

## **Brief 5: class and collective actions in Belgium**

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*In the Belgian Official Gazette of April 29, 2014, the law of March 28, 2014, inserting a class action in the Code of Economic Law, was published. This law introduces for the first time a represented collective action (or class action) in the Belgian legal order, albeit only applicable in consumer cases. In this brief, an analysis of the situation before the law and the added value of the law shall be examined.*

## 1. Introduction to class actions

Until recently, Belgian law did not provide for actions for collective redress. All collective claims had to be brought by way of joined actions (actions in which multiple plaintiffs with closely connected claims, each acting in their own name and on their own behalf, can have their claims decided in one set of proceedings).

According to Belgian law, a plaintiff must have, for his claim to be admissible, a direct, personal and actual interest in a claim to be able to institute legal proceedings<sup>1</sup> (Articles 17 to 18 Judicial Code). The aim of this legal rule is to prevent a plaintiff from bringing claims on behalf of others in a single action. This means that in principle, class actions are not permitted under Belgian law.

In the past years, the legislator has reconsidered this position and has opened up pathways for collective redress.

On the one hand the legislator introduced legislation creating a procedure by which actions for collective redress may be brought by certain organisations on behalf of consumers and/or SMEs under certain conditions.

On the other hand, in specific matter-related legislation, the legislator has given legal entities the right to bring a representative action for injunctive relief on behalf of an unidentified group of people to defend specific collective interests, such as consumer and environmental interests and human rights.

This means that outside the scope of application of the Code of Economic Law, which implies an exception to the general rule of personal interest, actions for collective redress are not permitted in Belgium.<sup>2</sup>

## 2. Collective possibilities according to Belgian law

In Belgium, there are three methods to seek collective redress.

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<sup>1</sup> H. BOULARBAH and M-C. VAN DEN BOSSCHE, *Class/collective actions in Belgium: overview*, 2021, [https://uk.practicallaw.thomsonreuters.com/2-618-0367?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/2-618-0367?transitionType=Default&contextData=(sc.Default)&firstPage=true).

<sup>2</sup> X. TATON, G-J. HENDRIX and F. DANIS, *Collective redress around the globe – Belgium*, 2020, <https://www.linklaters.com/en/insights/publications/collective-redress/collective-redress-across-the-globe/belgium>.

- a. Action for collective redress (class action as regulated by the law of September 2014).

This action is exercised by a claimant appointed by law (the group representative). The group representative brings, on behalf of an unknown group of individuals, an action which leads to a decision that prevents subsequent litigation (not only towards the group representative and the defendants, but also towards all group members that have opted in or have not opted out of the procedure). Only the group representative and the defendants are parties to the proceedings, not the group members.<sup>3</sup>

- b. Collective or joined actions

Collective actions refer to several individual legal actions arising from a same or similar event or contract which are joined in the same proceedings by different claimants. In this case, multiple plaintiffs either jointly bring an action or request the court during proceedings to join their individual actions.<sup>4</sup>

A joined action is only possible in the event that the claims are so closely connected which makes it appropriate to try them together because this avoids potentially incompatible decisions. It's important to emphasize that each plaintiff must still have an immediate, personal and actual interest (see above personal interest criterion) in the claim and must have consented to the commencement of proceedings in his name.<sup>5</sup>

- c. Actions of collective interest

These actions are brought by an organisation with the aim to realise an objective that goes beyond the personal interests of the individual members of the organisation or group.<sup>6</sup>

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<sup>3</sup> H. BOULARBAH and M-C. VAN DEN BOSSCHE, *Class/collective actions in Belgium: overview*, 2021, [https://uk.practicallaw.thomsonreuters.com/2-618-0367?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/2-618-0367?transitionType=Default&contextData=(sc.Default)&firstPage=true); X. TATON, G-J. HENDRIX and F. DANIS, *Collective redress around the globe – Belgium*, 2020, <https://www.linklaters.com/en/insights/publications/collective-redress/collective-redress-across-the-globe/belgium>.

