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Class & Group Actions 2025

17th Edition

Contributing Editors:

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Expert Analysis Chapters

Q&A Chapters

Digital Edition Chapter

Preface

Each year we comment on the growth of class and collective action litigation, and this year is no exception. The global growth of class and collective action litigation shows little sign of slowing, and there are no signs that group litigation activity will not continue its inexorable rise.

Collective actions are now seen as part of the business landscape in the United Kingdom and, increasingly, in Europe. While interest in collective actions was historically transactional (typically following major events, such as Dieselgate), or confined to certain sectors (such as product liability, particularly in the medical context), participation in collective actions has increased markedly. There is also much greater press and media interest and coverage of the actions, and the events that have given rise to them.

This change in perception is attributable to various factors, including a rise in claims of specific types (such as actions following high-profile data privacy breaches), and increased media attention in respect of other claims (such as high-profile competition actions against water companies and gaming console manufacturers). Public concern about environmental issues (and a perception of governments failing to do enough to tackle climate change) has also generated increased interest in environmental class actions.

A key driver of the expansion in activity over recent years has been attempts by claimant groups (supported by increasingly experienced law firms, litigation funders and other service providers) to test the boundaries of the procedural routes by which collective actions can be pursued. Similar developments have occurred in the last 12 months. From a procedural perspective, key judgments have been issued that are likely to shape the future of the collective actions landscape, providing 'blueprints' that offer guidance to key market participants (including law firms, funders and prospective claimants) on the likely demands of pursuing collective actions.

One particular area to watch in the United Kingdom – where available mechanisms for so-called 'opt-out' claims are comparatively restricted – is representative actions. The Courts are regularly being asked to consider whether they are prepared to show flexibility in their interpretation of the procedural rules allowing for representative actions to assist collective actions to proceed. Some cases currently proceeding through the Courts are expected to shine an interesting light on this important area.

Third-party litigation funding continues to underpin (and often drive) the rise in collective actions. Funders are increasingly receiving returns from collective action proceedings, and are increasing their investments in various types of cases, which include competition, securities litigation, labour and employment, environmental and data privacy. Cases in all of these areas are now assessed against a background of increased knowledge about the legal and procedural issues which determine their likely success.

All of these areas merit close scrutiny and monitoring. Other areas showing growth in the market are collective actions following the fallouts from recent geopolitical events, such as COVID-19 and the invasion of Ukraine, and claims directly or indirectly arising from 'greenwashing' and ESG. The much-developed marketplace is increasingly well-poised for future geopolitical and other events and the current trajectory seems likely, if not certain, to continue.

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Collective Actions on the Rise in the UK and Europe: Impacts on Securities, Data Privacy, Competition and Climate Change Litigation

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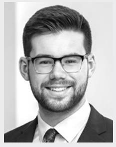
Keir Baker

Introduction

The collective actions market in the UK and EU continues to expand. At its heart is what might be termed a "positive spiral" where significant interest and activity in this area generates yet further interest and activity – specialist law firms are being joined by litigation funders and other service providers, all of whom are bringing experience of pursuing class actions from other jurisdictions.

As more collective actions are brought in the region, the number of opportunities for the courts to provide guidance on questions relating to key procedural and substantive matters increase. For example, in the 2024 chapter, we explored how the boundaries of the procedural mechanisms for pursuing collective actions in England and Wales are being continuously tested by litigants. This included, importantly, the scope of the CPR 19.8 (formerly CPR 19.6) representative action, which is the only available route for "opt-out" actions in England and Wales outside the context of claims for breaches of competition law.

Similar developments have occurred in the last 12 months. From a procedural perspective, key judgments have been issued that are likely to shape the future of the collective actions landscape, providing "blueprints" that offer guidance to key market participants (including law firms, funders, prospective claimants and potential defendants) on the likely demands of pursuing and defending collective actions. Although judgments continue to round out the landscape, substantial questions remain. In some areas, opportunities for the courts to consider major substantive legal questions have been lost thanks to last-minute settlements.

In this chapter, we examine a number of key areas that illustrate the fast-moving trajectory in the collective actions landscape in the UK and EU – securities litigation, data privacy, competition, and climate change litigation.

