Preface

With the end of the 20th century came an increase in judges’ influence on the conduct of judicial proceedings and on the rules applicable to the dispute. This marks the emergence of a true ‘welfare’ judge, the face of a public administration that must provide both a quick and right solution to any dispute it is led to examine.

However, this ‘hyperactivity’, in stark contrast to the traditional image of the ‘umpire’ judge, increases tenfold in the framework of collective redress mechanisms. Anyone examining these specific proceedings will have made the same observation: in these proceedings, more so than in any other, the judge is the guardian of the various interests at stake. The judge strives to protect the interests of the absent members (sometimes represented in court without their knowledge), those of the defendant (who is facing claims of significant proportions) and those of the justice system (which must devote significant amounts of time and means to the conduct of the proceedings).

Much has been written on the subject in the legal systems that have had collective redress mechanisms for many years (Quebec, United States of America, etc.). To date, however, there have been far fewer studies thereof in the Member States of the EU that have recently adopted – or are about to adopt – such mechanisms.

Upon examination of the systems that already provide for such mechanisms, one is force to observe that statutory texts seldom describe precisely the role of the judge, and scholarly opinion does not say much on the subject. The few decisions handed down in the context of such proceedings only reveal the tip of the iceberg. The role of the judge can often only be properly apprehended through a factual analysis of the exercise of his power and of his own view of such power. In reality, this is seldom made explicit in judgments, and then only in part. It is on the occasion of hearings and during the decision-making process that this role comes into being rather than in the judgment itself. Information is therefore particularly hard to come by, and even more so for French- or English-speaking lawyers for linguistic reasons. The little available information, whether in terms of statutory texts, articles or books or even judgments, is often only available in the national language and cannot be found save after extensive research.

In the light of the above, one might consider almost impossible the act of carrying out in a limited timeframe a structured study that is both an overview and as comprehensive as possible.
Ms Elodie Falla set out to do the impossible, and did so to great success. Ms Falla is a brilliant researcher with a singularly international profile, working on a doctoral thesis on compensation in collective redress and having worked in several of the most renowned international research centres in the field of collective redress (Tilburg, Stanford, Montreal). Over the span of a few months, Ms Falla put together a very robust methodology, created a first-rate network of contacts and collected the most relevant data – including factual information – which enabled her to write the present study. This study contains in its first section the results of a comparative analysis by the author in relation to six national legal systems within the European Union (England & Wales, Germany, Italy, Portugal, Sweden and Spain). On each of the topics covered, the author was able to identify the strengths and weaknesses of each system studied. In a very original manner, examples that gave rise to leading cases are examined in the form of case studies, which enables the author to highlight the precise role played by the judge in the relevant case. The second section presents and substantiates the recommendations that the author drew from this comparison. The two sections are remarkably well structured, as they both examine the role of the judge in a chronological manner across the various stages of the collective redress mechanism: filing, investigation, judgment and enforcement of the decision. In each of the sections, the questions are examined in a comprehensive and substantiated manner. The writing is clear, precise and direct, and no difficult question is set aside, even when there is little or even no information available.

The end-result of Ms Falla’s study, summarised in the present book, is of immense value in various respects.

First, it provides any policy-maker, whether at European level or at national level, with the keys to a balanced collective redress mechanism, aided by the intervention of the judge at all of the stages of the proceedings. The timing of the study is exquisite in this respect. In its recent recommendation of 11 June 2013 on collective redress, published on 26 July 2013, the European Commission invites all Member States to implement by 26 July 2015 in their national systems a collective redress mechanism that should meet a number of principles. One of the Commission’s recommendations is precisely that ‘a key role should be given to courts in protecting the rights and interests of all the parties involved in collective redress actions as well as in

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The choice of these countries was not made by the author but by BEUC, which had ordered the preliminary study that served as a basis for this book. It is obvious that other legal systems would also have been of interest, such as the Dutch system (see E. Falla, “Vers un mécanisme belge d’accord de réparation collective: quels enseignements pouvons-nous tirer de l’expérience néerlandaise ?”, R.D.I.D.C. 4/2013 - pp. 595 et seq.).
managing the collective redress actions effectively’ (recital (21)). Yet nothing is stated as regards the precise framework and practical implications of such a role. The national legislator, tasked with bringing the national system in line with this Recommendation, will find in the present study elements that can fill in the gaps. Likewise, the Commission, tasked with assessing implementation of this Recommendation, will be able to evaluate the various collective redress mechanisms in the light of the principles set out in Ms Falla’s study, which could serve as a benchmark of sorts.

The comparative aspect of the study, stressed in the title of this work, should however not be taken to mean that it is of no practical interest for legal practice.

On the contrary, it will be a very useful book for legal practitioners in the systems examined in the comparative study, as it can provide a useful summary of their national law and practice, something not always available. It will also be a reference work for practitioners who will soon see the introduction of collective redress mechanisms within their own legal systems. Belgian law is a perfect example in this respect: the Parliament is about to adopt a bill on collective redress claims, which will allow one representative to act on behalf of a group of consumers to obtain compensation for the damage or loss suffered by the members of such group. This is a wholly new mechanism under Belgian law, and the judge is given an important role to play. The judge will be given significant discretionary power over many key aspects of the proceedings: whether a collective redress action is more efficient than individual claims, whether the claim has been filed by a sufficiently adequate representative, whether an opt-in or an opt-out should apply, whether one should create categories and sub-categories within the group, what form indemnification should take (global or individualised), whether to approve collective redress agreements, etc. The Court of First Instance (or, by way of an exception, the Commercial Court) of Brussels, which will have sole and exclusive jurisdiction over collective redress claims, will be able to draw from this work guidelines on how to exercise its new-found power, through examining both the principles and practice found in systems that already have collective redress mechanisms and Ms Falla’s recommendations, which are based on the best practices of all. This invaluable contribution will not only be useful to Belgian judges, but also to all of their colleagues who will shortly face similar questions (France, etc.).

In summary, the present work, which is remarkably well structured and substantiated, is both fundamental and topical for the analysis and practical functioning of collective redress mechanisms, which will radically transform
over the next few years the role of the judge as it is still traditionally known in most Member States of the European Union.

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