



**British Institute of  
International and  
Comparative Law**

# COLLECTIVE REDRESS BELGIUM



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**British Institute of  
International and  
Comparative Law**

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#### Vision

To be a leading research institute of international and comparative law and to promote its practical application by the dissemination of research through publications, conferences and discussion.

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# I. General Collective Redress Mechanism

There is no general collective redress mechanism for representative actions in Belgium. The provisions regarding collective actions in the Economic Code, whilst framed in general terms, are only applicable in cases concerning the infringement of specified rights which can generally be described as relating to consumers.



## II. Sectoral Collective Redress Mechanism: Consumer Law

### 1. Scope

The 28 March 2014 Law has a limited scope. It aims to enhance and reinforce the rights of consumers.

Only consumers can rely on the 28 March 2014 Law to bring a claim, provided they allege that the defendant, i.e. a legal or natural person pursuing long-term economic aims (hereinafter, an enterprise), has infringed a contractual obligation or one of the 31 regulations or laws listed in the 28 March 2014 Law.<sup>1</sup>

Hence, a claim cannot be brought by a consumer against government or public authorities, nor against non-profit organisations.

In addition, legal entities, independents, employees or investors cannot rely on the 28 March 2014 Law either to bring a claim in any of the aforementioned capacities.

### 2. Procedural framework

The 28 March 2014 Law provides for a two-stage procedure if no agreement was reached before the filing of the petition.

If an agreement has been reached prior to the filing of the petition or in the course of the proceedings, the parties can request the Court to approve the agreement reached. The Court will refuse to approve the agreement if:

- the compensation for the group or subgroup is manifestly unreasonable,
- the delay during which the victims can decide to opt in or opt out is manifestly unreasonable,
- the additional publicity measures are manifestly unreasonable; or
- the indemnity to be paid to the group representative exceeds his real costs.

#### a. Competent Court

The Courts of Brussels (either the French or Dutch Court of First Instance or the French or Dutch Commercial Court and, in appeal, the Court of Appeal) have exclusive jurisdiction to hear collective redress proceedings.

#### b. Standing

The group of consumers who wish to initiate proceedings must consist of consumers who have suffered damage in their personal capacity due to a common cause. However, they are not capable of initiating the proceedings themselves. Collective redress proceedings can only be initiated by a 'group representative'. The legislator has opted for an 'ideological plaintiff', i.e. a claimant who defends the rights of the consumers, but does not aim to make profits. The group representative cannot be a lawyer and will not be able to make profits from his job. He will only receive the reimbursement of his real costs.

The 28 March 2014 Law recognises three categories of possible group representatives:

- (i) a consumer organisation with legal personality which is also represented in the 'Conseil de la Consommation / Raad voor Verbruik' (an advisory body within the Federal Public Service Economy) or is recognised by the Minister of Economic Affairs,
- (ii) an association which has had legal personality for over three years, which has a corporate purpose directly related to collective damages, which does not pursue an economic purpose in a sustainable manner, and which is recognised by the Minister, or
- (iii) the Federal Ombudsman (but the latter can only represent the group during the negotiation phase).

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<sup>1</sup> Actions for collective redress can only be brought if an enterprise has infringed obligations deriving from competition law, market practices and consumer protection, payment and credit services, intellectual property, energy, telecom, transport, pharmaceuticals, food, or insurance.

Only one group representative can be appointed per proceeding.

**c. Availability of Cross Border collective redress**

It is possible to initiate class action proceedings against a foreign defendant before the Belgian Courts.

**d. Opt-in / opt-out**

**Principal availability of either/or/both options?**

The 28 March 2014 Law allows the parties or the judge, in a case where no agreement has been reached, to choose between an opt-in (système d'option d'inclusion / optiesysteem met inclusie) or an opt-out system (système d'option d'exclusion / optiesysteem met exclusie). The choice is irrevocable.

**Conditions for either type**

The judge has a wide discretion in deciding which system will govern the proceedings. The preparatory works of the 28 March 2014 Law provide that an opt in should be applied in cases with a large number of consumers who suffered limited damages or when it is necessary to identify forthwith the members of the group.

However, where the aim of the proceedings is to obtain compensation for physical or moral harm, then the opt-in procedure is compulsory.

The Dutch speaking Court of First Instance of Brussels ruled in both the Thomas Cook case and the Proximus case that when deciding which system to be applied in a particular case it must first be assessed how the consumers' interests can be best protected in the specific case.

In the Thomas Cook case the Court ruled that an opt-in system would be applicable since it considered that consumers must have been aware that they have become a victim of damage and they could easily get an idea of their rights, the interest of the individual victims' in being part of the group is sufficiently protected by the opt-in system.

