HOUTHOFF CLASS ACTION SURVEY

A 360-degree analysis of class action trends in 12 jurisdictions

In collaboration with:

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Houthoff
Class Action Survey

This publication is made for informational purposes only and not for the purpose of providing legal advice.

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Contents

Foreword

Thank you for your interest in our class action survey.

Class actions are a significant concern for many of our clients. They must navigate a landscape where, in Europe, borders are becoming less defined and competition is intensifying, while in other parts of the world, barriers are rising and free trade is declining. At the same time, rapid scientific and technological advancements, alongside disruptive developments such as climate change and geopolitical instability, pose significant challenges.

Moreover, our clients face increasing regulation from governments striving to manage these changes and developments while also empowering consumers to assert their rights. In such a volatile business environment, decisions can have unwanted or even unforeseen consequences, potentially impacting large groups across multiple jurisdictions. Modern technology readily facilitates a mass response to these consequences.

Against this backdrop the Representative Actions Directive (EU) 2020/1828 has come into force, requiring EU Member States to ensure that qualified entities have the right to bring – cross-border – collective actions to enforce consumer rights and obtain remedies for affected parties.

The growing complexity and scale of society are reflected in an increasing complexity and scale of potential legal disputes. Our clients are experiencing first-hand how this trend is challenging traditional methods of resolving legal disputes. They face growing societal demand to facilitate the aggregation of litigation, a topic that is being pushed to the forefront of legal debate by NGOs, consumer organisations and other stakeholders. It is clear that new forms of aggregated litigation bring various challenges, dynamics and exposures, and could create new legal markets that attract different parties and service providers, such as third party litigation funders.

When discussing aggregated forms of litigation, the US class action system often serves as a reference point. This jurisdiction, with its long history and distinctive class action cases, stands apart from others in many ways. While often praised, other jurisdictions

are wary of potential "American scenarios" and "US-style class actions". This has led them to seek different approaches to collective actions. It remains to be seen whether the path chosen within the EU offers a better alternative: where are we headed, and how will these developments impact businesses and their operations?

At Houthoff, we observe that today's business climate is undergoing pivotal changes, presenting new challenges for dispute resolution. Addressing these challenges requires staying informed about new trends and legislation. We believe that a deeper understanding of how class actions function in various jurisdictions is crucial for understanding, assessing, anticipating, avoiding, and, if necessary, resolving today's complex international mass claims cases. We hope these insights provide valuable practical strategies for all involved.

The results of the previous Survey 2019 assisted the business and legal community significantly. Building on that foundation, our current research extends to 12 jurisdictions, providing an even broader perspective. With this in mind, our Class Actions Team sent out questionnaires and had interviews with various experts (claimants' lawyers, defence lawyers, third party litigation funders, general counsel and legal counsel) from these 12 jurisdictions. In our discussions, we analysed each jurisdiction's class action history, important recent developments, and the current situation, enabling us to anticipate potential future developments. The conclusions from these valuable discussions are compiled in this publication.

Without the essential input from these experts and the efforts of our team members at Houthoff, we would not have been able to share our findings with you. We sincerely believe that advancing our field, particularly in the area of class actions, requires collective effort. We hope this publication represents another step towards that goal.

We extend our heartfelt gratitude to everyone involved for their contributions, especially to Arthur Cox, Cleary Gottlieb, Gide, Gómez-Acebo & Pombo, Legance, Liedekerke, Macfarlanes, Morais Leitao, Noerr, S. Horowitz & Co and Wolf Theiss for collaborating on this project. Your collective efforts, expertise and introductions have been invaluable to the success of this survey. We are profoundly grateful for the dedication you have shown throughout this journey.

Albert Knigge

Executive summary

1. Introduction

1.1. Welcome

1.1.1. In 2019, we published the first edition of the *Houthoff Class Action Survey*. Five years later it was time for a new edition, as a lot has happened in the class action field since then. Embarking again on this comprehensive research of class actions across various jurisdictions and stakeholders has been an enlightening journey. The rich tapestry of insights from our *2024 Houthoff Class Action Survey* (Survey) is now available to you.

1.1.2. The jurisdictions covered in the Survey are Belgium, France, Germany, Ireland, Israel, Italy, Poland, Portugal, Spain, the Netherlands, the UK and the US.

1.1.3. Class actions have become an increasingly significant aspect of legal and business operations worldwide. They serve as a powerful tool for collective redress and collective settlements, enabling groups of individuals or entities to seek justice for common grievances. However, the rise in class actions also introduces new risks and complexities: both in finding suitable and safe procedures and in preventing unnecessary high revenues benefitting parties who did not suffer damages.

1.1.4. This Survey aims to shed light on the broad spectrum of issues, providing a detailed overview of the current state of class actions in the researched jurisdictions and offering predictions for future developments.

1.1.5. This executive summary strives to encapsulate the diverse opinions and expectations shared by the experts on some of the main topics in Chapter 2. Chapter 3 gives you more detailed information on the Representative Actions Directive (RAD).[1] However, I invite you to also delve into the various interviews with an open mind, appreciating the treasure of information in this publication. I believe the Survey illuminates the nuanced and multifaceted nature of class actions as seen through the different perspectives of those at the forefront of this field. To this end, you will find footnote references to experts who elaborate on specific topics and statements.

1 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (OJ L 409, 4.12.2020, p. 1).

1.1.6. If you are interested in the specific legislative state of affairs of each country, you will find an overview with the current legislation and pending bills in the beginning of each country chapter.

1.2. Methodology

1.2.1. The methodology for this Survey involved a multifaceted approach to gather data and insights from various jurisdictions and stakeholders. Each jurisdiction was examined in detail to understand the specific legal frameworks, key cases and emerging trends that define its class action landscape. However, we have adapted the level of research according to both the relevance of the jurisdiction and the number of developments over the past five years.

1.2.2. We conducted in-depth interviews via questionnaires and orally with subject leaders, including legal experts, business executives, third party litigation funders and others. These interviews provided first-hand accounts of the state of affairs, challenges and opportunities associated with class actions in different legal environments.

1.2.3. In addition to the interviews, we reviewed recent legislative changes, court cases, and academic literature to ensure a comprehensive understanding of the subject matter. The Survey also draws on the findings from our *2019 Houthoff Class Action Survey*, allowing us to compare and contrast developments over the past five years.

1.2.4. Enjoy reading!

2. Collective redress: main findings and insights

2.1. Leading types of collective redress cases

2.1.1. In Europe, the current leading types of class actions are (in alphabetical order):

a. class actions related to consumer products and passenger rights;[2]

b. data breach related claims;[3]

2 Belgium (Vanden Berghe, Van den Brande and Kesteloot); France (Azar-Baud; Dimitrov); Germany (Huebert); Poland (Gąsowski and Gerlich); Portugal (Sousa Ferro; Macedo); Spain (Arévalo; González; Macedo); The Netherlands (Knigge; Lemstra and Alberga-Smits; Rutten); UK (Day).

3 France (Azar-Baud); Germany (Schläfke); Italy (Geronzi); Portugal (Sousa Ferro; Macedo); The Netherlands (Knigge; Lemstra and Alberga-Smits; Rutten); UK (Day).

c. environmental, social and governance (ESG) litigation against companies;[4]
d. financial litigation against banks and other financial institutions or insurance companies;[5]
e. follow-on competition and anti-trust claims;[6]
f. judicial review of government policies often related to climate change or public measures;[7] and
g. shareholders litigation.[8]

2.1.2. A trend in Israel and the US that has not yet fully arrived in Europe is pension- related issues.[9] However, these are expected to gain traction in the Netherlands.[10] Other US trends that have not led a significant increase of European class actions are asbestos, tobacco and opioid litigation,[11] as well as false advertising cases against companies for misleading claims regarding their sustainability targets and achievements, and natural products.[12]

2.2. EU: RAD as major driver, but culture is even more important

2.2.1. Class actions have seen significant growth and evolution in Europe since our last survey in 2019. The implementation of the RAD across EU Member States will likely be a major driver of the continuation of this change. The RAD requires each Member State to introduce a collective redress mechanism, including compensation, for EU consumer law infringements. It also aims to harmonise those mechanisms across the EU, providing a more consistent framework for class actions. All EU jurisdictions that we examined, except for France and Spain,

4 Spain (Macedo); The Netherlands (Knigge; Lemstra and Alberga-Smits; Rutten); UK (Lasserson).
5 France (Dimitrov, although he notes these types of actions are mostly not brought by means of a group action); Italy (Geronzi); Poland (Gąsowski and Gerlich); Spain (Arévalo; Macedo); The Netherlands (Bruins Slot); UK (Lasserson).
6 France (Dimitrov), Germany (Huebert; Makatsch and Stieglitz); Portugal (Sousa Ferro; Macedo); Spain (Arévalo; Macedo); The Netherlands (Knigge; Rutten); UK (Day; Lasserson).
7 France (Azar-Baud; Dimitrov); Poland (Gąsowski and Gerlich); Spain (Arévalo); The Netherlands (Knigge; Lemstra and Alberga-Smits; Rutten).
8 Belgium (Vanden Berghe, Van den Brande and Kesteloot); Portugal (Macedo); The Netherlands (Rutten); UK (Lasserson).
9 Israel (Zamir); US (Bensman and Cooper).
10 The Netherlands (Knigge).
11 US (De Cazotte)
12 US (Bensman and Cooper; Scott). This is not yet a trend in the EU, despite occasional court cases, such as the Amsterdam District Court judgment of 20 March 2024, ECLI:NL:RBAMS:2024:1512 (KLM).

have transposed the RAD (as of September 2024). However, despite the implementation of the RAD, we see that there are major differences between the Member States in the field of collective redress.

2.2.2. One of these differences seems to stem from the legal culture of each country. At one end of the spectrum, countries like the Netherlands[13] and Portugal[14] seem to have a broadly welcoming attitude towards it. In the Netherlands, the implementation of the RAD does not make a substantial difference, and one could even say it limited the existing options for ad hoc vehicles.[15] In contrast, Portugal's new law offers a more structured framework for class actions, enhancing the existing mechanisms.

2.2.3. At the other end of the spectrum is Belgium, a jurisdiction where class actions will likely not see a surge in popularity, even though it has made some efforts to make collective proceedings more attractive.[16] The same will likely be true for Italy, a jurisdiction which may need some time to fully accept the concept of collective redress.[17] Also for Poland, the effects of implementing the RAD are still uncertain. It has not yet developed a strong class action culture despite the availability of class actions since 2007, but the implementation of the RAD could increase the popularity of class actions.[18]

2.2.4. For some cultures, the RAD is expected to have a substantial impact. It has led to substantial legislative changes in Ireland, which previously had no mechanism for collective redress. This development might lead to Ireland becoming a key jurisdiction for class actions in Europe due to being the largest common law jurisdiction in the EU and home to numerous multinational companies.[19] Similarly, in Germany, the RAD has led to substantial legislative changes which may also lead to cultural changes. This marks the first time a collective action

13 The Netherlands (Bruins Slot; Knigge; Lemstra and Alberga-Smits).
14 Portugal (David and Vaz Sampaio; Sousa Ferro).
15 The Netherlands (Knigge; Rutten).
16 The most significant changes aim to streamline the process and make it more attractive by shortening the admissibility phase and standardising the opt-in process. Additionally, the opt-in process will be postponed until after the judgment on the merits. See: Belgium (Vanden Berghe, Van den Brande and Kesteloot).
17 Italy (Geronzi).
18 Poland (Gąsowski and Gerlich).
19 Ireland (Sweeney; Willis).

for redress measures, including compensation to class members, has become available.[20]

2.2.5. France and Spain have not yet implemented the RAD. However, it is unlikely that France will become a particularly attractive jurisdiction for collective redress.[21] Even if the current parliamentary draft, which includes the introduction of civil fines to be paid to the Treasury, is implemented and brings some important changes.[22] In contrast, Spain's draft bill is expected to significantly impact the popularity of the class action regime. It will introduce opt-out class actions, replacing the current opt-in system, and expand the scope beyond the RAD's provisions.[23] Some even expect that Spain could become a new frontrunner in consumer redress.[24]

2.3. Other EU legislation

2.3.1. Other EU legislation and European court decisions are generally also perceived as drivers for class actions.[25] In the upcoming years, EU legislation is anticipated to have an even greater impact on class actions.[26]

2.3.2. Data breaches and other infringements of the General Data Protection Regulation (GDPR) are prime examples for representative actions due to their widespread effects and the high level of 'rational apathy' among consumers.[27] The Dutch example shows a substantial number of GDPR claims being brought.[28] In Ireland, this will likely be one of the prime areas that will see a rise for claims due to the presence of numerous multinational tech companies.[29]

2.3.3. The Product Liability Directive,[30] the Unfair Terms Directive and the Unfair

20 Germany (Schläfke); UK (Victoria).
21 France (Azar-Baud; Dimitrov).
22 France (Dimitrov).
23 Spain (Arévalo; González).
24 Spain (Macedo).
25 Germany (Huebert; Schläfke).
26 Portugal (Sam); The Netherlands (Lemstra and Alberga-Smits; Rutten).
27 Belgium (Vanden Berghe, Van den Brande and Kesteloot).
28 The Netherlands (Knigge; Lemstra and Alberga-Smits). However, Rutten (The Netherlands) points out that these cases might have lost some appeal to funders due to recent setbacks in jurisprudence.
29 Ireland (Willis).
30 Including the proposal for a new directive on liability for defective products to update the existing PLD.

Commercial Practices Directive have been and will likely continue to be key pieces of EU legislation driving class actions.[31]

2.3.4. Another relevant body of EU legislation mentioned as potentially fuelling class action growth are regulations included in the 'Digital Services Package': the Digital Markets Act[32] and the Digital Services Act.[33] One interviewee mentioned the AI Liability Directive.[34] Also, the Corporate Sustainability Reporting Directive and Corporate Sustainability Due Diligence Directive are often mentioned as legislation that will trigger collective redress actions.[35] One expert further pointed to the Directive on empowering consumers for the green transition as being relevant in this respect.[36] When adopted, this could also be true for the Directive on Green Claims.[37]

2.3.5. Although the UK post-Brexit is no longer part of the Acquis Communautaire, some of these reforms, notably on the Product Liability Directive, may be mirrored in the UK.[38]

2.4. Main developments in Israel, UK and US

2.4.1. Outside the EU, there were also relevant developments. These are driven by jurisprudence.

2.4.2. In the US, this has not been a seminal change. Class actions have become a standard practice since they were introduced over 50 years ago. However, the volume and variety of class actions continue to evolve and varies with contemporary legal developments.[39] Clear trends include increasing scopes of class actions, a movement towards 'mass' arbitrations and an uptick in frivolous suits in certain states.[40] It is considered a very costly system.[41]

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31 Portugal (David and Vaz Sampaio); The Netherlands (Knigge; Lemstra and Alberga-Smits; Rutten).
32 France (Dimitrov); Germany (Schläfke); Ireland (Willis); Portugal (David and Vaz Sampaio); Spain (Macedo).
33 Portugal (David and Vaz Sampaio); The Netherlands (Lemstra and Alberga-Smits; Rutten).
34 UK (Victoria).
35 Germany (Richter); Portugal (David and Vaz Sampaio); The Netherlands (Knigge; Lemstra and Alberga-Smits); UK (Victoria).
36 Portugal (David and Vaz Sampaio).
37 Portugal (David and Vaz Sampaio).
38 UK (Day).
39 US (Scott)
40 US (Bensman and Cooper; De Cazotte).
41 US (De Cazotte).

2.4.3. The most relevant change in the UK has been the significant increase in the number and types of collective actions for competition damages in the UK's Competition Appeal Tribunal (CAT). There is a trend for shoehorning claims as an infringement of competition law to take advantage of the opt-out regime of the CAT, which is not otherwise available in the UK.[42]

2.4.4. Israel, like the US, has a very well-developed class action system, leading to relatively the largest number of class actions worldwide. Clear trends include the Supreme Court limiting 'de minimis' class actions, i.e. actions on behalf of parties who suffered separately insignificant damage, and a further increase in early settlements, often before the merits of the case are assessed.[43]

2.5. Third party litigation funding

2.5.1. Another main driver, beside legislation and jurisprudence, for significant growth and evolution of class actions, or lack thereof, is the availability and regulation of funding.[44] In the US and Israel, class action funding is typically undertaken by law firms that obtain contingency fees if they win or settle the case.[45] In the UK and in some EU Member States, funding is often provided via third party litigation funding (TPLF). Italy has also introduced a 'reward fee' system for representatives and claimants' attorneys.[46]

2.5.2. In 2019, TPLF was still relatively nascent in many jurisdictions. Now, funders, mostly from the US, UK or Australia, are initiating and enabling class actions aimed at obtaining damages on a broad scale in the EU.[47] TPLF is also introducing new challenges and discussions related to transparency, conflicts of interest and regulatory oversight.[48] Critics and supporters of TPLF typically fall into two groups: defendants and their lawyers on one side, and representative organisations, funders, and their lawyers on the other.[49]

42 UK (Day; Lasserson).
43 Israel (Zamir).
44 Germany (Huebert); Portugal (Ben); The Netherlands (Knigge; Philips); UK (John; Victoria); US (Bensman and Cooper; De Cazotte).
45 Israel (Zamir); US (Bensman and Cooper).
46 Italy (Lorenzo).
47 France (Azar); Germany (Huebert); Italy (Lorenzo); Spain (González; Martínez); The Netherlands (Knigge); US (Bensman and Cooper; De Cazotte).
48 Portugal (Sam); The Netherlands (Bruins Slot); US (De Cazotte; Scott).
49 The Netherlands (Philips).

2.5.3. The main complexities often mentioned are that i) the funders' motives and interests are not always aligned with those of the individual class members whose claims they fund while ii) funding agreements and the investors behind such funding agreements often remain undisclosed.[50] This leads some companies to take the stance of not settling any claim involving TPLF.[51]

2.5.4. In countries where funding is readily available and barely regulated, there is a clear rise in damages class actions.[52] This availability of funding is often linked with the opportunity to bring class actions on an opt-out basis.[53] Funders often mention that certainty regarding the application of class action regulations is crucial for the possibility of offering TPLF.[54]

2.5.5. If funding is prohibited or restricted, it is not expected that damages class action claims will see a rise. The RAD does not impose Member States to allow TPLF but stipulates certain minimum conditions if TPLF is allowed (see § 3.10). Examples of regulations going beyond the RAD requirements are found in the following EU countries:

a. Germany: TPLF is subject to stringent conditions under the VDuG, including a cap on the funder's share of proceeds at 10% and the fact that a qualified entity cannot receive more than 5% of its financial resources from TPLF.[55] However, there are also measures to provide state funding and limit court fees for the claimants.[56]
b. Ireland: TPLF is currently prohibited.[57]
c. Italy and Portugal: qualified entities must disclose their funding arrangements to the court and the defendant.[58]
d. Poland: a TPLF agreement must be filed along with the collective claims submitted.[59]

50 Germany (Voss); Israel (Zamir); Spain (González); The Netherlands (Knigge); UK (John); US (De Cazotte).
51 Portugal (Ben).
52 Portugal, The Netherlands, US and UK. See US (Bensman and Cooper; De Cazotte).
53 Belgium (Vanden Berghe, Van den Brande and Kesteloot); France (Azar-Baud calls opt-out "the main loophole of the French system"); Germany (Schläfke); Ireland (Aidan); Israel (Zamir).
54 Italy (Lorenzo); Portugal (Macedo).
55 Germany (Huebert; Richter; Schläfke).
56 Germany (Huebert).
57 Ireland (Aidan; Willis).
58 Italy (Geronzi); Portugal (Overview; Sousa Ferro; David and Vaz Sampaio).
59 Poland (Gąsowski and Gerlich).

e. Spain: the funding agreement is examined at a hearing attended by the claimant, defendant, the funder and their lawyers. Courts can impose varies measures to ensure the agreement's confidentiality.[60]

2.5.6. In the UK, the Supreme Court ruled that certain litigation funding agreements are considered damage-based agreements, and thus, unenforceable.[61]

2.5.7. In some countries, self-regulatory codes of conducts are available:

a. The Netherlands: the self-regulatory Claim Code 2019 includes principles that aim to ensure the independence of the interest organisation from the funder.[62]

b. UK: a voluntary code of conduct overseen by the Association of Litigation Funders.[63]

2.5.8. One of the questions is who is to pay the cost of the TPLF.[64] Portugal seems to be the only EU country to date that has regulated that unclaimed redress funds will be used to pay, amongst others, the funder.[65] In the UK, a class representative can request in a CAT proceeding to be paid all or part of any undistributed damages to pay its funder.[66]

2.6. Environmental, social, and governance issues

2.6.1. All experts expect that environmental, social and governance (ESG) issues will become an ever more significant area for class actions. This applies both to the 'core issues' of such claims, such as NGOs suing for specific policy changes, and to 'financial derivatives' such as shareholder claims, for instance, in cases of ESG-related misrepresentation or failure to deliver on ESG commitments. The Netherlands is seeing an increasing number of cases pertaining to alleged ESG-related infringements outside the EU.[67]

2.6.2. Until now, most ESG litigation has focused on climate change and environmental impacts, with many climate lawsuits targeting governments and energy sector

60 Spain (Macedo).
61 UK (Day; Lasserson).
62 The Netherlands (Lemstra and Alberga-Smits; Rutten).
63 UK (Day; Lasserson).
64 The Netherlands (Knigge).
65 Portugal (Overview; Sousa Ferro; Macedo).
66 UK (Day).
67 The Netherlands (Knigge; Lemstra and Alberga-Smits).

companies engaged in high-carbon activities, or those financing such activities.[68] However, an increasing number of other companies, such as consumer goods companies, can expect to also be sued.[69] The next trend in this regard could be plastic pollution litigation.[70] The fact that a company has a clear pathway to reduce greenhouse gas emissions does not mean it is shielded from climate change litigation.[71] This type of claim is also partially driven by TPLF.[72]

2.6.3. The 'social' and 'governance' claims could also very well become an increasing trend in Europe as is already the case in Israel and in the US.[73]

2.7. Globalisation and legal tech

2.7.1. Finally, a notable trend is the increasingly global perspective of class actions and class settlements. These are no longer confined to single jurisdictions but are becoming more interconnected across borders.[74]

2.7.2. Technological advancements in the mass distribution of goods and services mean that errors, defects and unlawful acts can impact millions of people in a very short period. These same technological innovations also facilitate large groups in coordinating efforts, seeking legal counsel, publicising their experiences and even applying political pressure in the different countries.[75] It also enables semi-automated systems sending claim letters.[76]

2.7.3. There are no global class action litigation mechanisms in place to handle such cross-border cases.[77] However, there are already similar cases for claimants in different countries who proceed simultaneously or consecutively in multiple countries, often worldwide initiated and coordinated by a US law firm or a litigation funder. This interconnectedness brings new complexities, as parties

68 Italy (Lorenzo); The Netherlands (Knigge; Lemstra and Alberga-Smits).
69 E.g. Poland (Gąsowski and Gerlich); Spain (Arévalo); The Netherlands (Lemstra and Alberga-Smits; Rutten).
70 US (De Cazotte; Scott).
71 The Netherlands (Bruins Slot).
72 US (De Cazotte).
73 Israel (Zamir); US (Bensman and Cooper; Scott).
74 Germany (Schläfke).
75 Germany (Huebert; Makatsch and Stieglitz); The Netherlands (Lemstra and Alberga-Smits); UK (Day).
76 Israel (Zamir).
77 Israel (Zamir).

may need to litigate class actions and negotiate settlements that span different legal systems. International collaboration and coordination are becoming essential. It is questionable whether the RAD's provisions provide enough basis for this collaboration in the EU on the claimant's side.

2.8. Alternatives to collective redress

2.8.1. The bundling of claims through assignment of individual claims to a claim organisation or by providing the claim organisation with a mandate remains a popular alternative to collective redress in the EU.[78] This is especially the case in countries where an opt-out class action model is lacking.[79] But even in the Netherlands, such alternatives are unfailingly popular.[80] This is not true for Portugal where these are barely applied.[81]

2.8.2. In the UK, litigation by mandate or the assignment of claims is generally not used for group claims,[82] but there is a workaround through the lead claimant model in which common issues between a number of cases are identified and tried via a small number of lead claims.[83] In the US, multidistrict litigations are used as an alternative to class actions.[84] The use of claims assignment in the US class action context is not widespread, and the ability to assign claims varies across states.[85]

2.8.3. Another alternative route is bringing test cases. In Ireland, this is mainly done through 'pathfinder cases' that serve as a test case for other pending cases.[86] Spain also has the opportunity to bring 'test cases', but its application is limited to general terms and conditions.[87] In the Netherlands, individual test cases have been brought parallel to class actions.