<sup>4</sup> H. BOULARBAH and M-C. VAN DEN BOSSCHE, *Class/collective actions in Belgium: overview*, 2021, [https://uk.practicallaw.thomsonreuters.com/2-618-0367?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/2-618-0367?transitionType=Default&contextData=(sc.Default)&firstPage=true).

<sup>5</sup> X. TATON, G-J. HENDRIX and F. DANIS, *Collective redress around the globe – Belgium*, 2020, <https://www.linklaters.com/en/insights/publications/collective-redress/collective-redress-across-the-globe/belgium>.

<sup>6</sup> H. BOULARBAH and M-C. VAN DEN BOSSCHE, *Class/collective actions in Belgium: overview*, 2021, [https://uk.practicallaw.thomsonreuters.com/2-618-0367?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/2-618-0367?transitionType=Default&contextData=(sc.Default)&firstPage=true).

The possibility of this action derogates from the general principle of “personal interest” as written down in the judicial code. Therefore, certain legal entities and certain representative organisations have been given the statutory right, in accordance with their statutory purpose, to bring a representative action on behalf of an unidentified group of people to defend specific collective interests (eg: consumer interests, environment and human rights).<sup>7</sup>

### 3. Law of 1 September 2014

The law of 28 March 2014 regarding collective redress introduced the concept of class actions into Belgian law. As already mentioned earlier, class actions were not possible before this act in Belgium due to the lack of fulfilment of the “personal interest” criterion. The only possibility to seek redress was filing a lawsuit based on closely connected claims. However, the practical challenges of these requirements made it almost impossible to file a lawsuit for thousands of claimants (all the names and addresses of all the individual claimants had to be mentioned in all court documents (writ of summons, submissions, judgment, convocations, etc.).

Since the Act of 28 March 2014, it is possible to file a class action in Belgium, which has been formally named an “action for collective redress.”

Title 2 of Book XVII of the Code of Economic Law by the Act of 28 March 2014 provides for the “action for collective redress”.<sup>8</sup> The scope of this action is strictly limited.<sup>9</sup>

- An action for collective redress is only permitted when the claim is based on a breach by an undertaking of a contract or of one of the Acts or European Regulations specifically listed in Article XVII.37 of the Code of Economic Law.<sup>10</sup>
- Actions for collective redress may only be brought by certain representative organisations and only in respect of harm suffered by either consumers or small or medium-sized-enterprises (SMEs) in the sense of Commission Recommendation 2003/361/EC.
- Actions for collective redress may only be brought in respect of facts underlying a collective harm that occurred after 1 September 2014.

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<sup>7</sup> In a judgment of 11 June 2013, the Court of Cassation broadly accepted that environmental organizations may, on the basis of the Aarhus Convention, lodge an action to defend environmental interests, even though no such explicit derogation from the condition of a direct, personal and actual interest exists in Belgian law.

An Act of 21 December 2018 extended these actions for the protection of a collective interest, under certain conditions, to all legal entities whose purpose is to protect human rights or fundamental freedoms recognized by the Belgian Constitution or international treaties binding on Belgium.

<sup>8</sup> H. BOULARBAH and M-C. VAN DEN BOSSCHE, *Class/collective actions in Belgium: overview*, 2021, [https://uk.practicallaw.thomsonreuters.com/2-618-0367?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/2-618-0367?transitionType=Default&contextData=(sc.Default)&firstPage=true).

<sup>9</sup> X. TATON, G-J. HENDRIX and F. DANIS, *Collective redress around the globe – Belgium*, 2020, <https://www.linklaters.com/en/insights/publications/collective-redress/collective-redress-across-the-globe/belgium>; T. HEREMANS, *Class actions in Belgium*, 2021, <https://cms.law/en/int/expert-guides/cms-expert-guide-to-european-class-actions/belgium>.

<sup>10</sup> These include consumer rights and protection rules such as product safety and liability, insurance regulation, protection of personal data, the sale of financial products and pharmaceuticals regulation, as well as competition law, intellectual property law and the statutes on certain regulated industries, such as natural gas and electricity.

- All actions for collective redress must be brought in the courts of Brussels.

