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What's next for representative actions in the EU and UK? Hogan Lovells speaks at BIICL

February 2020

Introduction

Hogan Lovells litigation partners Matthew Felwick and Valerie Kenyon took part in a panel discussion on the EU Representative Actions Directive, at the British Institute of International and Comparative Law (BIICL) on 3 February 2021. The panellists included Augusta Maciuleviciute (BEUC - the EU consumer organisation), Neil Purslow (Therium Capital Management), and Rhonson Salim (Aston Law School).

Here are seven highlights from this interesting panel discussion.

1. Will there be enough qualified entities?

First, there was some discussion about whether there would be enough qualified entities in all Member States to bring claims under the full scope of the Directive. In particular, Augusta pointed out that in smaller Member States there may not be a qualified entity capable of bringing claims for each type of issue covered by the Directive. From a litigation funding perspective, Neil also questioned whether the criteria for qualified entities would be too narrow for some consumer organisations to comply with them, and whether there would be sufficient incentives for consumer organisations to bring claims. He concluded that the requirement for a qualified entity to bring the claim may end up being a bottleneck that could limit the success of the Directive.

Valerie responded that it is likely that there will be enough qualified entities, as long as consumer interest continues to grow, and as long as litigation funding is innovative and procedural rules vary from Member State to Member State, which creates the possibility of forum-shopping. She added that, while there will be defined criteria that qualified entities must meet, there is also a permission for Member States to designate a qualified entity for a specific domestic representative action on an ad-hoc basis, which will provide some flexibility.

2. Forum shopping and parallel proceedings: overlay with private international law

Neil and Rhonson discussed the overlay of the Directive with private international law, including the Brussels I Regulation, which will determine the level of forum-shopping that claimants may engage in and the extent to which parallel proceedings may occur. Neil observed that, depending on how this overlay plays out, there will be a number of strategic questions for claimant law firms and qualified entities in relation to the jurisdictions in which to begin proceedings.

3. Provisions on undue influence by litigation funders

From a litigation funder's point of view, Neil said that the provisions in the Directive which aim to prevent undue influence by litigation funders are not likely to present any form of barrier to funding (noting that similar provisions exist in most jurisdictions). Valerie commented that, although the criteria for qualified entities engaging in domestic representative actions must be consistent with the objectives of the Directive in all Member States, the rules will necessarily vary among Member States to some extent, and it therefore remains to be seen how effective the provisions aiming to prevent undue influence will be across the European Union.

4. Remedies: to what extent will the availability of damages determine the success of the regime?

Augusta pointed out that that the availability of remedies, and the existence of any restrictions, may be key factors in the success of the regime. For example, the existing French class actions procedure only allows "material damages" to be covered, which in the past has discouraged BEUC members from bringing claims because of the difficulty in proving material damages. Neil added that the availability of damages will determine the level of interest from litigation

fundors, and commented that the non-profit character of qualified entities may be misaligned with the drive for damages in the Directive.

5. Publicity around representative actions: powerful but problematic?

Offering a defendant's perspective, Matthew noted that another important deterrent from infringing the relevant EU laws is the obligation on traders to inform consumers of the breach, which may have a significant reputational impact. In fact, the recitals to the Directive expressly foresee this as a deterrent for traders. However, it will be important to ensure that other publicity around a representative action (before the judgment) is not unduly damaging to the reputation of traders whose liability has not yet been established. Matthew concluded that the publicity measures could be very powerful, but there was potential for the publicity around representative actions to be problematic as well.

6. In which Member States will this Directive bring the most change?

Drawing on input from Hogan Lovells' network of collective action specialists, Matthew provided an overview of the existing class actions mechanisms in various Member States, – including France, Italy, and the Netherlands. He noted that Germany may be the major European country where the Directive makes the most significant impact, given that the current mechanism (“Musterfeststellungsklage”) in Germany does not allow direct redress measures.

Neil also observed that the way in which the Member States implement the Directive will be key, and that Member States that implement the Directive in a more progressive way are likely to be countries that already have collective redress mechanisms in some form.

Matthew added that the Directive may also contribute to existing pressure to reform the collective actions mechanisms in England and

Wales, particularly if the Directive is regarded as a success which provides EU consumers with greater access to redress than UK consumers.

7. In which areas of law is the Directive most likely to be used?

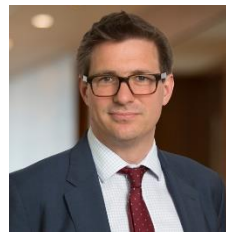
In response to a question from a member of the audience, there was some discussion about which area of law would be the subject of most representative actions. Valerie's view was that this would depend largely on funding and on the number of people that are affected by an issue. She considered that data breaches may be a particularly active area of litigation, given the large numbers of people affected. Valerie also added that the Directive may open up the possibility of representative actions in areas that have not historically been the subject of group litigation in Europe, such as in relation to warranties.

Further information

If you would like further information about representative actions in the EU and UK, please do not hesitate to contact a member of our team.



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