comme susceptible d'attirer l'attention de toute personne ayant été affectée par le dommage de masse sur lequel l'action de groupe est fondée. La publicité doit inviter

de telles personnes à adhérer à l'action de groupe et préciser de quelle manière elles peuvent le faire.

Règle [X7] Obligation du demandeur qualifié
Le demandeur qualifié agit à tout moment dans l'intérêt du groupe tout entier ou de son sous-groupe.

Règle [X8] Types d'action de groupe en réparation
(1) Toute action de groupe emploie le système de l'option d'inclusion à moins que le tribunal en décide autrement en vertu de l'alinéa (2).
(2) Le tribunal peut décider que l'action de groupe inclut les membres du groupe qui n'ont pas décidé de s'en retirer en vertu de l'alinéa (3) s'il considère:
    (a) que les demandes des membres du groupe ne peuvent prendre la forme d'une action individuelle en raison de leur enjeu réduit ; et
    (b) qu'un nombre significatif de membres du groupe déciderait de ne pas adhérer à l'action de groupe.
(3) Le tribunal fixe un délai pour permettre aux membres du groupe de lui indiquer s'ils entendent se retirer du groupe. En cas de circonstances exceptionnelles, le tribunal peut permettre eux membres de se retirer après l'écoulement du délai prévu.

Règle [X9] Système d'option d'inclusion
(1) Selon le système de l'option d'inclusion, les membres du groupe qui souhaitent adhérer au groupe doivent le notifier au tribunal selon les modalités fixées par celui-ci.
(2) Le tribunal s'assure que les notifications des membres du groupe sont correctement enregistrées dans le registre public en application de la Règle X13.

Règle [X10] Actions individuelles
(1) Les membres du groupe qui ont adhéré au groupe selon la Règle X9 ou qui ne se sont pas retirés selon la Règle X8 (3) ne peuvent engager une action individuelle contre un défendeur à l'action de groupe en réparation portant sur le même dommage de masse.
(2) Au cas où en application de la Règle 8 (2) un membre du groupe engage une action individuelle contre le défendeur à l'action de groupe pendant la période laissée pour se retirer du groupe, il doit être considéré comme s'étant retiré de l'action de groupe.
(3) Le délai de prescription prévu par le droit national pour les actions individuelles portant sur un préjudice causé par un dommage de masse est suspendu dés le commencement de l'action de groupe en réparation. La suspension prend fin
    (a) avec le désistement ou l'irrecevabilité de l'action de groupe en réparation ; ou
    (b) si le membre du groupe concerné décide de se retirer en application de la Règle X8 (2)-(4).
(4) Dans le cas ou (3) (a) ou (b) s'applique le délai de prescription restant pour engager l'action individuelle reprendra son cours six mois après le désistement, l'irrecevabilitié ou le retrait de l'action de groupe.

Partie III : Mise en état dans le cadre de l'action de groupe en réparation

Règle [X11] Pouvoirs de mise en état
Dans le cadre d'une action de groupe en réparation, le tribunal détient les pouvoirs complémentaires de mise en état suivants:
    (a) démettre un demandeur qualifié s'il ne remplit plus les conditions prévues par les Règles X2 et X3 ou s'il n'agit pas dans l'intérêt de tous les membres du groupe. Cet alinéa s'applique pour démettre un demandeur qualifié d'une sous-

groupe ;

(b) autoriser, avec son accord, un nouveau demandeur qualifié;
(c) modifier la description du groupe;
(d) diviser un groupe en sous-groupes et autoriser, avec son accord, un demandeur qualifié pour chaque sous-groupe;
(e) radier l'action de groupe s'il n'y a plus de demandeur qualifié;
(f) [Ordonner les modifications concernant] [Procéder à la réctification de] l'enregistrement du groupe (Rule 9 [2], 13).

Le tribunal peut entendre toute personne qu'il considère avoir un intérêt dans la gestion de l'affaire avant de prendre toute mesure de mise en état en application de cette règle.

Règle [X12] Publicité

(1) Dans une action de groupe en réparation, le tribunal doit procéder à la publicité ou faire procéder à la publicité
   (a) quand un demandeur qualifié est démis ou autorisé;
   (b) quand la description du groupe est modifiée ou bien lorsque le groupe est divisé en sous-catégories ;
   (c) quand une transaction collective est proposée ;
   (d) à chaque fois qu'une ordonnance ou un jugement est rendu;
   (e) de l'information concernant la plateforme électronique prévue par la Règle X13; et
   (f) en cas d'irrecevabilité ou de désistement de l'action de groupe.
(2) La publicité doit être réalisée de telle sorte que le tribunal considére qu'elle est la mieux à même d'attirer l'attention de toute personne susceptible d'avoir été affectées par le dommage de masse dans un temps suffisant lui donnant une opportunité raisonnable de participer à l'action de groupe de manière adéquate.

Règle [X13] Communication –Plateforme électronique sécurisée

Le tribunal crée ou autorise la création d'une plateforme électronique sécurisée pour la bonne gestion de l'action de groupe.