78 Belgium (Vanden Berghe, Van den Brande and Kesteloot); Germany (Huebert; Richter); Italy (Lorenzo); Spain (Arévalo; Macedo); The Netherlands (Knigge).
79 France (Dimitrov); Germany (Richter; Schläfke).
80 The Netherlands (Knigge; Philips; Rutten).
81 Portugal (Sousa Ferro; Macedo; David and Vaz Sampaio).
82 UK (Lasserson).
83 UK (Day).
84 US (Bensman and Cooper).
85 US (Scott).
86 Ireland (Willis).
87 Spain (Arévalo).

2.9. Abuse

2.9.1. The potential rise in frivolous claims is occasionally noted as a consequence of commercial TPLF.[88] However, most interviewees believe this risk is low for the EU. This is because key drivers associated with frivolous lawsuits in the US, such as jury trials, pre-trial discovery, and punitive damages, are generally not available in the EU.[89]

2.9.2. A more frequently occurring form of abuse, according to mainly defendant representatives, is filing disproportionate class action claims.[90] One interviewee called this predatory litigation.[91] Some claimants' representatives describe the lack of a well-functioning class action system or certain defences raised by the defendants as abuse.[92]

2.9.3. Court scrutiny based on clear regulations is generally mentioned as preventing any form of potential abuse of the class action system.[93] One recent example of court scrutiny in the Netherlands is a first instance court announcing it would limit the funder's success fee to a maximum of five times the total invested amount.[94] UK regulations do not limit the percentage funders obtain, which recently sparked a debate after the *Post Office Horizon* case where funders reportingly took up to 80% of the damages.[95] In the UK, the potential exposure to an adverse cost order generally deters spurious and speculative claims.[96]

2.10. Class settlements

2.10.1. Only the Netherlands has specific settlement legislation that enables a court to declare a settlement binding even if no class action is initiated, but this system is

88 Germany (Makatsch and Stieglitz); Ireland (Aidan warns that this could be the case if TPLF will be allowed without any restrictions or regulations); Israel (Zamir).
89 Germany (Huebert; Makatsch and Stieglitz; Richter); Italy (Lorenzo points to an appeal judgment in the Volkswagen case in which the compensation order was reduced from 200 to 20 million due to lack of evidence of actual harm suffered); The Netherlands (Knigge; Philips; Rutten); UK (Victoria).
90 Israel (Zamir); Portugal (Ben; David and Vaz Sampaio; Sousa Ferro); Spain (Arévalo); The Netherlands (Knigge); UK (Day).
91 UK (John)
92 Italy (Lorenzo); Portugal (Macedo).
93 Italy (Geronzi); Portugal (Sousa Ferro); Spain (Macedo); The Netherlands (Lemstra and Alberga-Smits; Rutten); UK (Day; Lasserson).
94 The Netherlands (Lemstra and Alberga-Smits).
95 UK (Lasserson).
96 UK (Lasserson).

not frequently used;[97] one expert even called it 'effectively obsolete'.[98] However, all researched jurisdictions provide the opportunity to have a collective settlement declared binding within the context of a class action or will provide such after the implementation of the RAD. The requirements usually consist of some type of court scrutiny examining the reasonableness of the settlement.[99] In Poland, a settlement requires the consent of more than half of the group members in the class action.[100] In Israel and the US, the pressure to settle is often due to the high cost of the litigation that cannot be recovered from the claimant.[101]

2.11. Impact on businesses

2.11.1. The recent legislative changes and trends in class actions have significant implications for businesses operating in the EU, which should expect a rise in class actions.[102]

2.11.2. Class actions are not just like another type of normal legal proceedings.[103] One of the primary challenges is navigating the new regulatory landscape, which is particularly challenging in cross-border cases.[104] Another challenge is the sheer potential volume of the envisaged class and the reputational risks associated with such massive class actions.[105] These actions are often used to create broad support for the case and to exert pressure, for which the representative organisation will usually try to attract significant media attention and public scrutiny.[106] This can impact a company's brand image and consumer trust, making it essential for businesses to proactively manage their public relations and stakeholder communications.[107] In particular, opt-out systems like those in the Netherlands and Portugal can lead to large classes and high potential liabilities.

97 The Netherlands (Lemstra and Alberga-Smits).
98 The Netherlands (Knigge).
99 Germany where it only applies to VDuG cases (Huebert), Poland; The Netherlands.
100 Poland (Gąsowski and Gerlich).
101 Israel (Zamir); UK (Victoria); US (Bensman and Cooper).
102 Germany (Makatsch and Stieglitz; Voss); Italy (Fonzi).
103 The Netherlands (Bruins Slot).
104 France (Sophie); Germany (Voss); Italy (Fonzi); UK (John).
105 Portugal (Sam).
106 The Netherlands (Bruins Slot; Knigge).
107 France (Sophie); Portugal (Ben).

Other challenges are managing the extensive filings and analysis,[108] and coordinating with external counsel.[109]

2.11.3. Class actions do not alter the core business but do change the risk profile and cost of doing business due to the challenges mentioned above.[110] They also impact innovation since more extensive testing must take place to cover the legal risks and prepare for potential defence.[111] The possibility for class actions necessitates a proactive approach to risk management, compliance, effective communication and stakeholder engagement within and outside the company.[112]

2.12. Conclusion

2.12.1. It is clear that the landscape of class actions is both dynamic and intricate. Looking ahead, the future of class actions will undoubtedly be further shaped by ongoing legislative developments, evolving legal cultures, technical developments and the growing influence of TPLF. Various EU legislation and ESG issues will be key areas to watch. Additionally, class actions are expected to increasingly adopt a global perspective, especially if a case is settled. These developments will influence the way companies do business.

3. Representative Actions Directive

3.1. Introduction

3.1.1. As discussed in the previous chapter, the RAD has been a game changer in the realm of class actions within the EU.[113] This is true for all Member States who did not already have a system for collective redress in place. But its transposition in national law has also brought about significant differences in how collective redress is pursued and managed across Member States. More importantly, it supports the ongoing trend of collective global litigation. The RAD aims at minimum harmonisation, and its implementation differs across the EU.

3.1.2. Below are the RAD's key features. If you are interested in the specific legislative

108 Portugal (Sam).
109 Portugal (John); Spain (Martínez).
110 Germany (Voss); Italy (Fonzi); UK (John).
111 UK (John).
112 France (Sophie); Germany (Voss); Italy (Fonzi); The Netherlands (Bruins Slot).
113 Portugal (Ben); US (De Cazotte).

state of affairs of each country, you will find an overview of the current legislation and pending drafts at the beginning of each country chapter.

3.2. Scope

3.2.1. The RAD's scope is limited to protecting specific consumer interests. It applies to representative actions brought against infringements of specific provisions of EU consumer law listed in Annex I of the RAD, by "traders". A trader is any natural or legal person acting – directly or through another person – for purposes relating to that person's trade, business, craft or profession.

3.2.2. Only organisations or public bodies representing consumers' interests that Member States have designated as "qualified entities" can bring a representative action.

3.3. Domestic and cross-border actions

3.3.1. The RAD distinguishes between "domestic" and "cross-border" representative actions. Whether an action is considered domestic or cross-border depends on where the qualified entity is designated and where it brings its claim. The domicile of the consumers and traders involved does not matter.

3.3.2. If a qualified entity brings an action in the Member State in which it is designated, the action is considered a domestic representative action. If it brings an action in another Member State, the action is considered a cross-border representative action.

3.3.3. Whether an action is cross-border or domestic is relevant for the designation as a qualified entity and the standing requirements. An organisation that aims to bring cross-border actions must be designated beforehand by the Member State as a qualified entity. An organisation that aims to bring domestic actions can also be ad hoc and be 'designated' as qualified by the court when assessing its standing. The standing requirements are discussed below.

3.4. Standing

3.4.1. An organisation must fulfil six requirements to be eligible to be designated as a qualified entity that can bring cross-border representative actions. It must:

a. be a legal person, properly constituted according to the law of the Member

State of its designation, which has been engaged in actual activities on consumer protection during the previous 12 months;

b. have a legitimate interest in consumer protection according to its articles;
c. be a non-profit;
d. not be insolvent or the subject of insolvency procedures;
e. be independent and have procedures preventing it from (i) being influenced by third parties with an economic interest in bringing representative actions and (ii) conflicts of interest between itself, its funding providers and consumers; and
f. publicly disclose certain information, such as compliance with these criteria.

3.4.2. Qualified entities that can bring cross-border representative actions are entered on a list published by the Commission. Being listed proves standing, but a court may examine if the action brought falls within the scope of the objects of the qualified entity according to its articles. The national rules should enable the defendant to challenge compliance with these criteria in court.

3.4.3. Member States are free to decide whether the same standing requirements apply to qualified entities that bring domestic actions or if they are subject to other national requirements.

3.5. Admissibility

3.5.1. The court must examine the admissibility of a representative action under the provisions laid down in the RAD and in national law. If it finds that the case is manifestly unfounded, the court must be able to dismiss it at the earliest possible stage of the proceedings in accordance with national law.

3.5.2. Member States can choose whether they require a minimum number of consumers represented in the action, or to what degree the interests of the consumers represented in the action must be sufficiently similar, so that they can be bundled.

3.6. Types of relief

3.6.1. Member States must ensure that qualified entities can claim at least "injunctive relief" and "redress measures":

a. Injunctive relief includes measures to cease or prohibit an infringing practice,

or an order to publish a decision that certain practices constitute an infringement of consumer law or a corrective statement.

b. Redress measures include paying compensation, replacing a product, reducing or reimbursing the purchase price paid or terminating a contract, as available under EU or national law. Punitive damages are not permitted (although not explicitly prohibited) to prevent misuse of representative actions.

3.7. Opt-in/opt-out

3.7.1. In the case of a claim for redress, the consumers concerned must be able to expressly or tacitly indicate whether they wish to be represented in the action brought. Therefore, the consumers must be timely and adequately informed about the action. Qualified entities must provide information, particularly on their website, about ongoing and future representative actions.

3.7.2. Member States can choose an opt-in mechanism or an opt-out mechanism, or a combination of both. In any case, consumers domiciled in a Member State other than the state in which the representative action is brought can only be represented on an opt-in basis. If an injunction is sought, an opt-in or opt-out mechanism is not required.

3.7.3. The consumers who are represented in the action for redress are bound by its outcome, even if the collective action is dismissed. However, they can still claim any relief that was not claimed in the representative action.

3.8. Limitation periods

3.8.1. Limitation periods must be suspended or interrupted by pending representative actions for injunctive relief, so that the consumers represented in the action can bring subsequent actions. The same applies to actions for redress.

3.9. Collective settlements

3.9.1. According to the RAD, collective settlements should be encouraged. Settlements reached during representative actions for redress must be assessed by a court to be binding on the consumers represented in the action. Approval can be denied if the settlement is contrary to mandatory national law or includes provisions that cannot be executed. Member States may establish rules allowing the court to

refuse approval if the settlement is deemed unfair. Approved settlements bind the qualified entity, the trader and the consumers represented in the action. Member States may provide the possibility to opt in or opt out of the settlement.

3.10. Funding

3.10.1. Third party litigation funding is allowed, if permitted by national law. However, Member States must ensure that conflicts of interest are avoided in representative actions for redress. Litigation funding by a third party that has an economic interest in bringing an action or its outcome cannot "divert the representative action away from the protection of the collective interests of consumers". Specifically, (a) the third party cannot unduly influence the decisions that the qualified entity makes about the representative action, including settlements; and (b) the representative action cannot be brought against a funder's competitor or a defendant on whom the funder is dependent.

3.10.2. If reasonable doubts arise, the court can examine whether the funding arrangements of a qualified entity comply with the RAD's provisions. The entity must disclose a financial overview of its funding sources to the court. If these funding sources do not comply, the court may take appropriate measures, such as requiring the qualified entity to refuse or change the funding or denying the qualified entity standing in the action.

3.10.3. Public funding is also allowed because Member States must ensure that procedural costs do not prevent qualified entities from effectively bringing representative actions.

3.11. Costs

3.11.1. Qualified entities may require a modest participation fee or similar charge from consumers who wish to be represented in a specific action for redress.

3.11.2. The losing party in a representative action for redress must pay the other party's litigation costs, according to the national law that applies to court proceedings. Individual consumers represented in the action shall not pay any procedural costs, except in cases of intentional or negligent conduct.

3.12. Conclusion

3.12.1. The RAD has significantly reshaped the minimum framework for collective redress in the EU. It has introduced a harmonised system that addresses gaps in Member States lacking existing mechanisms and supports the trend towards global collective litigation.

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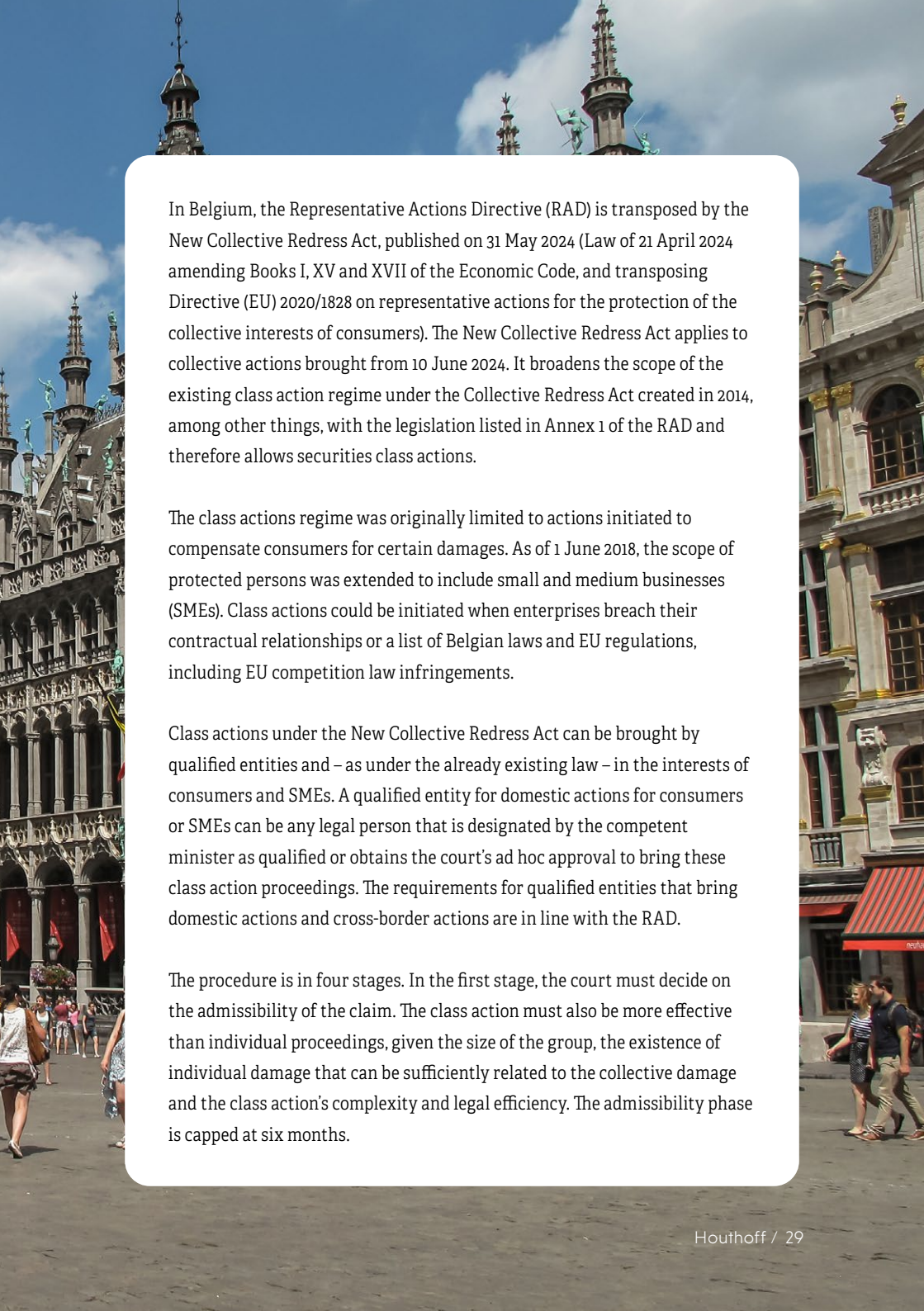
Belgium



In Belgium, the Representative Actions Directive (RAD) is transposed by the New Collective Redress Act, published on 31 May 2024 (Law of 21 April 2024 amending Books I, XV and XVII of the Economic Code, and transposing Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers). The New Collective Redress Act applies to collective actions brought from 10 June 2024. It broadens the scope of the existing class action regime under the Collective Redress Act created in 2014, among other things, with the legislation listed in Annex 1 of the RAD and therefore allows securities class actions.

The class actions regime was originally limited to actions initiated to compensate consumers for certain damages. As of 1 June 2018, the scope of protected persons was extended to include small and medium businesses (SMEs). Class actions could be initiated when enterprises breach their contractual relationships or a list of Belgian laws and EU regulations, including EU competition law infringements.

Class actions under the New Collective Redress Act can be brought by qualified entities and – as under the already existing law – in the interests of consumers and SMEs. A qualified entity for domestic actions for consumers or SMEs can be any legal person that is designated by the competent minister as qualified or obtains the court's ad hoc approval to bring these class action proceedings. The requirements for qualified entities that bring domestic actions and cross-border actions are in line with the RAD.

The procedure is in four stages. In the first stage, the court must decide on the admissibility of the claim. The class action must also be more effective than individual proceedings, given the size of the group, the existence of individual damage that can be sufficiently related to the collective damage and the class action's complexity and legal efficiency. The admissibility phase is capped at six months.

If the claim is admissible, there is a mandatory negotiation period to allow the parties to seek an amicable settlement (second stage). If they cannot, the procedure continues on the merits of the case (third stage), but the parties may still settle the dispute at any time before the court issues a decision on the merits. Any settlement agreement is to be endorsed by the court.

Opt-in is the rule. Opt-out will only apply in the unlikely scenario where the parties agree to opt out of a settlement. However, opt-out is prohibited in the case of physical or moral harm. Consumers or SMEs must opt in within four months after the ruling of redress.

Finally, a claims handler will be appointed to ensure the beneficiaries receive the compensation they are entitled to (fourth stage).

Third party litigation funding (TPLF) is allowed but not regulated in any way other than by meeting the RAD requirements. The rules on legal costs and the delayed opt-in mechanism make TPLF unattractive. Therefore, class actions are quite rare in Belgium

Class actions | Rechtsvordering tot collectief herstel/Action en réparation collective | Collective Redress Act | New Collective Redress Act

Scope	Breach of contract or infringement of specific legislation regarding e.g. consumer issues, product liability, competition, GDPR and the legislation listed in Annex I RAD.
Access granted to	Qualified entities representing the interests of consumers and SMEs recognised by a competent minister; an entity without ministerial recognition can apply for an ad hoc approval by the court.
Opt-in or opt-out	Opt-in is the rule; parties can agree on opt-out in the amicable settlement. Opt-in is mandatory if the consumers and SMEs do not reside in Belgium, or in the case of physical or moral harm.
Declaratory relief or damages	Damages; no declaratory relief.

Frequently used	No
Regulatory framework	Title 2 of Book XVII of the Belgian Code of Economic Law (inserted by Law of 28 March 2014); Law of 21 April 2024 amending Books I, XV and XVII of the Economic Code, and transposing Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers.
Alternatives used in practice	Actions for the protection of a collective interest; joined actions of multiple claimants.

Class settlements

Binding class members after court approval	The homologation decision binds all group members, pursuant to the exercise of their opt-in right.
Opt-in or opt-out	In principle, opt-in, unless the parties agree to apply opt-out in the collective settlement agreement. Opt-in is mandatory if the consumers and SMEs do not reside in Belgium, or in the case of physical or moral harm.

Third party funding

Regulated by law	Only RAD requirements which entail that a condition for being recognised as a qualified entity is being free from external influence, including the third party litigation funder.
Frequently used	No

Good to know

Despite the RAD and the limited implementation it requires, a surge in popularity for class actions in Belgium is not expected, even though some efforts have been made to make the procedure more attractive. The system currently lacks appeal for third party litigation funding.

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17 June 2024, editors: Albert Knigge, Luce Mulder, Rosalie Becker and Isabella Wijnberg

The future of Belgian class actions: the rise of ESG actions

We recently had the opportunity to speak with three prominent Belgian lawyers: Olivier Vanden Berghe, Sarah van den Brande and Jean Pierre Kesteloot, all lawyers at Liedekerke. Olivier leads the firm's Commercial Contracts and Litigation Practice, and has been representing large businesses for over 25 years. Sarah is an all-round litigator who focuses on the intertwined legal areas of intellectual property, technology, database rights and market practices. Jean Pierre specialises in transport and aviation, and serves as a defence lawyer in group actions. It proved to be an interesting journey on class action litigation in Belgium – or lack thereof, European class action legislation and the position of Belgian third party litigation funders.

The Representative Action Directive and its implementation

Since the last Class Action Survey, the RAD has come into force. Interestingly, the Belgian Parliament adopted a law on 18 April 2024 to amend the existing one on representative actions to implement the RAD. "The Belgian legislation was already quite

compliant with the RAD, so the implementation did not require many changes. However, Belgium managed to be late in its implementation once again," says Olivier with a smile.

The most relevant statutory changes are not related to the RAD but to the already existing procedure for collective redress. The Belgian government aimed to make the procedure smoother and more attractive by shortening the "admissibility phase" and ending the time-consuming opt-in/op-out debate in favour of making opt-in as a standard.

The changes apply to any representative action introduced on or after 10 June 2024.

Representatives for consumers and SMEs

In Belgium, class actions for both injunctive and redress measures can be initiated not only for consumers but also for small and medium enterprises (SMEs) since 2018. Consumers and SMEs must be represented by different qualified entities, but the rules applicable to them are similar.

Qualified entities, with the exception of some public bodies and existing interprofessional organisations representing SMEs, must be recognised by the competent minister. The main conditions for such recognition include a non-profit purpose of protecting the interests of consumers or SMEs, at least 12 months of activity, independent from anyone who is not a consumer or an SME, and transparency in public communication regarding their activities and funding.

"The conditions for being a qualified entity have been slightly tightened in accordance with the RAD, but it is expected that the existing qualified entities will pass the new test and be granted approval," Sarah notes. They should not be a hurdle for representatives. Interestingly, Belgian law does not require any proof of funding: "The Belgian legislature trusts the professionalism of these recognised entities and takes them at their word in this regard. This could lead to unpleasant surprises if it appears that a representative had sufficient means to start proceedings but not to complete them," Jean Pierre adds.

Upon receiving recognition, which is valid indefinitely but subject to a compliance check at least every five years, the entity is entitled to initiate both domestic and transnational representative actions. This recognition can be revoked at any time if the conditions are no longer met. As Jean Pierre notes, "An entity without ministerial recognition still has the option to apply for ad hoc approval from the court when filing a request for a specific domestic representative action."

Representative actions are grounded in the consumer protection rules outlined in the RAD. However, they also encompass more general contractual liabilities and, in the case of SMEs, certain Belgian laws that regulate specific business-to-business relations. These laws include those that govern commercial agency and distribution agreements.

Streamlining the admissibility phase

Apart from the RAD, the most relevant change in Belgium in relation to class action litigation since 2019 has been the simplification and shortening of the admissibility phase of the trial. "This phase, which in the past took up to 17 months in cases like *Dieselgate*,[1] is now streamlined. It should be handled in 'short debates' and in any event within six months," Olivier explains. The opt-in/opt-out discussion has been removed from this phase, as well as the suitability check of the representative. From now on, the court will only need to verify whether the claimant is a qualified entity and whether its statutory objective is directly related to the action.

The court, in its proceedings, will naturally assess whether a case is appropriate to be presented as a representative action. This assessment takes into account the nature of the infringement and the characteristics of the harm suffered. A group obviously requires more than one potential victim, but strikingly there is no legal threshold, allowing the court to determine the required size to form a group. A representative action merely for the passengers of one delayed flight was considered admissible.[2]

1 Brussels Court of First Instance, Test *Achats/Volkswagen*, 27 July 2023, (https://economie.fgov.be/nl/themas/consumentenbescherming/rechtsvordering-tot-collectief/beslissingen/zaak-test-aankoop-tegen-vw).

2 Brussels Court of First Instance, *Test-Achats/Thomas Cook*, 4 April 2016 (https://economie.fgov.be/sites/default/files/Files/Consumer-protection/Vonnis-rechtbank-1e-aanleg-Brussel-class-action-Thomas-Cook-Airlines.pdf).

However, as Jean Pierre points out, "The court should not normally make an evaluation of the suitability of the group representative." There is one notable exception to this: when multiple qualified entities are vying to represent the same group, the court will select the most suitable one. The admissibility phase may not always be a mere formality, as both the defendant and the court could raise doubts about the group representative still meeting all the requirements, such as transparency and independence.