Securities Litigation: The Fast Rise of Group Actions in the Market

The growth of the securities litigation market in England and Wales has continued, reinforcing prior indications of institutional investors' growing appetite to participate in these claims before the English courts.

Claims under Section 90 and Section 90A of Financial Services and Markets Act 2000 ("**FSMA 2000**") offer investors a potential route to compensation for losses suffered from price drops in securities issued by publicly listed companies where: (i) certain information published to the market by those companies was defective; and (ii) in broad terms, a "*person discharging managerial responsibility*" within the defendant company had a dishonest state of mind about that defective information. In particular:

- Section 90 applies to listing particulars and prospectuses; and
- Section 90A applies to other published information (including Annual Reports and Half-Year Reports).

The requirements for these claims are similar, but there are certain key differences. For example: (i) as above, Section 90 only applies to listing particulars and prospectuses; and (ii) unlike for Section 90A, Section 90 does not require claimants to show reasonable reliance on the relevant misleading information.

Claims under Section 90 and Section 90A may be brought together, or a claim under one provision may be pursued alone. In certain ongoing litigations, some claimants bring claims under Section 90 while other claimants are pursuing claims under Section 90A as well.

The following table details all of the claims under Section 90 and/or Section 90A currently known to the authors:

No.	Defendant	Date of First Claim	Multiple Groups?	Subject Matter(s)	Status
Group Litigation – Institutional Investors on Equity Markets					
1	Tesco	5 December 2016	Yes – two	Tesco's 2014 accounting scandal	Concluded
2	HSBC	10 July 2018	No	*Unknown*	Concluded
3	G4S	10 July 2019	No	Allegations of overcharging and fraud regarding prisoner tagging contracts	Reported settled
4	Serco	10 July 2019	No	Allegations of overcharging and fraud regarding prisoner tagging contracts	Reported settled
5	RSA	5 November 2019	No	RSA's 2013 accounting scandal	Reported settled
6	Tesco	18 September 2020	Yes – two	Tesco's 2014 accounting scandal	Reported settled

No.	Defendant	Date of First Claim	Multiple Groups?	Subject Matter(s)	Status
7	Standard Chartered	29 October 2020	No	Alleged non-compliance with sanctions, financial crime control failures and bribery	Ongoing
8	Barclays	26 November 2020	No	Allegations regarding Barclays' dark pool securities trading facilities	Ongoing
9	Indivior	21 September 2022	No	Allegations regarding the marketing of Suboxone	Ongoing
10	Reckitt Benckiser				
11	Glencore	28 September 2022	Yes – five	Alleged bribery	Ongoing
12	BT	26 October 2022	No	Allegations of "inappropriate management behavior" at BT's Italian business	Ongoing
13	Petrofac	11 May 2023	Yes – three	Alleged bribery	Ongoing
14	Entain	2 Aug 2024	Yes – two	Alleged bribery	Ongoing
15	Kingspan	N/A	No	Allegations relating to the Grenfell Tower disaster	Threatened
16	Boohoo	N/A	No	Allegations relating to modern slavery	Threatened
17	Rolls Royce	N/A	No	Alleged bribery	Threatened
18	Quindell (formerly Watchstone)	N/A	No	Watchstone's 2014 accounting scandal	Threatened
19	Home REIT	N/A	No	Alleged misuse of investors' funds	Threatened
20	Drax	N/A	No	Alleged greenwashing	Threatened
M&A Litigation – Purchasers of Public Companies					
21	Former Directors of Autonomy	30 March 2015	No	Alleged misrepresentations as part of an M&A transaction	Ongoing
22	Former Directors of Cattles	22 March 2014	No	Alleged misrepresentations as part of an M&A transaction.	Concluded

Some clear trends are evident:

- Institutional investors' participation in securities litigation has been framed by certain market participants as being relevant to their stewardship and ESG credentials. In this respect, most existing securities claims can be characterised as concerning the "G" strand of ESG – namely, alleged breakdowns in corporate governance. This pattern may shift in line with broader ESG trends and/or changes in regulatory focus. For example, the "E" strand of ESG may underpin future claims based on "greenwashing", whereby investors allege (most likely after a regulator finds) that a company issued defective information regarding its environmental credentials. The threatened claim against Drax is understood to be the first example of this.
- Claims are increasingly by brought against defendants by multiple claimant groups, reflecting the increased level of activity and competition in this area. Litigations with multiple claimant groups are likely to see: (i) claimants cooperating and pooling resources and knowledge in respect of key workstreams; and (ii) both challenges and opportunities for defendants in terms of their strategies for engaging with each claimant group.