Since the entry into force of the class action regime in September 2014, nine class actions have been initiated, whereof three led to a court decision (Diesel gate, Proximus and Thomas cook).<sup>11</sup>

### 3.1 Ratio of the law

The basic premise of the law is that in consumer disputes there is little recourse to the courts, because in many cases the costs of litigation do not outweigh the potential benefits.<sup>12</sup> In practice, there are significant barriers to the exercise of individual legal actions by consumers, including lack of knowledge of their rights, means of redress and the costs of exercising their rights in court.

With the action for collective redress, the legislator wants to broaden and facilitate access to justice in consumer cases. In this way, the collective damage of a group of consumers can be repaired all at once.

### 3.2 Ratione personae

According to the Code of Economic Law, actions for collective redress may only be brought by one of two entities<sup>13</sup> if they concern the reparation of harm suffered by consumers.<sup>14</sup>

The claim can thus only be filed for damage suffered by (a group of) consumers. According to Article I.1, 2° of the Economic Code, a consumer is "any natural person who is acting for purposes which are outside his trade, business, craft or profession".<sup>15</sup>

If it concerns the reparation of harm suffered by a group of SMEs, the action for collective redress can only be brought by an inter-professional organisation for the protection of SMEs which has legal personality and is represented in the High Council for Self-Employed Persons and SMEs or has been recognised by Ministerial Decree.

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<sup>11</sup> H. BOULARBAH and M-C. VAN DEN BOSSCHE, *Class/collective actions in Belgium: overview*, 2021, [https://uk.practicallaw.thomsonreuters.com/2-618-0367?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/2-618-0367?transitionType=Default&contextData=(sc.Default)&firstPage=true); T. HEREMANS, *Class actions in Belgium*, 2021, <https://cms.law/en/int/expert-guides/cms-expert-guide-to-european-class-actions/belgium>.

<sup>12</sup> S. BRIJS and R. LINDEMANS, *Class actions in België: een eerste bespreking van de nieuwe wet*, *Het poelaertplein* 2013-14, 8; S. VOET and B. ALLEMEERSCH, *De rechtsvordering tot collectief herstel: een Belgische class action voor consumenten*, *RW* 2014-15, 644.

<sup>13</sup> - an association for the protection of consumer interests that has legal personality and either holds a seat in the Special Advisory Commission for Consumer Affairs or has been recognized by Ministerial Decree;  
- the Consumer Ombudsman, although only with a view to negotiating a collective settlement agreement. If no collective settlement agreement is found, the Consumer Ombudsman must be replaced by another representative. This right of action for the Consumer Ombudsman is controversial and subject to a pending test case.

<sup>14</sup> X. TATON, G-J. HENDRIX and F. DANIS, *Collective redress around the globe – Belgium*, 2020, <https://www.linklaters.com/en/insights/publications/collective-redress/collective-redress-across-the-globe/belgium>.

<sup>15</sup> S. BRIJS and R. LINDEMANS, *Class actions in België: een eerste bespreking van de nieuwe wet*, *Het poelaertplein* 2013-14, 10.

Additionally, two types of entities can act for a group of either consumers or SMEs.<sup>16</sup>

Only a group of consumers, small and medium size enterprises (SME) or group representatives may initiate an action for collective redress when they suffer damage as a result of a *common cause*. It's not required that the damage suffered by consumers is identical, but it should arise from a "common cause".<sup>17</sup>

### 3.3 Ratione materiae: consumer related disputes only (initially)

The procedures for class actions are restricted to specifically permitted types of claim.<sup>18</sup> Class actions are not available for disputes between employees and employers, for shareholders' disputes or for environmental claims.<sup>19</sup>

It's important to notice that the invoked cause of action must relate to a possible breach by a company of one of its contractual obligations or of one of the European regulations or laws listed in the Act<sup>20</sup>. The law lists exhaustively the legal provisions that constitute the scope of application which are consumer law provisions only.

The Explanatory Memorandum emphasizes that the Act establishes a collective redress procedure exclusively for C2B or consumer disputes. Disputes between shareholders and companies or disputes concerning contractual shortcomings within the sphere of employment law are thus excluded from the scope of application.