The legal culture and representative actions

The implementation of the RAD certainly fits into the legislative system that introduced representative actions back in 2014. However, the legal culture presents a different scenario. "Over the past decade, representative actions have not seen much success, with only ten cases initiated,"[3] Jean Pierre points out. Except for one action started by the public Belgian Consumer Mediation Service against six electricity suppliers (on early termination indemnities, a claim that was declared inadmissible)[4], all have been filed by the consumer organisation Test-Achats.

Four of these *Test-Achats* cases (against *SNCB*,[5] *Events Belgium* (and five other websites),[6] *Groupon*,[7] and *Facebook*[8]) have been settled before any judgment on the admissibility, two have been settled after the judgment confirming the admissibility (*Thomas Cook*[9] and *Ryanair*[10]), one has been declared unfounded

3 Only three decisions are published on the website of the Federal Public Service (https://economie.fgov.be/nl/themas/consumentenbescherming/rechtsvordering-tot-collectief/beslissingen-over-vorderingen), the other cases are mentioned on the Test-Achats website https://www.test-achats.be/toutes-les-actions.

4 Brussels Court of Appeal, *Belgian Consumer Mediation Service/Essent* a.o., 14 April 2021, (https://www.ombudsmanenergie.be/nl/faq/collectieve-rechtsvordering-vaste-vergoedingen-versus-verbrekingsvergoedingen).

5 Brussels Enterprise Court, *Test-Achats/SNCB*, 27 July 2017.

6 Brussels Court of First Instance, *Test-Achats/Events* Belgium and five other websites, 15 Mai 2018.

7 Brussels Court of First Instance, *Test-Achats/Groupon*, (https://www.test-aankoop.be/collectieve-acties/groepsvordering-groupon-compensatie).

8 Brussels Enterprise Court, *Test-Achats/Facebook*, (https://www.test-aankoop.be/collectieve-acties/facebook).

9 Brussels Court of First Instance, *Test-Achats/Thomas Cook*, 4 April 2016, (https://economie.fgov.be/sites/default/files/Files/Consumer-protection/Vonnis-rechtbank-1e-aanleg-Brussel-class-action-Thomas-Cook-Airlines.pdf).

10 Brussels Enterprise Court, *Test-Achats / Ryanair*, 7 December 2020, TBH, 2021, 528.

(*Proximus*[11]) and one has been successful (*Volkswagen*[12]). The claim against Apple for programmed obsolescence, started in 2020, is still pending[13] without a decision on the admissibility. Even Test-Achats appears to have less interest in such representative actions. It has not started any in the past years.

"The lack of interest is even more striking on the SME side," Olivier adds. Not one SME action has been introduced yet, probably because for SMEs there is no representative entity that has a similar publicity motive as Test-Achats on the consumers' side. Moreover, the more commercial SME mindset might be less inclined to litigation than consumer organisations.

Despite the RAD and the limited implementation it requires, Olivier does not expect a surge in popularity for such actions. "The government has made some efforts to make collective proceedings more appealing by shortening the 'admissibility phase', but on the other hand its new 'opt-in' process could make things even less attractive to potential group representatives."

Delayed opt-in becomes the standard

Previously, the group representative specified in its request how the group should be constituted, either by opt-in or opt-out. This was debated in the first phase of the procedure, the admissibility phase, even before any discussion on the merits of the case. The *Proximus* case[14] serves as an interesting example of the complexities involved in these legal proceedings. This case revolved around the forced replacement of purchased

11 Brussels Court of Appeal, *Test-Achats/Proximus*, 30 January 2019, (https://www.ejustice.just.fgov.be/cgi/article_body.pl?numac=2019700626&caller=list&article_lang=N&row_id=1&numero=1&pub_date=2019-02-20&sql=bron+%3D%27aank%27+and+pd+%3D+date%272019-02-20%27&language=nl&fromtab=+montxt).

12 Brussels Court of First Instance, *Test Achats/Volkswagen*, 27 July 2023 (https://economie.fgov.be/nl/themas/consumentenbescherming/rechtsvordering-tot-collectief/beslissingen/zaak-test-aankoop-tegen-vw).

13 Brussels Enterprise Court, *Test-Achats/Apple*, no admissibility decision yet (see https://www.demorgen.be/nieuws/testaankoop-zet-door-met-classaction-tegen-apple-wegens-het-vertragen-van-iphones~b848e449/.

14 Brussels Court of Appeal, *Test-Achats/Proximus*, 30 January 2019, (https://www.ejustice.just.fgov.be/cgi/article_body.pl?numac=2019700626&caller=list&article_lang=N&row_id=1&numero=1&pub_date=2019-02-20&sql=bron+%3D%27aank%27+and+pd+%3D+date%272019-02-20%27&language=nl&fromtab=+montxt).

decoders with rented ones. Initially, the court of first instance ordered an opt-out approach, but this decision was later changed to opt-in by the court of appeal. Jean Pierre notes, "The admissibility discussion alone took more than a year." However, all these discussions and changes ended up being much ado about nothing, as the court of appeal eventually rejected the claim on the merits.

Now, since June 2024, opt-in has become the standard, with the group being constituted only by those who expressly declare that they want to participate. More importantly, Olivier explains, the opt-in moment is now postponed until *after* the judgment on the merits holding the defendant liable. An opt-out class is still possible in theory, but only in the unlikely event it is agreed by both claimant and defendant in a settlement.

Regarding the statute of limitations, Sarah notes that Belgian law opts for the suspension of the limitation periods for individual claims. Once the collective procedure is over, the pending limitation period will resume, but it will not start over again.

Third party litigation funding

The cost of a representative action remains a significant barrier. "Proceedings' costs and lawyers' fees, although relatively cheap compared to other countries, can still be substantial," Olivier notes. Sarah explains that third party litigation funding (TPLF) is allowed in Belgium, provided there is transparency, independence, and no conflict of interest, as set out in the RAD. However, to date, all representative actions have been filed by the consumer organisation Test-Achats using its own funds, except for the unsuccessful action started by the public Belgian Consumer Mediation Service,[15] which used public funds.

Despite TPLF being theoretically allowed, Belgian representative actions for collective redress have never attracted third party funding. According to Olivier, this is unlikely to change. "The potential return on investment for a third party investor is limited, as punitive damages are excluded and the amount due by the defendant in addition to

15 Brussels Court of Appeal, *Consumer Mediation Service/Essent*, among others, 14 April 2021, (https://www.ombudsmanenergie.be/nl/faq/collectieve-rechtsvordering-vaste-vergoedingen-versus-verbrekingsvergoedingen).

the damages will never exceed the actual costs supported by the representative," he explains. Olivier continues, "Even the full recovery of lawyers' fees is not possible." The funder's income must therefore be levied on the damages awarded to the victims, which is even more improbable under the new delayed "opt-in" regime. Indeed, the group is only formed by opt-in and *after* the defendant has been ordered to indemnify the victims, making it unlikely that beneficiaries will each voluntarily waive part of their entitlement. This is particularly true since a court appointed administrator ensures that beneficiaries are paid.

Cross-border representative action and jurisdictional preferences

According to Sarah, the institutionalisation of cross-border representative action, which allows a qualified entity to start such an action in another Member State, has influenced the relevance of European jurisdictions for class actions. Belgium, for instance, is not expected to be among the top preferred jurisdictions when a choice is possible. This is due to the perception that Belgian court proceedings are slow, a view that has not exactly been disproved by past class actions, despite the new law's intention to speed up the process. "On the other hand, the Netherlands is generally considered a more class action-friendly jurisdiction. The introduction of the RAD has not significantly changed this perspective," Sarah adds.

Future trends in class actions

In the coming years, other EU legislation is expected to play a larger role in class actions. Specifically, data breaches and other violations of the General Data Protection Regulation (GDPR) are seen by Sarah as cases with the typical ingredients that make representative actions relevant, such as scattered effects and consumers with a high degree of 'rational apathy'. "These are expected to be among the most relevant grounds for future class actions," Sarah predicts. Additionally, investor protection, securities fraud or other financial services infringements are also expected to trigger class actions.

The state of class actions in Belgium

In Belgium, there have only been ten representative actions to date, with the majority concerning passenger rights. Jean Pierre explains that these include cases brought by

Test-Achats against *Thomas Cook* (air transport)[16], *SNCB* (rail transport)[17], and *Ryanair* (air transport)[18], making passenger rights the most common application for class actions in Belgium. All three actions were settled out of court at various stages of the proceedings. In the *Thomas Cook* and *Ryanair* cases, compensation was paid to the passengers concerned. In the *SNCB* case, the parties reached an out of court settlement involving an improved compensation scheme for passengers.

"Follow-on litigation has not really found its way to Belgian representative actions, while many of these cases could probably be suitable for such proceedings," Olivier notes. Maybe this lack of success is because once the "liability" is established, the long proceedings of the representative actions are perceived as a burden. This slows down the claims process, leading victims to prefer filing individually, if they believe the amount is worth the cost.

Future use of class actions and alternative methods of collective redress

Olivier expects the use of class actions to change, but not the type covered by the RAD. This expectation is driven by a general tendency to opt for grouped or mass actions over individual actions, not only for financial reasons but also because they garner more media attention.

Jean Pierre points out that numerous collection agencies have emerged in Belgium with the development of air passenger rights, their corporate objective being the recovery of lump sum compensation owed by air carriers to passengers based on Regulation (EC) 261/2004. These collection agencies are profit-making companies and therefore do not have the capacity to act in a representative action. Instead, they use alternative methods of collective redress, such as litigating by mandate or via assignment of claims. These agencies have, until now, not shown interest in more complex cases with individualised damages that are not in line with their business case.

16 Brussels Court of First Instance, *Test-Achats / Thomas Cook*, 4 April 2016 (https://economie.fgov.be/sites/default/files/Files/Consumer-protection/Vonnis-rechtbank-1e-aanleg-Brussel-class-action-Thomas-Cook-Airlines.pdf).
17 Brussels Enterprise Court, *Test-Achats / SNCB*, 27 June 2017.
18 Brussels Enterprise Court, *Test-Achats / Ryanair*, 7 December 2020, TBH, 2021, 528.

Claimants' lawyers often try to convince a large group of claimants to consolidate their claims in a single case against the same defendant to reduce legal costs. However, Belgian judicial law (apart from the representative action regime) is not really suitable for group litigation, Olivier points out. It is only permissible when separate claims are sufficiently connected, meaning there's a risk of incompatible decisions if they are brought separately. Merely having the same defendant and factual background is not enough to initiate a grouped procedure. Moreover, there is no concept of collective damage, and each claimant must invoke and prove their individual damage. This makes collective actions burdensome and likely to be slower than separate actions.

Class settlements and upcoming changes

Regarding class settlements, no upcoming changes are expected other than those brought about by the RAD. It is worth noting that, according to Sarah, negotiations with a view to a settlement were and remain mandatory. After the judgement declaring the claim admissible, the judge decides on a mandatory negotiation period of 3 to 6 months, which can be extended once by an additional 6 months, for a total maximum of 12 months. In the *Thomas Cook* case,[19] the negotiation period lasted for 6 months and 9 days before a settlement was reached. In the *Dieselgate* case,[20] this period lasted for 12 months but no settlement was reached. However, from now on, the court is not only entitled to extend, but also to early terminate the negotiation phase and start the merits phase if it appears a party is unwilling.

The likelihood of abuse of class actions

According to Olivier, Jean Pierre and Sarah, the likelihood of abuse of class actions in Belgium is considered low. This is because only 'ideological claimants' operating on a non-profit basis are permitted to initiate representative actions, and third party funding must be transparent.

19 Brussels Court of First Instance, *Test-Achats/Thomas Cook*, 4 April 2016 (https://economie.fgov.be/sites/default/files/Files/Consumer-protection/Vonnis-rechtbank-1e-aanleg-Brussel-class-action-Thomas-Cook-Airlines.pdf).

20 Brussels Court of First Instance, *Test-Achats/Volkswagen*, 27 July 2023 (https://economie.fgov.be/nl/themas/consumentenbescherming/rechtsvordering-tot-collectief/beslissingen/zaak-test-aankoop-tegen-vw).

When it comes to class actions, the Belgians often view the US as an example of what to avoid. "The general sentiment is that class actions should not be a means to make money, a perception that is commonly associated with US class actions," Olivier concludes.

The 'loser pays' rule

In Belgium, under procedural rules, there is a 'loser pays' rule. The winning party is entitled to a lump sum, which is a procedural indemnity for the lawyers' fees, depending on the value of the claim. For claims exceeding EUR 1,000,000, the standard indemnity is EUR 22,500, but this can be increased by the court up to EUR 45,000.

Significant class actions in Belgium

Over the past ten years, the most important class action in Belgium has been the *Dieselgate* case. Sarah explains that this case is significant as it led to a judgment on the merits by the Dutch-speaking Court of First Instance in Brussels. The court ordered the Volkswagen group to compensate the owners of diesel vehicles that were equipped with software that altered exhaust emission test results. Volkswagen was ordered to reimburse 5% of the purchase price of the vehicle to the owners, or 5% of the difference between the purchase price and the resale price if the vehicles had changed hands.

Climate litigation on the rise

As awareness of environmental issues increases, there is a growing trend towards climate litigation in Belgium. "Climate change liability is generally based on general tort law, which does not provide a legal basis for initiating a representative action," Olivier notes. As a result, these actions, whether aimed at injunction measures or damages, are generally brought using standard judicial procedures.

However, in terms of actions other than representative actions, the *Klimaatzaak* is considered the most important. The non-profit organisation Klimaatzaak, joined by thousands of individuals and even 58 trees, filed an injunction claim against the Belgian federal and regional public authorities. In a groundbreaking decision of 30 November 2023, the Brussels Court of Appeal ordered the Belgian State and the Flemish and Brussels regions to take the necessary measures to reduce greenhouse gas emissions in

Belgium by at least 55% by 2030.[21] Despite the controversy surrounding the case, legal authors have generally approved it. In a new case, a Belgian farmer named Hugues Falys has asked the Enterprise Court of Tournai to order TotalEnergies to reduce its gas emissions.[22] This case, which is financed by NGOs such as Greenpeace, has only one claimant.

The balance between assisting consumers and preventing abuse

From Olivier's perspective, the current balance in Belgium between assisting consumers and preventing abuse is appropriate. "It would not be desirable to further expand the range of cases that qualify for a representative action," Olivier states. "We believe it would not be desirable for representative redress actions to become the norm and individual cases the exception."

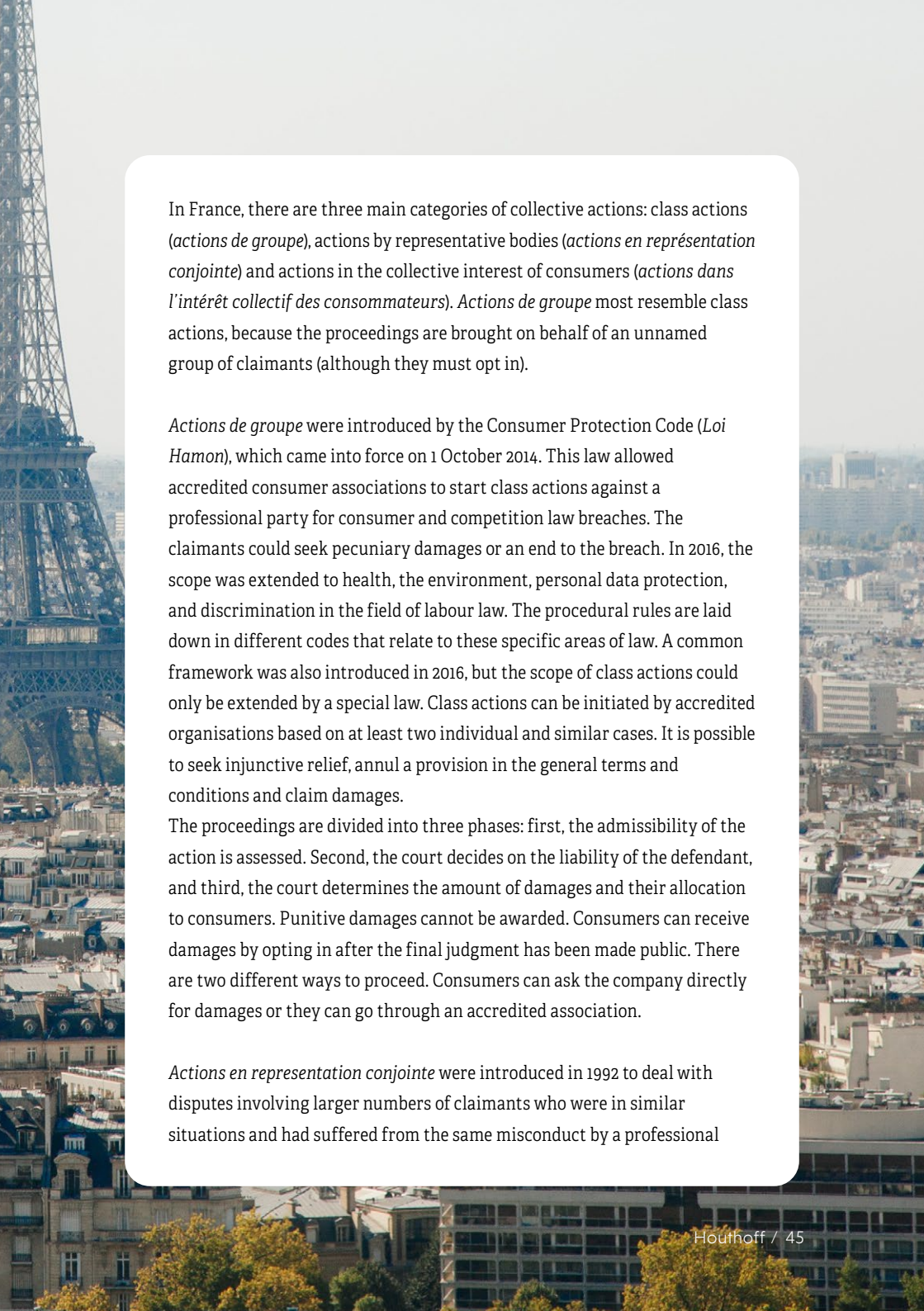
The future of class actions

According to Olivier, Jean Pierre and Sarah, the most important development in the Belgian future of class actions will be the increase in Environmental, Social and Governance (ESG) class actions, primarily climate liability actions. "This is a significant shift in the landscape of class actions, and we anticipate that it will bring about new legislative challenges, especially with the implementation of the Green Claims Directive," Sarah concludes.

As we continue to explore the evolving landscape of class action law in Belgium, we look forward to gaining more insights in the future from Olivier, Sarah and Jean Pierre.

21 Brussels Court of Appeal 30 November 2023, JLMB 2024, 356.
22 Tournai Enterprise Court, *Falys/TotalEnergies*, introduction hearing 16 April 2024, ongoing.

France



In France, there are three main categories of collective actions: class actions (*actions de groupe*), actions by representative bodies (*actions en représentation conjointe*) and actions in the collective interest of consumers (*actions dans l'intérêt collectif des consommateurs*). *Actions de groupe* most resemble class actions, because the proceedings are brought on behalf of an unnamed group of claimants (although they must opt in).

Actions de groupe were introduced by the Consumer Protection Code (*Loi Hamon*), which came into force on 1 October 2014. This law allowed accredited consumer associations to start class actions against a professional party for consumer and competition law breaches. The claimants could seek pecuniary damages or an end to the breach. In 2016, the scope was extended to health, the environment, personal data protection, and discrimination in the field of labour law. The procedural rules are laid down in different codes that relate to these specific areas of law. A common framework was also introduced in 2016, but the scope of class actions could only be extended by a special law. Class actions can be initiated by accredited organisations based on at least two individual and similar cases. It is possible to seek injunctive relief, annul a provision in the general terms and conditions and claim damages.
The proceedings are divided into three phases: first, the admissibility of the action is assessed. Second, the court decides on the liability of the defendant, and third, the court determines the amount of damages and their allocation to consumers. Punitive damages cannot be awarded. Consumers can receive damages by opting in after the final judgment has been made public. There are two different ways to proceed. Consumers can ask the company directly for damages or they can go through an accredited association.

Actions en representation conjointe were introduced in 1992 to deal with disputes involving larger numbers of claimants who were in similar situations and had suffered from the same misconduct by a professional

party. Initially, they were only an option for consumer protection, but the scope was extended to other sectors including the medical sector, financial services and investor protection, real estate and the environment. These proceedings can only be initiated by accredited associations. The action has a limited scope. Claimants can seek injunctive relief to put an end to an unlawful breach that causes damage, annul a provision in the general terms and conditions and claim damages. It is based on an opt-in system: each claimant must give a written mandate to the representative body to begin the action.

Actions dans l'intérêt collectif des consommateurs were introduced in 1973. Certified consumer associations can initiate actions for the benefit of all consumers. In this case, the damages are allocated to the consumer association to compensate damage to the collective interest of consumers.

The regulatory framework applicable to *actions de groupe* in France is about to be modified significantly with the implementation of the Representative Actions Directive (RAD). On 8 March 2023, the *Assemblée Nationale* (lower house of the Parliament) adopted a very ambitious bill with major changes to the current regime, including the transposition of the RAD. On 6 February 2024, the *Sénat* (upper house of the Parliament) adopted a much more restricted text than the one passed by the *Assemblée Nationale*. Considering the significant disagreements between the two chambers of the French Parliament and the dissolution of the *Assemblée Nationale* on 9 June 2024, the new regime is unlikely to enter into force in the near future. Thus, clarity is lacking regarding the content of the final draft and the date of implementation.

Class actions | Actions de groupe (RAD not yet transposed)

Scope	Consumer protection; competition damages; labour discrimination; environmental issues; medical and cosmetic products; data protection.
Access granted to	Accredited organisations.
Opt-in or opt-out	Opt-in
Declaratory relief or damages	Damages
Frequently used	No
Regulatory framework	Specific codes e.g. Consumer Protection Code (L n°2014-344/17), Environmental Code, Labour Code, Public Health Code (L n°2016-41/27), Public Justice Code (L n°2016-1547/18), Law n°78-17 on Information Technology, Data Files and Individual Liberties.
Alternatives used in practice	*Actions en représentation conjointe (L n°92-60/18), actions dans l'intérêt collectif des consommateurs* (L n°73-1193/27); digital platforms to bundle claims.

Class settlements

Binding class members after court approval	Yes, in class actions, often through mediation.
Opt-in or opt-out	Opt-in
Regulatory framework	Specific codes, see above.

Third party funding

Regulated by law	No
Frequently used	No

Good to know

- To date, 37 class actions have been lodged in around 10 years. Only one has resulted in a judgment holding the defendant liable.
- Litigating by mandate, or via the assignment of claims, raises serious concerns from a French procedural point of view.

Maria José Azar-Baud
Claimant Lawyer Perspective
Professor at the University of Paris-Saclay

12 July 2024, editors: Isabella Wijnberg and Caroline Devès

We should not expect a revolution

In the ever-evolving French legal landscape, class actions are slowly emerging as a tool for collective redress. Over the past five years, significant developments have shaped the field, impacting various sectors including consumer rights, health, discrimination, data privacy, and environmental matters. We sat down with Maria José Azar-Baud, a prominent figure in France in this field, to discuss these transformative changes and their implications. Maria José is notably a Professor (*Maître de conférences en droit privé*) at the University of Paris-Saclay and the founder and head of the Observatory of Class Actions and other forms of Collective Redress. She also acts as an independent counsel managing mass disputes as a lawyer and sits on the Executive Board of two European claim vehicles seeking, as claimants, to obtain access to justice on a collective scale for their constituency.

The gradual rise in class actions in France

Maria José highlights the gradual adoption of group actions since October 2014 in various fields including consumer law, health, discrimination, data, and environmental law. These collective lawsuits should empower individuals to seek justice collectively, amplifying their impact. However, Maria José notes that "group actions in France have been initiated only since 2014 so they constitute a relatively new phenomenon." The website of the Observatory of Class Actions, which she founded, reports a total of 37

group actions filed in France, spanning both judiciary and administrative courts.[1] Maria José adds "these cases cover a wide spectrum, from consumer disputes (20) to discrimination (12) health-related claims (3) and data privacy violations (2)."

Before the judiciary courts hearing namely on civil matters, four group actions have resulted in a settlement and seven have been rejected either at the admissibility stage or on substantive grounds. Notably, only one case resulted in a favourable decision on the merits, with the defendant being held liable in the health sector.[2] The other sixteen cases are seemingly still pending.

Before the administrative courts, only 9 group actions have been initiated, but 62 actions for recognition of rights, a different form of collective declaratory relief, have been brought. Of the nine group actions, five are in progress, three have been rejected and one has been withdrawn.