As more claims under Section 90 and Section 90A are pursued, the potential opportunities for judicial consideration of key questions relating to those provisions increase.

Most judgments issued to date concern procedural matters and interlocutory applications. For example, as examined further here: https://www.morganlewis.com/pubs/2023/06/a-blueprint-may-be-emerging-for-the-case-management-of-securities-litigations-in-england-and-wales, judgments in the *RSA*, *G4S* and *Serco* litigations appear to have created a case management framework for future claims, which has been further endorsed and developed upon in judgments from the *Standard Chartered*, *Barclays* and *Glencore* litigations. The existence of that framework also appeared to be a key factor in the High Court's rejection of the claimants' attempt in the *Reckitt Benckiser/Indivior* litigations to deploy a CPR 19.8 representative action for a securities litigation claim, which we foreshadowed in the 2024 chapter. It is understood that this judgment will be considered by the Court of Appeal in Spring 2025.

By contrast, the English courts have had limited opportunity to consider substantive questions relevant to Section 90 and Section 90A of FSMA 2000. There remains various key matters on which there is limited judicial guidance, including in relation to: (i) reliance (such as the concept of reliance on omissions, and the availability of the "fraud on the market" argument typically deployed in the US – though as noted below, this is set to be considered in the *Barclays* litigation); and (ii) the appropriate methodology for calculating loss.

In the last 12 months specifically:

- Some opportunities for judicial examination of substantive issues in respect of Section 90 and Section 90A claims did arise, albeit in the interlocutory context:
  - In December 2023, in the *G4S* litigation, the High Court concluded (on both substantive and procedural grounds) that claimants could not rely on the principle that a company cannot assert privilege against its shareholders (except for privileged material created for litigation against those shareholders). A recent judgment in the *Glencore* litigation indicates that certain claimants intend to revisit this question.
  - In June 2024, the Court of Appeal issued its first judgment on a Section 90A claim, dismissing an appeal in the *Standard Chartered* litigation concerning aspects of the claimants' pleading. This judgment provides

important guidance on pleading dishonesty, both in securities claims and more generally – including confirming that a "*measure of generosity*" should be afforded to claimants in cases featuring an asymmetry of information prior to disclosure.

- In July 2024, in the *Barclays* litigation, the High Court heard the defendant's application challenging so-called "indirect reliance" cases that (in broad terms) have parallels with the "fraud of the market" argument typically deployed in US securities litigations. Judgment is expected later in 2024.

- Heavily anticipated opportunities for the examination of substantive issues after a trial of a Section 90A claim were lost following reported settlements of the *G4S* and *Serco* litigations. Those settlements mean that the first trial of a Section 90A claim is now expected to be in the *Barclays* litigation, the first trial of which is listed for 10 weeks in October 2025.

As the securities litigation market in England and Wales continues to boom, any and all future judgments on claims under Section 90 and Section 90A are likely to be the subject of sustained scrutiny, from claimants, defendants and other relevant market participants alike.

Collective Data Protection Litigation: New Avenues for Data Subjects in the UK?

Data subject claims for compensation

The UK General Data Protection Regulation ("**UK GDPR**") and the Data Protection Act 2018 ("**DP Act**", and collectively, with the UK GDPR, "**UK Data Protection Law**") allow the Information Commissioner's Office ("**ICO**") and affected "data subjects" to commence regulatory enforcement action (which could result in, for example, administrative fines) and claims for compensation, respectively, against organisations and individuals allegedly infringing these laws. We consider the latter topic in this chapter.

