Environmental Class Actions in Belgium

Belgium: Class Action for Environmental Issues

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Belgian general principles of procedural law require the plaintiff, in any court proceeding, to meet several basic mandatory conditions. One of those conditions is that the plaintiff must have a personal interest in the proceeding at the time it is initiated (Article 17 of the Judicial Code).

On that basis, the *Cour de Cassation (Hof van Cassatie)*, the Belgium Supreme Court, permits associations to appear before civil and commercial courts only to defend their own interests. Interests are here defined as the existence of the association itself or its physical and moral assets, including its honour or its good reputation (Cass 19 November 1982, Arr Cass 1982–1983, No 172, p 372; Cass 25 October 1985, R W 1985–1986, col 2411 and foll; Cass 24 November 1982, R P S 1984, p 21).

In contrast, an association is permitted to bring an action even for the defence of collective interests, before administrative courts (*Conseil d'Etat – Raad van State* and *Cour d'Arbitrage – Arbitragehof*). In addition, lower civil and criminal courts have accepted claims filed by associations with respect to collective interests in spite of the principles set forth by the Supreme Court.

Both the legal uncertainty which prevailed in connection with the existence of a right of action for legal entities and the progress made in the same area in other (adjacent) countries and at EC level gave some cause for concern to Belgian political authorities. They therefore decided to address that question. This lead to the law of 12 January 1993.

Beneficiaries

Non-profit making associations

Initially the draft law was intended to grant a right of action to "groupings", which the draft, however, limited to non-profit making associations (*Association sans but lucratif – Vereniging zonder winstoogmerk*) and institutions of public utility (*Etablissement d'Utilité Publique – Instelling van Openbaar Nut*), both governed by a law of 27 July 1921.

The Council of State stressed that an institution of public utility (where assets are allocated to a specific purpose by one single person and which is granted legal personality) in fact is not a grouping. As a result, the right of action was granted only to the non-profit making associations.

The non-profit making associations must, in addition, meet the following conditions in order to be authorised to make use of that right of action:

- the association must have obtained legal personality in accordance with the law of 27 June 1921 on non-profit making associations, ie its articles of association and any modifications thereto, as well as the nomination, resignation or dismissal of its directors must have been published in the Enclosures to the Belgian State Gazette; the list of its members must have been filed on an annual basis with the registrar of the Court of First Instance; all documents issued by the ASBL must show the association name and type (in full or in abbreviated form); ⅗ths of the members must have Belgian nationality or reside in Belgium and be registered in the population records;
- the legal personality must have been acquired at least three years before the claim is filed in court;
- the geographical area of the association's activities must be delineated by the articles of association. Therefore, a claim filed by an association in connection with an environmental issue located outside that geographical area will not be accepted. Likewise, the association cannot make use of the new legal provisions pertaining to facts which have causes and consequences found exclusively outside that territory. Also an association whose geographical scope of action extends to a whole region cannot bring a claim concerning facts which have causes and consequences which are purely local;
- proof must be given that the real activities conducted by the association correspond to its corporate purpose.

Other authorised persons

The Public Prosecutor, who is entrusted with the defence of the general good, is also entitled to file a claim based on the law of 12 January 1993.

Although initially only the Public Prosecutor and non-profit making associations were to be granted a specific right of action as regards environmental protection, it was decided, in the course of the discussions in parliament, to extend it to any adminstrative authority which has the jurisdiction to decide environmental issues.

Competent Court

The President of the Court of First Instance has the jurisdiction to decide on any action filed on the basis of the law of 12 January 1993.

The law does not contain any specific provision governing the geographical jurisdiction of the court. Bearing in mind that the action, although handled in accordance with the rules applicable to summary proceedings, relates to the merits, reference must be made to Article 624, 1 and 2 of the Judicial Code. The court of the domicile of the defendant or that of the place where the infringement is committed will therefore have jurisdiction. As in the case of injunctions provided for by the law on fair trade practices, that jurisdiction could presumably be extended to the place where the consequences of the infringement arise.

