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Belgium
Class Actions

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This country-specific Q&A provides an overview of class actions laws and regulations applicable in Belgium.

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Belgium: Class Actions

1. Do you have a class action or collective redress mechanism? If so, please describe the mechanism.

A representative action, as regulated in Title 2 of Book XVII of the Code of Economic Law ("CEL"), is a judicial procedure whereby a qualified entity claims injunctive measures or redress measures (compensation) for the benefit of a group of not yet identified consumers or SME's he represents, against an enterprise allegedly liable for the collective harm caused.

Unlike in a normal judicial procedure, a personal interest of the plaintiff is not a condition for the admissibility of the claim. The entitlement of a group representative to start an action for the benefit of *third parties* is precisely the essence of a representative action.

The representative action was introduced in Belgium in 2014. A law of 18 April 2024 amended the regime on representative actions to simplify the procedure and to implement the EU Representative Actions Directive 2020/1828 ("*RAD*"). The implementation did not require many changes since the Belgian legislation was already quite compliant with the RAD.

The procedure for an action for *injunctive measures* is quite similar to a general cease and desist action under Belgian law.

Specific procedural rules apply to a representative action for *collective redress* though. The four phases of the procedure are (i) the admissibility phase, (ii) the mandatory negotiation phase, (iii) the litigation phase on the merits and (iv) the distribution and enforcement phase.

In the **admissibility phase** the court basically checks the admissibility conditions:

- The status of the plaintiff as a qualified entity (see question 2)
- The claim is based on one of the specific legal grounds entitling to file such a representative action (see question 4).
- The representative action seems more efficient than a standard judicial procedure (see question 5).
- The question of the composition of the group (opt-in or opt-out – see question 8) was also debated in the admissibility phase. Under the new regime, there will be no more debate on the composition method of the group in the admissibility phase, nor in any later stage for that matter. Unless the parties agree on an opt-out system during the negotiation phase, opt-in will be standard.

Under the 2014 regime, the admissibility phase was very time-consuming. Although the law provided for a decision on the admissibility within a period of two months (Art. XVII.43 CEL), this deadline was rarely respected. The law of 18 April 2024 aims at expediting and simplifying the admissibility phase in order to make the collective redress procedure more attractive. The admissibility phase is treated in succinct debates, or at least within 6 months (new Article XVII.43 CEL).

Once the claim is declared admissible, there is a **mandatory negotiation phase** (see question 17)

If the parties have not succeeded in reaching an agreement during the negotiation phase, they will exchange written submissions on the merits in the **litigation phase**, according to proceedings similar to ordinary judicial proceedings, and the court will assess the claim on the merits (see questions 10 to 13).

While in the past the group of beneficiaries (opt-in or opt-out) was determined in the admissibility phase, it is now only after a decision granting the claim that beneficiaries opt-in, within a period of 4 months (new XVII.55/1 BCEL).

In the final **distribution and enforcement phase** a claims handler will be appointed to ensure the beneficiaries receive the compensation they are entitled to. The claims handler is paid by the defendant.

2. Who may bring class action or collective redress proceeding? (e.g. qualified entities, consumers etc)

Only qualified entities representing consumers or SME's can start representative actions. The law of 18 April 2024 slightly changes the conditions for being a qualified entity.

A qualified entity should be recognized as such by the

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competent Minister. To obtain such recognition, its statutory purpose should be the protection of the interests of consumers or SME's, it may not seek profit and it should be active for at least 12 months. It should be solvable, independent and free from external influence. It should publish information proving these conditions are satisfied.

Against a refusal of recognition, an appeal before the Council of State is possible. The most recent association to be recognised was "*Association Professionnelle du Libre-Service Indépendant en Alimentation*" on 15 March 2022.

The Consumer Ombudsman Service can also act as a group representative (art. XVII.39, 3° CEL). This is the autonomous public service providing advice on consumer protection. The Consumer Ombudsman Service can only act until the mandatory negotiation stage and needs to be replaced by a qualified entity in case of litigation on the merits.

The new regime also provides for an automatic recognition of foreign legal entities competent in another Member State of the European Union to bring cross-border claims (Art. XVII.1, §2 CEL).