The UK GDPR provides that data subjects "*who ha[ve] suffered material or non-material damage*" arising from an infringement may "*receive compensation from the [data] controller or processor for the damage suffered*". While controllers are "*liable for the damage caused by processing*" infringing UK Data Protection Law, processors are liable in narrower circumstances, namely when the processor has infringed (the far fewer) obligations directed at processors or has "acted outside or contrary to lawful instructions of the controller". In addition, the UK GDPR – potentially – allows data subjects to mandate non-profit organisations (which have been pre-approved by the UK government) to bring data protection claims on the data subject's behalf. This mechanism, if realised, could allow such organisations to bring a collective action on behalf of data subjects, though the UK government is yet to pre-approve any such organisations.

Other UK Data Protection Law principles (such as potential joint and several liability for controllers and processors in certain circumstances, and assertions that compensation be "*full and effective*") present a potentially pro-data subject legal position with respect to obtaining compensation under UK Data Protection Law. However, in practice, many of these points remain untested in UK courts because of the relative absence of collective data protection litigation in the UK – largely arising from procedural hurdles to bringing such claims.

As detailed in the 2024 chapter, the UK Supreme Court's decision in *Lloyd v. Google* from 2021 erected a significant hurdle for claimants wishing to pursue "opt-out" collective actions for breaches of the Data Protection Act 1998 (predecessor to the UK GDPR and the DP Act). In that case, the Supreme Court blocked an attempt to pursue claims for breaches of the Data Protection Act 1998 using a CPR 19.8 representative action. The last 12 months have shown that claimants are continuing to attempt to identify potential workarounds to the judgment in *Lloyd*, presenting continued uncertainty for organisations who may be defendants in such collective litigation.

Potential New Workarounds to Procedural Hurdles?

In the 2024 chapter, we documented the various unsuccessful attempts by claimants to circumvent the judgment in *Lloyd* and establish something akin to an "opt-out" case management framework for data protection class actions. This included: (i) the decision in *Prismall v. Google* from May 2023 in which the High Court summarily dismissed an attempt to deploy a CPR 19.8 representative action for a misuse of private information claim; and (ii) recent cases – including the High Court's judgment in *Beck v. Police Federation* – that called into question the availability and/or appropriateness of Group Litigation Orders for certain data protection claims.

Taken together, those developments appeared to substantially limit the procedural routes by which claimants can seek to pursue collective action claims in UK courts in respect of alleged breaches of their data protection rights.

However, as anticipated in the 2024 chapter, claimants have continued to explore potential avenues for identifying procedural routes that facilitate the pursuit of data protection collective claims. A number of developments have provided guidance on the future shape of the law in this area.

First, a new framework appears to be emerging based on "lead claimants". That framework (which has now been adopted in the *Beck v. Police Federation* litigation) sees claimants joined to a "typical" opt-in action, with a sub-set of claimants (the "lead claimants") selected to act as test claimants. Under this approach, the Court determines the common issues and the quantum payable to each lead claimant, with those determinations intended to allow for the damages payable to the remaining claimants to be calculated.

Second, in February 2024, the Competition Appeal Tribunal ("**CAT**") approved its first competition-based data protection class action, in a ruling that may lead to a number of further actions by which claimants (wishing to avail themselves of the "opt-out" procedure available in the CAT) seek to frame UK Data Protection Law-related claims relating to data collection practices into competition-based actions. In that case, Dr Liza Lovdahl Gormsen, an international competition law expert, secured permission to act as class representative on behalf of *c.* 46 million UK consumers in a claim based on allegations that Meta (the parent company of Facebook) had abused its market dominance by only allowing consumers to use Facebook in exchange for signing up to allegedly onerous terms and conditions that give Meta control of their personal data. Having first refused Dr Gormsen's initial attempt to certify the claim (in part because it considered that part of the claim was "*extraordinarily difficult to pigeonhole as an abuse of a dominant position… these allegations seem to us not to be competition law infringements at all*"), the CAT recognised that a "*branch and root*" reformulation of the claim had occurred and issued a landmark ruling giving permission for the *c.* £2.1 billion opt-out claim to proceed.

