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PERSPECTIVES

THE RISE OF CLASS ACTIONS IN THE UK AND CONTINENTAL EUROPE: RISKS AND OPPORTUNITIES

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Ever more often, the filing of yet another 'class action' grabs the headlines in the UK and on the continent, whether in antitrust, privacy or securities misselling. Class actions, or aggregate litigation, pose risks and compliance challenges for a number of corporations. Conversely, they offer business opportunities to certain market participants. Whichever part of the value chain your organisation sits in, being aware of and keeping up to date with this rapidly developing area would be of benefit.

Why is there such a rise in class actions in Europe?

The US has traditionally been an active playing field for aggregate litigation. Until recently, that was not to anything like the same extent the case in the UK or the European Union (EU). There has, however, been a surge in filed and anticipated class actions on this side of the pond, likely driven by four key factors.

First, both the judiciary and the legislature seem to be providing significant support enabling this development. The UK Supreme Court in *Okpabi and others v. Royal Dutch Shell Plc*, for example, gave

the green light to a significant category of collective action claims when it determined that the English court has jurisdiction over a claim brought against an English-domiciled parent company and its Nigerian subsidiary by a group of over 42,000 Nigerian farmers and fishermen seeking compensation of over $100bn for environmental pollution from pipelines operated by the subsidiary. So far as the legislature is concerned, and as described further below, the statutory regime in the EU is also changing, with the adoption of the first pan-European legislation on class actions, the Collective Redress Directive, and its transposition into domestic law by the end of 2022.

Second, legal issues which are prime candidates for collective redress have received increased focus globally. These include environmental, social and governance (ESG) issues, privacy and cyber security, antitrust, securities misselling, product liability and employee claims. In the UK, for example, we have seen a significant increase in group securities claims, including claims against Lloyds Banking Group and its former directors relating to its acquisition of HBOS plc, Tesco PLC based on the false accounting scandal, and Royal Bank of Scotland (RBS) and its former directors in relation to alleged misleading statements at the time of RBS's rights issue.

Third, the economics of class action claims have shifted due to the rise of the attractive, on the claimant side, 'opt out' regime in certain jurisdictions, such as the Netherlands and the UK. In an 'opt out' regime, individuals are considered members of the class unless they positively choose not to be a part of it. The alternative regime is an 'opt in', where people have to elect proactively to be part of the class. This may be both time consuming and inefficient from a cost perspective, which in turn creates doubts as to whether a sufficiently large class can be formed in order to make the claim viable, including for litigation funders.

"The litigation funding market has significantly matured recently, which makes claims possible that otherwise would not have been brought for financial reasons."

On the topic of litigation funders, the growth of that industry is likely the fourth driver of the rise in class actions. The litigation funding market has significantly matured recently, which makes claims possible that otherwise would not have been brought for financial reasons.

The UK: two recent highlights

The two most notable claims in the UK in this space are the *Merricks v Mastercard* claim, and the *Lloyd v Google* claim, both of which are briefly summarised below.

The first case is an antitrust issue: a £14bn claim brought by Mr Merricks, the former chief ombudsman of the Financial Ombudsman Service, as the class representative for over 46 million consumers, against Mastercard. The claim was brought in the UK's Competition Appeal Tribunal (CAT). Mr Merricks claimed that the class of consumers, being all UK residents aged 16 or over at any time between 1992 and 2008, had suffered loss as a result of Mastercard's anti-competitive multilateral interchange fees. At first instance, the CAT refused to certify the claim, a decision which was appealed through to the Supreme Court. In its judgment, the Supreme Court overturned CAT's decision and held that, in collective action proceedings, damages do not have to be apportioned so as to reflect every individual's actual loss. In August 2021, the CAT (to whom the matter was referred back) certified, and is now considering,

this claim, the first ever opt out collective action in the UK.