The recognition entitles the entity to initiate both domestic and transnational representative actions. It is valid for an indefinite term but compliance with the conditions will be checked at least every 5 years and can be revoked at any time whenever it appears that the conditions are not met anymore (XVII.1/1 CEL).

When a representative action is initiated, the judge will check in the admissibility phase whether the plaintiff is a qualified entity.

Previously the court had to determine the suitability of the group representative as well, which could lead to debates. Under the new regime, the court will only need to check whether the applicant is a qualified entity and whether its statutory object is in direct relation with the action (new article XVII.36, 2°). Since every representative must be recognised to bring a collective claim, the suitability of the representative should not be called into question. One exception though: when several qualified entities candidate to represent the same group, the court will choose the most suitable one. Moreover, both the defendant and the court could raise doubt on the group representative still meeting all the requirements, for example regarding transparency and independence. In such a case, the court could still examine the current suitability of the group representative.

An entity without Ministerial recognition can apply for an *ad hoc* approval by the court when filing its request for a specific domestic representative action. This recognition will only apply to said action.

3. Which courts deal with class actions or collective redress proceedings?

The courts of Brussels are exclusively competent to deal with class actions or collective redress proceedings (Art. XVII.35 CEL). Only the territorial competence has been explicitly provided for in the legislation, leaving the option to the claimants to bring the claim for collective redress before either the enterprise court of Brussels (for example in the cases against Thomas Cook and telecom operator Proximus) or the court of first instance of Brussels (for example in the case against SNCB, the national railway operator).

4. What types of conduct and causes of action can be relied upon as the basis for a class action or collective redress mechanism?

Legal grounds for a representative action are of course the consumer protection rules mentioned in Directive (EU) 2020/1828 on representative actions, but in addition and more generally any contractual liability can be invoked and (since SME's can also be represented) also some Belgian laws governing specific b2b relations, such as those governing commercial agency, distribution agreements and precontractual information obligations in franchise and other cooperation agreements (XVII.37 CEL).

5. Are there any limitations of types of claims that may be brought on a collective basis?

Even if a claim is filed by a qualified entity representing consumers or SME's (see question 2) and is based on one of the limited infringements (question 4), the court can still declare it inadmissible if it appears that the action for collective redress does not seem more efficient than a standard judicial procedure. Class actions should benefit procedural economy and provide more efficient protection to consumer and SME's than ordinary court proceedings. When assessing this condition, the judge can consider multiple criteria such as the underlying facts, the potential damage, the size of the potential group, etc. The judge has a large margin of appreciation, but a collective redress action will be most obviously appropriate when there is damage scattered over an important number of consumers or SME's, all suffering a

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very similar (albeit individually limited) damage, that can therefore easily be compensated in a general, without need to study and individualize the situation of every victim.

When a representative action for collective redress is impossible or declared inadmissible, the main alternative, is to have multiple claimants join their respective claims in one procedure (article 30 Judicial Code). This can be done by one writ of summon with multiple claimants (art. 701 Judicial Code), or one writ of summon with follow-up voluntary interventions by new claimants, or by requesting to join cases that were initiated by several writs of summons. The general condition though is that the claims are so closely connected that it is desirable to hear and judge the claims together in order to avoid solutions that may be incompatible if the cases were tried separately. Moreover, the intervention may not delay the main case.

In some cases, a pilot case is launched with one plaintiff, followed, in case of success by multiple new claims invoking the precedent of that claim. Even though the pilot judgement has no actual *res iudicata* value in favour of third parties, they still can invoke the judgment as a rebuttable presumption.

6. How frequently are class actions brought?

Class actions are not frequently brought. Since the introduction of class actions in 2014, only 11 claims for collective redress have been brought, almost all by the consumer protection association "Test-Achats":

