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Class and Collective Actions: the European Front

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4 March 2020



Agenda

- The changing landscape
- UK
 - Group litigation
 - Class actions for competition claims
 - Representative actions for data breaches
- The EU
 - EU draft Directive on Consumer collective claims
 - Regimes in EU countries
- Who is at risk?
- How can businesses respond?

An aerial photograph of a lush green hillside covered in terraced rice fields. The terraces are arranged in a series of concentric, wavy lines that follow the contours of the mountain. A small, simple wooden hut with a white roof is situated on one of the upper terraces. The overall scene is vibrant and shows a traditional agricultural landscape.

The Changing Landscape

The Changing landscape

- Many new (and different) class / collective claim regimes across different jurisdictions and sectors
- Many informal approaches to claim aggregation being used effectively
- Developments being driven by:
 - policy
 - scandal
 - demand / claimant lawyers
 - dramatic expansion of litigation funding
- Resulting in
 - a much heightened risk of mass claims in Europe
 - little prospect of claims being consolidated
 - a complex, incoherent landscape to navigate



The UK

England & Wales: a recap

Procedures for efficient management of collection of individual claims in one action

Wide variety of sectors concerned



Target sectors:
automotive;
financial services;
life sciences.



**Human rights
concerns**



**Environmental
issues**



**Data class
actions**



**Competition
claims (a 'true'
class action)**



Established procedural mechanisms: group litigation order & representative action

Group litigation order ("GLO")

Group action:

a consolidation of individual claims managed by a Judge



Class action:

the class is represented by an individual claimant

A number of claims exist which give rise to "common or related issues of fact or law"

A GLO must establish a group register:

- all claimants wishing to join the group litigation need to apply to be entered onto the register before a specific date given by the Court
- the GLO issues

The Court can try a number of **lead cases** representative of the cohort, or try generic issues

Judgment on one or more of the GLO issues will bind all the claimants on the group register

UK Competition opt-in/opt-out class actions

Power to hear class actions for breach of UK and EU competition law, on either an opt-out or opt-in basis:

Opt-out:

- If approved an opt-out basis, all eligible claimants domiciled in the UK will be included in the action automatically, unless they choose to opt-out
- Overseas claimants will not be automatically included in the class, but they may choose expressly to opt-in to the class



Opt-in:

- Claims can also approve on an opt-in basis
- Available to overseas claimants



UK Competition Class Actions - Class certification

- Claim brought on behalf of an identifiable class
- Claim must raise same, similar or related issues of fact or law
- "Suitability" test for a collective claim - with reference to:
 - whether a collective claim is an appropriate means for the fair and efficient resolution of the common issues
 - the costs benefits
 - the size and nature of the class
 - whether the claims are suitable for an aggregate award of damages
 - whether the claim, if certified, should proceed as opt-out or opt-in claim
- Body or individual must be an appropriate representative



The rise of data class actions in England?

- **Representative action**
 - One representative Claimant acts on behalf of a class
 - All members of the class must have the same interest in one cause of action
 - Any judgment or order binding on all persons represented
- **Article 80 of the GDPR**
 - Does not create a new mechanism, but...
- **GLOs and representative actions are effective for data breach actions**
 - *Various claimants v WM Morrisons Supermarket PLC*
 - Vicarious liability for an employee's deliberate disclosure of his co-workers' personal data brought as a GLO
 - *Lloyd v Google*
 - Representative action on behalf of a class of over 4 million



The EU

EU draft Directive on Consumer collective claims

- Directive would set minimum requirements for regime in all EU Member States
- Still a draft, subject to negotiation between the EC Commission, Parliament and Council
- Expected to enter into force in summer 2020 with Member States having implementing thereafter
- Would apply to:
 - Claims on behalf of groups of consumer against "traders" ie businesses
 - for breaches of specific EU laws
 - seeking injunctions and/ or redress (ie compensation)

EU draft Directive on Consumer collective claims

Will apply to breach of specific EU laws in various areas including:

Consumer
rights

Data
protection

Financial services/
investment services

Travel/
Tourism

Telecoms

E-commerce

Energy

Product
information

Environment

Health

Insurance

Pensions

EU draft Directive on Consumer collective claims

- Claims would be brought by Qualified Representative Entities (QREs)
 - QREs can be designated for domestic claim – criteria will vary from country to country
 - QREs can be designated for cross border claims – will need to meet specified criteria:
 - not for profit, with legitimate interest in ensuring compliance with relevant laws
 - independent of market operators and law firms
 - designated in advance and have a track record of consumer protection
 - have necessary skills and finances
 - transparent about funding

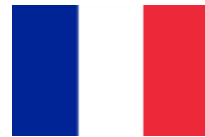
EU draft directive on Consumer collective claims

