

CLASS ACTION DEVELOPMENTS

IN BELGIUM

(April 2016)

Stefaan Voet

In 2009 and 2010, three class action bills were proposed in Belgium. All three failed because political consensus could not be reached. In the 2011 coalition agreement, the Di Rupo government aimed to put in place a procedure of collective claim settlement for consumers. In mid-December 2013, the cabinet approved a draft act introducing an action for collective redress in Belgium. The proposal was submitted to Parliament at the beginning of 2014. The Act of 28 March 2014 introducing a consumer collective redress action in the Code of Economic Law was published in the Official Gazette on 29 April 2014 and entered into force on 1 September 2014 (*Loi portant insertion d'un titre 2 'De l'action en réparation collective' au livre XVII 'Procédures juridictionnelles particulières' du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique* of 28 March 2014, *Moniteur Belge* of 29 April 2014, p. 35201).

Class Action Prerequisites

Only Consumer Law

The first class action certification criterion is that the cause of action must be a possible infraction by the defendant of his contractual obligations or of one of the 31 European or Belgian consumer regulations or acts that are specifically enumerated in the Act. These regulations and acts relate to some provisions regarding competition law and banking, market practices, consumer protection, payment and credit services, product safety, intellectual property, privacy, electronic signature, prices, insurance and professional liability, travels, energy and transport of passengers. The class representative has to base his claim on one or more of these regulations or acts.

The Belgian class action procedure only applies to C2B (consumer-to-business) disputes. Amendments to expand the scope of the procedure, for example, to shareholder disputes, were rejected. The Minister clarified that the Act is a modest first step. An evaluation is planned in

2017. If this turns out positive, the procedure might be expanded to other fields of substantive law.

Standing to Sue

The second certification prerequisite is that the class action can only be brought by an adequate class representative. Only authorised consumer associations and authorised non-profit organisations, whose statutory aim corresponds with the collective harm, have standing to bring a class action. The Consumer Ombudsman Service only has standing to initiate a class action and to negotiate a collective settlement. If a settlement cannot be reached, and the court has to decide the merits of the case, a consumer association has to step in to continue the procedure.

Belgian law explicitly states that the representative also has to be adequate. Standing has to be distinguished from adequacy of representation. An association or organisation having class action standing is not automatically adequate to be a class representative in a specific case. When multiple associations present themselves as class representative, the class action mechanism forces the court to determine which association or body is most adequate to represent the class in that particular case. There is no 'first come, first serve' principle.

Superiority

The third and final condition is that the class action be more suitable than (or superior to) an individual civil action. In assessing this condition, the court may take into account the following elements: the potential group size, the existence of individual damages in connection with the collective harm, the complexity and judicial efficiency of the class action mechanism, and the legal certainty for the group of consumers on whose behalf the action is brought. The size of the individual damages cannot be a decisive factor, in the sense that a judge cannot deny certification simply because the damages suffered by the class members differ while they all face the same or similar factual or legal issues.

Brussels courts

The courts in Brussels have exclusive jurisdiction to decide class actions that will be binding on the whole country (*Loi portant insertion des dispositions réglant des matières visées à l'article 77 de la Constitution dans le livre XVII 'Procédures juridictionnelles particulières' du Code de droit économique et modifiant le Code judiciaire en vue d'attribuer aux cours et tribunaux de Bruxelles une compétence exclusive pour connaître de l'action en réparation collective visée au livre XVII, titre 2, du Code de droit économique* [Act Making the Brussels Courts Exclusively Competent Regarding Collective Redress Actions] of 27 March 2014, *Moniteur Belge* of 29 April 2014, p. 35197). In the first instance, the class action can be brought before the Brussels Court of First Instance or the Brussels Commercial Court. On appeal, the case is brought before the Brussels Court of Appeals.

Opt-in or opt-out

In its certification decision, the Belgian court can freely choose between an opt-in or opt-out system. The court will make the decision in light of the underlying facts and claims of the case. In some (limited) cases, the court must impose an opt-in system: when the class members are not residing in Belgium, and when physical or moral damages are claimed.