Ignited no doubt by the Supreme Court's decision in *Merricks*, a wide range of other claims have been filed with CAT, including a £1bn action against a number of investment banks, which are accused of rigging the global foreign exchange market, and a £600m collective action claim against BT Group plc.

The second case is in the privacy sphere, an area (together with a few others) where efforts have been made to develop an opt out regime as well. In *Lloyd v Google*, Mr Lloyd, a consumer rights activist, brought a claim as a so-called 'representative action' against Google, alleging a breach of its statutory data protection duties and seeking damages of altogether around £3bn. The claim was on behalf of around 4.4 million iPhone users and alleged they had all suffered a 'loss of control' of their personal data for which they ought to be compensated. Though Mr Lloyd lost at first instance, he won in the Court of Appeal. On 10 November 2021, the Supreme Court, however, ruled unanimously against him, stating his claim did not meet the test under the applicable legislation, which required a claimant to show he had suffered material damage such as financial loss or mental distress.

The Supreme Court's judgment in *Lloyd* left open the possibility of the 'representative action' procedure, which essentially allows a person to bring a claim on behalf of a class of individuals who have the same interest, to be used as an opt out mechanism in certain circumstances. A number of cases relying on that procedure had been filed and stayed, pending the judgment in *Lloyd*, and it remains to be seen which will be withdrawn or amended in order to take account of the directions in *Lloyd.*

The EU: important changes encouraging class actions

The Collective Redress Directive will need to be adopted by each EU member state by the end of 2022. It will significantly change the EU class actions landscape. Three key features are worth noting.

First, claims will have to be brought by a qualified entity on behalf of consumers. Individuals are therefore protected from a cost perspective, as a qualified entity will not be able to seek reimbursement from individuals if it loses a claim, other than in exceptional circumstances. In addition, member states are obliged to implement measures ensuring that qualified entities are not discouraged from bringing claims for financial reasons, such as limiting court fees or enabling funding.

Second, and connected with the above, the directive allows third party litigation funding, provided that qualified entities ensure that there are no conflicts of interests. Certain EU jurisdictions, such as Ireland, do not currently allow the use of litigation funding and it will be interesting to see how they adapt in order to implement this provision.

Third, the directive attempts to address, in part, the increased number of parallel action claims being brought against the same defendant in multiple EU jurisdictions. The 'Diesel-gate' scandal on alleged manipulation of emission figures and the 'Trucks cartel' European Commission's finding on collusive arrangements on pricing have both, for example, resulted in parallel collective actions being brought against various car and truck manufacturers in Germany, France, Spain, the Netherlands and the UK. The directive encourages qualified entities to join together in a cross-border action to sue a defendant in one court, as a way of saving time and resources.

Certain EU jurisdictions have already amended their legal regime independently from the directive, making it more attractive for collective redress actions. Since January 2020, the Netherlands has had a fully functional procedural class actions framework, not dissimilar to the US lead plaintiff and opt out mechanisms, with around 30 cases launched under the new regime so far.

Dutch courts have also been willing to support class actions. In a groundbreaking decision of May 2021, the Hague District Court ruled that Royal Dutch Shell plc had breached its duty of care to certain non-governmental organisations and Dutch residents by not adequately reducing its CO2 emissions. Notwithstanding that the company was not found to be in breach of any of its statutory obligations, it was ordered to reduce its worldwide CO2 emissions by 45 percent by 2030.

Take away points

There is no doubt that the risk of an aggregate litigation being filed against an organisation in the UK and the EU has significantly increased, and is certainly set to increase further, in particular in light of the implementation of the directive in EU member states. Due to that increased risk, organisations may wish to consider expediting any legal and compliance plans and programmes already in motion. It may be worth paying particular focus on the areas lending themselves well to collective redress, such as antitrust, privacy and cyber security, or securities misselling.

Conversely, organisations which would like to explore the business opportunities that class action claims offer should monitor the rapidly changing developments and adjust their position accordingly, in order to be able to bring a viable claim as and when the circumstances allow. R&C

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