Current challenges

Despite progress, challenges persist. Maria José emphasises that the average annual number of actions – currently 37 in total – has slightly declined in recent years. In 2023, no new group actions were initiated, and in 2024, none had yet been initiated at the time of writing.

Additionally, Maria José underlines that "third party funding is also not common in class actions in France." She continues, "In the consumer sector, this is probably due to the fear of a strict interpretation of the rule that approval can only be granted to associations that are independent of any form of professional activity (Article L.811-2 Consumer Code)." However, Maria José hopes that the implementation of the RAD should facilitate the use of third party funding in the future. Indeed, "the aforementioned provision was meant to prevent undue influence over 'approved' consumer associations, a requirement which is already foreseen in the RAD whilst acknowledging third party funding," she explains.

1 https://observatoireactionsdegroupe.com/registre/registre-france/ (in French)
2 Tribunal Judiciaire de Paris, 5 January 2022, *APESAC c/ Sanofi* (Affaire Dépakine), Case No. 17/07001

Legislative response

Maria José observes that "in response to both the small number of cases and the even smaller number of positive outcomes for claimants," the French Parliament recognised the need for reform. That is why it commissioned an Informative Report in 2020.[3] Following extensive discussions, a proposed law on group actions was submitted in December 2022 and, after discussions, a new text was adopted by the French Assembly in March 2023.[4] After amending key provisions related to material scope and standing, the Senate adopted a revised version in February 2024.[5] Maria José underlines that "A joint commission (*commission mixte paritaire*) was expected to be appointed to reconcile the differences, but that did not take place before the Assembly's dissolution in June 2024."

Striking cases and settlements

When asked about the most striking cases rendered recently in France, Maria José mentions one out-of-court settlement concluded on 1 January 2024,[6] and one remarkable decision from 5 January 2022.[7]

The out-of-court settlement was signed between a nationally approved consumer protection association (CLCV) and BNP Paribas Personal Finance for the approximately 4,400 customers who had taken out a mortgage loan of a sum in Swiss francs, repayable in euros. The consumers challenged the contractual term concerning the Swiss franc's indexation for being unfair. BNP Paribas Personal Finance agreed to pay between EUR 400 and 600 million to compensate its customers.

The court decision was rendered in the *Depakine* case, in which an association of victims who had suffered birth defects and neurodevelopmental issues sued Sanofi-Aventis France Laboratory for liability related to the defectiveness of the anti-epileptic drugs it produced and marketed.

3 Information report no. 3085 on the results of and prospects for class actions (Philippe Gosselin and Laurence Vichnievsky, Députés), 11 June 2020 (in French).
4 Draft bill n. 639 on the legal regime for class actions,15 December 2022, followed by Draft bill no. 87 adopted by the National Assembly (lower chamber of the French Parliament), 8 March 2023 (in French).
5 Modified draft bill n. 64 (2023-2024) adopted by the Senate, 6 February 2024. (in French).
6 *CLCV c/ BNP Paribas*
7 Tribunal Judiciaire de Paris, 5 January 2022, *APESAC c/ Sanofi* (Affaire Dépakine), Case No. 17/07001

Maria José underlines that "it was the first time that a group action of this kind reached the merits phase." The court held that Sanofi-Aventis was liable both for a failure of vigilance and a failure to provide information about the risks associated with Depakine, as well as for the defectiveness of the anti-epileptic drugs the defendant produced and marketed. Maria José explains that "the court did not set the actual amount of damages, which will depend on the situation of each victim, but opened an opt-in period consisting of five years. The victims who meet the criteria established can join the group to obtain compensation for their bodily injury by a request addressed either to the claimant or the defendant accompanied by the evidence to document their claims. Only then, at the third (enforcement) stage, will this lead to compensation on a voluntary individual basis by the company. Persons whose claims have not been satisfied may ask the judge for compensation of their damage. The decision represents a milestone in France, although it is still under appeal."

Expectations for the upcoming five years

Maria José expects that the implementation of the RAD will "lead both to an enlargement of persons having standing to sue and of the material scope whereby group actions can be brought." She attributes this to the wording of the drafts but also to the expected increased use of third party funding in France and to initiatives of foreign associations designated as qualified entities under the RAD.

Maria José also predicts that the increase in the number of class actions will not be sharp or immediate, since the current proposals keep the opt-in regime, which she describes as "the main loophole of the French system." She nonetheless notes that there is still a wide range of harmful situations that are well-suited to opt-in cases, like some cases involving bodily injury. In these types of cases, as shown by *Depakine*, "there is strength in numbers", and a group action can lead to a declaratory decision before the compensation period is opened.

Lastly, Maria José highlights that, if the simplified group action remains in force (one of the drafts proposes to abrogate it whereas the other proposes to keep it), then despite it not having been exercised in ten years, it might end up being finally used in practice. This is because these group actions are neither opt-in nor opt-out but are instead ones in

which the judge can order the defendant to compensate easily identifiable consumers when the harm is identical or highly similar.

In a nutshell, Maria José believes that "the landscape of group actions will evolve in France, even though we should not expect a revolution."

Dimitri Dimitrov
Defence Lawyer Perspective
Partner at Gide

6 June 2024, editors: Isabella Wijnberg and Caroline Devès

Class actions in France: the next five years will be telling

In France's dynamic legal landscape, the last five years have witnessed a seismic shift in the approach to collective redress. Currently, there are extensive political debates concerning the future of class actions in the country. As we delve into the intricacies of this legal evolution, we draw on the expertise of Dimitri Dimitrov, a partner at the French law firm Gide, a defence lawyer who has been at the forefront of class action proceedings in France for over 20 years. His insights shed light on the emerging trends and the undercurrents of legal reform that are reshaping the field.

A surge in collective mandates

"Companies in France have found themselves increasingly embroiled in collective redress proceedings in the last five years across various sectors," Dimitri observes. The scope of collective redress proceedings is very broad: from follow-on competition damages claims to indemnifications of patients in the pharmaceutical sector. As an example, an action was brought against Sanofi to indemnify patients in relation with the use of its drug Depakine by pregnant women. This is the first action where the action was found admissible by the first instance court of Paris.[1] Also, non-governmental organisations have initiated actions against major groups for greenwashing (for

1 Tribunal Judiciaire de Paris, 5 January 2022, no. 17/07001.

example, a consumer protection association attempted to attack an advertisement of TotalEnergies for greenwashing) and indemnification related to financial services and investment products.

According to Dimitri: "Such proceedings are brought more frequently on the basis of collective mandates or by associations representing the collective interest of consumers then on the ground of group actions." He adds, "Since 2014, around 37 group actions have been initiated, with only one case declared admissible." The other cases were either declared inadmissible or settled. Some are also still pending. This emphasis on procedural gatekeeping reflects a cautious approach to class actions, one that prioritises the legitimacy of claims before delving into substantive matters.

Legislative evolution and the RAD transposition

The rising tide of class actions caught the attention of Philippe Gosselin and Laurence Vichnievsky, members of the *Assemblée Nationale* (lower house of French Parliament), prompting them to author a pivotal report in 2020.[2] "Important debates took place since then to reform the French class actions regime," Dimitri notes.

He explains that the RAD transposition in France is currently in progress. The *Assemblée Nationale* adopted a bill on 8 March 2023, which proposed to establish a single and unified regime for class actions in France, replacing the current sectorial regimes in various codes such as consumer protection, environment, competition health, discrimination, etc.[3] Dimitri highlights that this bill also proposed significant changes, including compensating all types of the claimants' losses (not limited to material losses), extending the accredited associations to launch class actions (i.e. enabling ad hoc associations including those created by undertakings), significantly extending the opt-in period and introducing a civil fine to be ordered by the French courts (to be paid to the Treasury and not to the claimants to differ from punitive damages).

2 Information report n. 3085 on the results of and prospects for class actions (M. Philippe Gosselin et Mme Laurence Vichnievsky, Députés), 11 June 2020 (in French).

3 Draft bill n. 87 adopted by the Assemblée Nationale (lower chamber of the French Parliament), 8 March 2023 (in French).

Dimitri further explains that one year later, on 6 February 2024, the *Sénat* (upper house of the French Parliament) adopted a bill[4] which "aims to have a more balanced approach, namely by restricting the conditions that would apply to accredited associations, reducing thus the number of approved associations that could launch class actions, deleting the civil fine, introducing clear restrictions regarding third party financing, reintroducing an obligation of formal notice, implementing the new regime only for cases which triggering event is after the bill etc." He adds, "Even though both houses maintain the 'opt-in' mechanism, a compromise would be needed between both houses to have an Act on class actions in France."

Dimitri also observes that due to the dissolution of the *Assemblée Nationale* on 9 June 2024, it is currently unclear when such an Act could come into force.

Third party funding

When it comes to third party litigation funding, France exhibits a mix of caution and curiosity. "There are reservations and objections, certainly," Dimitri concedes, "but third party funding is emerging, especially for follow-on competition damages claims."

Anticipating the future

Looking ahead, Dimitri anticipates a rise in collective redress actions in France, mirroring a broader European trend due to the RAD implementation in other EU jurisdictions. "The next five years will be telling," he acknowledges, as he predicts an increase in actions against e-commerce and digital platforms, particularly for Digital Markets Act infringements.

Dimitri ends by stressing that it will be important to see how the new Act will be designed for class actions in France. He adds that there is overall a huge expectation to preserve "a good balance" between public and private enforcement in all fields of law. This balance is crucial to avoid specific practices prevalent in the US, such as drawn-out and costly proceedings that can disrupt companies without necessarily allowing a proper indemnification of claimants.

4 Modified draft bill n. 64 (2023-2024) adopted by the Sénat, 6 February 2024. (in French).

Business Perspective
Senior legal counsel of a global automotive leader

30 August 2024, editors: Isabella Wijnberg and Caroline Devès

Class actions: a daily and challenging reality

In an interview with a prominent senior legal counsel of a global automotive leader, we delve into the intricacies and challenges of managing class actions in Europe. Our interviewee prefers to remain anonymous, so we give her the name 'Sophie'.

The RAD: not a gamechanger

Sophie starts by explaining that class actions are a significant part of her daily work. It mostly involves managing ongoing class actions that are brought in multiple European jurisdictions simultaneously. "The RAD expands the possible venues in Europe where a claim can be brought. However, there were already some possible venues such as the Netherlands that are – and will likely remain – quite popular. In that sense, the implementation of the RAD does not fundamentally change our litigation risk and strategy, although it does likely increase our exposure." She adds that as a general rule the company tries to have a consistent approach to litigation, despite the constant regulatory changes inherent to the business. "The RAD is one of them but a relatively minor one considering everything that is ongoing," she smilingly adds.

Jurisdictional challenges and specificities

We continue by asking whether the Netherlands is in her view the most challenging or attractive European jurisdiction for class actions. "Well," Sophie pauses, "the European landscape is complex and diverse. It is a patchwork in which each jurisdiction has its own positive and negative aspects. I would therefore not pinpoint one single jurisdiction as the most challenging or attractive. It is the complexity deriving from these differences that makes my work challenging but also very interesting. To give you an example, the proceedings in the UK are based on the exchange of a lot of correspondence between the parties, before the claims are formally brought to the courts, and also in

parallel to the defence filed to the court and to the hearings. Also, the way language is used in the different courts is very different – not only in terms of the language itself (French, English, etc.) but also the level of formality. Each country has its own legal culture and habits. For instance, the number of documents that must be disclosed in the UK is a whole different ball game compared to the number of documents that must be disclosed in other countries."

The role of third party litigation funding

"And what about third party litigation funding (TPLF)? Does that affect the amount of litigation brought against companies?" we ask. "Yes. TPLF is an undeniable reality in the class action landscape that certainly is a driver behind the majority of the class actions that envisage damages," Sophie acknowledges. "What is interesting and challenging is that there are big differences between the funders. There is sometimes a lack of transparency with claimants about their third party funders and it can be sometimes difficult for the courts to have information in this regard. It is, however, important to scrutinise the legitimacy and independence of the funders involved."

Managing class actions: not an easy job

Sophie explains that it is a challenge to manage class actions – more challenging than just 'regular' proceedings. Thinking about what causes this difference, she answers: "To start, class actions are much more complex in terms of the procedural rules, the national and international consequences, and the number of parties. In addition, it involves a larger amount of data due to the people constituting the class and usually a greater amount of expert and other evidence. Also, class actions take longer which adds to the complexity due to legislative changes and missing data." Sophie adds, "And most importantly, the outcome of class actions is much more unpredictable and therefore requires continuous monitoring and adjustment of assessments. This is caused mainly by the lack of case law and varying judicial approaches – sometimes even within the same country."

Future direction of class actions

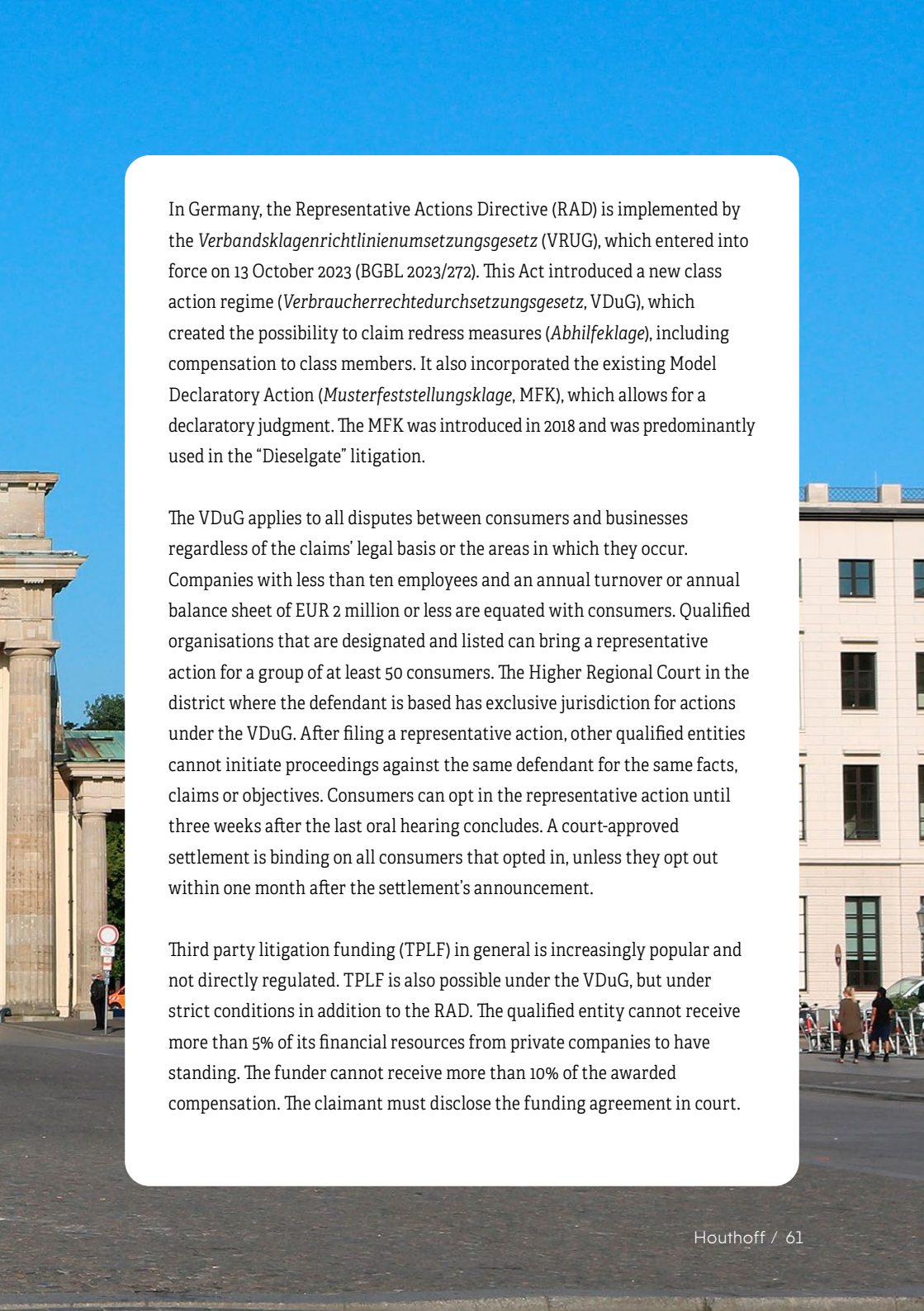
If Sophie could change one thing in the way class actions are being dealt with, she would focus on increasing efficiency. She observes, "It would be good if class actions started

with a phase in which the court determines whether a claimant is admissible and whether the allegations are prima facie substantiated with evidence. Currently, you see that huge litigations can be launched even without evidence provided by the claimants, which leads to significant and unnecessary costs for the court system and the defendant. There is a lot of back and forth before the claim is substantiated – if that ever happens. As a consequence, it takes a lot of time and costs before it is clear what the company has to defend itself against."

ESG and diverse issues

Sophie's company actively assesses the risks of class actions related to ESG issues and other matters. Sophie adds that ESG issues are a critical consideration in all company aspects and not just class actions. But more generally, whatever the subject of a class action, it always requires good organisation and coordination, as this type of litigation is complex and involves a lot of parties.

Germany



In Germany, the Representative Actions Directive (RAD) is implemented by the *Verbandsklagenrichtlinienumsetzungsgesetz* (VRUG), which entered into force on 13 October 2023 (BGBL 2023/272). This Act introduced a new class action regime (*Verbraucherrechtedurchsetzungsgesetz*, VDuG), which created the possibility to claim redress measures (*Abhilfeklage*), including compensation to class members. It also incorporated the existing Model Declaratory Action (*Musterfeststellungsklage*, MFK), which allows for a declaratory judgment. The MFK was introduced in 2018 and was predominantly used in the "Dieselgate" litigation.

The VDuG applies to all disputes between consumers and businesses regardless of the claims' legal basis or the areas in which they occur. Companies with less than ten employees and an annual turnover or annual balance sheet of EUR 2 million or less are equated with consumers. Qualified organisations that are designated and listed can bring a representative action for a group of at least 50 consumers. The Higher Regional Court in the district where the defendant is based has exclusive jurisdiction for actions under the VDuG. After filing a representative action, other qualified entities cannot initiate proceedings against the same defendant for the same facts, claims or objectives. Consumers can opt in the representative action until three weeks after the last oral hearing concludes. A court-approved settlement is binding on all consumers that opted in, unless they opt out within one month after the settlement's announcement.

Third party litigation funding (TPLF) in general is increasingly popular and not directly regulated. TPLF is also possible under the VDuG, but under strict conditions in addition to the RAD. The qualified entity cannot receive more than 5% of its financial resources from private companies to have standing. The funder cannot receive more than 10% of the awarded compensation. The claimant must disclose the funding agreement in court.

The losing party bears the litigation costs based on fixed statutory rates related to the amount in dispute. In representative actions, the cost risks for qualified entities are limited because the amounts in dispute are capped at EUR 300,000 for redress actions and EUR 250,000 for Model Declaratory Actions.

A court-appointed administrator, whose decisions can be reviewed in court, distributes the awarded damages. Consumers can start follow-on proceedings if they did not opt in the representative action or if the administrator fully or partly rejects their claims. If the court has only rendered a declaratory judgment, consumers can start individual proceedings to obtain an enforceable judgment.

The Capital Markets Model Case Act (*Kapitalanleger-Musterverfahrensgesetz*, KapMuG) provides for an opt-in collective action mechanism. This mechanism applies to capital market disputes that involve a minimum of ten investors. Defendants can include securities issuers or auditors. The KapMuG came into force on 1 November 2005, in response to the enormous number of claims in the *Telekom* case. The KapMuG has since been revised twice (in 2012 and 2024). KapMuG proceedings lead to a declaratory judgment, but damages cannot be awarded. The proceedings can be ended through a settlement, which becomes binding when the court approves it and fewer than 30% model proceedings participants opt out. Participants can also start individual follow-on actions for damages.

Class actions | VDuG (*Abhilfeklage* and MFK) / KapMuG

Scope	VDuG (*Abhilfeklage* and MFK): all civil law matters involving consumers as class members. KapMuG: securities issues.
Access granted to	VDuG (*Abhilfeklage* and MFK): qualified entities. KapMuG: capital investors
Opt-in or opt-out	All: opt-in
Declaratory relief or damages	VDuG: both. KapMuG: declaratory relief
Frequently used	VDuG (*Abhilfeklage*): to be seen. KapMuG: yes, hundreds of cases. MFK: approx. 30 cases so far.
Regulatory framework	*Verbandsklagenrichtlinienumsetzungsgesetz* (VRUG); *Verbraucherrechtedurchsetzungsgesetz* (VDuG); *Kapitalanleger-Musterverfahrensgesetz* (KapMuG)
Alternatives used in practice	Assignment of claims and representation by means of mandates

Class settlements

Binding class members after court approval	Yes, in VDuG (*Abhilfeklage* and MFK) and KapMuG
Opt-in or opt-out	All: opt-out
Regulatory framework	VDuG (*Abhilfeklage* and MFK); KapMuG

Third party funding

Regulated by law	No, but qualified organisations may not receive more than 5% of their finances from corporate entities under the VDuG and MFK. TPLF's participation under VDuG is capped at 10% of the consumers' proceeds.
Frequently used	No, but increasingly seen; Germany has a long history of funding firms but only recently funding became more visible in litigation.

Good to know

In Germany, legal scholars and experts consider a sole opt-out system in class actions and class settlements to be unconstitutional.

Jakob Huebert
Funder Perspective
Head of Germany & Nordics at Nivalion

3 September 2024, editors: Davide Ballestrero, Rick Cornelissen and Isabella Wijnberg

Germany's new era of class actions, unaided by the RAD

As we delve into the intricacies of class action law in Germany, we find ourselves in conversation with Jakob Huebert, who is responsible for Nivalion's funding activities in Germany and the Nordic countries. Jakob lectures on third party funding in international arbitration at the University of Frankfurt. He is ranked in *WWL Thought Leaders: Third-Party Funding* and is regularly invited to speak at conferences on topics covering legal finance.

Jakob starts with a famous quote of US Judge Richard Posner: "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for USD 30."[1] Class actions can be a procedurally efficient mechanism for offering access to justice for consumers if it works properly. Beyond providing direct relief, class actions also work as a deterrent to corporate misconduct. However, the RAD's transposition into German law represents only an incremental step towards providing better access to justice for consumers.

Implementing the RAD and the Consumer Rights Enforcement Act (VDuG)

"Since the last Class Action Survey, the RAD has been implemented in German law. The law transposing the RAD, known as the Consumer Rights Enforcement Act,

1 *Amchem Products, Inc. v. Windsor* , 521 U. S. 591, 617 (1997); *Carnegie v. Household Int'l, Inc.*, 376 F. 3d 656, 661 (CA7 2004)

Verbraucherrechtedurchsetzungsgesetz or 'VDuG', came into force on 13 October 2023," Jakob informs us.

Jakob explains that the VDuG contains certain limitations in comparison to the RAD. "For instance, the qualified entity must be registered in accordance with Section 4 of the German Law on Injunctions (UKlaG)," Jakob explains. The UKlaG contains various requirements that must be met for the qualified entity to have standing. He further elaborates on the requirements for a claim to be admissible and the conditions for funding a redress claim. Jakob notes that from a funder's perspective, it is interesting to see that the German legislator chose to limit the standing to those qualified entities that receive no more than 5% of their capital from businesses. Similarly, the collective claim is deemed to be inadmissible if the claim is funded by a third party funder that is promised an economic share of more than 10% of the proceeds. These limitations are not contained in the RAD. The claim is also inadmissible if it is funded by a funder from whom "it is to be expected" that they will influence the procedural actions of the qualified entity to the detriment of consumers. In contrast, the RAD requires an undue influence, not just an expectation of it. Also, at the start of the claim, the claimant must disclose to the court the source of its funding and any agreements with the third party funders in accordance with Section 2, para. 3 of the VDuG.

On a positive note for consumers, Jakob emphasises that the German legislator took measures to comply with the obligation under Article 20 of the RAD to ensure that costs of proceedings related to representative actions do not prevent qualified entities from initiating these claims: "These measures include the funding of several consumer organisations by state funds and limiting the maximum amount of court fees and lawyer fees payable by the losing party." In particular, Germany introduced a rule that the amount in dispute for VDuG claims will be capped to EUR 300,000. This alleviates the qualified entity's (QE) cost burden since court fees and the opposing party's costs are calculated on an ad valorem basis.

The German litigation landscape

"The RAD's implementation in Germany has not significantly altered the country's litigation landscape in the area of collective redress," Jakob observes. The current

collective action scene in Germany is mainly influenced by other laws enacted by the German legislator in 2005 and 2018, rather than by the VDuG.

