

Temperatures rising in Europe for consumer claims



Full-blown US-style class actions for consumer claims aren't likely to be a regular feature of life in Europe any time soon. But legislators are turning up the risk dial, with a number of EU territories now embracing or considering a form of class action, and an increased focus on consumer remedies.

Risk assessments for advertising claims and other consumer issues need to be revisited, as Europe moves increasingly away from reliance on self-regulatory systems and back-stop criminal enforcement by official bodies.

Click on the flag to see which way the wind's blowing in Belgium, France, Germany, Italy, the Netherlands, Spain and the UK. Then check our list of action points for businesses and get in touch to discuss how we can help.



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Belgium: Class actions available from September 2014



Belgium

“Whilst this new legislation is highly encouraging for consumers who have been victims of anti-competitive behaviour, the incentive to initiate a class action is still very low considering the lack of punitive damages.”

Wendy Van der Hoeven,
Osborne Clarke Brussels



- The Code of Economic Law - introduced on 28 March 2014 and in force from 1 September 2014 - allows class action litigation for breach of various consumer and competition laws.
- Recognised consumer associations, some defined public bodies, as well as associations recognised by the Minister of Economic Affairs can initiate a class action.
- The judge will be able to decide on the “opt-in” or “opt-out” character of the case.
- The proceeding will be tri-levelled: receptivity phase, negotiation phase & judicial phase.
- Compensation will be in kind or by equivalent (indemnification). Judges may decide on a global amount or on individual amounts. No punitive damages or interest are available.



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France: Class action procedure under March 2014 law



France

“The procedure is described as opt-in, but consumers can expect to be notified of claims through public advertising, and may be able to opt in at a stage when liability has already been established.”

Claire Bouchenard,
Osborne Clarke Paris



- The Loi Hamon - in force since 19 March 2014 - allows for class action lawsuits against businesses for breach of consumer and competition laws as well as for breach of a business’s contractual obligations.
- Only recognised consumer associations can bring these proceedings, and they are on an “opt-in” basis.
- Damages can only be awarded to compensate for actual financial loss; punitive damages are not available.
- Implementation decree for this Act regarding class action procedures are expected to be published in Autumn 2014.



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Germany: Massive enforcement against digital businesses



“We have seen a massive increase in enforcement actions against digital businesses lately, along with huge PR campaigns. This means early reviews of TOS, privacy policies and product designs and well composed defences are more important than ever before.”

Konstantin Ewald,
Osborne Clarke Cologne



- A new proposal would allow consumer watchdog organisations to enforce not just consumer rights but also data protection rules.
- Consumer watchdog organisations have had their budgets increased significantly in 2014 by the newly elected government.
- 2014 has seen a wave of massive enforcement actions against games and digital businesses. Mostly they are directed against terms and conditions and the technical design issues.
- Enforcement action generally goes hand in hand with extensive PR campaigns against the targeted businesses.



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Italy: Class action procedure under Consumer Code



“Class action in Italy is an increasing phenomenon but still not well known. However the need of a prior evaluation by the court could potentially trigger mass use.”

Edoardo Tedeschi,
Osborne Clarke Milan

- Italy’s consolidated “Codice del Consumo” (Consumer Code) permits both consumer associations and qualifying consumers (or “users”) to bring action to protect the collective interests of consumers/users by way of a prohibition order or suitable measures to remedy or eliminate adverse consequences.
- Under article 140 bis of the Consumer Code, homogeneous, individual rights of consumers/users can be enforced through a class action in relation to unfair commercial practices or anticompetitive behaviour.
- The class action works on an opt-in basis, and those who don’t join the action remain free to sue the defendant business on an individual basis. Each class action is subject to prior evaluation by the Court as to its admissibility.



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Netherlands: Gateway for international class actions



Netherlands

“WCAM provides a viable worldwide class action settlement mechanism, in particular, if the claims face significant obstacles under U.S. (or other foreign) law”

Jeroen Bedaux,
Osborne Clarke Amsterdam



- Dutch law does not provide for “American style” class actions, but it does offer an opt-out mechanism that facilitates the implementation of collective settlements.
- The Act on the Collective Settlement of Mass Claims (WCAM) has been in force since 2005.
- Dutch courts assume jurisdiction with regard to all interested parties, irrespective of their domicile. It is not required that any of the potentially liable entities is seated in the Netherlands. Only some connection with the Netherlands is required.
- The Dutch Minister of Security and Justice has started a consultation on a draft bill on collective damages actions (going beyond the current collective settlement regime). The consultation ends on 1 October 2014.



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Spain: An improved two-fold consumer protection system



“The recent admission by a Spanish Court of a joint claim by 3,650 consumers affected by the purchase of the so-called ‘preferential shares’ of a banking institution represented by a consumers association is a good illustration of how effective and workable Spain’s collective redress regime can be.”