Measures That Can Be Obtained

The action provided for by the law of 12 January 1993 may require the court to:

- note the existence of behaviour, even when criminally sanctioned, which constitutes a blatant violation or a serious threat to any law, decree or ordinance relating to the protection of the environment, and/or
- order the cessation of any act purporting to carry out such a violation or threat, or impose measures aiming to prevent environmental damage.

It is interesting to observe that the court could, as a matter of fact, note that there is a violation or a threat

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presenting those characteristics stipulated by the law and could at the same time decide not to order the defendant to stop the behaviour in question. This option has been inserted in the law in order to avoid the cessation of an infringement leading to the cessation of an economic activity. (Report of M Landuyt to the Chamber, Doc Ch 55616-SE 1991–92).

The violation of any law, decree, ordinance or regulation relating to the protection of the environment, including provisions regarding the quality of the air, the land, water, wastes, noise, town and country planning, conservation of sites, landscapes and nature, may give rise to that right of action.

If that right of action is used in connection with an act which is criminally sanctioned, the criminal court will suspend the proceedings until a decision has been made by the civil court, in order to avoid discrepancies between decisions. (NB the Belgian judicial system, in fact, is based on the principle that criminal proceedings suspend civil proceedings.) In addition, in order to avoid the risk that a criminal infringement could no longer be sanctioned by the criminal courts because the statute of limitation has lapsed, the law provides for the suspension of that statute as long as the claim is pending in front of the President of the Court of First Instance.

This law does not purport, however, to grant non-profit associations any right to claim damages before civil courts, to bring independent claims for damages before the criminal courts, or even to sue directly before the criminal court, as long as the associations do not suffer any personal damage with regard to their assets or their activities. In addition, only those beneficiaries listed by the law are granted a specific right of action. In other words, in no event does this new law purport to introduce an actio popularis (ie authorising any citizen to bring an action irrespective of the nature of his interest in the proceeding) in Belgian law. (Only the law of 12 August 1911 authorises any citizen to claim the restoration of the beauty of landscapes devastated by mines and quarries.)

Although the law provides the cessation of the action damaging to the environment as the sole measure which can be claimed on the basis of its provisions, the Report made to the Senate by the Commission for Justice specifies that this can include the restoration of the site to its original state when this constitutes the only way to eliminate the infringement. (This will be the case when the infringement is permanent). The Report stresses also that several environmental regulations already authorise the criminal court to order such a restoration.

As in any other court proceedings, the claimant can also require the judge to order fines (*astreinte – dwangsom*) for the case where the defendant fails to abide by the injunction issued (per day or per action as the case may be). The law itelf provides also for the immediate initiation of criminal proceedings if the injunction is not abided by, in order to obtain a further condemnation of the defendant, this time at the criminal level.

Procedure

With a view to speeding up the handling of court proceedings initiated on the basis of the law of 12 January 1993, the claim will be filed and handled in accordance with the rules of the Judicial Code which govern the proceedings in chambers. In contrast with proceedings in chambers, however, the plaintiff will not be required to prove that the situation is urgent, or be limited to requesting temporary measures, pending a decision on the merits.

The proceedings can be initiated either by serving a summons on the defendant or by petition.

No injunction will be issued prior to the parties attempting a conciliation. In addition, as part of the measures which have been inserted with a view to balancing out the needs of environmental protection and the economic interests at stake, the law authorises the court to give the defendant a period in which to conform with the measures ordered.

It is worth noting that the legislature has opted for proceedings regarding determination of the merits although the procedural rules to be applied are those of proceedings in chambers.

Conclusion

Some legal analysts of course may regret the many conditions which the law requires if those associations are to be entitled to make use of that right of action. Others may criticise the law because it does not include consumer protection associations among its beneficiaries. The law of 12 January 1993, however, certainly represents positive progress because it finally recognises a right of action by associations for environmental disorders.