

## INTERNATIONAL

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*Whether in response to the EU Commission's Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States or simply continuing the current trend in Europe to adopt class actions or actions for "collective redress", the latest EU Member States to do so are France and Belgium. France's class action regime went into effect in March 2014 and Belgium's will go into effect on September 1, 2014. This article outlines the scope and procedures under each.*

## France and Belgium Adopt Class Actions Spring 2014

### ABOUT THE AUTHORS



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### ABOUT THE COMMITTEE

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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

### FRANCE ADOPTS CLASS ACTIONS

On February 12 and 13, 2014, the French Parliament adopted a new law, the Consumer Regulation Act, Law No. 2014-344, permitting consumer class actions by recognized associations. After approval by the Supreme Constitutional Court on March 13, the law became effective on March 17, 2014.

Generally the law permits several victims to seek compensation, via an association, for damages against the same company. Cases involving (1) loss as a result of breach of a legal or contractual obligation in the purchase of goods or provision of services, or (2) anticompetitive practices, fall within the scope of the law. These actions may be brought only against *professionals*, in essence the producer and supplier of a product or service. The purpose of the law is to eliminate perceived roadblocks under existing law and permit consumers to bring legal actions while avoiding significant individual costs.

The law includes several restrictions intended to prevent the perceived abuses in the U.S. system. First, unlike in the U.S., advance class action waivers are not permitted. Second, only national consumer protection associations recognized by the French government may bring class actions; ad hoc associations are not permissible. Currently, only sixteen such associations exist. Third, those associations may bring suit for individual harm to *consumers*, defined as “any natural person acting for purposes which fall outside of his trade, business, craft or profession”, for similar or identical claims. The law does not permit suits on behalf of businesses. Fourth, the law covers only material pecuniary losses, not bodily injury or

environmental harm.<sup>1</sup> Consumers are permitted to recover only actual losses, not punitive damages. Finally, the law imposes opt-in requirements. In other words, no consumer is bound by a judgment unless he or she affirmatively agrees to the terms.

French class actions follow two different procedures: standard procedure or simplified procedure. The standard procedure requires a consumer protection agency to initiate suit before the *Tribunal de Grande Instance*. The association must present concrete, individual cases of consumers who suffered actual harm; *potential* victims alone are not enough. A judge will then issue a single “declaratory decision on liability.” The decision (1) determines liability; (2) defines the group and the parameters for membership; (3) determines damages or the method for calculating damages, either for each individual or by category; (4) provides the time frame and means for joining the group; and (5) provides the time by which damages must be paid. Only after the declaratory decision on liability is final and is published may individuals join the class.

In contrast, the simplified procedure is appropriate only when (1) the identity and number of harmed consumers is known; and (2) the consumers suffered the same loss; or (3) the consumers suffered loss of identical value for a service in the specified time. When those requirements are met, after ruling on liability, the judge may order the defendant to compensate the consumers directly and individually. Consumers must specifically consent to compensation of their losses.

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<sup>1</sup> However, it should be noted that legislation was introduced in early 2014 to broaden the permissible claims to include bodily injury or environmental claims, and at the same time reduce the protections and limitations in the newly adopted regime. Interested persons will want to keep an eye on that proposal.

Anticompetitive claims against professionals differ from consumer claims under the new law in that professionals may be liable in class actions only *after* a final decision by EU authorities, national authorities or jurisdictions finding that the professional had engaged in illegal anticompetitive activity. The final decision of such authorities prevents the professional from disputing liability in the class action. Although there can be no liability asserted or found for anticompetitive claims before a final decision by the authorities, associations may *initiate* the class action before the final decision of the competition authority. However, associations likely will wait until the final decision on liability because that decision creates an irrebutable presumption of breach, and the pendency of the matter before the authorities tolls the five-year limitations period for initiating an anticompetitive class action claim.

Even after a final decision of breach, professionals are not necessarily liable to every consumer in a class action brought by an association. Each consumer must demonstrate concrete, direct, and actual prejudice as a result of the breach. The court will determine the scope and criteria of the “class” and the mechanisms of determining the amount of individual damages, as well as the time limit and arrangements for payment. As above, this is an opt-in scheme, so consumers will not be bound by a decision if they do not consent by affirmatively opting in in accordance with the notice and procedures ordered by the court.

The legislation can be found at [France Class Action Legislation 2014](#).

### BELGIUM TO ADOPT CLASS ACTIONS IN 2014

SETS EFFECTIVE DATE OF SEPTEMBER 1, 2014

Belgium adopted class action legislation on March 13, 2014, to be a part of the Belgian Economic Code. The effective date has since been set as September 1, 2014. The focus and purpose of the law is the protection of consumer rights. The new regime is applicable to claims for collective damage with a common cause which arose *after* the legislation’s effective date.

As with other European countries which have or are considering class actions, the Belgian Legislature sought to avoid the perceived excesses of the U.S. class action regime and litigation system, and particularly to avoid excessive increases in litigation risks for companies. For example, (a) damages are compensatory only; there are no punitive damages; (b) contingency fees are not allowed. Only violations of specified legislative acts are included within permissible substantive class action claims, including, for example, EU or Belgian competition law, consumer protection laws, privacy and electronic data protection laws. As stated in the law, “the collective redress action is admissible when each of the following conditions is fulfilled:

1. the claimed cause is a potential violation by the company of one of its contractual obligations, one of the European regulations or one of the laws referred to in article XVII. 37 or their implementing decrees;
2. the action is brought by an applicant which satisfies the requirements referred to in article XVII. 39 and which is considered as adequate by the judge;

3. the recourse to a collective redress action seems more efficient than an action under general law.”

Reflecting a trend in the EU and the Member States, there is a focus on ADR as well. Accordingly, parties must engage in mandatory ADR process. Only if such efforts at settlement have been unsuccessful may a class action be initiated. Likewise, during the litigation, the court may force the parties to settlement negotiations or procedures, and the law provides for confirmation of class action settlements.

A class action can be brought by only (a) consumer associations that are determined by the government or meeting other requirements in the law; self-appointed ad hoc

associations are not permitted; or (b) the federal ombudsman (but only for the purposes of effecting a settlement). The consumers must each have suffered damages as a result of a common cause.

Opt-in vs opt-out. Class actions can be either opt-in or opt-out as determined by the court on a case by case basis, except that in claims for physical or moral damages, only the opt-in procedure is available. Likewise, if the class is to include consumers residing outside Belgium, only the opt-in procedure is permissible.

The legislation can be found at [Belgium Class Action Legislation 2014](#).

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