Règle [X14] Transaction

Le tribunal emploie ses pouvoirs de mise en état pour faciliter un accord transactionnel dans le cadre de l'action de groupe en recourant aux méthodes alternatives de résolution des litiges qu'il estime appropriées.

Part IV: Transaction au cours d'une procédure d'action de groupe en réparation

Règle [X15] Homologation du tribunal

Un membre du groupe n'est pas lié par un accord transactionnel mettant fin en tout ou partie à une action de groupe en réparation si cet accord n'est pas homologué par le tribunal.

Règle [X16] Demande d'homologation

(1) Une partie au projet de transaction peut demander au tribunal son homologation en application de la Règle X15.
(2) La demande d'homologation comporte:
   (a) la description du groupe dont les membres seront liées par la transaction;
   (b) une copie du projet de l'accord transactionnel. Dans une action de groupe visant des dommages et intérêts, l'accord envisagé inclut le montant total des dommages et intérêts dues et les critères de distribution de ce montant à chaque membre du groupe;

(c) la manière dont le fonds sera administré et dont les sommes seront distribuées aux membres du groupe ; et
(d) une brève explication des raisons montrant que l'accord transactionnel est équilibrée et appropriée.

Règle [X17] Procédure d'homologation de la transaction

(1) Avant d'homologuer la transaction le tribunal peut
(a) prendre toutes les mesures nécessaires pour obtenir d'avantage d'informations afin d'apprécier le caractère équilibré du projet de transaction ;
(b) nommer un expert pour assister le tribunal.
(2) The tribunal doit
(a) procéder à la publicité de la transaction proposée selon la règle X12, précisant que le tribunal n'a pas encore pris sa décision concernant le caractère équilibré de la transaction ;
(b) fixer une periode au cours de laquelle tout commentaire peut être fait ; et
(c) prendre en considération tout commentaire fait par un membre du groupe et les parties.
(3) Le tribunal peut prendre en considération tout autre commentaire pertinent porté à son attention.

Règle [X18] Homologation de la transaction

Le tribunal n'homologue pas l'accord transactionnel si
(a) le montant des dommages et intérêts prévus est manifestement inapproprié;
(b) les conditions de tout autre engagement pris par le défendeur sont manifestement inappropriés ;
(c) la transaction est manifestement contraire à l'*ordre public*; ou
(d) les conditions du paiement des frais de justice et de tout autre frais de procédure contenues dans le projet de transaction ou non, sont manifestement inappropriées.

Règle [X19] Homologation de la transaction dans le système de l'option d'inclusion

La transaction homologuée lie les membres du groupe qui y ont déjà adhéré au moment de l'approbation de l'accord par le tribunal.

Règle [X20] Homologation de la transaction dans le cadre d'une action de groupe au sens de la Règle X8 (2)

La transaction homologuée lie tous les membres du groupe sauf ceux qui se sont retirés avant l'approbation de l'accord par le tribunal.

Partie V: Le jugement en réparation collective

Règle [X21] Effet du jugement définitif

(1) Le jugement définitif rendu dans le cadre de l'action de groupe en réparation lie
(a) toutes les parties et tous les membres du groupe qui ont adhéré à l'action de groupe en réparation ; ou
(b) dans une action de groupe au sens de la Règle X8 (2) toutes les parties et tous les membres du groupe résidents du pays du tribunal qui ne se sont pas retirés au cours de la période fixée par le tribunal.
(2) Aucune autre action de groupe en réparation n'est recevable au regard des litiges résolus par le jugement définitif du tribunal.
(3) Le jugement définitif est mis à exécution par le demandeur qualifié. S'il

ne met pas à exécution le jugement définitif dans un délai raisonnable tout membre du groupe peut le faire avec l'autorisation du tribunal.

Règle [X22] Jugements partiels

(1) Le tribunal peut dans une action de groupe en dommages et intérêts rendre un jugement définitif sur la responsabilité de tout ou partie des défendeurs avant de se prononcer par une décision séparée sur le montant des dommages et intérêts dus.
(2) Les deux jugments lient les personnes indiquées par la Règle X21 (1).

Règle [X23] Montant des dommages et intérêts

Le jugement définitif qui prévoit le montant des dommages et intérêts dans une procédure d'action de groupe en réparation inclut:

(a) le total montant des dommages et intérêts dus pour réparer les dommages subis par les membres du groupe ou des sous-groupes. Si un calcul exact n'est pas possible ou extrêmement difficile, le tribunal peut faire une estimation du montant;
(b) les critères de distribution des dommages et intérêts à chaque membre du groupe et la méthode d'administration du fonds.

Partie VI: Transaction en dehors d'une procédure d'action de groupe en réparation

Règle[X24] Qualité pour conclure une transaction

(1) Toute entité remplissant les exigences de la Règle X2 (a) et (b) pour être un demandeur qualifié peut conclure un accord transactionnel pour un groupe même si un jugement de recevabilité de l'action collective en réparation n'a pas été rendu.
(2) Cet accord transactionnel est négocié de bonne foi au bénéfice de tous les membres du groupe.