In 2005, the German legislator introduced a collective action scheme concerning securities litigation (*Kapitalanleger-Musterverfahrensgesetz*, KapMuG). Under KapMuG, parties may request the court to conduct a lead case. The decision issued in the lead case may be significant for other cases as it is binding on all the parties who actively joined the model action. In 2018, the model declaratory action (*Musterfeststellungsklage*, MFK) was introduced.

Under the MFK, qualified consumer associates may bring collective claims on behalf of groups of consumers. The model declaratory action's aim is to have the court determine specific factual or legal aspects of the case in a declaratory judgment. Subsequently, consumers may initiate follow-up proceedings for the determination of their potential damages. In those individual follow-up proceedings, the declaratory judgment rendered under the MFK has a binding effect.

The largest case filed under the MFK was a case of a consumer organisation vzbv against Volkswagen.[2] This case concerned 'defeat software' contained in certain Volkswagen engines. The case was filed in 2018 and settled in 2020. While the claim settled the claims of a large group of claimants, thousands of claims had to continue on an individual basis. The Volkswagen case's speedy resolution was a promising sign. However, when compared to the case against Volkswagen in the US, the compensation received by German claimants was significantly lower. While Volkswagen reportedly made payments ranging from approx. USD 12,500 to USD 44,000 per car to US consumers, German consumers were paid in a range between EUR 1,350 to EUR 6,257 per car.

In addition to the option of bringing collective claims under the KapMuG and the MFK, a large number of claims in Germany are brought based on the well-known assignment model. "Since 2019, a significant change in the jurisdiction related to class action litigation, apart from the RAD, has been the Federal Court of Justice's

2 See for an article on the settlement: https://www.lto.de/recht/nachrichten/n/olg-braunschweig-musterfeststellungklage-vergleich-vw-vzbv-dieslaffaere-entschaedigung (in German).

(*Bundesgerichtshof*) confirmation of the admissibility of the claims assignment model in several decisions from 2021 and 2022[3]," Jakob says.

Considering the assignment model and the other legal instruments available to effectively initiate a collective claim in Germany, the VDuG represents a small step towards further developing the collective action scene in Germany. However, the VDuG is unlikely to bring about substantial changes in the German litigation landscape. "Under the VDuG, consumers are still reliant on a limited list of QEs and are heavily dependent on whether the QEs consider a matter to be worthy enough to pursue. It is notable that most of the claims initiated so far by the QEs under the VDuG concern disputes with regional savings banks and local energy suppliers" Jakob explains.

The largest current collective redress cases in Germany are:

1. Cases on the basis of competition law violations (e.g. Trucks cartel) (assignment model);4
2. *vzbv v Volkswagen* (MFK claim);
3. Also, a large number of small cases are handled by legal tech entities such as Flightright (flight delays) and Conny (claims against landlords for rent reduction). The cases these companies bring concern relatively limited damages claims. However, the number of cases dealt with by these companies is extremely large. So, if you look at the aggregated amount of the damages claims, these types of cases certainly belong on this list.

The Netherlands and Portugal: jurisdictions to watch

Jakob views the Netherlands as a positive example for Germany when considering the most relevant European jurisdictions for collective actions. He also anticipates a significant impact on class actions in Europe due to the RAD's transposition in Portugal.

3 See for articles on these decisions: https://www.lto.de/recht/juristen/b/bgh-ii-zr-84-20-gruende-rechtsdienstleistung-inkasso-verbraucher-sammelklage, https://www.lto.de/recht/juristen/b/bgh-legal-tech-wenigermiete-zr25621-rechtsdienstleistung-inkasso-lexfox, https://www.lto.de/recht/juristen/b/bgh-viii-zr-285-18-legal-tech-wenigermiete-de-inkassodienstleistung-weite-auslegung-abtretung-wirksam-rechtsdienstleistungsgesetz (all in German).

4 See for an overview of cases brought on the basis of the assignment model: https://competitionlawblog.kluwercompetitionlaw.com/2023/08/25/effective-enforcement-of-cartel-damage-claims-through-the-assignment-model-the-preliminary-ruling-procedure-before-the-cjeu-in-case-c-253-23-asg-a-comment/.

The future of class settlements

"When it comes to the topic of class settlements, there is an anticipation of potential changes beyond the RAD," Jakob states. He explains that it is still too early to predict the new VDuG's exact impact on class settlements, as its relevant rules have not yet been applied. Notably, under Section 9 of the VDuG, court approval is required for group settlements. Interestingly, this rule is not applicable to settlements of collective actions that fall outside the VDuG's scope.

The risk of collective action abuse

Jakob addresses the concerns often voiced by the legal and business communities about Germany potentially mirroring the US in terms of its class actions. He observes, "In Germany, the US class action system is often used as a doom scenario that must be avoided at all costs. The main argument raised in this respect is that claimants may be encouraged to initiate unmeritorious collective actions to force defendants into settlements. These fears are unfounded." He continues, "The burdens imposed on defendants in US class actions stem from a combination of several US-specific factors, including extensive pre-trial discovery, jury decisions and the risk of punitive damages. These factors do not exist in Germany." Therefore, even if Germany were to implement the most consumer-friendly collective action scheme, it would not pose the same risks to corporations as US class actions do.

The role of third party litigation funding (TPLF)

"TPLF has been a part of the German legal landscape since 1998 and has evolved significantly over the years. Over the last few years, the TPLF scene has become more diverse with various funders establishing their presence in Germany and providing funding and other risk transfer solutions (e.g., litigation risk insurance) for a wider variety of cases. Funding is becoming a more common tool in the dispute lawyers' toolbox."

According to Jakob, the German legislator seems to be in two minds when it comes to TPFL. On the one hand, the VDuG introduces various elements that strictly limit TPLF. Violating these rules carries the heavy burden of the claim being inadmissible. "To my knowledge, no other Member State implemented these severe restrictions on TPLF. It is

difficult to imagine that funders will be willing to fund German VDuG collective actions under these circumstances," Jakob says. Simultaneously, the German legislator also introduced changes to the German Unfair Competition Act which encourages TPFL: "These changes do not only allow for TPLF. Under certain conditions, the German Unfair Competition Act's rules give the qualified entity the right to recover the funding fees that it incurred from the Federal Office of Justice." However, these rules are limited to the funding of small matters related to willful or grossly negligent offences against the German Unfair Competition Act that generate a profit for the entity breaching the law, resulting in an obligation to hand over this profit to the Federal budget (*Gewinnabschöpfungsklagen*).

Jakob concludes, "TPLF remains a significant aspect of the German legal system."

The principle of 'loser pays'

"In Germany, the principle of 'loser pays' applies, which dictates that the costs are determined based on the amount in dispute," Jakob explains. This, in combination with the fact that the amount in dispute is capped for VDuG claims, is likely to result in reimbursements of rather small amounts to the winning party that will not cover the legal costs actually incurred in relation to the dispute. He also highlights an area of ambiguity in the VDuG: "In the event the defendant loses the case, the payment of the funder's success fee is not explicitly dictated by the VDuG, aside from the rule that a collective redress claim is inadmissible if the claim is funded by a third party funder that is promised an economic share of more than 10% of the proceeds." He continues, "In principle, Sections 280 and 286 of the German Civil Code may be deemed to allow for a recovery of the funding costs if certain requirements are fulfilled. However, there are no court decisions confirming this."

The significance of the *Diesel* case

Jakob identifies the *Diesel* case as the most significant class action in the past decade, particularly from a German perspective. "This case underscored Germany's urgent need for an effective collective redress system, as the multitude of individual *Diesel* claims overwhelmed the courts, preventing judges from addressing a high volume of other cases," he observes.

The rising popularity of class actions

Jakob observes the rising popularity of class actions outside the United States. He believes that the RAD signifies a progressive step towards enhancing consumer access to justice. He also shares his vision of the ideal class action: "Consumers should be able to swiftly obtain full recovery of their loss through a collective action, without bearing a high-cost burden. To achieve this goal, consumer actions need to allow for a recovery of funding fees, so that consumers would not have to bear the funding costs for the litigation themselves."

The future of class actions

Jakob is rather confident that a time will come when Germany and the EU will have an effective and efficient collective redress system: "The future of class actions, in my view, will be significantly shaped by the current lawyers and funders who are actively involved in the collective redress scene." He explains, "This is also due to legal tech entities who are becoming increasingly active in the area of collective redress. Legal tech entities increasingly purchase consumer claims and use effects of scale to bring single claims to the courts. Another development will also be the rise of ESG claims in the EU. It will depend on the QEs, whether consumers will be able to use the VDuG to bring these claims."

Jakob continues to describe the challenges faced in the journey towards collective redress, expressing his optimism: "At times, it seems that the path for collective redress leads through a thick and heavy jungle and each step requires heavy machete blows to clear the way. But with each new piece of EU legislation and each favourable decision obtained at the level of the Federal Court of Justice or the European Court of Justice, another step towards progress is made. I am optimistic that a time will come when we will have effective and efficient collective redress in Germany and across the entire EU. I just don't know how long it will take until we get there..."

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30 August 2024, editors: Davide Ballestrero, Rick Cornelissen and Elselique Hoogervorst

Collective enforcement of claims in competition antitrust damages cases

"In Germany and across Europe, the collective enforcement of claims is still in its infancy. We expect a significant increase in the number of these claims in the coming years." We speak with Tilman Makatsch and Robert Stieglitz. Tilman is head of the Competition Litigation & Antitrust Economics department of Deutsche Bahn AG. Robert is Senior Counsel Competition Litigation at Deutsche Bahn AG. Tilman and Robert previously worked as lawyers for large international commercial law firms. We discuss class action developments in Germany and the importance of class actions in the area of antitrust damages claims. Tilman's and Robert's statements reflect their personal opinions only.

The power of class actions

"Class actions, when defined broadly to include legal proceedings brought on behalf of a large number of individuals or companies based on 'assignment models,' play a significant role in our daily work, especially in pursuing antitrust damages claims," Tilman begins. Under the assignment model, companies harmed by the same

competition law infringement assign their respective damages claims to a specialised legal service provider (LSP). The LSP becomes the owner of the claims, as a result of which it is entitled to bring the claims in court, represented by a lawyer, and to conduct settlement negotiations. The LSP distributes the damages awarded to the assignors and receives a fee in return if successful. "Often, such actions are also supported by commercial litigation funders who provide financial resources to cover the costs of legal proceedings in exchange for a share of the proceeds if the case succeeds," Robert explains. "Assignment models are crucial for companies affected in the area of cartel damage claims, as currently there is no other effective and cost-efficient way for companies to jointly assert their claims against antitrust offenders in Germany," he adds.

Cartel damages claims at Deutsche Bahn

Deutsche Bahn is a pioneer in the field of cartel damages claims, particularly through the collective enforcement of claims via the assignment model. Claims of entities belonging to the Deutsche Bahn group, together with claims of other affected companies, are purchased and bundled by DB Barnsdale AG and DB Competition Claims GmbH. "Deutsche Bahn is pursuing damages claims relating to, for instance, the Airfreight and Truck cartels. As Deutsche Bahn offers this service without external litigation funder involvement and all assignors have the same goal of obtaining the highest possible compensation, there is no risk of a conflict of interest under the German Legal Services Act (*Rechtsdienstleistungsgesetz*)," Tilman explains.

The impact of the RAD

The implementation of the Representative Actions Directive (RAD) has indeed altered the litigation risk and strategy for companies in their respective jurisdictions and across Europe. "The RAD has made it possible for a representative entity to file collective actions on behalf of a group of individuals, increasing the probability of businesses facing extensive cross-border litigation. Thus, businesses need to adapt their litigation strategies to be prepared to defend against collective actions in various Member States; their compliance and legal defence strategies must be robust," Tilman and Robert explain.

The RAD was implemented in Germany through the Consumer Rights Enforcement Act (*Verbraucherrechtedurchsetzungsgesetz*) (VDuG), which entered into force on 13 October

2023. Robert and Tilman are sceptical about the RAD's impact in Germany. "From a claimant's perspective, the VDuG fell short of its expected impact in competition litigation. It does not apply to large businesses and its use is restricted to small and medium-sized enterprises with fewer than ten employees and an annual turnover or annual balance of not more than EUR 2 million. Given that the regulations for financing class actions are very restrictive, it remains to be seen whether potential claims under the VDuG will be attractive for litigation funders."

Class actions in other European jurisdictions

From a claimant's perspective, the attractiveness and challenges of European jurisdictions for class actions can vary greatly. "Factors such as legal frameworks, judicial efficiency, procedural rules and consumer rights protection play a significant role. Also, the procedural costs, availability of litigation funding, and predictability of decisions are of particular importance," Tilman points out.

Tilman and Robert turn a critical eye to the German class action regime. "In Germany, there is room for improvement in comparison with other European countries, particularly regarding the length of the proceedings. Moreover, there have been relatively few judgments in cartel damages cases where damages were awarded to the injured parties. However, this seems to be changing. Several courts have now issued judgments, including in major class actions, awarding specific amounts of damages. In these cases, the courts estimated the damages and avoided further time-consuming and costly court-appointed expert assessments. This development is to be welcomed," Robert concludes.

The impact of third party litigation funding

Third party litigation funding (TPLF) has a significant impact on the class action landscape in Europe, prompting an increase in the volume and variety of class actions. "From a claimant's perspective, TPLF provides the necessary financial resources for claimants who might otherwise be unable to afford litigation, thereby increasing access to justice. Funding enables the pursuit of complex and expensive cases that require extensive resources, expert testimony and prolonged legal battles, and can potentially provide a level playing field between claimants and defendants." However, Tilman and

Robert also warn that TPLF might increase the likelihood of frivolous claims and conflicts of interest.

Managing class actions: challenges and opportunities

For a legal counsel managing class actions, several challenges and opportunities arise. "From a defendant's perspective, risk management is extremely demanding due to the substantial financial burden of a class action," Tilman explains. This entails careful management of legal fees, expert witness costs and other expenses. "Class actions often attract significant media and public attention, necessitating careful management of the case's public profile and the client's reputation. Furthermore, the volume of data to be processed in a class action, which must be evaluated and prepared to substantiate claims in a manner that holds up in court, is challenging," he adds. In cartel damages cases, the assignment model offers important upsides in the context of claim substantiation. "From a claimant's perspective, particularly in cartel damages claims, collective redress via assignment models offers opportunities: the aggregation of numerous claims leads to improved data for demonstrating damages, cost sharing, and an overall increase in the effectiveness of litigation given that claimants pursue claims in unison with other parties involved in the class action."

Navigating class settlements

When it comes to class settlements, careful analysis is required of the case's strengths and weaknesses, stakeholder interests, financial and time considerations, and broader business impacts. "The balance of these factors influences the decision to either settle or litigate, aiming to achieve the best possible outcome for the client and class members." When considering a class settlement, having a clear view of the merits of the case is key. "This allows for an evaluation of the potential risks of proceeding to trial versus the rewards, taking into account the likelihood of a favourable judgment for the claimant and potential damages," Robert concludes.

The future of class actions

Germany requires more efficient proceedings to promptly resolve large class actions and provide financial compensation to injured parties. "Using procedural tools, advancing digitalisation, and making greater use of legal tech are some of the measures that need

to be taken," Tilman suggests. The German legislature should also take action. "For instance, a statutory rebuttable presumption of the amount of the damage in the context of cartel damages claims could be a step in the right direction. Additionally, 'lead case proceedings', i.e. proceedings that lead to a decision that has binding effects for similar proceedings in lower instances, would provide greater legal certainty and predictability in mass proceedings. This would probably result in class actions being more widely accepted by the injured parties and the courts."

In Europe, the state of class actions is evolving towards greater harmonisation and increased litigation activity. This is driven by legislative developments, increased use of technology and a growing focus on consumer protection. But there is still room for improvement. "To improve the system of class actions in Germany and other Member States, it is crucial to keep streamlining procedures, carefully regulating third party funding, harmonising standards across jurisdictions, and enhancing access to justice."

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22 July 2024, editors: Davide Ballestrero, Rick Cornelissen and Isabella Wijnberg

Steps needed for true access to justice

Over the past ten years, several significant class actions have taken place in Germany. These include collective actions against Volkswagen concerning the diesel emissions matter, as well as cases involving the trucks cartel, the roundwood cartel, the sugar cartel, and the AirBerlin insolvency. We have the opportunity to speak with Ann-Christin Richter, Deputy Managing Partner at Hausfeld in Berlin and Hamburg. She is a specialist in representing clients in cartel damages actions. We speak with Ann-Christin regarding the RAD's implementation in Germany and other developments in the German class action landscape. She also shares her view on the envisioned next steps to render the class action system more effective, thereby allowing true access to justice for all.

New possibilities to bring collective redress claims

She begins by explaining that the RAD was implemented only after the implementation period had ended. This led to a rush process in Germany, which unfortunately did not allow for a thorough discussion about the law's draft in parliament. She adds, "It had been implemented in Germany through the national implementing law, the *Verbraucher-rechtedurchsetzungsgesetz* (VDuG), which came into force in December 2023."

The most significant statutory change in German law was the introduction of the representative action for damages claims (*Abhilfeklage*) with the VDuG. "This new

development allows for collective and direct assertion of damages claims," Ann-Christin explains. Prior to the VDuG's entering into force, a representative action could only be brought to resolve preliminary questions in advance (also known as "model proceedings" (*Musterfeststellungsklage*)), while damages still had to be individually claimed and assessed in follow-up proceedings. With the *Abhilfeklage's* introduction, damages claims can be asserted collectively and directly.

Peculiarities of the VDuG

Only consumer protection associations (*Verbraucherverbände*) can be registered as a qualified entity. To be recognised as a qualified entity, the association must be registered and its statutory tasks must include the protection of consumer rights and interests by providing information and advice on a non-commercial basis. The association must also fulfill certain requirements pursuant to § 2 para 1 of the VDuG and § 4 of the Act on Injunctions for consumer rights and other violations (*Unterlassungsklagegesetz*).

The VDuG follows a strict opt-in model as consumers and small companies must register for the collective action under the VDuG. Small companies, i.e., companies with less than 10 employees and with a revenue that does not exceed two million euros, are considered consumers.

In principle, the VDuG applies to all areas of private law. However, the qualified entity must show that at least 50 consumers might be affected by the outcome of the proceedings and that the potential claims are "essentially similar". There is an ongoing debate on the definition of the term "essentially similar". The discussion revolves around to what extent "essentially similarity" restricts the scope of possible action for damages claims, and if it was introduced to avoid an overly high standard for the homogeneity of the claims.

Limited implementation of the RAD

According to Ann-Christin, it is fair to say that the RAD was implemented in a rather limited way into German law. "This is particularly true for the provisions laid down in the VDuG regarding third party litigation funding and limitation periods. While the VDuG expressly recognises that collective actions may rely on litigation funding, it also shows

some scepticism towards third party litigation funding." She explains that any representative action under the VDuG, including the collective claim for damages, is not allowed if it is financed by a third party who is promised a success fee of more than 10 percent of the enforced claim. Additionally, the VDuG provides for a mandatory disclosure of the financing agreement, which is not mandatory under Article 10 of the RAD.

The German legislator also opted for a limited implementation of Article 16 (2) of the RAD. Under the VDuG, the collective action for damages only suspends the limitation period for claims of registered consumers, whereas Article 16 (2) of the RAD states that the limitation period is suspended or interrupted 'in respect of the consumers concerned by that representative action'. "Considering the limitations to third party litigation funding and the implementation of Article 16 (2) of the RAD, it seems fair to say that the RAD was implemented into German law in a conservative manner," Ann-Christin concludes.

Few *Abhilfeklagen* on the horizon?

Ann-Christin's view is that the number of representative actions under the VDuG will likely be limited. "Given that eligible associations have very limited funds and do not directly benefit from the collective action, and considering that the maximum success fee for a litigation funder is 10 percent compared to the usual market rate of around 30 percent, it is likely that there will be few redress actions (*Abhilfeklagen*). These actions will be limited to low-value and non-complex cases," she explains. A competition damages claim under the VDuG, for instance, is unlikely to be economically feasible due to substantial costs for economic expert opinions. While there is no apparent reason why the RAD or any other representative action initiative could not fit into the German legislative system or culture, there remains a degree of scepticism from German lawmakers and segments of the legal profession concerning representative or class actions.

The leading jurisdictions

The UK and the Netherlands are currently the most relevant jurisdictions for class actions, according to Ann-Christin: "In the UK, the case law with regard to antitrust class actions is developing at a rapid pace. And in the Netherlands, class actions are well

established and accepted. It is too early to say whether the RAD puts any other jurisdiction on equal footing. Spain, for instance, might be an interesting jurisdiction in the future."

The added value of the 'assignment model'

"Since 2019, another significant development in Germany, has been the Federal Court of Justice's acceptance of the 'assignment model'[1]," Ann-Christin says. The assignment model allows for the assignment of claims to a legal service provider, who then collects these claims and asserts them as the claimant in court. She explains, "Due to the lack of a well-functioning class action system, the assignment model is often the only economically viable option to bring a claim, especially in case of low individual damages." Ann-Christin expects this method to remain the preferred approach, especially given its broader litigation funding possibilities.

The rise of ESG matters

While it is speculated that there has been an increase in claims related to ESG matters, particularly those concerning a company's environmental impact, Ann-Christin notes that there is currently no evidence of parties utilising class actions for these types of claims in Germany. However, she believes the landscape may change following the CSDDD's implementation. "This legislation could potentially influence the landscape of class actions in the coming years," she says.

Abuse of class actions is unlikely

Ann-Christin finds it challenging to envision how and why abuse would occur in class actions in Germany. "Actions under the RAD can only be initiated by qualified entities that do not derive any financial gain from the action," she explains. "And in the case of assignment models, legal service providers are usually dependent on litigation funding or act as funder themselves. A funder is unlikely to take on a case that is without merits."

TPLF remains largely unregulated

"In Germany, there is no comprehensive regulation for TPLF apart from the limited number of rules laid down in the VDuG," Ann-Christin informs us. She anticipates that

1 Bundesgerichtshof 13 July 2021, II ZR 84/20, ECLI:DE:BGH:2021:130721UIIZR84.20.0 (*AirDeal*); Bundesgerichtshof 12 June 2022, ECLI :DE:BGH:2022:130622UVIAZR418.21.0 (*Financialright*).

TPLF will assume an increasingly significant role in the future, as consumers and companies are now familiar with risk-free litigation offers on a success-based fee. "Usually, consumers are only willing to self-fund a case if they have taken out before the event insurance. And many companies, especially small and medium sized ones, would not be able or willing to bear the costs and cost risks of litigation themselves," she explains.

The 'loser pays' rule and the funder's success fee

Under German procedural law, the losing party must reimburse the winning party's costs that were necessary for the appropriate enforcement of the claim or for the legal defence against the claim. This means that the losing party only must bear the opposing party's legal fees to the amount prescribed by the German Lawyers' Fee Act (*Rechtsanwaltsvergütungsgesetz*), which usually only amounts to a fraction of the actual cost.

If the defendant loses the case, the payment of the funder's success fee does not require the court to order the losing defendant to compensate the winning party for this success fee. "There is an ongoing, albeit largely academic, legal debate about whether the success fee can be reimbursed as part of the damages. This could occur, for example, if the defendant did not pay the initial claimed amount in time, making litigation funding necessary. This amount would then have to be claimed in addition to the primary damages. As of now, there is no case law from the higher courts in Germany addressing this question," Ann-Christin notes.

Suggested improvements

When asked what should improve in Germany, Ann-Christin has various suggestions. "To begin with, legal service providers, industry associations and individual companies should be able to act as class representatives. If there is a need to regulate a success fee for litigation funding, it should be based on the standard market rate. Thirdly, there should be specialised courts that are well-equipped and have the option to involve service providers, such as accountants, when it is necessary to verify large amounts of data." Ann-Christin continues, "Also, there should be an opt-out system. In my opinion, such system is compatible with the German constitution. It would be the easiest system

to handle for everyone involved. This would ensure true access to justice for all. And it would even benefit defendants since they would have legal certainty once a settlement is reached."

Past predictions and future developments

Reflecting on our interview from five years ago, Ann-Christin notes that the prediction about the progress in the availability of collective redress has come to fruition, albeit at a slower pace than anticipated. However, the foreseen implementation of a widely used ombudsman system has yet to occur.

"Looking ahead at future developments in class actions, the most significant long-term advancement is going to be the establishment of a European-wide class action," Ann-Christin predicts.

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2 September 2024, editors: Davide Ballestrero, Rick Cornelissen and Isabella Wijnberg

A paradigm shift in class actions

Henner Schläfke is a partner at Noerr in Berlin, where he heads the Class & Mass Action Defence practice group. Henner specialises in antitrust damages litigation and defends his clients against follow-on claims. We speak with Henner regarding the implementation of the Representative Actions Directive (RAD) in Germany and other developments in the German class action landscape.