In order for class members to make an informed decision whether to remain in the class or opt out, they should be notified of the key decisions, including about certification and the merits of the case. In Belgium, the certification decision and other key decisions (judicial approval of a collective settlement, decision on the merits of the case and the decision closing the procedure) are published in the Official Gazette of Belgium (*Moniteur Belge*) and on the website of the Federal Public Service Economy, SMEs, Self-employed and Energy. In exceptional cases, the court can order other forms of notice (e.g., in newspapers, magazines or on websites), including individual notice.

The consumer has to opt in or opt out after the certification decision has been notified. This choice is irrevocable. If a consumer has opted in or has not opted out, and afterwards disagrees with a collective settlement or the decision on the merits of the case, he will be bound by the *res judicata* effect of that settlement or decision. It allows to determine the definite size of the group at an early stage of the proceedings, which can facilitate and

encourage a collective settlement. The law also wants to avoid that class members make their opt-in or opt-out decision in function of the result of the procedure.

Procedure

Settlement before the Proceedings

If the parties reach a collective settlement before the start of the proceedings, they jointly submit it to the court to have it approved (homologated). The agreement has to contain the following information: a detailed description of the collective harm; a description of the class; information about the class representative and the defendant(s); the extent and the forms of collective redress; the reasons for using the opt-in or opt-out system; in case of an opt-out system, the amount of time the class members who will not opt out will have after the settlement approval to come forward to obtain individual compensation; the amount of costs the defendant(s) will pay to the class representative; which party will pay the costs of notice; a possible revision procedure; additional forms of notice and the text of the collective settlement as it will be notified to the class members. If one of these elements is missing or unclear, the court will send the agreement back to the parties, who will have to complete it within eight days. The joint petition must contain evidence that the certification criteria are met.

The court must make a decision within two months. If it refuses to approve the settlement, the procedure will end; it will not proceed as a litigation class action. There is no *pro forma* approval. The law states that the court will refuse approval if the agreed redress is evidently unreasonable. Approval will also be refused if the amount of time that the class members who will not opt out will have after the settlement approval to come forward in order to obtain individual compensation is evidently unreasonable; if the additional forms of notice are evidently unreasonable; or if the amount of costs that the defendant(s) will pay to the class representative exceed the real costs the latter has incurred. Again, and if necessary, the court can send the agreement back to the parties to have it amended on one or more of these grounds. If the settlement is ultimately approved, the court will appoint a collective claims settler. Neither the collective settlement nor the judicial approval decision implies a recognition of liability by the defendant. The approval decision and the complete text of the

settlement will be published in the Official Gazette of Belgium and on the website of the Federal Public Service Economy, SMEs, Self-Employed and Energy.

No Settlement Before the Proceedings

If the parties have not reached a collective settlement, the class action procedure will be initiated by the class representative, who will submit a petition to the clerk of the court. The complaint must contain the following information: evidence that the certification criteria are met; a description of the collective harm; a detailed description of the class; and the reasons for using the opt-in or opt-out system. If one of these elements is missing or unclear, the court will send the petition back to the class plaintiff, who will have to complete it within eight days.

The court has to make a certification decision within two months. If the class action is not certified, the lawsuit will be dismissed without prejudice. Otherwise, the court renders a certification decision that has to contain the following elements: a description and the cause of the collective harm; the applicable opt-in or opt-out system and its modalities (including the opt-in or opt-out period); a detailed description of the class; information about the class representative and the defendant(s); the period during which the parties have to negotiate a collective settlement; and additional forms of notice. The certification decision will be published in the Official Gazette of Belgium and on the website of the Federal Public Service Economy, SMEs, Self-Employed and Energy.