- Claims for redress
 - opt-in or opt -out for consumer of the Member State where claim is brought
 - only opt-in for consumers from other Member States
- Member States may set admissibility requirements to be assessed by the Courts
- Court approved settlements
- Some requirement for disclosure of evidence
- A collective claim suspends limitation period for other claims by relevant consumers
- Damages must be compensatory and not punitive
- An infringement decision made by a Court or Regulator in Member State will be admissible as evidence of the infringement in another Member State



France

The French class actions



Consumer class actions:

- Law of 17 March 2014 – French Consumer Code
- Only nationally recognised consumer protection associations
- Consumers in an identical or similar situation
- Actions based on consumer law and some aspects of competition law
- Exclusions of bodily injuries and non-financial losses
- No punitive damages

‘Class action common law’:



Five types of class actions:

- Law of 18 November 2016
 - Common set of rules applies to the various types of class actions (except for consumer class actions)
 - Very similar to consumer class action mechanism
 - Authorised associations only
 - Opt-in mechanism
 - Two-step procedure
- For health products and cosmetics
 - For environmental issues
 - For breach of data privacy
 - For discrimination
 - For discrimination in the workplace



Italy

Class actions in Italy



The current mechanism is not a major concern for businesses

Key features

Claimants

Only consumers and users also through associations

Limited scope

Only for the protection of homogenous rights and collective interests

- Contractual claims
- Product liability claims
- Unfair commercial practices or anticompetitive conducts

Strict admissibility criteria

- Two-stage opt-in mechanism (admissibility and merits)
- Admissibility criteria (manifest groundlessness, conflict of interests, non-homogeneous rights, inability of the lead plaintiff to represent the interests of the class)

Costs

- Litigation funding is left to the lead plaintiff
- If the claim is found inadmissible, the lead plaintiff can be ordered to pay attorney's fees
- The lead plaintiff can be ordered to pay for the publication of the decision

In 2017-19 Relatively few actions and small amounts awarded

- 58 actions filed before the Courts
- 11 passed the admissibility stage, 18 declared non admissible, 40 still pending
- Only 3 decisions handed down
- Amount of damages awarded to claimants not significant

A mechanism under reform



Top 5 things you need to know about the new mechanism

1.

- 3 April 2019: the Italian Parliament approved the Bill reforming the Italian class action regime
- Entry into force 12 months after its publication in the Official Journal

2.

- Class actions are **no longer limited** to consumers/users
- They are opened to **other damaged parties**

3.

- The “new class action” is open also to **any torts claim**
- Class action might be brought under **other strict liability regimes** (e.g. regime which applies to whoever exercises a dangerous activity)

4.

- Claimants could **opt-in** also **after** the decision on the merits is handed down
- Potential claimants will have **180 days** as from the date of the decision on the merits
- Opting-in will be **relatively easy** with **very limited costs** for claimants

5.

- **Economic incentives** for the promotion of class actions
- **Remuneration sum** to the **class representative** (between 9% and 1% of the total amount awarded)
- **Remuneration sum** to the **lawyer for the lead plaintiff** calculated on the basis of the same criteria



Germany

New: Collective Declaratory Action (*Musterfeststellungsklage*)



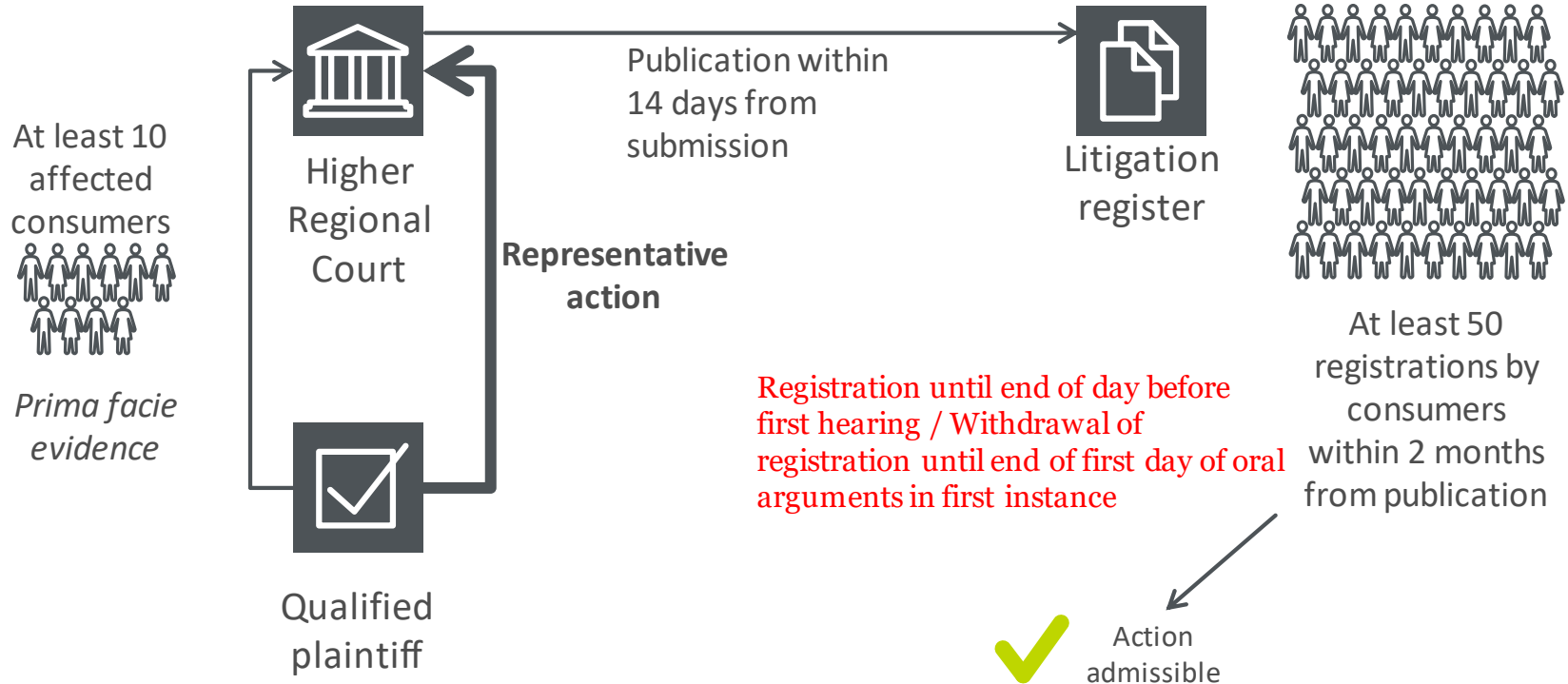
Potential beyond Diesel emission litigation