Three further points also create extant uncertainty about the procedural routes by which claimants could pursue data protection collective claims:

- As regards CPR 19.8 representative actions:
  - The *Prismall* decision is set to be appealed, giving the Court of Appeal a further opportunity to provide guidance on CPR 19.8 representative actions in the data protection context.
  - Whether this procedural tool can be deployed for breaches of the UK GDPR and the DP Act remains untested – as examined in the 2024 chapter, the High Court in 2022 accepted that there may be sufficiently material differences between the relevant sections of the UK GDPR and the DP Act, on the one hand, and its 1998 predecessor, on the other hand, that *Lloyd v. Google* could be distinguished.
- There may be scope to contend that the decision from the *Beck v. Police Federation* litigation calling into question the availability of GLOs for data protection class actions could be distinguished in circumstances where a defendant has not admitted liability.

Many key aspects of UK Data Protection Law relating to compensation for data subject remains untested. From a procedural perspective, claimants have continued to pursue innovative strategies to overcome the putative hurdles to collective data protection litigation arising from the *Lloyd* decision in 2021. Meanwhile, substantively, a decision on one or more key points of uncertainty could lead to a fundamental shift in the landscape, and form the basis of future collective actions. This is why, outside the context of collective actions, many organisations (keen to avoid the risk of the floodgates opening) take very seriously the defence of (even relatively) small-value data protection claims brought by single (or small) groups of claimants in local courts.

Competition: Evolving Standards in Certification of UK Collective Actions

Section 47B of the Competition Act 1998 ("**CA98**") enables either stand-alone or follow-on proceedings to be initiated collectively by an authorised class representative ("**CR**"). This is contingent upon the issuance of a Collective Proceedings Order ("**CPO**") by the CAT following a "certification" stage where the CAT evaluates whether a proposed action can advance.

2023 saw a surge in high-value, opt-out collective actions in the CAT, with claimants seeking damages in the hundreds of millions or even billions. This reflects the growing attractiveness of the collective actions regime for pursuing large-scale competition law claims. The certification stage is a critical moment in determining whether a class action may proceed, and operates as an early filter for the suitability of claims.

Certification Criteria

Certification is the initial stage involving an assessment of the suitability of the proposed CR and the claims themselves, ensuring they meet the "authorisation" and "eligibility" conditions. Section 47B(5) of the CA98 requires the CR's role and the claims to align with defined criteria, including the clear identification of a class, the commonality of the issues among the class members, and the overall suitability of the claims for collective adjudication (including a plausible methodology for calculating damages on a class-wide basis).

First condition: authorisation

Pursuant to the authorisation condition, established in Section 47B(8) of the CA98 and Rule 78 of the CAT Rules 2015 ("**the Rules**"), the CAT may authorise an individual to act as the CR, irrespective of whether they are a member of the class. However, authorisation is contingent upon the CAT concluding that it is "*just and reasonable for that person to act as a representative in those proceedings*".

Under Rule 78, the CAT must consider if a CR would "*fairly and adequately act in the interests of the class members*" and ensure that they do not have a material interest conflicting with those of the class. The rule also considers the suitability of the applicant compared to others, and the organisational nature (i.e., whether it is a pre-existing body and its relevant functions) of the applicant if not a class member.

The CAT's considerations extend to logistical matters. The CR must present a detailed plan including their litigation strategy, updates for the class, and a clear outline of governance, consultation processes, and cost management. If there are sub-classes, possessing unique common issues not shared by the broader class, the CAT may authorise separate representation under similar criteria.

Second condition: eligibility

According to Section 47B(6) of the CA98, claims are only eligible if they "*raise the same, similar or related issues of fact or law*" and are deemed suitable for collective proceedings. This eligibility is closely tied to what the Rules define as "*common issues*".

Rule 79 outlines specific criteria that the CAT must consider in certifying claims as eligible. The claims must represent an identifiable class of persons and raise common issues. Additionally, the CAT assesses the appropriateness of collective proceedings for resolving issues efficiently and fairly, the comparative costs and benefits, the existence of related individual claims by class members, the class's size and nature, the clarity in class membership definition, the suitability for an aggregate award of damages, and the availability of alternative dispute resolutions or voluntary redress schemes. In deciding whether collective proceedings should be opt-in or opt-out, the CAT considers the strength of the claims and the practicality of managing opt-in collective proceedings weighed against expected damages recoverable by individual class members.