Implementation of the RAD in Germany

Since the last Class Action Survey, the RAD has come into force and was implemented in Germany on 13 October 2023. This implementation was carried out by the Representative Actions Directive Implementation Act (*Verbandsklagenrichtlinienumsetzungsgesetz*). This Act created a new Consumer Rights Enforcement Act (*Verbraucherrechtedurchsetzungsgesetz*, VDuG), introducing a new representative action for redress measures.

"This is a major achievement for Germany," Henner notes, "as it marks the first time a collective action for redress measures, including compensation to class members, has become possible." The transposition in Germany was delayed due to lengthy debate within the coalition government on various issues such as the requirements for legal standing to bring a representative action, the point in time by which consumers must have opted in, and the effect of such claims on the limitation of the broader class's claims.

According to Henner, Germany's strict adherence to an opt-in regime conflicts with the overarching goal of facilitating access to justice for consumers. "The fear of US-style class actions versus the desire for broad access to collective redress has been a recurring theme whenever new means of collective redress have been discussed," Henner explains. The VDuG represents a compromise eventually reached after extensive debate.

A paradigm shift in Germany

"The introduction of a collective action for performance in Germany represents a paradigm shift," Henner tells us. Despite the challenging legislative process, the RAD was not transposed narrowly. Instead, it resulted in an entirely new representative action for redress with a broad scope, albeit on an opt-in basis.

"These representative actions for redress under the VDuG cover all civil law disputes regarding claims and legal relationships of a group of consumers against a company," Henner elaborates. This means that the VDuG's application is significantly broader than strictly required by the RAD, encompassing not only specific consumer protection legislation, but for instance also general tort law and competition law infringements. A representative action can be brought if a group of at least 50 consumers might be affected by materially similar claims. As such, the threshold set relates to the size of the class rather than to the number of actual consumers opting in.

In addition to consumers, small companies with fewer than ten employees and an annual turnover or an annual balance that does not exceed EUR 2 million can join an action for redress. When it comes to qualified entities, the German legislature strictly followed the requirements laid down in the RAD, which lowered the bar for qualified entities compared with the previous law. "As qualified entities need to be established for a full year before filing a representative action, and must support consumer rights more broadly than just a single action, a real ad hoc entity cannot bring a representative action for redress," Henner points out. "However, the period of a year seems to allow for entities that *de facto* follow a single purpose."

Funding limitations

There is, however, a limit to the admissibility of actions brought by qualified entities. In

addition to the funding limitations aimed at preventing conflicts of interests already laid down in Article 10(2) RAD, Germany opted to include a hard cap on the share of proceeds a litigation funder can be allocated from a redress claim: an action for redress becomes inadmissible if a funder is promised a share exceeding 10% of the economic proceeds.

Impact on the statute of limitation

The transposition of the RAD has also resulted in more lenient statute of limitation rules. "Representative actions for injunctive relief now suspend the limitation vis-à-vis any affected consumer; this has a significant effect, as no consumer needs to opt in at this point. Such broad suspension of limitation provides fruitful ground for later collective actions but also for individual claims and service providers collecting claims based on the assignment model or based on mandates," he explains. "Also, once an action for redress measures has been filed, consumers do not even have to hurry: opting in to a representative action for redress measures suspends the limitation *ex post*, starting from the date on which the action was filed. Opting in is still possible until quite late in the proceedings – within three weeks of the oral hearing being held."

The RAD and its impact on the German litigation landscape

In principle, the RAD aligns well with the German system of collective redress. Germany's Model Declaratory Action (*Musterfeststellungsklage*), which was introduced in November 2018 to tackle the first wave of emissions cases, already enabled representative actions. The purpose of the Action was and still is not to provide an enforceable judgment but to clarify factual or legal questions common to claims or the legal relationship between consumers who have opted in and the defendant trader.

The strict opt-in nature of the action for redress under the VDuG and the Model Declaratory Actions reflects Germany's litigation culture, which features a mix of individual claims, often funded by legal risk insurance and brought on the basis of the assignment model, and a limited number of representative actions. "Even before the introduction of a class action for performance, consumer associations, predominantly the Federal Association of Consumer Associations (*Verbraucherzentrale Bundesverband*, VZBV), played a significant role by filing a multitude of claims for injunctive relief based

on the Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb*) and nearly thirty Model Declaratory Actions under the old law," Henner notes.

Germany's role in the international debate

Despite being Europe's largest market, Germany has historically played a limited role in the international debate on consumer class actions. This is partly due to the absence of an opt-out regime, which prevents high-value claims that would otherwise attract interest from international funders.

"The implementation of the RAD will probably not lead to a dramatic change, but it could shed more light on the class action market," Henner predicts. An incidental change brought about by the implementation of the RAD is that all representative actions, including those for injunctive relief, are now published online.[1] This was previously not the case, and the published matters might attract more attention early on. "Germany might sometimes be late to the party, but as the biggest consumer market and a major European economy, consumer representative actions are likely to come more into focus. This is especially true if associations from other Member States start rolling out their claims across multiple European jurisdictions. Compared to this and due to the additional complexity of mixing applicable laws, I find it unlikely that qualified entities will advertise on a larger scale for consumers to opt in on a cross-border basis, creating true pan-European actions for redress," Henner concludes.

Class actions in the digital domain

"In the coming years, I expect all EU legislation that regulates digital markets and creates rights for consumers and businesses to play a significant role in class actions," Henner tells us. The digital economy is driven by data, and complying with a multitude of new Acts and regulations is likely to become challenging.

1 See for actions for redress measures: https://www.bundesjustizamt.de/DE/Themen/Verbraucherrechte/VerbandsklageregisterMusterfeststellungsklagenregister/Verbandsklagenregister/Verbandsklagen/Verbandsklagen_node.html, (in German) and for actions for injunctive relief, see: https://www.bundesjustizamt.de/DE/Themen/Verbraucherrechte/VerbandsklageregisterMusterfeststellungsklagenregister/Verbandsklagenregister/Unterlassungsklagen/Unterlassungsklagen_node.html (in German).

The General Data Protection Regulation (GDPR) serves as an example of this development: "In recent years, the Court of Justice of the European Union (CJEU) has clarified that, if the GDPR is infringed, Article 82 GDPR allows damages claims even if an aggrieved party has only suffered immaterial harm." This poses a significant risk for companies, as an analysis of publicly available GDPR judgments shows that German courts are currently awarding an average of EUR 3,500 for immaterial damage per person per data breach, with a lower median at EUR 1,000.[2] The Digital Markets Act (DMA) poses new challenges. The DMA has created individual rights to access, and Germany decided to expand its competition damages laws to apply directly to DMA infringements. "This includes assigning DMA claims to specialised competition panels where a developed legal regime for claims for damages and injunctive relief is already in place."

Other developments in German class action litigation

Apart from the RAD, the most significant statutory reform related to class action litigation since 2019 is the impending reform of the Capital Investors Model Proceedings Act (*Kapitalanlegermusterverfahrensgesetz*) (KapMuG). Capital Investors Model Proceedings were introduced to establish test case proceedings in which common factual and legal questions could be determined in a decision that would be binding on individual proceedings against the same defendant. "The KapMuG, which was initially introduced with an expiration date, was reformed and made permanent in Summer 2024," Henner informs us. An Act for its reform came into force on 21 July 2024.[3] "The aim of this legislative reform is to expedite the notoriously slow KapMuG proceedings by enhancing the role of the Higher Regional Courts and reducing the number of parties involved in the model proceedings. But also, means for disclosure of documents have been introduced and the scope of the KapMuG has been significantly extended." The KapMuG now covers claims against crypto-asset custodians, rating agencies and auditors. Ratings for issuers or providers of investments within the meaning of the EU Credit Rating Agencies Regulation can form the basis for Investor Model Proceedings. The same applies to auditors' reports on the annual financial statements and consolidated financial statements of issuers of investments that must be disclosed.

2 Based on published judgments. A collection of judgments (in German) is accessible via Noerr's damages tracker at https://www.GDPRdamages.com.

3 Cf. on the reform https://www.noerr.com/en/insights/bundestag-passes-new-capital-markets-model-case-act-faster-model-case-proceedings-and-broader-scope.

Henner predicts: "It can therefore be expected that rating agencies and auditors will also come under the scrutiny of investor representatives and will have to defend themselves against KapMuG proceedings in the near future."

Alternative methods for collective redress

Henner explains that claims based on assignment models have been filed in follow-on competition damages matters, emissions cases and consumer-related matters, adding: "The exact number of these claims is unknown, but the assignment model is available for both consumers and businesses."

Mass claims are also brought based on mandates. This approach is often seen in competition damages actions, where claimants generally plead uniformly despite their individual purchases and claimant-specific damages calculations. However, bundling cases by means of mandates is limited by procedural efficiency, as courts have wide discretion to split up unrelated claims into multiple proceedings. Looking ahead, Henner expects that the assignment and mandate models will not undergo significant change. However, within the narrow field of consumer claims, if given the choice consumers might prefer a representative action with a capped success fee to an assignment model with higher success fees.

Henner anticipates that the VDuG will add an additional dimension and broaden the scope of class actions. This expansion is particularly relevant for matters that have not been commercially attractive for current claimants. "We expect that, once associations highlight an issue and raise awareness, legal service providers and claimants with legal risk insurance will join the cause." He believes this approach is likely to enhance the effectiveness and reach of collective redress mechanisms.

The rise of environmental, social and governance (ESG) claims

Henner notes the emergence of claims on ESG-related matters. "Recent climate change litigation against companies includes a few claims seeking injunctive relief to enforce climate goals, but these claims have been unsuccessful so far. Additionally, we are seeing quite some litigation concerning greenwashing, including ESG-labelled capital investments."

Limited regulation of third party litigation funding

Apart from the 10% cap, third party litigation funding (TPLF) is permitted and not regulated. There are, of course, discussions at EU level, but in Germany there are no plans to regulate TPLF at national level.

Recovery of legal costs

A 'loser pays' rule exists under German law. This rule is grounded in statutory legal and court fees, which are calculated based on the claim value. However, this value is capped at EUR 30 million. In the case of actions for redress and Model Declaratory Actions, the claim value is further reduced and capped at EUR 300,000 and EUR 250,000, respectively. "This effectively limits the adverse cost risk to very moderate levels," Henner observes.

Payment of the funder's success fee

There is no established regime for determining payment of the funder's success fee if the defendant is unsuccessful. "It remains unclear whether the court can order the defendant to pay the success fee or if the fee is deducted from the total compensation amount. Furthermore, the VDuG does not address the court's ability to limit the success fee." However, within the scope of the RAD, the success fee is limited to 10% of the economic proceeds.

Significant class actions over the past decade

In the past decade, there have been several significant class actions. Henner mentions the *Volkswagen* case as a standout for the Model Declaratory Action,[4] and *Deutsche Telekom* as a notable action brought under the KapMuG.[5] However, a particularly impactful case was the 2015 Düsseldorf Higher Regional Court's judgment on CDC's claim in the *cement cartel* case.[6] "This case, which I happened to work on as an associate, set out boundaries for assignment models in Germany," he shares.

4 Cf. the VZBV's German-language press release on the settlement at https://www.vzbv.de/pressemitteilungen/vzbv-klage-gegen-vw-fuehrt-zu-deutschlands-groesstem-massenvergleich.

5 For a summary of the proceedings, see a German-language press release by the German Federal Court of Justice on its last decision before the settlement, available at https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021044.html.

6 OLG Düsseldorf 18 February 2015, ECLI:DE:OLGD:2015:0218.VI.U.KART3.14.00.

The case remains relevant as there is no class action regime including claims by companies outside the scope of the KapMuG.

Need for higher standards

When considering the requirements for the ideal class action, Henner believes that the courts play a significant role. "The need for qualified and experienced panels that can guide the proceedings towards a timely resolution is paramount," he says. This is particularly relevant given that German civil procedure, unlike Dutch law, does not permit interim judgments on individual legal questions. "This is a fundamental reason why the KapMuG has taken years to become effective, with cases being continually transferred back and forth between the Higher Regional Court as first instance and the German Federal Court of Justice, with the latter setting aside judgments (in full or in part), remanding the proceedings and clarifying issues step by step," he explains. Moreover, Henner believes it would be beneficial to ensure that qualified entities, such as associations or legal service providers, meet higher standards if they are to bring claims. "Speedy and effective proceedings can only be guaranteed if the claimant is qualified to initiate and pursue a claim and is on an equal footing with the defendant," he asserts. Class actions need to demonstrate their ability to resolve matters quickly to efficiently alleviate the courts' burden of thousands of individual claims. "Also, in my view, it would be highly undesirable if class actions were to become mere investment vehicles, with the inconvenience of the proceedings being leveraged in negotiations," Henner concludes.

Reflections and predictions

Reflecting on the interview from five years ago, Henner notes that one prediction that has proven accurate is Germany's continued stance against opt-out class actions. "This remains true to this day," he confirms. "In the future of class actions, the most significant development, in my view, will be the collective enforcement of European law," Henner forecasts. Despite the slow transposition of the RAD, he believes the spark has been ignited. "Combined with new regulations and the CJEU's strong inclination to set aside principles of national law to guarantee effective enforcement of European law in the areas of consumer law, competition law and digital regulation, companies need to brace for parallel class actions that reinforce each other across Europe," he concludes.

Till Voss
Business Perspective
Global Public Affairs Business Partner for Law, Patents & Compliance, Group Finance and ESG at Bayer AG

18 July 2024, editors: Isabella Wijnberg and Dawit Bakker

Class actions: an increasingly significant aspect of daily operations

In the world of multinational companies, class actions are increasingly becoming a significant part of daily operations. Bayer is a global enterprise with core competencies in the life science fields of healthcare and agriculture. The company designs its products and services to help tackle some of the world's biggest challenges, catering to the fundamental human needs of health and nutrition. Till Voss, the Global Public Affairs Business Partner for Law, Patents & Compliance, Group Finance and ESG at Bayer AG, gives us some insights into the impact of class actions on their operations.

The impact of class actions on Bayer

"Indeed," Till begins, "class actions are a significant aspect of daily operations for legal departments. Large corporations like Bayer are subject to a countless rules and regulations, and class actions further complicate this landscape. All these factors must be taken into account and monitored." Till particularly points out that the existence of collective actions increases the likelihood of being sued in a particular jurisdiction. This is because it lowers the threshold and makes it more attractive for commercial actors to initiate legal actions. This is also true for the implementation of the Representative Action Directive (RAD), which will impact the likelihood of being confronted with class actions throughout Europe. In that sense, it alters the risk profile and cost of doing

business. This is particularly true if class actions are combined with ESG issues. However, this does not change the core business.

Challenging jurisdictions

When asked about the most challenging European countries for class actions, Till refers to the Netherlands and France: "This is due to local laws. In the Netherlands, for example, there is a low legal threshold for the admissibility of collective actions in which ad hoc claim vehicles are admissible. In France, this is not so much due to their class action laws, but rather linked to how they have shaped product liability issues, particularly in the context of anxiety-related claims."

The role of third party litigation funding

TPLF is becoming an increasingly relevant factor in European litigation, particularly in class action litigation. "It adds another party to the equation, a party with its own interests and motivations that diverge from the other parties in the proceedings," Till explains. He further adds, "As a consequence, you cannot dismiss the possibility that additional claims, which might not have been filed otherwise, are being brought due to such funding." Like any other company, Bayer thoroughly assesses whether the funding falls within the legal framework of the local jurisdiction and addresses it in its defence statements if this is not the case. Till observes, "It is a positive development that the European Commission is currently contemplating specific and unified rules for TPLF, so the regulatory framework is clear for everyone and all stakeholders are protected from abuse. At Bayer, we advocate full transparency, banning conflict of interests as well as tough profit-sharing limitations."

Challenges in managing class actions

According to Till, one of the main challenges of managing class actions is when you are confronted with a case that is unsuitable for class actions: "Ideally, such a case would be declared inadmissible at a preliminary stage, but not all jurisdictions have this stage. Also, sometimes you see courts taking a rather liberal approach towards the certification of a class action, postponing issues with a lack of similarity or commonality to a later stage. This makes a proper defence often burdensome and unnecessarily costly."

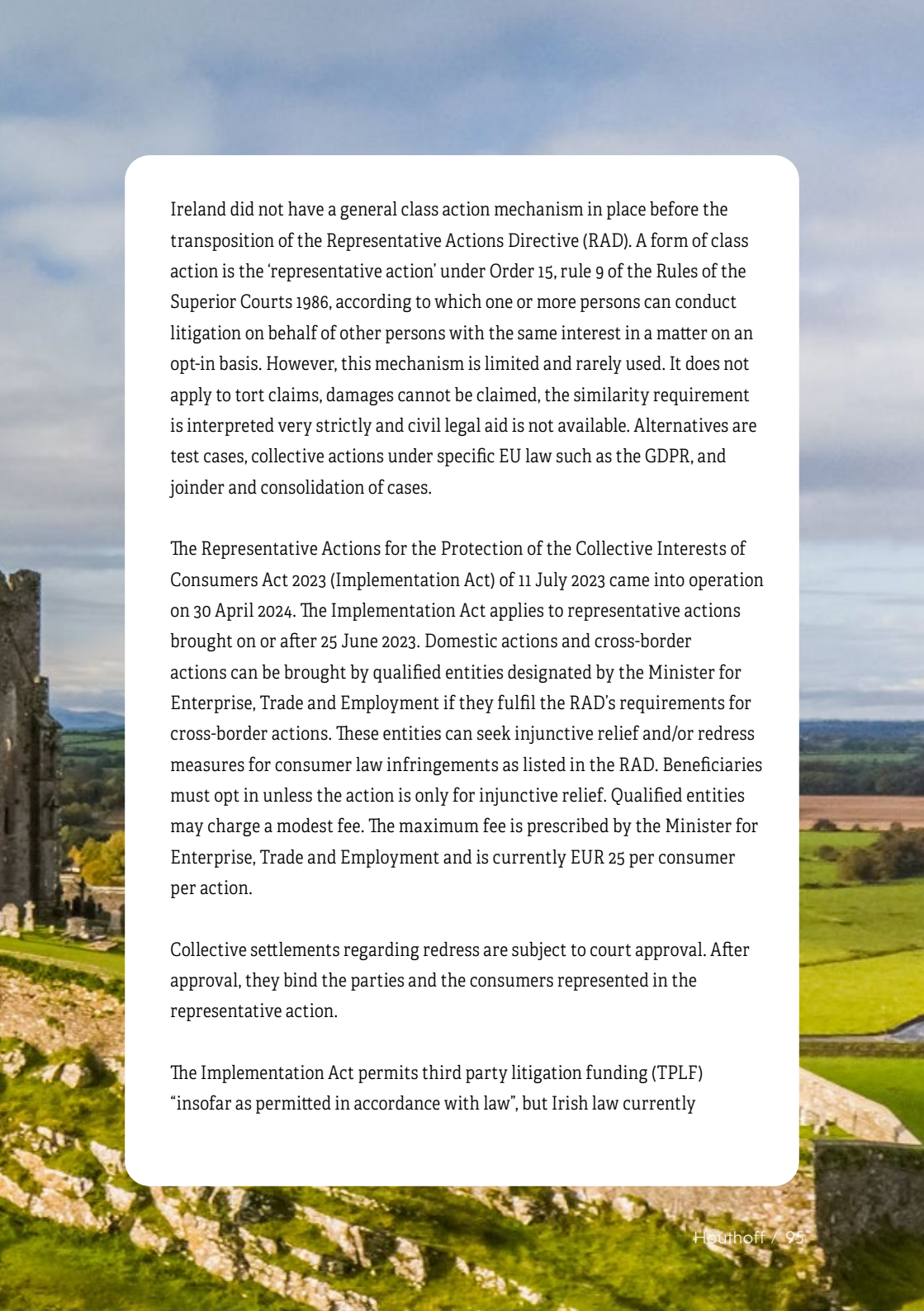
Approach to class settlements

When it comes to class settlements, Till explains that a decision to settle or not mainly depends on a comprehensive set of relevant factors. These include the chances of success, economic implications of both the litigation and a settlement, and the specific circumstances of the cases or the jurisdiction in which they are pending.

Improvement opportunities for class actions in the EU

Till believes that Europe's current class action systems could be improved if forum shopping were prevented. It currently seems rather easy for claimants to choose the jurisdiction they find most suitable, which is not always the country most relevant for the dispute. "Also," he continues, "as mentioned, it would be good to have clear rules for third party funding and rules to ensure class actions are only for cases that are suitable for such actions." After some thought, he adds, "Another point for improvement is that the burden of proof should remain with the claimants and not be shifted to the defendants, as seems to be increasingly the case. With the exception of some rare cases, it should not be the defendant that has to prove they are not liable, but it sometimes feels as if this is becoming the standard."

Ireland



Ireland did not have a general class action mechanism in place before the transposition of the Representative Actions Directive (RAD). A form of class action is the 'representative action' under Order 15, rule 9 of the Rules of the Superior Courts 1986, according to which one or more persons can conduct litigation on behalf of other persons with the same interest in a matter on an opt-in basis. However, this mechanism is limited and rarely used. It does not apply to tort claims, damages cannot be claimed, the similarity requirement is interpreted very strictly and civil legal aid is not available. Alternatives are test cases, collective actions under specific EU law such as the GDPR, and joinder and consolidation of cases.

The Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 (Implementation Act) of 11 July 2023 came into operation on 30 April 2024. The Implementation Act applies to representative actions brought on or after 25 June 2023. Domestic actions and cross-border actions can be brought by qualified entities designated by the Minister for Enterprise, Trade and Employment if they fulfil the RAD's requirements for cross-border actions. These entities can seek injunctive relief and/or redress measures for consumer law infringements as listed in the RAD. Beneficiaries must opt in unless the action is only for injunctive relief. Qualified entities may charge a modest fee. The maximum fee is prescribed by the Minister for Enterprise, Trade and Employment and is currently EUR 25 per consumer per action.

Collective settlements regarding redress are subject to court approval. After approval, they bind the parties and the consumers represented in the representative action.

The Implementation Act permits third party litigation funding (TPLF) "insofar as permitted in accordance with law", but Irish law currently

prohibits funding by third parties that do not have a legitimate and independent interest in the dispute (rules against maintenance and champerty). However, the Irish Law Reform Commission is conducting a review of the law on TPLF, which might lead to changes in the approach to TPLF in Ireland.

Class actions | Representative actions | Representative actions (RAD)

Scope	Representative actions: no tort claims; representative actions RAD: infringement of consumer law as set out in Annex I of the RAD.
Access granted to	Representative actions: one or more persons acting as representative(s); representative actions RAD: qualified entities designated by the Minister for Enterprise, Trade and Employment.
Opt-in or opt-out	Representative actions and representative actions RAD: opt-in.
Declaratory relief or damages	Representative actions: no damages; representative actions RAD: damages.
Frequently used	No
Regulatory framework	Representative actions under Order 15, rule 9 of the Rules of the Superior Courts 1986; Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 (Implementation Act).
Alternatives used in practice	Test cases, collective actions under specific EU law, joinder, consolidation of cases.

Class settlements

Binding class members after court approval RAD	Yes, in representative actions under the RAD.
Opt-in or opt-out	Binding on beneficiaries who opted in during representative action.

Third party funding

Regulated by law	Currently prohibited under Irish law, but a reform is being discussed. The Implementation Act permits TPLF insofar as permitted in accordance with law.
Frequently used	No

Good to know

All representative actions are published in the Register of Representative Actions (https://enterprise.gov.ie/en/publications/register-of-representative-actions.html).

Aidan Sweeney
Business Perspective
Head of Infrastructure & Environmental Sustainability at the Irish Business and Employers Confederation (Ibec)

5 July 2024, editors: Isabella Wijnberg and Clark Warren

Class actions in Ireland: a perspective from the business sector

Aidan Sweeney is Head of Infrastructure & Environmental Sustainability at the Irish Business and Employers Confederation (Ibec). Ibec is Ireland's largest business organisation, representing a diverse membership that ranges from small to large enterprises, both domestic and multinational. It includes 39 trade associations covering a wide range of industry sectors. We delve into the intricacies of class actions and their impact on the business sector. Aidan, who also serves as Vice Chair of Business on the OECD's Governance and Regulatory Policy Committee, provides a unique perspective on the subject.

Class actions and business success

"Class actions do not directly factor into the daily work at Ibec," Aidan begins. "The focus is primarily on influencing, supporting, and delivering for business success." He emphasises the importance of representing legal and civil justice matters from the perspective of users – rather than providers – of the Irish civil justice system.

