

Towards class actions in Belgium

Gómez-Acebo & Pombo, Brussels

One of the main legislative changes arising from the drawing up of the new Belgian Code of Economic Law ("CEL") is, without any doubt, the bill that will introduce class actions in Belgium.

I. Legislative procedure

On 13 March 2014, the House of Representatives adopted the bill inserting Title II "Class actions" in Book XVII of the CEL "Special legal procedures" ("the Bill")¹. On 20 March 2014, the Senate approved the Bill, without further amendments. The legislative process will conclude when the Bill receives royal assent. Entry into force of the new rules will be fixed by a Royal Decree.

II. Scope of the class action

The Bill does not introduce a general class action open to every single actor in the market, but provides instead the possibility for consumers to file a class action against an undertaking, through a group representative, in order to obtain compensatory damages. Any damage, injury or loss suffered by the consumers concerned must be the result of a breach by the undertaking either of a contractual obligation or of the provisions of a list of legal provisions explicitly referred to in the Bill.

II.1. Ratione materiae scope

Only consumers can benefit from class actions. A consumer is any natural person who is acting for purposes which are outside his trade, business, craft or

profession (article I.1.2^o CEL). In other words, class actions are only possible in business-to-consumer relationships (B2C), but not in business-to-business relationships (B2B), or against public authorities (C2G and B2G).

The national and European legislation of which the infringement may result in a class action are comprehensively listed in the Bill. The list covers laws related to product safety, competition and price developments, market practices and consumer protection, financial services and products, intellectual property, e-commerce, pharmaceuticals, transport, construction of new buildings, insurance, etc. (future article XVII.37 CEL).

II.2. The group of consumers

The consumers as a whole, individually suffering damage, injury or loss and represented in the class action, will be referred to as the "Group" (future article I.21.2 CEL).

The composition of the Group will result from the opt-in/opt-out systems allowing the consumer to join or leave the same (future article XVII.38 CEL), as the Belgian legislator has finally decided to keep both options open.

¹ *Projet de 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 Ier du Code de droit économique / Wetsontwerp tot invoeging van titel 2 Rechtsvordering tot collectief herstel" in boek XVII "Bijzondere gerechtelijke procedures" van het Wetboek van economisch recht en houdende invoeging van de definities eigen aan boek XVII in boek I van het Wetboek van economisch recht; <http://www.lachambre.be/kvvcr/showpage.cfm?section=flwb&language=fr&cfm=/site/wwwcfm/flwb/flwbn.cfm?dossierID=3300&legislat=53&inst=K> and <http://www.lachambre.be/doc/flwb/pdf/53/3300/53k3300007.pdf>.*

When the opt-in system (*système d'option d'inclusion / optiesysteem met inclusie*) applies, the consumers harmed by an undertaking will have to express explicitly their willingness to join the Group (future articles I.21.5 and 38.1.1.b CEL). The opt-out system (*système d'option d'exclusion / optiesysteem met exclusie*) includes all the consumers harmed by the undertaking, to the exception of those having expressed their willingness to not be part of the Group (future articles I.21.4 and 38.1.1.a CEL).

The system that will apply in each single case is to be determined by the Court when deciding about the admissibility of the action (see below III.1). Should the class action seek compensation for personal injury, only the opt-in system shall be applied (future article XVII.43.2.3 CEL).

Within the time limit set by the Court in its decision on the admissibility (between thirty days and three months), the consumers concerned will have the possibility to join or leave the Group; such choice being irrevocable (future article XVII.38.1 CEL). This means that consumers remain free to bring an individual action in parallel with the class action, unless they have decided to join the Group (in case of opt-in system) or to not leave the Group (in case of opt-out system).

II.3. The group representative

A class action can only be brought by a group representative (future article XVII.39 CEL).

The Bill identifies the entities which can act as a group representative:

- A consumer rights organisation with legal personality and either represented in the Consumer Affairs Council (Conseil de la Consommation / Raad voor het Verbruik) or recognised by the competent minister after complying with certain criteria to be established by Royal Decree;
- An organisation with legal personality, recognised by the competent minister, whose statutory purpose is related

to the harm suffered by the Group, not pursuing economic profit in a sustainable manner, provided that, when bringing the class action, it has had legal personality for at least three years. As a consequence, *ad hoc* group representatives are not authorised;

- An autonomous public service, to be created within the Federal Ministry of Economic Affairs ("the Ministry"), for the sole purpose of representing the Group at the stage of negotiating a settlement (see below III.2).

III. The proceedings

The Court of First Instance and the Commercial Court (if the Group chooses so) of Brussels have exclusive jurisdiction to hear and rule on the class action. Proceedings will consist of three stages: (i) admissibility of the action, (ii) negotiations and settlement approval or proceedings on the merits, and (iii) execution.

III.1. Admissibility of the action

Within two months following the application, the Court will first examine whether the specific conditions governing the admissibility of the action are met, that is:

- The alleged cause of the damage is a breach by the undertaking of its contractual and/or legal obligations (see above II.1);
- The action is filed by a group representative which meets the requirements of the Bill (see above II.3);
- The class action is more suitable than individual action (future articles XVII.43.1 and XVII.36 CEL).

The Court's decision shall contain, among other things, the following information which will be published in the Official Journal and on the website of the Ministry:

- The description of the collective damage, injury or loss;
- The alleged cause of the collective damage, injury or loss;

- The description of the Group and the most accurate estimate possible regarding the number of consumers taking part;
- The option system that will apply (opt-in or opt-out) and the deadline for the consumers concerned to exercise such option (see above II.2);
- The duration of the cooling-off period (see below III.2) (future article XVII.43.2 CEL).

III.2. Negotiations and settlement approval or proceedings on the merits

In the event that the action is held admissible, the group representative and the undertaking will be granted a cooling-off period of three to six months allowing them to negotiate a settlement (future article XVII.45 CEL).

If the parties reach a settlement, it will be submitted to the Court for approval. The Court will then examine whether the settlement contains all elements required by the Bill (future article XVII.45.3 CEL) and if it is acceptable on the merits (the Court may refuse the approval, for instance, when the damages granted to the Group or some of its members appear to be unreasonable; future article XVII.49.2 CEL). The parties are bound by the settlement approved by the Court (future article XVII.49 CEL).

The approval decision will be published in the Official Journal as well as on the website of the Ministry. In order to facilitate settlements, these shall be

made without prejudice and without admission of liability by the undertaking (articles XVII.46 and XVII.51 CEL).

If there is no settlement or the settlement is not approved, the Court shall rule on the merits of the class action and the damages. The Court's decision on the merits will bind all members of the Group, and will be published in the Official Journal as well as on the website of the Ministry (future articles XVII.52 to XVII.56 CEL).

III.3. Execution

A trustee will be appointed to ensure the proper execution of the approved settlement or the judicial decision (future articles XVII.57 to XVII.62 CEL).

The trustee's main task will be to allocate the right amount of damages to each individual member of the Group. The trustee's final report on the discharge of his duties will be submitted to the Court, the group representative and the undertaking. This report will also be published in the Official Journal and on the website of the Ministry.

III.4. Expenses

All expenses relating to the procedure or the publication required by the CEL as well as the trustee's fees shall be borne by the aggrieved party.

IV. Provisional measures

Class actions shall only be introduced for breach of contracts or law arisen after the entry into force of the new rules (see above I).

For any questions please contact:

Miguel Troncoso Ferrer

Partner, Brussels

Tel.: 32 (0) 2 231 12 20

mtroncoso@gomezacebo-pombo.com

For further information please visit our website at www.gomezacebo-pombo.com or send us an email to: info@gomezacebo-pombo.com

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