1. Claim of Test-Achats representing travellers against the national railway operator SNCB pertaining to travel disturbances caused by strikes (introduced in 2015).
2. Claim of Test-Achats representing travellers against Thomas Cook pertaining to the delay of a Tenerife-Brussels flight (introduced in 2015).
3. Claim of Test-Achats against Events Belgium pertaining to the prohibited resale of concert tickets at exorbitant prices (introduced in 2016).
4. Claim of Test-Achats against Proximus pertaining to the forced replacement of purchased decoders by rented decoders (introduced in 2017).
5. Claim of Test-Achats against Volkswagen pertaining to the manipulation of the NOx emission figures for cars produced by Volkswagen ("Dieselgate", (introduced in 2017).
6. Claim of Test-Achats against Ryanair pertaining to the cancellation and delay of Ryanair flights during the summer of 2018 (introduced in 2018).
7. Claim of Test-Achats against Groupon pertaining to a commercial offer on diapers (introduced in 2018).
8. Claim of Test-Achats against Facebook pertaining to the data of Facebook users shared with the marketing company Cambridge Analytica without permission (introduced in 2018).
9. Claim of the Belgian Ombudsman Service for Energy against 6 energy suppliers pertaining to early termination fees (introduced in 2018).
10. Claim of Test-Achats against Apple pertaining to the programmed obsolescence of the iPhone 6, 6 Plus, 6S and 6S Plus (introduced in 2020).
11. Claim of Test-Achats against HP pertaining to the Dynamic security technology installed on certain HP printers causing the printers to stop working when users inserted certain replacement (non-HP) ink cartridges (introduced and settled in 2022).

7. What are the top three emerging business risks that are the focus of class action or collective redress litigation?

Historically, the focus of collective redress litigation centred around consumer rights (against Volkswagen or telecom operator Proximus) and passenger rights (against. Ryanair, Thomas Cook or the national railway operator SNCB).

The top three emerging business risks being:

(1) Data breaches and other violations of GDPR appear to be cases with the typical ingredients that make representative actions relevant: scattered effects and consumers with a high degree of "rational apathy". We expect this could be one of the most relevant grounds for future class actions.

(2) One can also expect investor protection, securities fraud, or other financial services infringement to trigger class actions since the law of 18 April 2024 adds regulations and directives pertaining to securities markets and financial services such as MIFID II to the scope.

(3) The Belgian law does not allow for climate litigation,

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generally based on tort law, to be initiated through representative actions. While uncertain how the legislation pertaining to class actions will evolve, it is possible that either on an EU-level or on the national level these types of claims will fall into the scope.

8. Is your jurisdiction an "opt in" or "opt out" jurisdiction?

Under the previous regime, the judge decided in the admissibility stage on whether the claim should be *opt-in* or *opt-out* (Art. XVII.42, §1, 3° CEL). In an opt-out system, all members of the group, as defined in the admissibility decision, benefit from the collective redress, except those that expressly will choose not to. In an opt-in system, only the members of the group that expressly choose to, will benefit from the redress. The judge determined the deadline for such declaration, which was at maximum 3 months after the admissibility judgement has been published in the Official Journal (Art. XVII.43, §4 and XVII.43, §2, 7° CEL). The opt-in system was most frequently selected by the courts.

Under the new regime, except if the parties themselves agree otherwise in the negotiation phase, the *opt-in* system will always apply. The concerned consumers or SME's will need to make an explicit opt-in declaration within 4 months after the judgement confirming liability of the defendant (new Art. XVII.55/1 CEL). It is obvious that opt-in in these circumstances will have more success, than the previous system where one had to opt-in under the veil of ignorance on the outcome of the case.

Opt-in is mandatory, and the parties cannot agree otherwise, in two cases (i) with regards to consumers or SME's who do not habitually reside in Belgium (Art.XVII.45 §1 7° CEL) and (ii) claims with the to redress physical or moral collective harm (Art.XVII.45 §1 7° CEL).

9. What is required (i.e. procedural formalities) in order to start a class action or collective redress claim?

A group representative will bring a claim on behalf of the group before the competent court of Brussels. Only one representative can act for each distinct group. If there are distinct groups, several representatives can therefore act, for example one for consumers and the other for SME's. If there are two group representatives for the same group, the judge will determine the most appropriate group representative (new Art. XVII.40, §2 CEL).

The claim for collective redress can be brought by filing a request before the competent court of Brussels that must contain proof that the conditions of admissibility are fulfilled, a description of the collective damage and a description of the group for which the group representative intends to act (Art. XVII.42, §1 CEL). Under the new regime, the request does not need to propose opt-in or opt-out anymore, since this will no longer be assessed by the judge in the admissibility phase and opt-in will be standard. The plaintiff should however specify the demanded remedy in order to provide clarity to the defendant and enable possible negotiations already starting in the admissibility phase. The request should also disclose the litigation funder if any (new Art. XVII.42, §1, 6° CEL) (see question 21).