The impact of the RAD

The implementation of the Representative Actions Directive (RAD) has indeed altered the litigation risk and strategy for companies in Ireland and across Europe. "This directive has far-reaching implications for businesses operating both domestically and

on a cross-border basis," Aidan explains, adding that the transposition of this legislation into Irish law was not a straightforward task due to incompatibilities with existing Irish law and procedural aspects typical of class actions, such as collective redress, injunctive relief, and third party litigation funding. The implementation of the RAD necessitated fundamental changes to the general administration of civil law in Ireland. The Representative Actions for the Protection of the Collective Interests of Consumers Act, in force since 1 April 2024, aims to ensure that procedures are fair, transparent, and proportionate. It has designated only one Qualified Entity (QE), the Irish Council for Civil Liberties, and sets specific requirements for the designation of any further QEs. These procedures must be workable, legally sound, and consistent with broader civil justice reforms.

Ireland's business model and legislation

When considering which European jurisdiction is either most challenging or attractive for class actions involving the business sector, Aidan says it's crucial to take into account the implications of this and similar legislation for Ireland's business model after the transposition phase. "It is important that any legislation that alters established legal practices should not undermine Ireland's appeal as a location for foreign direct investment, especially as a preferred choice for global or regional company headquarters. It is important that policymakers continue to take into consideration how the RAD may interact with other recent legislative changes or those being proposed," he advises.

The role of third party litigation funding

The government does not provide for the third party funding of representative actions, not even under the RAD. This reflects a belief that it is inappropriate to introduce champerty. Ireland does permit limited third party funding of international arbitration through the Courts and Civil Law (Miscellaneous Provisions) Act 2023, but there is no expectation that this will result in changes to civil proceedings.

Aidan believes the impact of third party litigation funding (TPLF) on the class action landscape in Ireland and across Europe is significant. "In Ireland, litigation funding is not available and TPLF is expressly prohibited, a stance shared only by Greece among EU Member States. This prohibition, confirmed by the Supreme Court in 2017, is due to

TPLF constituting the torts of maintenance and champerty. The Irish Civil Justice Review Group has examined TPLF funding and expressed concerns about permitting it without strict regulation and sufficient safeguards. They warned that unregulated TPLF could lead to the 'commoditisation' of litigation and incentivise a litigation culture that could quickly overburden the court system." According to the Civil Justice Review Group, TPLF can drive speculative, sometimes baseless, claims, and increase litigation risks for businesses in Europe. Without robust regulation and oversight, TPLF can lead to abuses and lack of transparency, fostering an aggressive litigation culture with negative consequences for businesses, the court system, and ultimately consumers.

Aidan continues, "While the harmonisation of common minimum standards for TPLF is under consideration at the EU level, the prohibition on TPLF in Ireland should be maintained. Any attempts to provide for TPLF should be limited to circumstances already legislated for, such as international arbitration. The position should ultimately be determined from the perspective of the users, not the providers, of the system."

Businesses have raised several concerns about TPLF, including its largely unregulated nature in Europe, the complex ethical issues and risks of conflict of interests it poses, and the questionable narrative that TPLF ensures access to justice for victims. In Aidan's view, these concerns merit deeper consideration by the government prior to any changes to existing practices.

Business approach to class settlements

Businesses approach class settlements with a focus on reflecting the substantive merits of the claim. "QEs and traders, or their representatives, are generally capable of assessing the fairness of settlements and making a decision to accept or reject without court involvement," Aidan explains. However, he warns that this approach must be balanced with the need to minimise settlement pressure. "Companies should not be placed under unreasonable pressure to settle, rather than run the risk, no matter how low, of going to court. There may be instances where court involvement is necessary, such as when a settlement breaches a specific legislative requirement, necessitating court intervention and potential disapproval of the settlement," he adds.

The current state and future direction of class actions in Europe

According to Aidan, the current state and future direction of class actions in Europe, including jurisdictions like Ireland, are strongly influenced by a consensus at national and European levels to prevent the emergence of US-style class actions. "The preservation of the 'opt-in' system for both domestic and cross-border actions is seen as the only viable option to strike a balance between access to justice and procedural safeguards against abusive litigation," Aidan states. He adds that this system, where affected parties affirmatively elect to join a claim, has traditionally been the model for collective proceedings in Europe.

The impact of environmental, social and governance issues

Ibec is actively engaged in the evolving area of assessing risks of class actions related to environmental, social and governance (ESG) issues. "Once largely a matter of environmental compliance and good public image, corporate sustainability now encompasses a wide array of ESG risks. The significant rise in non-financial reporting obligations and strict regulations on sustainability is in no doubt influencing boardroom decision-making. There is a concerted effort on compliance by large corporates, which mitigates potential litigation risks while at the same time ensure the necessary standards are implemented. These obligations are also extending down through a company's value chain, which adds risk by association so to speak. However, ESG-related litigation is a fast-developing area in Europe and future corporate decision-making will be further influenced by evolving case law," Aidan explains.

Aidan has provided valuable insights on the reform of Irish class actions and the expected impact on the business sector. No doubt, further developments will be closely watched by all interested parties in the Irish class action field.

Richard Willis
Defence Lawyer Perspective
Partner at Arthur Cox

2 July 2024, editors: Clark Warren, Isabella Wijnberg and Elselique Hoogervorst

The future of class actions in Ireland: third party funding on the horizon?

We speak with Richard Willis, a prominent defence lawyer in class action and multinational litigation in Ireland. Richard, a partner in the Litigation, Dispute Resolution and Investigations practice of Arthur Cox LLP, has over 20 years of experience in complex disputes, internal and regulatory investigations which often require injunctive relief and crisis management across multiple jurisdictions. He provides advice to clients in various sectors, including financial, technology, sports and education. We speak with him about the noteworthy developments in class action litigation in Ireland, focusing on the implementation of the RAD.

A revolution in Irish collective actions

On 30 April 2024, Irish legislation implementing the RAD came into force, proving to be a landmark development. The Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 (the "Act") defines a "qualified entity" as a legal person or public body representing consumers' interests, designated by the Minister or another Member State other than Ireland, to bring representative actions. These entities must meet certain criteria, including having 12 months of actual public activity to protect consumer interests, demonstrating their non-profit character, and being independent and not influenced by persons other than consumers. A register of these qualified entities will be publicly available. "This Act has revolutionised collective actions in

Ireland by formalising the process," Richard explains. "Before the commencement of the RAD, Ireland lacked a uniform system for facilitating collective actions."

Injunctions and redress measures

The Act is limited to consumer actions and allows for two types of claims: injunctions and redress measures. "For injunctive relief," Richard states, "a qualified entity must demonstrate their prior efforts to consult with the trader of the proposed representative action to resolve the alleged infringement before escalating the dispute to litigation."

For redress, a consumer affected by a trader's alleged infringement can request to be represented by a qualified entity in a representative action for redress against that trader. "This request can be made at any time up until the case has been deemed admissible by the High Court," he explains. Under the Act, a single representative action may contain either or both types of claims.

Opting in and third party funding

A consumer must opt in to be represented by a qualified entity in a representative action seeking redress under the Act before the case is deemed admissible by the High Court. However, in representative actions requesting injunctive relief (either exclusively or in conjunction with a claim seeking redress under the same application), consumers are not required to opt in for injunctive relief.

Regarding funding, Richard clarifies: "The Act does not alter the current position under Irish law that third party funding, save for limited exceptions, is not permitted. The torts and offences of maintenance and champerty, which outlaw the funding of proceedings in which the funder has no interest in return for a share of the proceeds, remain part of Irish law and largely prohibit litigation funding."

The RAD and third party funding

"The implementation of the RAD has significantly altered the litigation landscape and risk profile in Ireland," Richard tells us. Although the Act, as previously mentioned, does not alter the current position under Irish law regarding third party litigation funding (TPLF), it has brought renewed attention to the status of TPLF. In 2024, the Law Reform

Commission is scheduled to issue a report reviewing the position on TPLF in Ireland. This follows the release of a Consultation Paper on 17 July 2023 and the submission of responses from interested parties by 15 December 2023. The Minister for Justice has committed to pressuring the Department of Justice to obtain the finalised Law Reform Commission Report and to work efficiently to implement the Report's findings. This commitment is aimed at ensuring the optimal functioning of this Act, indicating its alignment with the legislative system and culture. The pending Law Reform Commission Report, along with the proposed changes to third party funding of international commercial arbitration under the Courts and Civil Law (Miscellaneous Provisions) Act 2023, may serve as catalysts for significant changes to TPLF. This could potentially end Ireland's outlier status amongst the common law world in the future.

Ireland: a key jurisdiction for class actions

"Ireland is anticipated to become one of the most relevant jurisdictions within Europe for class actions, given its status as the largest common law jurisdiction in the European Union and its role as the base for the European divisions of numerous multinational companies, including many prominent tech companies," Richard remarks. The RAD's implementation has further solidified this perspective. Under the Act, parties designated as qualified entities by a Member State other than Ireland are entitled to take a representative action. This provision expands the pool of potential representative action litigants and, through Ireland's European Union membership, offers them convenient enforcement across other Member States.

EU legislation's growing role

"There are at least two instances in which EU legislation is anticipated to play a larger role in class actions in the coming years," Richard explains. For core digital services providers, qualified entities may initiate collective action proceedings on behalf of EU end users in response to the Digital Market Act (Regulation (EU) 2022/1925, "DMA"). In this context, the potential defendants would be 'gatekeeper' platforms designated by the European Commission. On 6 September 2023, the European Commission designated the first group of gatekeepers, including Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft, which had until 7 March 2024 to comply with their new obligations under the DMA. Key sections

of the DMA were crafted with the RAD in mind, as stated in Recital 104 of the DMA. In the context of data breaches, Article 80 of the General Data Protection Regulation 2016 provides that authorised entities can bring collective actions on behalf of data subjects. These developments indicate a growing role for EU legislation in class actions.

The Courts and Civil Law (Miscellaneous Provisions) Act 2023

"Apart from the RAD, another significant change in the jurisdiction related to class action litigation since 2019 is the signing into law of the Courts and Civil Law (Miscellaneous Provisions) Act 2023 on 5 July 2023," Richard notes. This Act of 2023, when commenced, would permit third party funding of international commercial arbitration. It amends the Arbitration Act 2010 to disapply the aforementioned torts and offences of maintenance and champerty. These essentially ban third party funding to "dispute resolution proceedings", which include international commercial arbitration, proceedings arising out of an international commercial arbitration before a court of competent jurisdiction, any appeal from a decision of such a court, and any mediation or conciliation proceedings arising out of an international commercial arbitration, proceedings or an appeal.

The Act of 2023 stipulates that a third party funding contract relating to "dispute resolution proceedings" shall not be treated contrary to public policy or otherwise illegal or void, provided it meets certain criteria.

The role of pathfinder cases

"Before the commencement of the RAD, there was no single, uniform mechanism for class actions in Ireland," Richard reiterates. "In Ireland, alternative ways for collective redress, such as litigating by mandate or via assignment of claims, have traditionally been available through the progression of 'pathfinder cases'," Richard explains. This process involves selecting a case that serves as a 'test case' due to its similar or identical facts to other cases before the High Court. Generally, proceedings similar to the test case are stayed until the determination of the test case. He highlights several significant test cases, including i) insurance cases brought by pubs concerning the indemnifications of losses as a result of the Irish government's decision to close pubs in

response to COVID-19 in 2021,[1] ii) financial product cases involving more than 15 lenders in relation to 'tracker mortgages' that had been presented as being cheaper but turned out to be more expensive, putting financial pressure on homeowners,[2] iii) personal injury cases against the Irish State for faulty cervical cancer screenings,[3] iv) shareholder and securities cases resulting from fraudulent acts by the owner of the Quinn Group, a major Irish conglomerate,[4] and v) product liability and consumer law cases resulting from the discovery of defective materials in concrete blocks, affecting 6,000 Irish homes.[5]

Anticipated increase in class actions

"The anticipated increase in class actions under the RAD is expected to draw attention to multiparty proceedings in general," Richard tells us. This includes those proceedings not brought under the Act, which may subsequently undergo changes in the future, potentially in terms of quantity or type of claims.

Abuse of class actions

"Considering the current restrictions on third party funding and the challenges involved in mounting multiparty litigation, it is viewed that the abuse of class actions in this jurisdiction would be a difficult endeavour," Richard states.

The difference between Irish and US class actions

"When it comes to class actions, the jurisdiction in Ireland, under the RAD, differs from the US class action regime," Richard clarifies. In Ireland, only certain non-specified, non-profit entities, which must be designated as such by a regulator, may prosecute a

1 Amongst others: Hyper Trust Ltd (t/a as the Leopardstown Inn) and FBD Insurance plc (No. 2020/3656 P); Aberken Ltd (t/a as Sinnotts) and FBD Insurance plc (No. 2020/3658 P); Inn on Hibernian Way Ltd (t/a as Lemon & Duke) and FBD Insurance plc (No. 2020/3402 P); Leinster Overview Concepts Ltd (t/a as Seán's Bar) and FBD Insurance plc (No. 2020/3453 P).

2 Amongst others: Ulster Bank Ireland DAC and Financial Services and Pensions Ombudsman and U.H.K. and F.K. (No. 2021/137 MCA); Ulster Bank Ireland DAC and Financial Services and Pensions Ombudsman and P.C. and D.B. (No. 2021/173 MCA); Ulster Bank Ireland DAC and Financial Services and Pensions Ombudsman and K.C. (No. 2021/174 MCA).

3 Amongst others: Vivienne Wallace and Health Service Executive & Ors (No. 2018/6109 P); Ruth and Paul Morrissey and Health Service Executive & Ors (No. 2018/4309 P).

4 Amongst others: Ciara Quinn & Ors and Irish Bank Resolution Corporation Limited & Or (No. 2011/4336 P)

5 Amongst others: Mary Connolly v Cassidy Brother Concrete & Ors (No. 2023/3037 P); Helen Doherty v Cassidy Brother Concrete & Ors (No. 2023/3033 P); Anne Marie Marley v Cassidy Brother Concrete & Ors (No. 2023/3038 P)

class action under the process facilitated through the Act. This stands in contrast to the US class action regime, which generally permits larger classes of plaintiffs.

The rise in ESG litigation

"Given the rise in ESG litigation in the US, it is anticipated that implementing the RAD across the EU will likely lead to a similar increase in litigation," Richard adds. This suggests that more claims regarding ESG matters, such as companies' impact on the environment, could be brought in the future, and parties are already using class actions for these types of claims.

Costs follow the event

"With respect to costs, the rule under Irish law is that costs follow the event, meaning that the unsuccessful party is generally required to pay the costs of the successful party," Richard notes. This rule is also mirrored in the RAD.

The issue of success fee

"In Ireland, due to the current restrictions against third party funding, the issue of how a funder's success fee is paid in case the defendant loses has not been addressed," Richard tells us. This includes whether the court orders the defendant to pay the success fee or if it is deducted from the total amount of compensation, and whether the court can and does limit the amount of the success fee.

Significant multiparty proceedings

"In the past ten years, several important multiparty proceedings have emerged in Ireland. However, the tracker mortgage cases are considered one of the most significant," Richard observes. These cases, which were highly publicised and resulted in some of the largest fines ever awarded against entities in the history of the Irish State, marked them as a notable event in the realm of class actions.

The rising popularity of class actions

"The rising popularity of class actions outside the US is seen as a positive development, particularly for Irish businesses and consumers," Richard says. The streamlined proceedings provided by class actions offer certainty and clarity, which is beneficial

compared to the current methods for prosecuting multiparty proceedings. Furthermore, Richard predicts that Ireland's popularity as a dispute resolution hub will continue to increase, especially given its European Union membership. This allows for the convenient enforcement of judgments issued by its courts across the European Union.

The ideal class action

"From my perspective, the requirements for an ideal class action would be those that ensure the efficient resolution of similarly situated claims among a group of claimants," Richard explains. This is based on a class action mechanism's purpose, which should be honed to prevent any abuse of processes.

The balance in class actions

Finally, we ask Richard about undesirable developments. He answers, "Any liberalisation of the system that does not maintain a balance between allowing individuals to act collectively and disincentivising frivolous or vexatious litigation." Richard believes that it is crucial that any expansion of the current system includes the necessary safeguards to ensure that cases lacking merit are quickly identified, thereby preventing significant costs and wasting valuable court time.

Final thoughts

Richard shares his final thoughts on the future of class actions. "In my view, the most important development in the future of class actions will be the significant regulation of third party funding, including cross-jurisdictional funding," he concludes. This development, encouraged by the European Parliament's proposal of a directive to regulate third party funding, would align Ireland with other jurisdictions.

Israel

Israel has a long history of numerous class actions, since alternative methods for collective redress are not customary. Class actions are limited to certain areas of law or types of actions, although the Class Actions Law 5766-2006, which was enacted during 2006, has broadened their scope. Class actions can concern, for example, the infringement of consumer and competition law, securities issues, environmental issues and product liability. Monetary remedies can be sought.

The general procedure is that a claimant submits a motion for judicial approval of their personal claim as a class action, seeking to serve as the representative claimant. Non-profit organisations and some public authorities can bring class actions under certain conditions. The court has to certify the class. In principle, class actions have an opt-out mechanism, although the Class Actions Law provides the court with the option to require class members to opt in.

On 8 April 2018, new regulations introduced court fees for class action lawsuits. The fees are meant to discourage class actions that are ill-founded or that have negligible importance or value.

Since the Class Actions Law was enacted, the majority of the class actions in Israel have been resolved either by settlements or consensual dismissal. Both must be approved by the court in order to protect the interests of the class members.

Class actions

Scope	Broad list of claims, based on the infringement of e.g. consumer, securities and competition law; environmental claims; product liability.
Access granted to	Class representative and certain non-profit organisations and public authorities.
Opt-in or opt-out	Opt-out; the court can choose an opt-in regime.
Declaratory relief or damages	Both
Frequently used	Yes
Regulatory framework	Class Actions Law 5766-2006, Class Actions Regulations.
Alternatives used in practice	No

Class settlements

Binding class members after court approval	Yes
Opt-in or opt-out	Opt-out
Regulatory framework	Class Actions Law 5766-2006.

Third party funding

Regulated by law	No, but public funding is regulated.
Frequently used	Yes, but still increasing.

Good to know

Israel has the largest number of class actions per capita worldwide.

Noam Zamir
Defence Lawyer Perspective
Partner at S. Horowitz & Co.

25 June 2024, editors: Phebe Franssen, Aimée de Goede and Isabella Wijnberg

A deep dive into the evolution of class action litigation in Israel

We have the opportunity to hear from Noam Zamir, a partner in the Dispute Resolution Practice Group of S. Horowitz & Co. in Israel. Noam, who specialises in class actions, has extensive experience representing both international and Israeli clients before all levels of Israeli courts, including the Israeli Supreme Court, as well as before arbitration tribunals. He also participated in the Class Action Survey conducted in 2019. Fast-forward to June 2024, and we revisit those insights, delving into the significant changes that have occurred in the field since 2019. Does Israel still have the largest number of class actions per capita worldwide?

Relevant changes in Israel in relation to class action litigation since 2019

Noam begins by pointing out that the Israeli Class Actions Law 5766-2006, which was enacted during 2006, of course has no connection with the Representative Actions Directive (RAD), which has come into force in Europe since our last Class Action Survey. Nevertheless, since 2019, the Israeli class action landscape has also changed due to a multitude of rulings, contributing to the shaping and refinement of practices. "One of the most important decisions since 2019 was rendered by the Supreme Court and concerned the defence of '*de minimis*' in class actions, i.e. the (im)possibility to file an action on behalf of parties who suffered separately insignificant damages." The Supreme Court ruled that there is a contradiction between the purpose of the '*de minimis*' defence and

the rationale of the class action mechanism.[1] The '*de minimis*' defence in the context of class actions in Israel is a legal argument that can be used by defendants to claim that the alleged harm or damage caused is too trivial or minor to justify a class action lawsuit. "As a result of the ruling of the Supreme Court, this defence will not directly apply in class actions. However, the court noted that the Class Actions Law establishes an internal mechanism that allows for discussions and considerations of justice. This is based on Article 8(a)(2) of the Law, which reads 'A class action is the efficient and fair way to decide a dispute in the circumstances of the matter', which might allow a court to give weight to considerations similar to a '*de minimis*' defence when dealing with the certification of a class action."

The judgment also addresses the question of the weight to be given to a regulator's interpretive position regarding its instructions. This could concern for example regulations of the insurance commissioner in connection with implementation of certain laws. The court ruled that the correct weight should not be defined in advance, but rather examined on a case-by-case basis in accordance with the circumstances, while paying attention to the regulator's interpretive position as a professional expert.

"As in 2019," Noam continues, "alternative methods for collective redress, such as litigating by mandate or via assignment of claims, are uncommon in Israel. This highlights the importance and prevalence of class action lawsuits in the Israeli legal landscape."

In the Class Action Survey in 2019, Noam anticipated that there would be a significant development in the number and nature of class actions due to the introduction of court fees, which would result in fewer relatively small class actions and more big, sophisticated class actions. This prediction has proven correct. "Although claimants continue to file motions, they have started shifting to class actions that do not require a court fee." However, it seems that Israel still has the largest number of class actions per capita worldwide, with over 1600 new motions filed each year.

1 AH 4960/18 *Seligman v. Phoenix Insurance Company Ltd.*

Cost apportionment

Israel has a form of 'loser pays' rule. "However," Noam explains, "the Israeli courts usually only order reasonable – some would say minimal – costs." These costs do not include funding costs. The funders will usually get the payments from the claimants and not from the defendant.

Third party litigation funding (TPLF) in Israel

We go on to discuss TPLF. Noam explains that a general consensus on TPLF in Israel has not yet been reached. "While it can potentially provide access to justice for individuals or entities who may otherwise be unable to afford litigation costs, it raises significant ethical concerns and poses potential conflicts of interest between the funds and the class represented (e.g., if the class is better off with litigating the case, but the relevant fund prefers to settle). Also, there are lingering questions about its impact on the legal system and its potential to incentivise speculative or frivolous litigation."

Currently, there are no specific laws governing TPLF in Israel. However, Noam explains, the legal community is engaged in ongoing discussions about the necessity for regulations to address transparency, conflicts of interest, and other risks associated with TPLF.

Looking ahead, it is likely that there will be continued debates and possibly regulatory developments regarding TPLF in Israel. Balancing the imperative of enhanced access to justice with the imperative for safeguards against potential abuses will be pivotal in shaping the future of TPLF regulation in the country.

Landmark case

We ask Noam what he considers to be the most important class action in the past ten years. He names *Rebecca Technologies Ltd. v. Talmor.*[2] "This case was a game changer in the realm of class action litigation." In it the court decided that the first claimant to file a motion is granted priority in pursuing the legal action. "However, this emphasis on timely filing also leads to another incentive," Noam continues, "the filing of unnecessary and ill-conceived motions. While the intention is to expedite justice, it inadvertently

2 CA 3293-17 640-01-17 *Rebecca Technologies Ltd. v. Talmor.*

encourages a race to the courthouse, leading to hastily prepared and underdeveloped claims. Unfortunately, this principle has since guided the handling of cases where multiple claimants file lawsuits related to the same alleged issue."

The pressure to settle: a look at the dynamics of class action lawsuits

Another trend in class actions in Israel is early settlement. The rising judicial workload, together with specialised law firms dedicated solely to class action submissions, has led to increased pressure for early settlements. This urgency arises from the prolonged duration of cases and the need to submit extensive defences. Even if a company is ultimately found to be in the right, it will not recover the full amount it paid for legal fees and case handling. These dynamics encourage parties to settle at an early stage, often before the merits of the case are assessed. The desire to avoid dragging out litigation and to limit costs plays an important role in this trend. "Lawyers representing class action claimants are well aware of this. They strategically use the potential for early settlement as leverage during negotiations. In Israel, where the claimant lawyer's share is derived from the total settlement amount, this leverage becomes even more pronounced. There are lawyers that seek favourable terms that maximise their own compensation."

Abuse of class actions

We ask Noam if he thinks abuse of class actions is likely to occur in Israel. He explains that, while class actions serve as a crucial tool for collective redress and access to justice, there have been occasional concerns about potential abuse or misuse of the system.

According to Noam, one potential area of abuse is the filing of frivolous or meritless claims by individuals or attorneys aiming to exploit the class action mechanism for personal profit. Such actions can impose unnecessary litigation costs on defendants and congest the court system with cases lacking substantive merit.

Moreover, there have been instances where class actions have been criticised for primarily benefiting lawyers rather than the class. This can occur when settlements result in substantial attorney fees while providing minimal relief to class members.

To reduce the risk of abuse, it is essential for the legal system to implement safeguards. These may include requirements for class action certification, judicial oversight of settlements, and mechanisms for the early screening of frivolous claims. Transparency and accountability in the class action process are also crucial to ensure that class members' interests are adequately represented, including ordering more substantial legal costs (a tool which is not used these days).