In the Proximus case the Court applied the opt-out system, since the Court took the view that the consumers were not necessarily aware of the potential misleading advertisement in relation to Proximus' new renting formula of its new decoders and that the damages were likely to be remote which might result in the affected consumers not taking any steps to join the proceedings should an opt-in mechanism govern the proceedings.

**Opt-out restricted to in-jurisdiction claimants?**

Foreign claimants may take part in collective redress proceedings. According to the 28 March 2014 Law foreign plaintiffs must opt-in to the proceedings. <sup>2</sup>

**If opt-out, is it justified by the sound administration of justice?**

Not applicable.

**Specific measures related to the fact that affected persons are not identifiable**

None.

**e. Main procedural rules**

**Admissibility and certification criteria**

Article XVII.36, §3 ELC provides that a class action can only be declared admissible if it appears more effective than an individual action under ordinary law. To assess whether this condition is fulfilled the judge can take into account the following requirement:

- The potential size of the group of consumers who suffered damages,
- The existence of individual damage which can be sufficiently related to the collective damage,



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<sup>2</sup> Article XVII.38, §1, 2° of the ELC.

- The complexity and legal efficiency of the action for collective redress,
- The legal certainty of the group of consumers,
- Efficient consumer protection,
- The smooth functioning of the judiciary.

### **Single or Multi-stage process**

Where no agreement was reached before the filing of the petition the proceedings continue in the following stages:

#### **Admissibility phase**

The ELC provides that once a petition for collective redress has been filed, the Court must determine - within, in principle, a period of 2 months - whether the claim is admissible. The Court may ask for further details from the claimant, which should be submitted within 8 days. If the details are not submitted or submitted out of time or incomplete, the action is deemed to be not filed. The decision on the admissibility is generally not rendered within two months after the filing of the petition. The Dutch speaking Court of First Instance of Brussels has ruled in a judgment dated 10 October 2016 that the 2 months period laid down in the ELC was not a binding time-period. If the safeguarding of the rights of defence of the parties so require, then aforementioned time-period to hand down a decision on the admissibility of a class action can be extended.

#### **Mandatory negotiation phase**

If the Court declares the claim admissible, it will determine whether the case will be governed by an opt-in or an opt-out system and it will fix the time-period during which the consumers must either opt-in or opt-out ranging between 30 days and 3 months. In addition, the Court will grant the parties a period of time ranging between 3 and 6 months during which the parties are mandated to try to negotiate an agreement for collective redress. This period may be extended once on the joint request of the parties for no longer than 6 months.

#### **If no agreement is reached, litigation phase**

The 28 March 2014 Law does not contain any provisions dealing with deadlines to be observed or abided by during the litigation phase. Therefore, the principles laid down in the Judicial Code will apply. During this phase the parties will exchange written pleadings addressing the merits of the claim, they will plead the case at the oral hearing before the court and the court needs to draft its decision. It is fair to assume that the litigation phase will last between 1 to 2 years (in first instance).

#### **Distribution of the compensation phase**

The 28 March 2014 does not contain any provisions dealing with deadlines to be observed or abided by during the distribution of the compensation phase. It is obvious that the duration of the compensation phase will depend on the one hand on whether the court chose for an opt-in or opt-out mechanism and, on the other hand, on the number of consumers at stake. If the group is rather limited and the court decided to withhold an opt-in system it will be rather straightforward for the liquidator to award the compensation to the consumers.

#### **Expediency (particularly in injunctive cases)**

Not applicable.

#### **Evidence/discovery rules**

The 28 March 2014 Law does not amend the existing rules of evidence. The onus of proof rests (primarily) upon the claimants, i.e. the group representative.

#### **Interim measures**

The 28 March 2014 Law does not amend the Judicial Code in respect of interim measures (e.g. as the appointment of an expert or an order to file specific documents with the court). Therefore the group representative can request within the framework of collective redress proceedings such measures. Interim measures are usually heard at the introductory hearing or during the course of the proceedings at a specific



hearing only dealing with the requested measures, i.e. prior to the hearing on the merits of the claim. If the case is very urgent or if specific circumstances exist, a plaintiff can apply via an *ex parte* petition for interim measures.

### **Court directed settlement option during procedure**

The 28 March 2014 Law does not provide for court directed settlements. The court does not take part in the mandatory negotiations which must take place between the parties if the class action is declared admissible.

### **In case of out of court settlements: judicial control**

If during the mandatory negotiations the parties reach an agreement, the court will endorse it, save if it takes the view that:

- The agreed compensation is manifestly unreasonable for the group or for a subgroup of consumers,
- The fees paid to the group representative exceed his real costs.