10. What remedies are available to claimants in class action or collective redress proceedings?

The class actions do not deviate from general contractual and tort law, meaning that the same remedies are available. The collective damage can either be redressed in kind or by equivalent. Remedies consisting of damages, repair, replacement, price reduction, contract termination or reimbursement of the price paid are available.

In the event of damages, the judge will have to determine whether he grants a global award to the whole group who then must divide said amount or whether he grants an individualised amount to every injured member of the group (Art. XVII. 54, §1, 7° CEL).

11. Are punitive or exemplary damages available for class actions or collective redress proceedings?

No, as a principle in Belgian law punitive damages are forbidden. The principle under Belgian law is full compensation meaning to restore damage caused to the injured party by placing the injured party in a position as if the damaging event did not take place, but nothing more than that.

12. Are class actions or collective redress proceedings subject to juries? If so, what is the role of juries?

No, juries do not play any role in class actions.

13. What is the measure of damages for class

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actions or collective redress proceedings?

Collective damage is defined as "the totality of all individual damages that have a common cause and that the members of a group have suffered" (Art. I.21, 1° CEL). This could refer to one singular event causing damage to multiple injured individuals (e.g., a delayed flight). It could however also refer to situations where people are exposed over a longer period of time, to an alleged infringement (for example programmed obsolescence of smartphones in the case against Apple).

14. Are there any jurisdictional obstacles to class actions or collective redress proceedings?

There are no actual obstacles, the length of the procedure being a burden though, starting with the admissibility phase. The law of 18 April 2024 aims at speeding up the admissibility phase.

15. Are there any limits on the nationality or domicile of claimants in class actions or collective redress proceedings?

Qualified entities in another EU member state can also act as a group representative in a Belgian representative claim (new Art. XVII.1, §2 CEL).

Foreign beneficiaries can also be represented in a collective redress action, in which case opt-in shall always apply.

16. Do any international laws (e.g. EU Representative Actions Directive) impact the conduct of class actions or collective redress proceedings? If so, how?

The Representative Actions Directive was implemented by the law of 18 April 2024. The implementation did not require many changes since the Belgian legislation was already quite compliant with the RAD.

17. Is there any mechanism for the collective settlement of class actions or collective redress proceedings?

As soon as the court declares the claim admissible, the parties are legally obliged to negotiate during three to six months (extendable to a maximum of 12 months) (Art. XVII.45, §1 CEL), before the court can be seized again. The law even provides for a possibility for the judge to appoint a mediator with approval of the parties in this stage to guide the negotiations (Art. XVII.45, §2 CEL). Under the new regime the court may end the negotiation phase at any time and order the start of the litigation phase if one of the parties remains passive for a period of 30 working days (new Art. XVII.45, §4 CEL). The assessment of the passive attitude is a discretionary decision of the court.

The settlement agreement should specify, among others, the detailed description of the collective damage which is the subject of the agreement, the description of the group (and possible opt-put instead of opt-in (see question 8), the amount to be paid by the defendant to the group representative; this amount may not exceed the actual costs incurred by the representative (see question 23), the guarantees to be provided by the defendant, where appropriate, etc. (Art. XVII.45, §3 CEL).

The conclusion of a collective redress agreement does not imply any admission of liability or guilt on the part of the defendant (Art. XVII.46 CEL).

Of the 11 collective redress actions, at least 4 have been settled through an agreement.

18. Is there any judicial oversight for settlements of class actions or collective redress mechanisms?

The collective settlement adopted during the mandatory negotiation phase needs to be homologated by the judge who declared the claim admissible (Art. XVII.49 CEL). The homologation judgement will also appoint a claims handler.

The judge will have to determine whether the collective settlement contains the required mentions. The judge may ask the parties to complete it or amend (Art. XVII.49, §1 CEL).

The judge can refuse homologation if (1) the agreed redress is manifestly unreasonable, (2) the time limit set for members of the group to opt in to obtain individual redress is manifestly unreasonable, (3) the additional disclosure measures are manifestly unreasonable, (4) the remuneration of the group representative exceeds the costs actually incurred by him or (5) the compensation is contrary to mandatory law or is unenforceable (Art. XVII.49, §2 CEL).

