Belgian Court Recognizes US Opt-Out Class Action Settlement

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The Belgian Lernout & Hauspie (L&H) case was one of the largest corporate scandals in European history (for an empirical case study analysis see S. Voet, 'The L&H Case: Belgium's Internet Bubble Story' in D. Hensler, C. Hodges & I. Tzankova (eds.), *Class Actions in Context: How Economics, Politics and Culture Shape Collective Litigation*, Edward Elgar (2016)).

It was a criminal case that was brought before the Criminal Court of Appeal in Ghent. Contrary to common law jurisdictions, the victim of a Belgian criminal case is not absent from the criminal trial. He or she is a formal party to the proceedings and has standing to plead. Regarding his or her civil claim, the victim can piggyback on the evidence brought forward by the Public Prosecutor in order to prove a civil fault. The victim only has to prove causation and his or her damages. Based on this technique, more than 15,000 duped shareholders filed their civil claim during the L&H criminal trial.

On 20 September 2010, the Court ruled on the criminal aspect of the case. L&H's founding fathers and most previous directors were convicted. The deep-pocket defendants Dexia Bank and KPMG, respectively L&H's bank and statutory auditor, were acquitted.

On 23 March 2017, seven years after its criminal decision, the Court ruled its first decision on the civil claims. The decision is available in Dutch at https://www.rechtbanken-tribunaux.be/sites/default/files/public/content/lh_-_geanonimiseerd.pdf.

Because L&H also had a second headquarters in the US, some (opt-out) class action procedures, on behalf of all persons and entities who had bought L&H shares on Nasdaq, were brought there against Dexia and KPMG (*In re* Lernout & Hauspie Sec. Litig., 138 F. Supp. 2d 39 (D. Mass. 2001); *In re* Lernout & Hauspie Sec. Litig., 208 F. Supp. 2d 74 (D. Mass. 2002) and Warlop v. Lernout, 473 F. Supp. 2d 260 (D. Mass. 2007)). Ultimately, these cases were settled. In the KPMG settlement 115 million dollars were paid, while in the Dexia settlement the

shareholders received 60 million dollars.

One of the issues the Belgian Court had to deal with was the impact of these US class action settlements in the Belgian procedure. More particularly, the question arose if the civil claimants in the Belgian procedure who were part of the US class action settlements and who had not opted out, still can claim damages in the Belgian procedure. In other words, does the Belgian Court has to recognize the US class action settlements?

Because the court decisions approving the class action settlements are rendered by a US court, the European rules (i.e. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) do not apply. Belgian international private law is applicable, and more particularly the Belgian Code of Private International Law (CPIL) (an English translation is available at http://www.ipr.be/data/B.WbIPR%5BEN%5D.pdf).

The Court first decides that the US decisions approving the class action settlements are foreign judgements that can be recognized and enforced in Belgium (Art 22, §1 CPIL). The Court rebuts the argument of one of the parties that the class actions settlements are nothing more than contractual agreements to which he is not a party (§ 66).

The central issue before the Court is whether the US court decision approving the class action settlements can be recognized in Belgium and whether the class members who did not opt out are bound by these settlements in the Belgian procedure (§ 67). If not, they can bring their civil claim. If so, they cannot bring their civil claim (at least to the amount they received in the US class action settlements).

The Court cannot assess the question whether the US District Court (approving the class action settlements) correctly applied Rule 23(a) and Rule 23(b)(3) FRCP (Federal Rules of Civil Procedure). Art 25, §2 CPIL clearly states that under no circumstances the foreign judgment will be reviewed on the merits (§§ 68-69).

Art 22, §1, 4th para CPIL states that the foreign judgment may only be recognized or declared enforceable if it does not violate the conditions of Art 25 CPIL. The latter states (in §1, 1° and 2°): “A foreign judgment shall not be recognized or

declared enforceable if 1° the result of the recognition or enforceability would be manifestly incompatible with public policy; upon determining the incompatibility with the public policy special consideration is given to the extent in which the situation is connected to the Belgian legal order and the seriousness of the consequences, which will be caused thereby and 2° the rights of the defense were violated." These are the two basic questions before the Court (§ 72).