## **3. Available remedies**

### **a. Type of damages**

The 28 March 2014 Law aims to grant consumers who have suffered damages full compensation for their loss. The 28 March 2014 Law does not amend the existing civil liability regime, neither does it introduce punitive damages into Belgian law.

The Court can order compensation to be paid either in kind or by equivalent.

### **b. Allocation of damages between claimants for compensatory claims/ distribution methods**

Since the 28 March 2014 Law does not amend the existing civil liability regime, each claimant must be awarded compensation for the damages suffered individually.

### **c. Availability of follow on or extra-compensatory damages and their conditions**

The 28 March 2014 Law does not introduce punitive damages into Belgian law

### **d. Skimming-off/ restitution of profits**

The 28 March 2014 Law does not provide for skimming-off or restitution of profits, but merely aims at compensating the consumers for the losses actually suffered.

### **e. Injunctions**

The 28 March 2014 Law does not contain any provisions dealing with injunction. Therefore the general principles apply.

### **f. Possibility to seek an injunction and compensation within one single action**

The 28 March 2014 Law does not contain any provisions dealing with injunction. Therefore the general principles apply.

### **g. Possibility to rely on an injunction in separate follow-on individual or collective damages actions**

The group representative will always have to convince the judge that a class action is well-founded and that the defendant infringed any of the infringed either a contractual obligation or one of the 31 regulations or laws listed in the 28 March 2014 Law and that this violation caused damage to the consumers.

### **h. Limitation periods**

The 28 March 2014 Law does not amend the existing provisions on limitation periods. Therefore, contractual claims will be time-barred after 10 years and claims in tort will be time-barred after 5 years as from the moment the victim has knowledge of both the existence of its damage and of the identity of the tortfeasor.

## **4. Costs**

### **a. Basic rules governing costs and scope of the rules**

The group representative can only receive the reimbursement of his real costs. He may not make any profit from the collective proceedings.





#### b. Loser Pays Principle (and exceptions from it)

Under Belgian law, the losing party has to bear the costs of the (collective) proceedings. There is no limit on costs except for the (capped) legal proceedings' costs, i.e. a lump sum the losing party has to pay to the winning party to cover the lawyers' fees of the winning party. The amount of the legal proceedings' costs is set by law and varies according to the amount at stake.

Under certain circumstances, the base amounts set by law may be increased or decreased by the court.

If the case is settled, costs and fees are set out in the agreement concluded by the parties.

### 5. Lawyers' Fees: Availability (or not?) of contingency fees and their conditions

It is prohibited under Belgian law for a counsel to agree with his clients that his fees will solely depend on the outcome of the case. However, a (reasonable, transparent and proportionate) success fee can be agreed.

### 6. Funding

The 28 March 2014 Law does not contain any provisions dealing with the funding of the class action proceedings.

#### Availability of funding

Third party funding of action for collective redress is not prohibited. However, this type of funding is of limited interest since the group representative is not entitled to make profits from his job as he will only receive the reimbursement of his real costs.

### 7. Enforcement of collective actions/settlements

#### a. Framework for enforcement

The 28 March 2014 Law provides that the Court, if it considers the claim to be well-founded or if the parties have reached an agreement, will appoint a loss administrator (liquidateur / schadeafwikkelaar) to oversee the execution of the decision. He is obliged to create a provisional list of members of the group who have explicitly identified themselves to be members of the group or subcategory. He may exclude certain persons who have identified themselves as members if he is of the opinion that they do not meet the description of the group or subcategory, though he must give reasons for his decision.

The list is filed with the registry of the Court and is publicly available. At this point in time, the loss administrator notifies the members of the group he wishes to exclude. For the next 30 days, extendable by the Court if necessary, the representative and the enterprise may challenge the inclusion or exclusion of members on the list. After this period, the registrar has 14 days to notify both the loss administrator and the relevant member of the Court's decision, who then have 14 days to notify the registrar of their point of view. After this, the Court will decide on the final list of members who are to receive compensation.

#### b. Cross border enforcement

Since a decision awarding compensation to consumers will always be laid down in a judgment, the rules governing the enforcement of a judgment will apply.

### 8. Number and types of cases brought/pending

To the best of our knowledge, Belgian leading consumer organisation Test Aankoop / Test Achat has, since the entry into force on 1 September 2015 of the 28 March 2014 Law, initiated five class actions.

### 9. Impact of the collective mechanism (or lack of) on behaviour/ policy of stakeholders (direct/ indirect, economic/social impact)

Given that class actions are very recent in Belgium and so far only a few proceedings have been initiated it is at this stage difficult to assess their impact on the behaviour or policy of stakeholders.