Key Themes in Recent Cases

Certification hearing not a "mini-trial" but CR must provide a "blueprint to trial"

The Supreme Court's ruling in *Merricks v. Mastercard* lowered the bar for certification as far as eligibility is concerned, holding that the CAT is not to conduct a mini-trial but should assess whether claims are suitable for collective proceedings based on a plausible methodology for calculating damages. However, recent decisions suggest a shift towards a more rigorous approach, particularly regarding the "blueprint to trial" requirement.

In *London & South Eastern Railway & Ors v. Gutmann*, the Court of Appeal emphasised the need for the proposed CR to provide a methodology developed by expert economists at the certification stage. The methodology ought to "*posit how the market would operate absent the alleged unlawful conduct and provide a benchmark against which to measure a defendant's* *actual conduct*" – i.e., identifying a workable counterfactual to serve as a benchmark for assessing harm suffered. In considering whether the proposed methodology is adequate, the CAT will apply the test established in Canadian case-law, *Pro-Sys Consultants v. Microsoft*. This involves evaluating whether legal and factual issues can be suitably addressed as a class, rather than through individual actions.

Subsequently, in *McLaren v. MOL & Ors*, the Court of Appeal refined aspects of the test, requiring, for example, the CR to show that the data underlying the methodology exists and can be obtained. In relation to the level of detail required at the certification stage, the Court said that while it will "*be fact and context sensitive*" that "*underlying the [Pro-Sys] test is the proposition that if a claim is certified then the methodology offered by the class representative will provide an initial blueprint for the parties and the CAT of the way ahead to trial*". This does not mean any methodology is "*set in stone*" – the CAT can revisit the methodology at any stage.

Following *McLaren*, in *Gormsen v. Meta Platforms*, the CAT refused to certify the action due to deficiencies in the proposed methodology. Citing *Pro-Sys*, it observed "the methodology must offer a realistic prospect of establishing loss on a class-wide basis" and that a blueprint should include a clear plan for the resolution of evidential gaps or issues at the time of certification. Reliance on future disclosure will not suffice. In *Gormsen*, the CAT allowed the CR to "have another go" and certification was granted a year later based on a revised methodology.

Certification in cases involving litigation funding arrangements

In relation to the authorisation condition, questions have primarily focused on CR funding. In July 2023, the Supreme Court's landmark judgment in *PACCAR* classified many existing litigation funding arrangements ("**LFAs**") as "damages-based agreements" ("**DBAs**") with stringent enforceability criteria. That judgment therefore raised questions about the enforceability of the funding arrangements for many current and prospective collective actions in England and Wales – particularly affected were opt-out collective proceedings, where DBAs are explicitly prohibited by law.

PACCAR created uncertainties in the litigation funding landscape where DBAs had frequently supported opt-out proceedings. This prompted funders to adapt remuneration structures and to call for legislative changes. A draft Bill was introduced in March 2024 to reverse the effect of *PACCAR*. However, despite strong cross-party support, that Bill was not enacted before the dissolution of Parliament triggered by the 2024 General Election. The re-introduction of that Bill is not one of the new administration's legislative priorities: the UK Government has now indicated that it will "*take a more comprehensive view of any legislation*" on litigation funding following the Civil Justice Council's ("**CJC**") review of the industry, which is expected to produce a report in Summer 2025 that will – in addition to considering *PACCAR* – examine broader structural issues relevant to the litigation funding market, including cost recoverability and exemplary damages.

Meanwhile, the CAT will continue to approach concerns arising out of *PACCAR* pragmatically, permitting adjustments to LFAs to resolve issues. Notable cases such as *Neill v. Sony* and *Kent v. Apple* have tested these waters, with the CAT permitting amendments to ensure LFAs do not constitute DBAs – e.g., linking recoveries to a multiple of a funder's investment rather than percentages of damages. Permission to appeal these cases has been granted. The Court of Appeal is likely to issue important guidance for funders, CRs and defendants alike.