19. How do class actions or collective redress

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proceedings typically interact with regulatory enforcement findings? e.g. competition or financial regulators?

There is no specific interaction and both procedures can exist in parallel. However, findings of a regulatory body could be used in any action (including collective redress action) to support the alleged infringement.

20. Are class actions or collective redress proceedings being brought for 'ESG' matters? If so, how are those claims being framed?

With increasing awareness of environmental issues, there is a tendency to climate litigation in Belgium as well. Climate change liability is generally based on general tort law, which is not a legal ground for starting a representative action. These actions, whether aiming at injunction measures or damages, are therefore introduced through the standard judicial procedure.

When damages are claimed, the victims should be the plaintiffs. When injunctive measures are claimed, this is often done by a non-profit organisation. The non-profit organization Klimaatzaak was joined by thousands of individuals in its injunction claim against the Belgian federal and regional public authorities. In a groundbreaking decision of 30 November 2023, the Brussels Court of Appeal ordered the Belgian State and the Flemish and Brussels regions to take the necessary measures to achieve a reduction of greenhouse gas emissions in Belgium of at least 55% by 2030. In a new case, a Belgian farmer, Hugues Falys, asks the Business Court of Tournai to order TotalEnergies to reduce its gas emissions as well. This case has only one plaintiff but is financed by NGO's such as Greenpeace.

21. Is litigation funding for class actions or collective redress proceedings permitted?

Even if proceedings' costs and lawyers' fees are relatively cheap in Belgium compared to other countries, the cost of a representative action remains an important barrier. There is no general public funding for class actions. Except for an action started by the public Belgian Ombudsman for Energy against some electricity suppliers (on early termination indemnities), all representative actions until today were filed by the consumer organisation Test-Achats, with its own funds. Belgium did not use the possibility given by the RAD to lay down rules regarding a modest entry fee for group members.

Third party litigation was already allowed and remains allowed under Belgian law, provided there is transparency, independence, and no conflict of interest, as set out by the RAD.

The Belgian representative action for collective redress however has never attracted third party funding and this is rather unlikely to change. Indeed, punitive damages are excluded and the amount due by the defendant in addition to the damages will never exceed the actual costs supported by the representative and the lawyer's fees one supported cannot even be recovered in full but will only be partly covered by a lump sum procedural indemnity (see question 23). Thus, the funder's income should necessarily be levied on the damages awarded to the group of victims. However, the group representative may not waive part of the damages on their behalf. Therefore, the third-party funder should seek a direct voluntary waiver from each and every group member. But since under the new regime the group will only be constituted once the defendant already has been found liable to pay damages, it is very unlikely that the opting-in beneficiaries will voluntarily waive part of what they are entitled to, all the more since a court appointed administrator should ensure that the beneficiaries are paid.

In these circumstances third party funding appears as quite a risky bet in representative actions. Third party funding appears as more appropriate in ordinary procedures.

Other motives for private third-party funding seem unlikely as well. Funding by a competitor of the defendant for example would render the qualified entity's claim inadmissible because of lack of independence.

22. Are contingency fee arrangements permissible for the funding of class actions or collective redress proceedings?

A fee agreement granting fees to the lawyer only in case of successful claim is prohibited, but fees can partly depend on the outcome of the case.

23. Can a court make an 'adverse costs' order against the unsuccessful party in class actions or collective redress proceedings?

The unsuccessful party will never be ordered to pay the actual lawyer's fees supported by the winning party. The winning party is only entitled to a lump sum procedural indemnity for lawyer's fees, that varies according to the value of the claim. For claims exceeding €1.000.000 the

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standard indemnity is €22.500 but it can be increased by the court up to €45.000.

Other reasonable costs disbursed by the winning party can be claimed form the unsuccessful party assuming they were necessary to establish the claim and the damage. The awarded damages will never exceed the actual costs.

24. Are there any proposals for the reform of class actions or collective redress proceedings?

If so, what are those proposals?

The new regime on representative actions was adopted on 18 April 2024. It applies to all cases brought before the courts as from 10 June 2024. For the ongoing cases, the previous legislation remains applicable.

We don't expect this law to suddenly create a large enthusiasm for representative actions in Belgium, even if some efforts were made to have a more attractive procedure.

There is no new proposition for change yet.

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