#### a. Incompatibilities with the Recommendation's principles

The 28 March 2014 Law does not allow legal persons to claim compensation for the suffered harm since only consumers can rely on the Law neither does the 28 March 2014 Law provide for a collective redress mechanism for injunctive relief.

#### b. Problems relating to access of justice/fairness of proceedings including

##### **Time and burden of collective actions on courts and parties compared to non-collective litigation**

The only difference regarding the timing of collective actions compared to non-collective litigation is the fact that the class action proceedings are twofold, i.e. an admissibility phase and a phase on the merits. The judgment declaring a class action admissible can be appealed and, given the backlog of the Court of Appeal of Brussels, there is a risk that a final judgment on the merits of the class action might be delayed should an admissibility judgement be appealed. In non-collective litigation the Court will in principle hand down a decision ruling on both the admissibility and the merits of the claim. Although this judgment can of course also be appealed the winning party can – at its own risks – enforce it pending the appeal proceedings.

##### **Risks of and examples for abusive litigation**

This risk is remote since the Belgian legislator has provided that only a limited number of non-profit organisation qualify as group representative who are entitled to initiate class action proceedings.

##### **Effective right to obtain compensation**

The 28 March 2014 Law does not adversely affect the right to obtain compensation.

There is no Belgian legislation providing for Sectoral Collective Redress Mechanisms.



### III. Information on Collective Redress

The 28 March 2014 Law provides that judgements handed within the framework of class action proceedings must be published in both the Belgian Official Gazette (Moniteur Belge / Belgisch Staatsblad) and on the website of the Federal Public Service Economy, SMEs, Self-Employed and Energy.



## IV. Case summaries

<p>SNCB</p> <p>Reference R.G. A/15/07232</p> <p>Subject area Consumer law</p>	<p>Keywords</p> <p>First class action - compensation from the Belgian National Railway Company - interruption and the suspension of the train service during strikes</p> <p>Outcomes</p> <p>According to the publicly available information Test Aankoop / Test Achat has withdrawn its claim.</p>
<p>Class Action</p> <p>French speaking Commercial Court of Brussels</p>	
<p>National</p>	
<p>Opt-in/out Not applicable</p>	
<p>Type of funding none</p>	
<p>Costs Not applicable</p>	
<p>Abusive litigation Not applicable</p>	

<p>Thomas Cook</p> <p>Reference 2015/4019/A</p> <p>Subject area Consumer law</p>	<p>Keywords</p> <p>Thomas Cook – Delayed flight (Regulation 261/2004)</p> <p>Summary of claims</p> <p>Test Achat claimed compensation in accordance with Regulation 261/2004 on behalf of the passengers of a delayed flight</p> <p>Outcomes</p>
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	Case is still pending, but is likely to be declared devoid of purpose since Thomas Cook claims to have paid the compensation to which the passengers are entitled.
Class Action	
Dutch speaking Court of First Instance of Brussels	
National	
Opt-in	
None	
Costs No decision yet	
Abusive litigation No	

Volkswagen Reference A/16/2706 Subject area Consumer law	<p>Keywords</p> <p>Emission scandal – misleading advertisement and alleged infringement of consumer protection law</p> <p>Summary of claims</p> <p>Test Achat argues that the tampering software constitutes an infringement of various provision of consumer protection law.</p> <p>Outcomes</p> <p>The case is still pending and the Dutch speaking court of Brussels will hear the arguments of the parties relating to the (in)admissibility of the class action at the oral hearings of 30 and 31 October 2017.</p>
Class Action	
Dutch speaking Court of First Instance of Brussels	
5 of the 6 defendants are foreign legal entities	
Opt-in/out No decision yet	
Type of funding	



None	
Costs No decision yet	
Abusive litigation No decision yet	

Proximus Reference 2016/4461/A Subject area consumer	<p>Keywords</p> <p>New renting formula of decoders – misleading information</p> <p>Summary of claims</p> <p>Test Achat argues that Proximus misled its consumers by giving the impression that they were entitled to a one year free subscription, whereas the offer actually started as from the moment they received their new decoder instead of as from 1 February 2017 when the old decoders would no longer be compatible.</p>
Class Action  Dutch speaking Court of First Instance of Brussels	<p>Findings</p> <p>The Court has declared the claim admissible, but not yet ruled as to whether Proximus misled is consumers.</p>
Cross-border character/ implications, if any None	
Opt-out	
Type of funding None	
Costs No decision yet	
Abusive litigation No	



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