

CLIENT ALERT

Belgium Introduces A Collective Redress Mechanism For Product Safety and Product Liability Claims

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Summary

Since September 1, 2014, Belgian law contains a collective redress mechanism. The procedure is available to Belgian and foreign consumers seeking redress from companies that have breached a contract or have violated certain consumer protection laws (European and domestic), including the product safety and product liability laws.

The damages that can be claimed are "collective damages" i.e. the damages suffered by each participant to the claim individually due to a cause (e.g. the product liability and/or product safety infringement) dated after September 1, 2014 and common to all individuals. The collective redress mechanism can be used to claim all types of damages, including physical, psychological, direct and incidental damages. Punitive damages are however excluded.

The Act

In March 2014, the Belgian parliament, following the example of many other European member states (such as the Netherlands, France, Germany, the United Kingdom, Austria, Spain, and Italy), approved a bill introducing a collective redress procedure to Belgian law (the "Act"). The Act was published in the *Belgian State Gazette* on April 29, 2014 and entered into force on September 1, 2014. The Act has been inserted in the Belgian Economic Code as Title XVII.

The scope of the collective redress claims

Collective redress is available to Belgian and foreign consumers who suffer damages due to a violation of the European and domestic consumer protection laws listed in the Act.

The provisions of national Belgian law implementing (i) the Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (Titel IX of the Belgian Economic Code: "Safety of products and services") and (ii) the Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (the Belgian law of 25 February 1991 on the liability for products with defects) are listed in the Act.

Collective redress is thus available for damages due to violations of the Belgian product safety and product liability provisions, i.e. for damages caused by the lack of safety of products.

Based on those provisions collective redress claims can be directed separately or jointly against every actor in the distribution chain of consumer products, from manufacturer and importer to the final reseller.

The damages that can be claimed are "collective damages," i.e. the damages suffered by each class member individually, due to a cause (e.g. the product liability and/or product safety infringement) common to all class members. The damages claimed may thus differ from one participant to another, but the cause of the damages has to be common to all participants to the collective redress claim.

Collective damages include physical or psychological damages, direct and incidental damages (including loss of income, etc.) in as far as not excluded by the legal provisions on which the claim is based. Punitive damages, however, cannot be claimed through the collective redress proceedings.

Finally, it has to be underlined that the collective redress mechanism provided by the Act can only be used for damage claims based on infringements committed after September 1, 2014.

The collective redress procedure

Jurisdiction over collective redress actions is exclusively reserved to the courts of Brussels. This is intended to favor the specialization of these courts and guarantee uniform case law.

Consumers must be represented by a class representative. Only certain recognized consumer-centered nonprofit organizations are entitled to act as class representatives. The class representatives must also, however, be authorized by the competent court. For negotiation and settlement purposes only, the Consumer Ombudsman can also represent the class.

Having authorized a class representative, the court will also determine whether the class will be constituted on an opt-in or an opt-out basis. There are certain limits on the court's discretion: the opt-out system cannot be applied to foreign consumers, nor to claims with regard to physical or psychological damage (which are considered highly person-specific).

The act favors amicable dispute resolution, providing two resolution mechanisms, judicial, and extra-judicial. Before initiating legal proceedings, the class representative and the defendant may agree to a settlement, which is subsequently submitted to the court for ratification (this mechanism is similar to that in the Dutch Act on Collective Settlement of Mass Damages).

The class representative can also opt to file a collective action before seeking settlement. Once the court has declared the collective action admissible, it will impose a mandatory period of between three and six months, during which the parties must hold settlement negotiations. Any settlement must subsequently be ratified by the court.

If no settlement is reached during the mandatory negotiation phase, the action will be resolved by the court. If the court holds the defendant liable, it can make an award reflecting the damages suffered by the class. Punitive damages are not available.

In its judgment, the court appoints a "damage trustee," who will, under the close control of the court, be responsible for the enforcement of the judgment. A special court list of persons eligible to act as damage trustees will be drawn up, composed of lawyers, civil servants, and judicial agents. Unlike in other proceedings, the court remains active until enforcement of its judgment has been completed.

In order to inform the affected consumers, the certification order, as well as the final court judgment (either ratifying the settlement or on the merits), will be published in the *Belgian State Gazette* and on the website of the Ministry of the Economy. Additional publication measures may also be imposed by the court or the government.

Costs of the proceedings are, in accordance with the general rules on civil proceedings, paid by the losing party. This means that an unsuccessful class representative will have to pay the costs of the proceedings and the statutory imposed contribution towards the defendant's legal representation costs.

Final comments

The collective redress mechanism introduced by the Act is in line with a general tendency in the EU Member States to increase the pressure on companies to comply with consumer protection laws and regulations.

The European Commission has in this respect made it a priority to encourage the EU Member States to introduce collective redress claims. The latest initiative of the European Commission on this subject was its Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

Hence, one can expect that other Member States will follow and align themselves with this general trend in the EU.

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