Rafael García del Poyo,
Osborne Clarke Madrid

- Royal Decree 1/2007 recognises consumers’ rights to protect their legitimate economic and social interests; particularly against unfair trade practices and abusive contract terms.
- Under the Spanish Civil Procedure Act, consumer associations can bring action to protect collective interests. This right is independent of the established individual consumer’s right to pursue the protection of legitimate interests. In addition, the Spanish Public Prosecution Service may also enforce consumers’ rights, either in the general interest or on behalf of consumer groups.
- Consumer associations can bring damages claims even if the group of affected consumers is not precisely determined.



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UK: Proposals for new remedies, and a limited new class action facility



“Advertising Standards Authority cases are going to start getting more attention at board level. New consumer remedies make it more likely that adverse ASA rulings will lead to compensation claims.”

Nick Johnson,
Osborne Clarke London

- From 1 October 2014, new consumer rights of redress for misleading or aggressive practices under the Consumer Protection from Unfair Trading (Amendment) Regulations 2014.
- Additionally, the Consumer Rights Bill - if and when enacted and brought into force - gives specified enforcement bodies rights to apply to court for “enhanced consumer measures”. These include compensation to affected consumers - and where consumers cannot be identified without disproportionate cost, measures for the collective interest of consumers.
- The Bill also introduces an opt-out collective actions regime, but only for competition law cases. (Anti-trust damages can already be claimed by consumer organisations on behalf of named consumers - for example, where retailers collude to fix prices - but this regime is not widely used.)



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At-a-glance comparison of collective action regimes



At-a-glance comparison



	Opt-out?	Loser generally avoids liability for other's costs?	Punitive damages available?	Contingency fees available for claimant lawyers?	Claimants/attorneys can bring claims (ie not just consumer associations and regulators)	Notes
Belgium	Yes	No	No	No	No	Law applicable as from 1 September 2014
France	No	No	No	No	No	The new law is on the statute book, but is not enforceable yet (as at August 2014) pending adoption of implementation decrees, so class actions cannot yet be issued.
Italy	No	No	No	No	No	-
Germany	No	No	No	No	No	German civil procedure law does not allow collective legal actions as such. However, consumer watchdog organisations can pursue violations of consumer rights on behalf of consumers in certain circumstances.
Netherlands	Yes	No	No	No	No	-
Spain	No	No	No	No	Yes	There is a clear distinction between a 'collective action', which enables a claim on behalf of multiple individual consumers and a 'joint action', that is simply a conjunction of individual actions. Only the latter is actually recognised under Spanish Law, so there is no scope for the benefit of the action to be extended to individuals who are not explicitly identified as claimants.
UK (Anti-trust only)	Yes	No	No	No	Yes	Not yet in force - class action would be available for anti-trust claims only, though specified bodies may also be able to seek collective redress for other consumer claims in certain circumstances.



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“Class actions are part of the fabric of business life for our US clients. Until now, they have been a largely domestic US risk. However with new regimes evolving across Europe, US businesses with EU operations will need to re-assess collective redress risks internationally.”

Steve Wilson,
Osborne Clarke Silicon Valley

Action points
for businesses

What do businesses trading in Europe need to consider?

- Reviewing processes for checking advertising copy and assessing other consumer risks (including consumer terms and product design issues).
- Reviewing insurance coverage: do existing policies cover liability under emerging new consumer remedies in Europe, and is the level of cover adequate?
- Re-assessing whether liability caps in key supplier agreements remain appropriate in light of potentially increased liabilities to consumers.
- Keeping a watching brief on developments in these areas.



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How can OC help businesses trading in Europe?

- We can provide an audit or bespoke risk analysis to help protect your operations from future class actions. Please speak to the relevant individuals listed overleaf or your usual OC contact.
- Our European-qualified lawyers working locally in our representative offices in the USA can help introduce you to expert US counsel in relevant sectors and regions should you have a US class action problem.
- We can help you keep up to date on relevant European developments via our [marketinglaw](#) blog. The site offers free regular updates on a wide range of advertising, marketing and consumer issues. Click [here](#) to subscribe.

OC Amsterdam's Jeroen Bedaux is acknowledged as a leading adviser on collective settlement of mass claims, having advised on Dexia, the Association of Stockholders in the Shell Collective Settlement and a group of international banks in the DSB Collective Settlement. Jeroen can provide specialist class action expertise across Europe, working in conjunction with colleagues in other OC jurisdictions.

Case Study - Click [here](#) to read more about Collective Settlement claims in the Netherlands.



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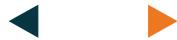


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