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The Incoming EU Collective Redress Directive – What the US Experience Tells Us

Affected companies can learn from how those in the US have dealt with the threat of class action lawsuits.

By Christopher Warren-Smith and Scott Schutte, Morgan Lewis

On 22 June 2020, negotiators from the European Union Parliament and Council took a major step toward giving EU consumers a US-style mechanism to seek collective redress when they reached agreement on the Collective Redress Directive.

While there will be a lag in the effective date – the agreement needs to be formally approved by both the EU Parliament and Counsel, and member states will then have 24 months to transpose the rules and a further 6 months to apply them – it is worth considering now how the Directive compares to the US class action regime so that businesses can begin considering what the Directive may mean to them.

Scott Schutte and Chris Warren-Smith, Morgan Lewis

Scope: The Directive is limited to collective actions in relation to general consumer law, data protection, financial services, environment and health, travel and tourism, energy, telecoms and train and air passenger rights. It only applies to claims brought on behalf of consumers. By comparison, there are no such scope limits in the United States; class action treatment is available for any claim if the certification requirements are met. Unlike in the United States, businesses who fall clearly outside the scope of the Directive will be able to take some comfort that they cannot be targeted with collective actions.

Opt-in/Opt-out: Under the Directive, a representative action may be brought on behalf of consumers by a qualified entity. It provides for both an opt-in and an opt-out system; member states can adopt either but must have opt-in as a minimum. Consumers who do not habitually reside in the member state in which an action is brought will only become part of the representative group by opting in.

Under the US class action system, consumer class actions are "opt-out," which increases the exposure but also provides the opportunity for a business to structure a settlement that (except for opt-outs, which typically are very limited in number) resolves an issue once and for all.

Cost-Shifting: The Directive envisages that the unsuccessful party will bear the costs of the action where that takes place in accordance with national law. Consumers will not be required to pay costs except in exceptional circumstances. In effect, domestic laws will determine how adverse costs are awarded, but the Directive supports the principle of cost-

shifting. A qualified entity will bear the adverse costs risk, rather than the consumers being represented. The Directive envisages third-party funding being available, but restricts its use. Member states are expected to ensure that conflicts of interest between funders and consumers are avoided. Qualified entities that bring actions on behalf of consumers are not permitted to be unduly influenced by the funder.

This is a profound difference from the US system, which (with very limited exceptions) does not provide for the potential of a prevailing defendant business recovering its fees and costs. As a consequence, counsel can initiate a class action in the United State knowing that the only financial exposure is the time and costs that they invest; they almost never are exposed to paying the costs of the other side if they lose. Notably, most consumer fraud laws in the United States allow a prevailing plaintiff to recover his/her fees or costs. This provision may dissuade the EU plaintiffs' bar from bringing claims unless they have a strong belief in the likelihood of success.

Certification Stage: The Directive does not expressly define how/when lawsuits can be certified as collective actions, but instead contemplates that the court shall assess the admissibility requirements of a representative action in accordance with national law. Again, member states will determine the process, which provides for the potential for "forum shopping" to identify plaintiff-friendly jurisdictions. The Directive does enable member states to ensure that a court may dismiss "manifestly unfounded" cases at an early stage. While high, this threshold does provide an avenue for summary dismissal.

For class actions filed in federal court in the United States, there is a uniform set of class certification requirements set out in Rule 23 of the Federal Rules of Civil Procedure. While there are some variations within the circuits, the application of the requirements is for the most part uniform, and defendant businesses can often assess the likelihood of certification at the outset. It appears that this assessment in the EU may depend on in which member state the lawsuit is initiated. In this respect, it is like class actions filed in state court in the United States, where there are significant differences in how certification is viewed from state to state (although relatively recent changes in US law make it easier for defendants to remove state class actions to federal court).

Qualified Entities: The role of qualified entities will be important, as they are required to publish information on their website about their involvement in collective actions and must keep consumers concerned abreast of progress. The role of these entities and their supervision at member state level looks to be an important area for development. There is no such oversight in the United States; class actions are brought by class representatives on behalf of absent class members, and there is virtually no regulation (other than state-by-state ethics rules) of the plaintiff law firms that drive most US class action litigation.

While it will be important to monitor developments as the Directive is implemented by member states, the Directive will fundamentally change the extent to which entities doing business are exposed to collective action exposure. While there are major differences with the US approach – most notably the potential for the shifting of costs from the plaintiff to the defendant – the Directive is sufficiently similar to the US regime that affected organisations would do well to consider how businesses in the United States have dealt with the threat of class action lawsuits.

Christopher Warren-Smith and Scott Schutte are partners at Morgan, Lewis & Bockius