In its certification decision, the court must set a time limit during which the parties have to negotiate a collective settlement. This cannot be shorter than three months and not longer than six months. The court can prolong the time limit once by a maximum of six months. During this mandatory negotiation phase, the parties can use an accredited mediator. If a settlement is reached, the approval procedure as described above will apply.

If a settlement cannot be reached within the allotted time frame, the procedure will continue so that the court can decide the merits of the case. Within a month after the court has been notified of the fact that no collective settlement could be reached, it will order a hearing, where the parties agree on a procedural calendar or one is imposed by the court. If the parties reach a collective settlement during the procedure on the merits of the case, they can ask the

court to approve it and the procedure as described above will apply. If no settlement is reached, the court will decide the merits of the case. If it finds the class claim valid, the decision will contain the same elements as a collective settlement. The court will also appoint a collective claims settler. The decision will be published in the same manner as the approval decision.

Collective Redress in Kind or by Monetary Payment

Any collective settlement and decision on the merits of the case will have to determine the extent and forms of collective redress. This redress can be in kind (e.g., replacement of a deficient product) or by monetary payment. The amount of payment can be determined on an individual basis, meaning that the defendant(s) will have to pay an individualised amount of money to every consumer coming forward, or, when this is impossible or impracticable, on a global basis.

Every consumer wanting to be compensated has to come forward, even in an opt-out system. In case of a low take-up rate, the court will determine the allocation of the residual funds. The court has a wide range of options: the funds can flow back to the defendant or the defendant can be ordered to set up a *cy-près* scheme (e.g., an invoice discount or the distribution of coupons or a free product). Common Belgian liability law applies, in the sense that the guiding principle remains full and individual compensation of the damages suffered. It is by no means the intention of the legislature to introduce punitive damages that could lead to overcompensation.

Enforcement Phase – Collective Claims Settler

Finally, there is a phase during which the settlement or the decision on the merits of the case is enforced under the supervision of a collective claims settler. The claims settler is appointed by the court from a list drawn up by the general assembly of the Brussels Court of First Instance, the Brussels Commercial Court or the Brussels Court of Appeals. Only attorneys, ministerial public servants or judicial mandataries who are competent in settling claims can be appointed.

The enforcement procedure is very complicated and governed by short time limits. In case of an opt-out system, the court determines a term during which the class members who have not opted out have to come forward before the clerk of the court in order to obtain individual compensation. In case of an opt-in system, consumer class members have already opted in with the clerk of the court. Based on the information received from the clerk of the court, and within a reasonable time, the claims settler draws up a provisional list of class members who will receive compensation. When a member does not meet the class description, this is mentioned on the list. The claims settler sends the list to the judge, the class representative, the defendant and the class members he proposes to exclude. Within 30 days, the class representative or the defendant can challenge the inclusion or exclusion of a class member on the provisional list with the clerk of the court. No more than 14 days later, the clerk informs the concerned class members and the claims settler. Within 14 days, the class representative, the defendant(s), the class members whose enlistment is challenged and the claims settler have an opportunity to communicate their views to the clerk of the court. Within 30 days, the court orders a hearing. The claims settler, the class representative, the defendants and the class members concerned are heard, after which the court creates the final list of class members entitled to compensation. This list is notified to all parties.

In case conflicts occur during the enforcement phase, the parties and the claims settler can always request the court to resolve them. Every three months, the claims settler reports to the judge. When the settlement or the decision are fully enforced, he deposits a final report, a copy of which is sent to the class representative and the defendant(s). The final report contains all the necessary information for the court to decide on the closure of the procedure. The final report gives an overview of the funds that were not distributed among the class members and contains a detailed outline of the costs and fees of the claims settler. In its final decision, the court determines the allocation of the residual funds and approves or reduces the costs and fees of the claims settler. By approving the final report, the court definitely ends the enforcement phase. Based on that decision, the claims settler can claim his costs and fees from the defendant. The decision is published in the Official Gazette of Belgium (*Moniteur Belge*) and on the website of the Federal Public Service Economy, SMEs, Self-Employed and Energy.