- **Objective:** Establishing whether legal or factual pre-requisites for civil claims by consumers exist – Not deciding on individual claims and damages
- **Standing to sue:** Qualified entities with particular eligibility aiming at a declaratory judgment regarding claims of consumers
- Consumer can register claims via online forms
- Action available since 1 November 2018
- To date **only a small number** of actions published in federal litigation register, further actions were dismissed as not admissible and not published

How does the Collective *Declaratory Action* work?



Admissibility, publication, registration



Standing to bring a Collective Declaratory Action



Criteria and assessment

- Eligible German and EU qualified entities can bring an action
- Complaint must demonstrate standing to sue
 - Admissibility criteria to be assessed by the court
- In case of serious doubt about funding or non-profit character of plaintiff court can request disclosure of funds
 - Defendant can raise argument
- Publicly funded consumer associations
 - Irrefutable presumption for meeting these requirements



Netherlands

Dutch Assignment model



- Developed in **anti-trust damages** cases because collective action does not provide for damages
- **Claim vehicles** sought other ways to bundle multiple damages claims into one type of litigation
- Injured parties **assign** claims to **claim vehicle**
- Claim vehicle **starts proceedings** against defendant in the Netherlands
- Often using “anchor” defendant to create jurisdiction of Dutch court
- Claim vehicle acts in its own name
- In the Sodium Chlorate and Air Cargo follow-on cases, the District Court of Amsterdam ruled that the assignment model is lawful and in Air Cargo that the assignments were valid

Collective actions for damages



Previous regime:

- Previous regime couldn't be used to obtain monetary damages, only a declaratory judgment which had to be followed by individual proceedings for determination of damage (or individual or collective settlement)

New Collective Actions Regime:

- On March 2019, the Dutch Senate approved legislation introducing collective damages actions. Act entered into force on 1 January 2020
- Legislation applies to “events” which took place on or after 15 November 2016
- “Opt-out” regime for Dutch class members. Class members outside the Netherlands “opt-in”
- Option to claim monetary damages
- Scope rule: sufficiently close connection (but not that close)

New System: Collective actions



- Exception: If foreign class members are relatively easy identifiable, court can extend “opt-out class” to foreign members
- Enhanced standing and admissibility requirements
- Requirements to the collective action for damages itself
- Appointment of **Exclusive Representative**
- Safeguards to restrict role/influence of **third party litigation funders**

Who is at risk?



Who is at risk?

- Any...
 - ...UK domiciled multinational or UK company with significant overseas supplier relationships
 - ...company exposed to privacy issues
 - ...company in a “target” sector, such as automotive, financial services, life sciences

.....so any company!



How to respond

How to respond – in advance

- Reassess the legal risk
- Focus on compliance
- Review group policies and public statements

How to respond – early

- Look out for early warning signs
- Treat regulatory issues as the potential first step in a longer process
 - The outcome may determine liability for collective claims
 - Consider how arguments before regulators might impact collective claims
 - Consider the impact of appeal on subsequent timing of claims
- Conduct factual investigations early to develop a clear factual account
- Considers privilege issues and do not assume there will be no documentary disclosure

How to respond - the diverse nature of the risk

- Control centrally
 - Coherent global legal strategy
 - Consistent factual account
 - Consistent external communications
- Implement locally
 - No one set of proceedings will be the same
 - Flex response to meet the nature of local procedures
- Considers the end game early - a path to settlement?

Key contacts



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