Aggregate damages: challenges in calculation and distribution

The introduction of aggregate damages represents a significant departure from the traditional approach to damages assessment in competition cases. This mechanism allows the CAT to assess damages for the entire class rather than on an individual basis, raising several legal and practical challenges. The distribution of aggregate damages also raises complex issues, particularly in opt-out cases where class members may be difficult to identify and locate. The CAT has indicated that it will consider a variety of distribution mechanisms, including *cy-près* awards and the use of claims administrators, to ensure that damages are distributed fairly and efficiently. In *Le Patourel v. BT Group PLC*, the CAT explored the possibility of distributing damages through account credits, highlighting the potential for novel solutions in this area. The Court of Appeal in this case stated that it would be a "*retrograde step*" to limit the concept of "*distribution*" to traditional forms of damages.

Certification Stage: Strategic Considerations

The evolving landscape of certification in competition collective actions presents opportunities and challenges. For claimants, securing certification requires meticulous preparation, robust evidence, and clear articulation of the common issues and proposed methodology for calculating damages. Choosing between opt-in and opt-out mechanisms also requires careful consideration, as it can significantly impact the size and composition of the class. The recent rise in carriage disputes, as seen in *Hunter v. Amazon.com* and *Hammond v. Amazon.com*, highlights the importance of early strategic planning and coordination among multiple claimants to avoid conflicts and to ensure efficient case management. Defendants, on the other hand, increasingly focus on identifying vulnerabilities in the proposed class definition and the underlying funding arrangements, challenging the alleged commonality of issues, and raising concerns about the suitability of the claims for collective redress.

Climate Change Litigation: What to Expect From the EU Class Action Directive

Unlike in the United States, class actions in the EU have not been widespread to date, partly because civil procedure law in many Member States has not provided suitable procedural instruments for pursuing class actions. However, there is a major legislative development ongoing in the EU, paving the way for collective redress in Europe.

As noted in the 2024 chapter, the Representative Actions Directive (Directive 2020/1828) aims to create a harmonised regime for collective redress mechanisms in the EU. This is reached by introducing "representative actions", enabling Qualified Entities to bring actions on behalf of consumer groups. This measure is intended to ensure that consumers can enforce their rights more efficiently and that companies can be held accountable for breaches of consumer protection laws.

This development creates new routes for consumers to take collective action against large companies that are alleged to be contributing to climate change, as demonstrated by collective climate actions being pursued by a large number of (international) claimants before German civil courts.

Regulatory Content

At its core, the EU Class Action Directive ("**the Directive**") stipulates that so-called Qualified Entities are authorised to assert the consumer claims listed in its Annex I by means of representative actions, including cross-border actions against defendants.

However, the Directive only sets out the minimum requirements for representative actions that the Member States must transpose into national law. Individual Member States are therefore authorised, at their discretion, to transpose the Directive into national law in a way that goes beyond the Directive's minimum standards.

Scope of the Directive

Annex I of the Directive covers a large number of other EU directives relating to consumer protection, including data protection, financial services, tourism and environmental law. The Directive therefore has a broad scope covering a wide range of different sectors.

Qualified Entities

One of the central elements of the Directive is the definition and recognition of Qualified Entities. These organisations are authorised to take legal action on behalf of identified consumer groups. This so-called "opt-in principle" represents the main difference to the US "opt-out principle" where claimants that fall within the relevant class are automatically covered by the class action. Qualified Entities must: (i) not be profit-oriented; (ii) have a legitimate interest in ensuring compliance with the infringed legal provisions; and (iii) have proven experience in representing consumer rights.

These provisions are intended to ensure that only reputable and competent organisations (such as NGOs or environmental associations) are authorised to bring representative actions.

Mechanisms for representative actions

The Directive requires Member States to introduce two main types of remedies into national law:

- Injunctive measures: National courts or competent administrative authorities must have the ability to issue injunctions that aim to stop unlawful practices and prevent them from being repeated (Article 8 of the Directive).
- Redress measures: National courts must have the power to issue measures (including orders for compensation, reimbursement, repair, replacement, or the reduction of a purchase price) that are intended to ensure that consumers are compensated for any damage suffered (Article 9 of the Directive).

