

# Belgian Class Actions now open to EU consumer protection organizations

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By decision of 17 March 2016, the Belgian Constitutional Court partially annulled the Belgian Class Action Law for being discriminatory *vis-à-vis* EU consumer protection organizations of other Member-States

## EU consumer protection organizations of other Member-States as class representatives

In accordance with the Belgian Class Action Law enacted in March 2014, only consumer protection organizations can act as class representatives in Belgium. Indeed, in order to be admissible as a class action representative, the organization shall either have a seat at the Consumer Council or meet specific criteria, confirmed by a ministerial authorization. *Test-Achat* is the main class action representative to be admissible so far in Belgium.

The Constitutional Court has now ruled that the requirement of a ministerial authorization was a violation of the freedom to provide services, guaranteed by European law (Articles 56 and 57 of the Treaty on the Functioning of the European Union and the Services Directive (directive 2006/123/EU)) and thus that the Belgian Class Action Law was unconstitutional for not providing the possibilities for EU consumer protection organizations of other Member-States to act as class representative without such authorization.

The Belgian legislator should now review the Belgian Class Action Law to correct this unconstitutionality.

In the meantime, to address the unconstitutionality of the law, the Constitutional Court has provided interpretation guidelines for Belgian judges to assess the admissibility of EU consumer protection organizations of other Member-States.

First, if the EU consumer protection organization of another Member-State is listed under article 4(3) of the EU Directive 2009/22/EC on injunctions for the protection of consumers' interests (the "**EU Directive 2009/22/EC**"), the Belgian judge has to declare the organization admissible. This list is maintained by the EU Commission based on communications with the Member-States and is published in the Official Journal of the European Union. The last version was published in March 2016 and can be found [here](#). For example, this list contains consumer protection organizations such as *Union fédérale des Consommateurs - Que Choisir (UFC-QUE CHOISIR)* or *Association de défense, d'éducation et d'information du consommateur (ADEIC)* in France but also governmental regulators like the Financial Conduct Authority in the UK.

Secondly, if an EU consumer protection organization of another Member-State is not listed, to assess the admissibility of this organization, the Belgian judge has to take into consideration the criteria set forth in the Recommendation of the EU Commission 2013/396/EU on common principles for injunctive and compensatory

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collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (the “**Recommendation 2013/396/EU**”). These criteria are:

- « *the entity should have a non-profit making character;*
- *there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and*
- *the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest. »*

As a consequence, the judge has no margin of appreciation for organizations listed under the EU Directive 2009/22/EU. Only for non-listed organizations can the judge assess the criteria set forth in the Recommendation 2013/396/EU. These interpretation guidelines are mandatory for Belgian judges. However, the Belgian legislator can decide to modify the Belgian Class Action Law, either to integrate the solution proposed by the Constitutional Court in the Belgian Class Action Law or to develop another solution for (EU) class representatives.

From a practical point of view, many European actors can now act as class representative for class actions brought in front of Belgian courts.

## Confirmation of the Belgian class actions regime

In the same ruling, the Constitutional Court dismissed the other grounds for annulment raised by the claimants. In so doing, the Constitutional Court confirmed most of the features of the Belgian Class Action Law.

### **Class actions only for facts that occurred after 1<sup>st</sup> September 2014**

The Belgian Class Action Law provides that class actions are only available as judicial remedy for damages whose common ground arose after 1<sup>st</sup> September 2014. The Constitutional Court considered that the non-retroactivity of the Belgian Class Action Law was relevant and not disproportionate.

### **Only Belgian consumer protection claimants with a ministerial authorization and not attorneys**

In the Belgian Class Action Law, the Belgian legislator decided that only (Belgian) consumer protection organizations can initiate a class action. The claimants argued that other actors, like attorneys, should be allowed to act as class representatives. The Constitutional Court considered that this limitation to consumer protection organizations was justified to ensure, among others, that consumers' interests are protected and to avoid the introduction of too many class actions. Of course, the Belgian consumer protection organizations can be assisted by an attorney in the class action proceedings.

The Constitutional Court also deemed the requirement for a ministerial authorization for Belgian consumer protection organizations to be constitutional. This requirement is thus maintained for Belgian class representatives only.

### **Class actions limited to the protection of consumers**

The scope of the Belgian Class Action Law is limited to consumer law, excluding thus all laws that are not enumerated in the Belgian Class Action Act (which all provide protection to consumers) and other victims than consumers (for example corporations or shareholders).

The Constitutional Court considered this unique protection for consumers to be reasonably justified, amongst others because of the emphasis placed on consumer protection in European law (citing the Recommendation 2013/396/EU) and the fact that consumers are more often than not the victims of small claims.

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## Further extension of the Belgian class action regime is possible

To confirm the validity of the limited availability of class actions to consumer law, the Constitutional Court mentioned the 'progressive approach' taken by the Belgian legislator. Indeed, as recalled by the Constitutional Court, the preparatory works of the Belgian Class Action Law indicate that it was a first limited step to introduce class actions in Belgian law and that an assessment of the new regime will be made in 2017. Based on these findings, the scope of the class action could be extended (the preparatory works consider that this '*may even be desirable*'). One could therefore expect to see an expansion of the Belgian class action regime in a near future.

## Conclusion

Class actions are a topic of rapid evolution within the European Union, and their importance for businesses is increasing. After the first opt-out class actions initiated in the UK (see [here](#)), this ruling of the Belgian Constitutional Court is another important step forward in the implementation of class actions in European legal systems. White & Case will continue to monitor this topic, as further developments are announced.

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