The Belgian legislator has clearly opted for a sectoral approach and not for a universal scheme, as in the European recommendation.<sup>21</sup>

### 3.4 Ratione loci

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<sup>16</sup> - an association which has had legal personality for at least three years and which has been recognized by Ministerial Decree. The statutory purpose of that association must be directly related to the collective harm suffered by the class and may not include long-term commercial activities;

- an entity which (i) is recognized by a Member State of the European Union or the European Economic Area to act as a representative body, (ii) has a non-profit making character, and (iii) has sufficient capacity to represent multiple plaintiffs, acting in their best interests, though only on the condition that (iv) there is a direct relationship between the objectives of the entity and the rights that are claimed to have been violated.

<sup>17</sup> S. BRIJS and R. LINDEMANS, Class actions in België: een eerste bespreking van de nieuwe wet, Het poelaertplein 2013-14, 9.

<sup>18</sup> Competition and pricing of products and services; Commercial practices and consumer protection; Payment and credit services; Safety of products and services; Intellectual property; Information society services; Medicinal products; Supply of gas and electricity; Construction of houses; Foodstuffs and consumers' safety; Liability insurance for motor vehicles; Product liability; Data protection; A variety of travel services, including transport per flight, train, ship or bus.

<sup>19</sup> T. HEREMANS, *Class actions in Belgium*, 2021, <https://cms.law/en/int/expert-guides/cms-expert-guide-to-european-class-actions/belgium>.

<sup>20</sup> Article XVII.37 CoEL

<sup>21</sup> S. VOET and B. ALLEMEERSCH, De rechtsvordering tot collectief herstel: een Belgische class action voor consumenten, *RW* 2014-15, 646; S. BRIJS and R. LINDEMANS, Class actions in België: een eerste bespreking van de nieuwe wet, Het poelaertplein 2013-14, 8.

The Brussels court of first instance and the Brussels court of commerce<sup>22</sup> are the only two courts with jurisdiction.<sup>23</sup> On appeal, the Court of Appeal in Brussels is competent.

The territorial scope for opt-out claims is restricted to persons domiciled in Belgium, but persons domiciled elsewhere may opt-in to a claim for collective redress.

### 3.5 Compensation

On the one hand, financial compensation can be given and aims to compensate the claimant for an amount of damages which is deemed appropriate in relation to the loss suffered.<sup>24</sup> On the other hand, compensation in kind could be offered in the form of replacement of the non-conforming product.<sup>25</sup> The damages are calculated on the basis of the actual loss suffered.

In this regard, it's important to notice that the compensation that can be asked depends on the type of proceeding which is initiated before the court.

In proceedings for the protection of collective interest, representative organisations are only entitled to seek injunctions to stop unlawful practices that harm the collective interests they represent. They cannot claim damages for breach of these interests.

In proceedings for collective redress, only specific performance and/or damages may be obtained.

In proceedings for joined actions, all types of relief may be sought.<sup>26</sup>

### 3.6 Opt-in or opt-out

To know who is included in the group of consumers that is represented in a collective redress action, the legislator has flexibly left this to the courts and has provided for the courts to decide, on a case-by-case basis, whether to use an opt-in or opt-out system.<sup>27</sup>

The group of claimants must choose whether they think the action should have an opt-in or opt-out system and after hearing argument, the Court will make the final decision on this. The legislators stated that an opt-out system is to be preferred where there are a large number of claimants who suffer minimal financial damage. An opt-in system is to be preferred where it is

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<sup>22</sup> Art. XVII.35 CoEL en art. 633ter Jud.C.

<sup>23</sup> T. HEREMANS, *Class actions in Belgium*, 2021, <https://cms.law/en/int/expert-guides/cms-expert-guide-to-european-class-actions/belgium>; S. VOET and B. ALLEMEERSCH, *De rechtsvordering tot collectief herstel: een Belgische class action voor consumenten*, RW 2014-15, 652.

<sup>24</sup> S. VOET and B. ALLEMEERSCH, *De rechtsvordering tot collectief herstel: een Belgische class action voor consumenten*, RW 2014-15, 656.