Cross-border cooperation

The Directive promotes cross-border cooperation by enabling Qualified Entities to bring claims in different Member States if consumers are affected by infringements that take place in several countries (Article 5 of the Directive).

Such cross-border cooperation is likely to facilitate the pursuit of climate claims in particular, because consumers are likely to contend that matters such as climate change and environmental damage do not recognise national borders and can therefore affect consumers in many countries equally.

Implementation in the Member States

EU Member States have been slow to implement the Directive. For example, in Germany, the Directive was not transposed into national law until 12 October 2023 through the German Act on the Enforcement of Association Claims ("**VRUG**").

Germany opted to implement the Directive expansively by amending its national law far beyond the minimum requirements: "all civil law claims" can now be asserted by way of representative action. Further, the Consumer Rights Enforcement Act ("**VDuG**") now also provides for the so-called redress action (*Abhilfeklage*) through which collective actions seeking damages/compensation can now be pursued. The procedure can be described as follows:

- Pursuant to Section 4(1) of the VDuG, a representative action is admissible if the Qualified Entity that brings the action can demonstrate that at least 50 consumers are affected by the redress action. Consumers must actively opt in, but this can be done in text form (including, e.g., text messages and emails), without legal representation, free of charge and even up to three weeks after the conclusion of the oral hearing.
- In accordance with Sections 16 *et seq.* of the VDuG, court proceedings are divided into three phases. First, there is an examination of merits of the claim. Second, if the claim is found to be admissible and well founded, an invitation for the parties to find an amicable settlement will be issued. Third, if those negotiations fail, the proceedings will proceed through to final judgment.

A judgment on redress may, if necessary, include an order for the defendant to pay a collective total amount to meet any justified claims of the participants, which sum will be distributed by a court-appointed trustee. The trustee examines the claims filed by consumers and set up an implementation fund. As part of the trustee's role for assessing each individual's eligibility, the trustee can also request that they provide evidence and declarations.

Possible Impact on Future Climate Litigation

NGOs and environmental organisations, especially in Germany, now have the potential opportunity to seek to become Qualified Entities and pursue climate actions (in the form of a redress action) on behalf of a large number of affected consumers. These actions are likely to be seen by those Qualified Entities and campaigners as a way to increase pressure on large companies to take steps with respect to climate change.

There is a significant rise of climate litigation in Germany outside the context of collective actions. So far, German courts have been reluctant to confirm the violation of fundamental rights of individuals. However, as this is a new area of law that is developing quickly, it is possible that the German courts will take a different approach in the near future.

A closely watched case in that regard concerns claims issued by a Peruvian farmer against one of the largest German energy companies (Higher Regional Court Hamm, File no.: 5 U 15/17). In this case, the claimant seeks compensation for the costs of building a dam around his property due to the glacial lake above his house threatening to overflow. The claimant argues that the defendant energy company is partly responsible for the melting of the glacier due to its CO_2 emissions. The court scheduled an evidential hearing in Peru (which took place in May 2022), and judgment is expected in the second half of 2024.

Further, lawsuits initiated against large German car manufacturers were recently dismissed by three different appeal courts. A decision of the German Federal Supreme Court is pending. In those cases, the claimants sought an order preventing the production of cars with gas engines by 2030, arguing that the production and sale of cars with gas engines would deplete the CO_2 budget of future generations. So far, it has been (the appeal courts have concluded/argued) that there is no danger of first infringement on the basis that there is no imminent risk of the damage alleged. However, it remains to be seen whether this will change in the upcoming months and years.

(Each of the cases above were not brought using the newly introduced redress action mechanism.) The creation of the redress action mechanism, which makes it possible for environmental associations and NGOs to file climate change lawsuits as collective actions, will likely lead to increased litigation risk and pressure on defendant companies, including in the form of higher value claims. It is therefore to be expected that the Directive and its resulting legislative developments will have a huge impact on the climate litigation landscape in Germany, and beyond.

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