The main criterion is the international public order. According to Belgium's Supreme Court (i.e. Court of Cassation) a law is of international public order if the legislator wanted to lay down a principle that is vital for Belgium's established moral, public or economic order. Any foreign rule or decision violating this international public order should be set aside (Court of Cassation 18 June 2007, C.04.030.F, www.cass.be). The criterion is subject to a marginal appreciation by the court (§§ 74-75).

The Court concludes that the US decision approving the class actions settlement does *not* violate Belgium's international public order. Consequently, the Court has to recognize the US decision. The Court invokes multiple reasons.

First of all, reference is made to the existence in Belgium, since September 2014, of an opt-out class action procedure (as laid down in Title II of Book XVII of the Code of Economic Law (CEL)) (see about this Belgian class action procedure S. Voet, 'Consumer Collective Redress in Belgium: Class Actions to the Rescue?', European Business Organization Law Review 2015, 121-143). Moreover, the legislature emphasized that the opt-out system is compatible with Art 6 ECHM (§§ 79-80).

Secondly, the Court compares the procedural rights of class members according to US federal class action law and to Belgian class action law. The US class action settlements were subject to a fairness hearing (see Rule 23(e)(2) FRCP). A similar provision exists in Belgium (Art XVII.38 CEL). The class action settlements were notified to US and foreign L&H shareholders (see Rule 23(e)(1) FRCP). A special website was also created. Similar provisions exist in Belgium (Art XVII.43, §3 CEL). In the US, the Court assessed whether the class actions settlements were fair, reasonable, and adequate (see Rule 23(e)(2) FRCP). Similar provisions exist in Belgium (Art XVII.49, §2 FRCP). Based on this analysis, the Court concludes that the procedural rights of the class members in the US class actions settlements were protected in a similar way as they would have been protected

under Belgian law. The Court adds that the procedural protection under Rule 23 FRCP is even stronger than under Belgian law (§§ 82-83).

Next, the Court examines whether the fact that non-US class members are bound by the US opt-out class action settlements violates Belgium's international public order. Although there are arguments to be made that only under an opt-in regime foreign class members can be bound by a class action decision or settlement, the Court reiterates that nevertheless opt-out class actions are possible in Europe (see Art 21 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms and the existing opt-out regimes in Portugal, Bulgaria, Denmark and the Netherlands (under the Dutch Collective Settlements Act)). It concludes that the desirability of an opt-in system for foreign class members does not automatically leads to the conclusion that an opt-out regime contradicts Belgium's international public order (§§ 84-88).

Finally, the Court notes that an opt-out class action, leading to a settlement that could be binding for foreign class members, could entail a violation of the rights of defense if not everything was done to guarantee that the foreign class members were notified of the class action procedure and the opt-out possibility. The Court concludes that this was the case. It for example refers to the following facts: 82.8169 individual notice packages were sent; notification was provided in the Wall Street Journal, the Wall Street Journal Europe and a Belgian journal; a specific website (www.lernouthauspiesettlement.com) was launched; the Belgian press reported about the US class action settlements; one of the Belgian associations representing L&H shareholders informed its clients about the US class action settlements and instructed them what to do if they wanted to opt out or receive money; the US District Court decided that Rule 23(e)(1) FRCP was met and that 288 mainly Belgian shareholders had opted out correctly while 325 other opt-out requests were dismissed; etc. KPMG, one of the parties to the class action settlements, submitted an expert report to the Belgian Court stating that everything possible was done to notify all class members. In conclusion, the Court finds that there was sufficient notice and that the rights of defense of the non-US class members were not violated (§§ 89-93).

The general conclusion of the Court is that all claims brought by the civil parties who were part of the US class action settlements and who did not opt out are only admissible insofar as they claim damages above the amount they received from the US class action settlements.