<sup>25</sup> T. HEREMANS, *Class actions in Belgium*, 2021, <https://cms.law/en/int/expert-guides/cms-expert-guide-to-european-class-actions/belgium>.

<sup>26</sup> X. TATON, G-J. HENDRIX and F. DANIS, *Collective redress around the globe – Belgium*, 2020, <https://www.linklaters.com/en/insights/publications/collective-redress/collective-redress-across-the-globe/belgium>.

<sup>27</sup> S. BRIJS and R. LINDEMANS, *Class actions in België: een eerste bespreking van de nieuwe wet*, *Het poelaertplein* 2013-14, 10.

impossible to estimate the number of potential claimants or where the kind of damage requires the active participation of the claimant, such as in case of a violation of privacy.<sup>28</sup>

The court will always impose an opt-in system for the group members who do not have their main place of residence in Belgium, as well as in situations where the claim regards compensation of physical or moral collective damage.

#### 4. Extension of the scope of application

As already mentioned before, the class action law of September 2014 was limited to the reparation of collective prejudices suffered by consumers. B2B relationships were strictly excluded.

However, after an evaluation of the initial class action act (2014) and as an answer to many critiques on the narrow scope of application of the law, the Belgian legislator decided to extent the scope of application (*ratione personae*) of the law. Since this extension in 2018, the class action act can also be applied in B2B relationships, although this relationship has to be interpreted rather restrictive. The law is only applicable when a small or medium enterprise is involved.<sup>29</sup> These enterprises are defined as “Belgian or foreign enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million”.<sup>30</sup> The criteria<sup>31</sup> which were already instated in the law of 2014 are still applicable and haven’t been modified.

#### 5. Conclusion

Before the law of September 2014 introduced the class action, there were only two possibilities provided in Belgian law to seek compensation, namely the collective action and the action for collective interest. This brief made clear that these two instruments didn’t suffice and that the consumer was in need of another more effective legal instrument.

With the law of September 2014, Belgium introduced a class action to seek collective redress with the group representative as the driving force behind any collective claim.

The collective remedy could only be sought by consumers for a violation, by a company, of a contractual obligation or of Belgian or European regulations listed exhaustively by law. The

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<sup>28</sup> S. VOET and B. ALLEMEERSCH, *De rechtsvordering tot collectief herstel: een Belgische class action voor consumenten*, RW 2014-15, 650.

<sup>29</sup> G. CROISANT, *The scope of the Belgian class action is extended to SMEs*, 2018, <https://www.linklaters.com/fr-be/insights/publications/2018/march/the-scope-of-the-belgian-class-action-is-extended-to-smes>.

<sup>30</sup> Article XVII.86, §2 CoEL

<sup>31</sup> - the SMEs victim of an alleged collective prejudice cannot conduct class action proceedings on their own motion. They must be represented by a Belgian or foreign SMEs’ organization.

- the SMEs’ collective prejudice must result from the alleged breach by an undertaking of either a contractual provision or one of the many legislations enumerated by the Act.

- the court can choose either an opt-in procedure (whereby SMEs specifically opting in can benefit from the action) or an opt-out procedure (whereby all SMEs affected by the breach benefit from the action unless they opt-out), unless for SMEs which do not have their principal offices in Belgium for which the opt-in procedure is mandatory.



consumers must appoint a representative of the group; only a few associations defending the interests of the consumers have the power to do so.

The new procedure, although initially limited to consumer cases, complies to a large extent with the European recommendation of 11 June 2013.<sup>32</sup>

The class action, which is provided in the law of September 2014, originally had a rather narrow scope of application since it could only be used in relationships concerning consumers. An amendment in 2018 widened the scope of application by making the class action available to SMEs in addition to consumers.

While class actions cover a broad range of infringements, they remain limited to claiming damages for violations of specifically enumerated laws and regulations.

## 6. Sources

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<sup>32</sup> S. VOET and B. ALLEMEERSCH, De rechtsvordering tot collectief herstel: een Belgische class action voor consumenten, *RW* 2014-15, 660.