Règle [X25] Demande d'homologation de la transaction collective

Une demande d'homologation de la transaction collective est formée auprès du tribunal en application de la règle X25 par toutes les parties à cet accord. La demande comprend toutes les informations exigées par la Règle X16(2). La demande doit aussi préciser si la transaction prévoit l'emploi du système de l'option d'inclusion ou d'exclusion.

Règle [X26] Procédure d'homologation

Saisi d'une demande d'homologation effectuée selon la Règle X25, le tribunal suit les règles de procédure prévues par la Règle X17 pour homologuer une transaction collective.

Règle [X27] l'ordonnance d'homologation et la procédure d'inclusion ou d'exclusion

(1) Le tribunal homologue le projet de transaction collective selon la Règle X18.
(2) Si le tribunal n'homologue pas le projet de transaction collective, il doit en donner les raisons et renvoyer le projet aux parties.
(3) Le tribunal procède à la publicité de la transaction homologuée en vertu de la Règle X12 (2), précise si la transaction lie les parties selon le système de l'option d'inclusion ou d'exclusion, et fixe une période d'au moins trois mois pour permettre aux membres du groupe d'adhérer ou de se retirer. Le tribunal décide à qui et comment notifier l'adhésion ou le retrait du groupe. Si les conditions de la transaction l'exigent, il convient de communiquer clairement le nombre exact ou le pourcentage de membres du

groupe qui accepte l'accord avant le paiement de l'indemnité.

(4) A l'expiration de la période fixée pour notifier l'adhésion ou le retrait, et, si la transaction prévoit un nombre nécessaire ou un poucentage de membres du groupe pour adhérer ou se retirer, le tribunal declare que la transaction homologuée devient contraignante. Dans le cas contraire, le tribunal declare la procédure suivie conformément à la partie VI éteinte sans transaction contraignante.

(5) La transaction homologuée lie toutes les personnes qui ont adhéré dans le cas d'une procédure avec option d'inclusion ou toutes les personnes qui ne se sont pas retirées dans le cas d'une procédure avec option d'exclusion.

Partie VII : Questions transfrontières

Section 1.- Au sein de l'Union Européenne

Règle [X28] Reconnaissance du demandeur qualifié

La reconnaissance d'un demandeur qualifié en application de la Règle 6(1) (a) lie tout autre tribunal d'un Etat membre sans qu'aucune autre demande de reconnaissance ne soit nécessaire au regard des procédures nées du même évènement ayant causé un dommage de masse.

Règle [X29] Coordination judiciaire

(1) Quand le dommage de masse a des effets transfrontières, les informations enregistrées pour toute demande de réparation collective doivent être rendues disponible sur la plateforme européenne e-justice.

(2) Les tribunaux doivent coordonner de leur mieux les procédures collectives en réparation dans les différents Etats membres pour éviter des jugements ou des transactions homologuées irréconciliables.

Règle [X30] Membres du groupe extérieurs au pays du juge saisi

(1) Le tribunal s'assure que les membres du groupe se trouvant en dehors du pays du tribunal saisi sont informée de l'action de groupe en réparation en application de la Règle X12.

(2) Aucune décision prise en vertu de la règle X8(2) ne lie les membres du groupe se trouvant en dehors du pays du tribunal saisi.

(3) Les membres du groupe se trouvant en dehors du pays du tribunal saisi sont autorisés à adhérer à l'action de groupe en réparation.

(4) Les alinéas (1) – (3) sont applicables également à la procédure de transaction collective prévue dans la partie VI.

Règle [X31] Pluralité de loi applicable

(1) L'existence de plusieurs lois applicables aux réclamations des membres du groupe ne doit pas les empêcher de participer à une unique action de groupe.

(2) Dans ce cas, le tribunal peut diviser le groupe en sous-groupes.

Section 2.- En dehors de l'Union Européenne

Règle [X31a] Membres du groupe en dehors de l'Union Européenne

Les Règles [X 30] et [X 31] s'appliquent également aux litiges ayant des effets transfrontières en dehors de l'Union Européenne.

Partie VIII: Frais de procédure et financement

Règle [X32] Financement de l'action de groupe

(1) Les demandeurs qualifiés peuvent avoir recours à des financements fournis par des tiers.

(2) Les demandeurs qualifiés doivent révéler leur source de financement.

(3) A la demande du tribunal ou d'une partie, la révélation des détails de l'accord de financement peut être effectuée confidentiellement au seul tribunal.

Règle [X33] Frais de la procédure d'action de groupe

(1) Seul le demandeur qualifié est redevable des frais de procédure si l'action de groupe en réparation échoue.

(2) Si l'action réussit, le montant total des dommages et intérêts reçues par le demandeur qualifié forme un fonds commun.

(3) Les frais de procédure doivent être payés sur le fond commun avant toute distribution aux membres du groupe en vertu de la Règle X24.