A recent court finding[3] of serious misuse involved class actions filed against small businesses for not making their websites accessible to people with disabilities. This issue has become a profitable venture for certain lawyers who send dozens, even thousands, of warning letters to small businesses, threatening lawsuits against them. They often operate semi-automated systems to identify these inaccessible websites without genuinely considering the level of harm, the usage of these websites, and the law's purpose. This trend underscores the need for vigilance and reform in the class action system.

Top 5 types of class actions in Israel

In Israel, the scope of class actions extends beyond consumers to include other individuals and entities. According to Noam, the five most common types of class actions in Israel relate to the following areas:

1. equal rights for individuals with disabilities;
2. consumer protection lawsuits;
3. spam-related cases;
4. banking disputes; and
5. pension or employment-related issues.

A distinctive feature of the Israeli class action landscape is the diversity of cases brought under this mechanism. While class actions have traditionally centered on consumer rights, labour disputes and securities issues, there has been a noticeable shift towards other areas such as environmental concerns, corporate governance and accessibility rights. This trend signals a promising trajectory for the expansion of class actions in Israel.

3 CA (Tel-Aviv) 52621-07-23 *Ben Or v. Aviv Investment House* (22.1.2024).

Israel's robust legal system, which includes provisions for class actions, is well-equipped to handle collective grievances. As societal awareness of legal rights and remedies continues to grow, it is likely that the demand for class actions as a tool for redress for widespread harms or injustices will increase. This evolution underscores the dynamic nature of class actions and their important role in the Israeli legal system.

Developments relating to ESG

We also discuss the developments in the field of Environmental, Social and Governance (ESG). Noam explains, "The corporate governance landscape in Israel is evolving, with a growing emphasis on stakeholder interests and the broader implications of corporate actions. This shift has paved the way for a potential increase in claims related to ESG factors. It is generally acknowledged in Israeli society that companies might have responsibilities that extend beyond mere profit generation, encompassing the welfare of employees, communities, and the environment. In particular with regard to the latter, class actions have emerged as an important instrument for environmental protection in Israel today."

Noam points to recent legal developments that highlight the importance of private enforcement tools in enforcing environmental laws. "Notably, recent rulings," he continues, "such as the landmark judgment in *Prof. Alon Tal v. Rotem Ampert Negev Ltd.*[4] - in which the Supreme Court created barriers from dismissing such actions on the basis of statute of limitation - have broadened the scope of class actions to include damages from long-standing environmental hazards."

Furthermore, Noam mentions cases such as *Antman v. Rotem Ampert, Ltd.*[5], which illustrate a rising trend of employing class actions to address environmental damage (in this specific case chemical manufacturer has been sued as a result of ecological disaster). As global and local awareness of environmental issues continues to grow, it is expected that class actions will increasingly serve as a mechanism to hold companies accountable for their environmental impact. This shows that class actions have an important role in promoting corporate responsibility.

4 CA 4354/22 *Prof. Alon Tal v. Rotem Ampert Negev Ltd.*
5 CA 4930-07-17 *Antman v. Rotem Ampert, Ltd.*

Fundamental principles of the Israeli class action system

As highlighted in the 2019 Class Action Survey, the Israeli class action system shares many parallels with its American counterpart. The Israeli legislature chose to adopt the American model of class actions, a decision first reflected in the incorporation of the Class Action Section within the Securities Law in 1988. This choice has persisted through subsequent amendments to class action legislation and was reaffirmed in the Class Action Law of 2006.

The framework is anchored by several key principles. Noam explains: "First, the claimant must seek the court's approval to bring a class action, which is granted based on the conditions stipulated in the law. Second, the opt-out principle is central to the process, whereby an approved class action includes all members of the defined group, excluding those who formally opt-out. Third, potential remedies in class actions can include financial compensation, even if the distribution of remedies among class members is not uniform. Fourth, attorney fees for the claimant's representation are contingent on the successful outcome of the claim or settlement and are determined, at least partially, by the value of the remedy awarded to the represented class in the judgment or settlement."

The ideal class action

According to Noam, the ideal class action should meet the following criteria:

- **A well-defined class:** It is crucial to have a clearly defined class, which ensures that the group of individuals affected by the alleged harm can be easily identified.
- **A clear legal basis:** The class action should be based on a solid legal foundation. Allegations must be sufficiently substantiated to warrant class certification, ensuring that the claims are meritorious and likely to succeed.
- **Commonality of issues:** There should be common questions of law or fact among the class members. These common issues should take precedence over any individual concerns.

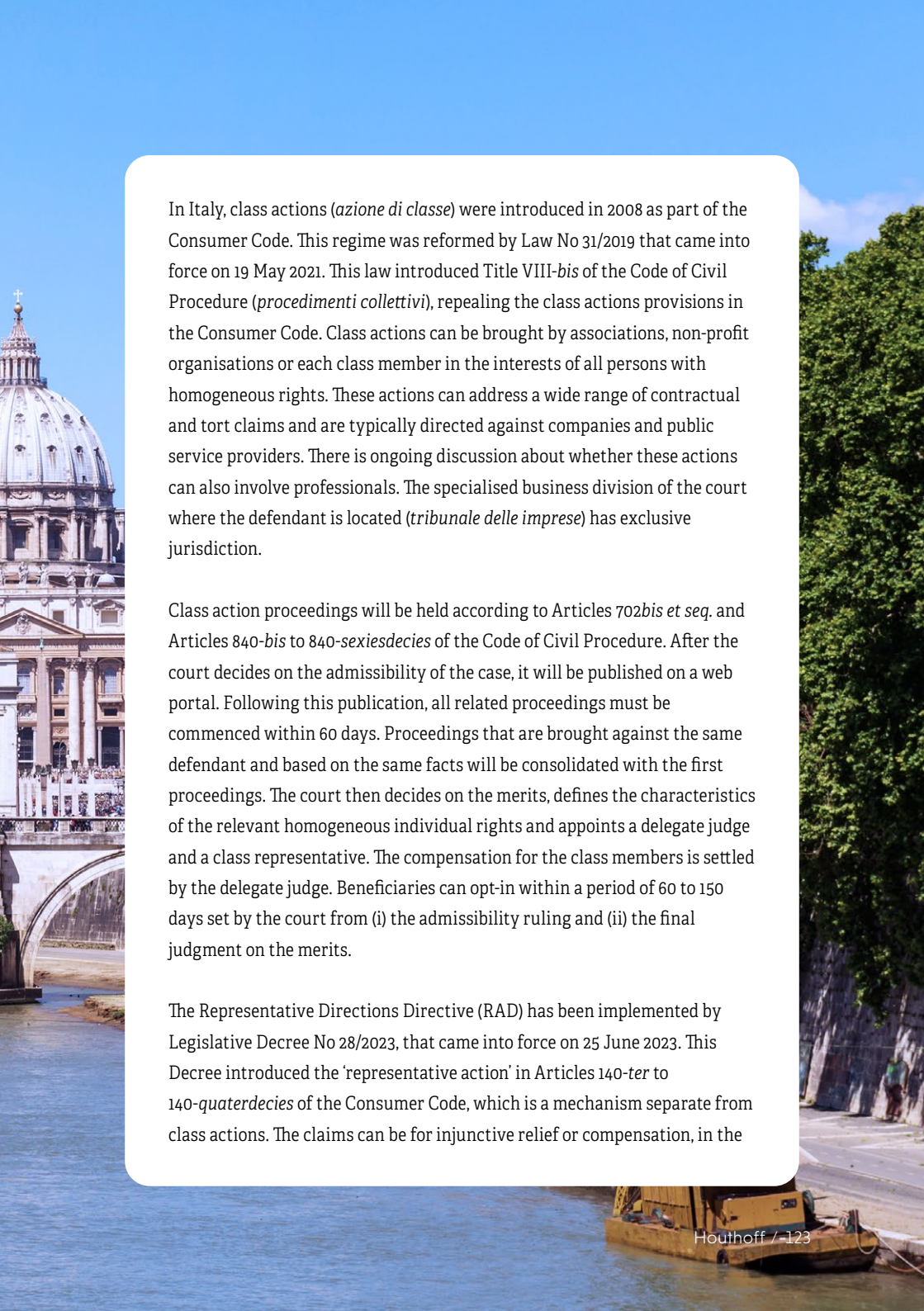
From Noam's perspective, an undesirable development in the Israeli field of class actions would be "any trend towards relaxing mandatory requirements or a court tendency to accept motions that lead to a decrease in the standards of the class actions that are

filed." This could potentially create a situation where the legal system becomes more vulnerable to abuse by law firms searching for causes to pursue solely for profit motives. Such a scenario could result in an increase in frivolous or opportunistic class action lawsuits that do not genuinely serve the interests of justice or the affected parties. Instead, it may overburden the legal system, waste resources, and undermine the credibility and effectiveness of class action litigation as a means of seeking redress. "To avoid this, we need to maintain rigorous standards and criteria for class actions to ensure their proper use and effectiveness," Noam concludes firmly.

The most important development in the future of class actions

With the increasing global popularity of the class action mechanism, the potential for cross-border class actions is expanding. According to Noam, this emerging trend necessitates a thorough examination of the appropriateness of establishing conventions or laws to govern cross-border litigation in this domain. "For instance, it might be feasible to establish a consensual mechanism that permits the cause of action to be examined in one country while the assessment of damages is to be conducted in another. This approach could streamline the process and enhance the efficiency of cross-border class actions. This will likely take more than five years to develop but let's re-discuss in five years," Noam jokes. We are happy to take that as a promise of his continued participation in the next edition.

Italy



In Italy, class actions (*azione di classe*) were introduced in 2008 as part of the Consumer Code. This regime was reformed by Law No 31/2019 that came into force on 19 May 2021. This law introduced Title VIII-*bis* of the Code of Civil Procedure (*procedimenti collettivi*), repealing the class actions provisions in the Consumer Code. Class actions can be brought by associations, non-profit organisations or each class member in the interests of all persons with homogeneous rights. These actions can address a wide range of contractual and tort claims and are typically directed against companies and public service providers. There is ongoing discussion about whether these actions can also involve professionals. The specialised business division of the court where the defendant is located (*tribunale delle imprese*) has exclusive jurisdiction.

Class action proceedings will be held according to Articles 702*bis et seq.* and Articles 840-*bis* to 840-*sexiesdecies* of the Code of Civil Procedure. After the court decides on the admissibility of the case, it will be published on a web portal. Following this publication, all related proceedings must be commenced within 60 days. Proceedings that are brought against the same defendant and based on the same facts will be consolidated with the first proceedings. The court then decides on the merits, defines the characteristics of the relevant homogeneous individual rights and appoints a delegate judge and a class representative. The compensation for the class members is settled by the delegate judge. Beneficiaries can opt-in within a period of 60 to 150 days set by the court from (i) the admissibility ruling and (ii) the final judgment on the merits.

The Representative Directions Directive (RAD) has been implemented by Legislative Decree No 28/2023, that came into force on 25 June 2023. This Decree introduced the 'representative action' in Articles 140-*ter* to 140-*quaterdecies* of the Consumer Code, which is a mechanism separate from class actions. The claims can be for injunctive relief or compensation, in the

interests of consumers. Only qualified entities can bring a representative action. Qualified entities are nationally recognised consumer and user associations that are listed by the Ministry of Enterprises and Made in Italy, and certain independent public bodies. The scope of defendants is broader than in class actions and includes all natural and legal persons involved in business activities as defined in the RAD. The court of the district in which the defendant is seated has jurisdiction. Consumers can opt in in the same way as for class actions.

Qualified entities for representative actions cannot file class actions under Law No 31/2019. However, there is a risk of parallel proceedings as individual class members can still initiate class actions on topics for which representative actions are available.

Class actions | *Azione di classe* | Representative action

Scope	*Azione di classe*: wide range of contractual and tort claims. Representative action: consumer law.
Access granted to	*Azione di classe*: each class member, associations or non-profit organisations registered on a public list. Representative action: qualified entities.
Opt-in or opt-out	*Azione di classe* and representative action: opt-in (two opt-in moments).
Declaratory relief or damages	*Azione di classe*: both. Representative action: damages.
Frequently used	*Azione di classe* and representative action: no, but more frequent use is expected.
Regulatory framework	*Azione di classe:* Articles 702-*bis* et seq. and Articles 840-*bis* to 840-*sexiesdecies* Code of Civil Procedure. Representative action: Articles 140-*ter* to 140-*quaterdecies* Consumer Code.

Class settlements

Binding class members after court approval	*Azione di classe*: yes. Representative action: yes.
Opt-in or opt-out	*Azione di classe*: Opt-in after settlement proposal made by the court, opt-out after settlement on the parties' initiative. Representative action: opt-in.
Regulatory framework	*Azione di classe*: Law No 31/2019; Code of Civil Procedure. Representative action: Article 140-*decies* Consumer Code.

Third party funding

Regulated by law	Azione di classe: no. Representative action: according to RAD.
Frequently used	No

Good to know

The 'Italian torpedo' is not possible in class actions. Class actions are governed by the rules on summary proceedings, and the court is given specific time frames to speed up the proceedings.

Francesca Fonzi
Business Perspective
Head of the Group Legal Coordination, Real Estate and Litigation at Casa Depositi

22 July 2024, editors: Davide Ballestrero, Rick Cornelissen and Isabella Wijnberg

Class actions have only recently taken a central role

Francesca Fonzi is the Head of the Group Legal Coordination, Real Estate and Litigation unit *(Coordinamento Legale di Gruppo, Immobiliare e Contenzioso)* of Cassa depositi e prestiti S.p.A. (CDP). CDP is the Italian National Promotional Institution. Founded in 1850, CDP finances the infrastructure and investment of public administrations and fosters sustainable development in Italy. CDP is involved in financing high-impact initiatives in various economic, environmental and social realms. These include specialised programmes focused on climate change, financial inclusion and women's entrepreneurship. Francesca's responsibilities within CDP span across corporate governance of the group; civil, administrative and criminal litigation; insolvency procedures; restructuring and debt recovery; real estate operations and general legal affairs. We speak with Francesca about the development of class action in Italy and its impact on her business sector.

The rising relevance of class actions

"Class actions have only recently taken a central role in our jurisdiction, in part due to supranational legislation. They have become particularly relevant for my daily work, and the changing legal context suggests that their relevance will only increase in the future," Francesca tells us. The RAD was implemented in Italy by Legislative Decree No.

28/2023. The RAD's implementation introduces an additional legal instrument to the traditional class action regime. "There is a need to take the RAD into account when defining litigation strategies, as it could represent a potential risk of increased litigation. Despite the fact that class actions have proven difficult to initiate and succeed within the Italian legal system, representative actions have emerged as a potentially impactful instrument. Moreover, although qualified entities within the meaning of the RAD are precluded to bring collective claims that fall outside the RAD's scope, the possibility of interference between the Italian regular class action framework and the RAD does not seem to be entirely excluded," Francesca explains. She further points out another aspect to consider in the context of litigation risk and strategy: the possibility for foreign qualified entities to bring representative actions under the RAD before the Italian courts.

Learning from common law jurisdictions

According to Francesca, common law jurisdictions are the most interesting when it comes to class actions. "This is due to the fact that class actions have been prevalent in these jurisdictions for a longer period of time, resulting in a wide range of legal precedents," she says.

Third party litigation funding: a new phenomenon

Third party litigation funding (TPLF) is a relatively new phenomenon in Italy which is not frequently used. "One of the reasons for the limited engagement of TPLF may be that in our jurisdiction the costs of litigation do not represent such a high expense as to extensively promote the TPLF's diffusion," Francesca notes. However, the Italian implementation of the RAD may result in TPLF becoming more relevant in Italy. Legislative Decree No. 28/2023 introduced criteria which must be fulfilled in relation to TPLF for a representative action to be admissible. For instance, the funder may not be a competitor of the defendant. "Hence, the funder's presence would certainly determine the need to verify, on a case-by-case basis, the existence of possible conflicts of interest that would result in the inadmissibility of the entire collective action," Francesca concludes.

The challenges of managing a class action

As a legal counsel, Francesca would face specific challenges in managing a class action:

"The main focus of CDP is on the economic and social development of the country. In light of this, when facing a potential class action, it's crucial to consider potential institutional and reputational impacts. This is in addition to addressing the purely technical and legal issues that arise during a class action. This would not be an easy task. It would require providing the best possible assistance to the company but keeping the context in mind while reflecting on the reasons why that action was promoted."
This also applies to the approach to potential class settlements, which is intricately connected to the unique circumstances of each case. "Each situation requires a specific assessment, especially when serving as legal counsel for a company like CDP, a unique entity in the Italian landscape with a fundamental role in the country."

The future direction of class actions

Francesca views the current state and future direction of class actions in both Italy and Europe with optimism: "Like many legal instruments, there is a hope for a more detailed and common regulatory framework for class actions that would make assessing a potential class action easier. We see that the legislature is already evolving in that direction with various regulatory interventions on the matter. It would be good if the legislative efforts would be aimed at harmonising class action laws across civil law jurisdictions."

ESG issues and class actions

Francesca highlights that CDP pays keen attention to all ESG-related matters: "At CDP, ESG risk management plays a pivotal role at the corporate governance level. Corporate sustainability strategies are strongly integrated in the core business." CDP has numerous ESG policies in place and plays an important role in sustainable finance. "ESG policies and criteria are used to assess and monitor CDP's lending and investment activities. For these reasons, CDP recently obtained an important award for its performance on the ESG front. CDP took first place worldwide in the 'ESG Risk Rating' ranking by Morningstar Sustainalytics in the category 'Banks' and also in the category 'Development Banks'. It also placed third among all companies across all sectors (out of 15,860 companies)."

Daniele Geronzi
Defence Lawyer Perspective
Partner at Legance

2 September 2024, editors: Davide Ballestrero, Rick Cornelissen and Isabella Wijnberg

Emerging trend or unpopular phenomenon?

Daniele Geronzi is partner at Legance, a prominent full-service law firm with offices in Milan, Rome and London. Daniele co-heads the firm's Dispute Resolution department. He has over 20 years' experience in advising leading national and international financial institutions and corporations on complex commercial, financial, corporate and insolvency litigations, including class actions. He acts mainly on the defence side. As he did five years ago, Daniele talks us through the recent developments in the field of class actions in Italy.

The RAD's implementation into the Italian Consumer Code

The RAD was implemented into Italian law and came into effect on 7 April 2023.[1] The RAD was transposed into the Italian Consumer Code (*Codice del Consumo*) in Articles 140-*ter* to 140-*quaterdecies*.

The RAD has brought about statutory changes, primarily concerning the scope, legal standing and the different types of class actions. "The Italian provisions transposing the RAD cover and regulate all collective actions brought against natural or legal persons who, in their professional activity, harm collective interests by violating certain directives and regulations," Daniele explains. Furthermore, cross-border representative actions and the possibility to submit collective settlement proposals are both topics that the Italian Consumer Code have explicitly addressed due to the RAD. The Italian

1 Legislative Decree No. 28/2023 which was published in the Official Gazette on 10 March 2023.

implementation of the RAD provides for a mandatory opt-in system for consumers represented in a collective action, as defined by the RAD. "The filing of the claim for injunctive and compensatory relief, if notified to the defendant within the prescribed time limit, is valid to interrupt the statute of limitation," Daniele adds.

New dimension in the Italian class actions system?

The RAD's implementation has also brought about changes in the litigation landscape and risk profile in Italy. "Although the RAD has been fully incorporated into the legislative system, it has not yet been fully accepted by the Italian legal culture," Daniele notes. However, he expects that the legal system will rapidly adapt to these new provisions in the near future. As a result, class actions may become an increasingly important tool for Italian stakeholders.

Class actions across Europe

"I would say the most significant European jurisdictions for class actions are the Netherlands, Germany and Portugal," Daniele states. These all have experienced a steep growth over the last five years in the number of class actions related to different types of claims, such as competition, financial products, safety and product liability. He also highlights the Portuguese forum's emerging role in relation to class actions. "By way of example, Portugal has been the forum of multi-million euro compensation claims and third party litigation forum in recent years. However, it is presumably still early to witness developments and changes on a large scale following the RAD's implementation." Daniele further observes that Slovenia may also become a prominent jurisdiction for class actions in the coming years.

"Italy has experienced a substantial increase in the number of class actions since the first class action against Apple Inc. in 2021. This action was particularly against banks and financial institutions, and related to consumer credit agreements and interest calculation prices."

Italy has more to offer

Daniele also discusses the most significant developments in Italy since 2019 apart from the RAD. "The most significant development in Italian class action litigation is the

enactment of Law No. 31 of 21 April 2019 in Italy," he says. This law incorporated a totally revised class action regime into the Italian Code of Civil Procedure (Title VIII-bis of the Italian Code of Civil Procedure 'Collective Proceedings'). And with its introduction, collective claims may be brought by individuals and corporations, based on both tort and contractual grounds. The main condition for a class action to be admissible is that the interests of the members of the represented class must be homogenous.

Future of class actions in Italy

Despite the developments in the Italian class actions landscape, no significant class action has been successful in the country so far. "However, I do expect that the quantity of collective claims that are not covered by the RAD will increase and that also corporates will start bringing collective claims under Law No. 31/2019," Daniele states. He also believes that ESG class actions may become more prevalent in the near future. This is because environmental issues have been a key focus for lawmakers in several jurisdictions, including Italy, and have played a pivotal role in public debates in recent years. "In-house legal professionals are seeking guidance on ESG disclosure requirements, and many companies are facing lawsuits over ESG-related issues, such as greenwashing. While class actions are currently not widely used for this type of claim in Italy, the RAD's implementation has allowed for filing class actions in cases of environmental violations."

Class settlements

Class settlements are extensively regulated by the Italian Civil Code (*Codice Civile,* ICC) but these provisions have not been used to date.

Attempts to abuse class actions

Daniele does not believe that the abuse of class actions is a significant issue within the Italian legal system. This is because the use of class actions remains quite limited, and Italian courts have demonstrated a willingness to thoroughly scrutinise collective claims brought before them. "I have witnessed several attempts to abuse class actions, but all of them were declared inadmissible by the courts," Daniele points out.

Comparing Italy with the US

Daniele highlights a few of the many differences between the class action system in Italy and the US: "Italian class action provides for an opt-in mechanism, contrary to the US opt-out system. Moreover, unlike in the US, the Italian legal system does not provide for any kind of disclosure and does not generally recognise punitive damages."

Third party litigation funding (TPLF) in Italy

"TPLF is permitted under Italian law. It is considered an 'atypical agreement' aimed at providing easier access to legal protection. The agreement is executed in accordance with Article 1332 of the ICC," Daniele explains. In Italy, questions have been raised regarding the compatibility of a TPLF contractual scheme with i) the provisions that prohibit the assignment of claims; ii) the rules on contingent fee agreements; and iii) the Italian Code of Conduct for Lawyers, particularly the rules on conflict of interest and the duties of confidentiality. "However, all of these provisions do not explicitly address the situation in which funders are contractually entitled to receive compensation, in the form of a percentage of the settlement sum or of the court's monetary award. So in my view, there does not seem to be any ordinal or deontological preclusion to a growth of TPLF in Italy. Ultimately, it will be up to the Italian lawmaker to regulate this matter, probably through the introduction of specific rules. However, Italian courts or the Italian National Bar Council could also take a stance in this discussion."

Who pays the bill?

In Italy, courts typically order the losing party to pay the legal costs incurred by the counterparty. The legal costs are awarded based on the value of the claim and the complexity of the case, and are specified in the final judgment. The amount of legal costs awarded by the courts is usually very limited compared to the actual costs borne by the parties. Furthermore, when the legal costs are deemed excessive or unnecessary, or if the successful party has violated the duties of fairness and probity during the proceedings, courts may refrain from ordering the losing party to compensate the legal costs. But there are no specific rules for class actions.

On the topic of the payment of the funder's success fee in the event of a defendant's loss, Daniele clarifies that Italian law does not provide for any rules in that respect. "The

payment of the funder's success fee is determined by the terms agreed upon between the funder and the funded party," he explains. "A court will probably not order a defendant to pay those fees."

Significant class actions of the past decade

When considering the most significant class action of the past decade, Daniele refers to the Facebook data breach settlement, often referred to as 'Cambridge Analytica'. "Facebook agreed to a settlement of USD 650 million in 2021, marking it as a landmark event in the realm of class action lawsuits in Italy," he said.

Reflections on the past and expectations for the future

When revisiting our interview from five years ago, Daniele notes that the anticipated increase in class actions in Italy has not yet materialised. However, he still expects that the numbers will rise: "We have not yet experienced a meaningful increase in class actions in Italy, but I expect that this may change in the near future. The most significant development will likely be the increase of cases related to climate change."

Giacomo Lorenzo
Funder Perspective
Senior Legal Counsel at Deminor

5 September 2024, editors: Davide Ballestrero, Rick Cornelissen and Isabella Wijnberg

Litigation funding: a catalyst for collective actions

Giacomo Lorenzo is Senior Legal Counsel at Deminor, a leading privately-owned and international litigation funder with activities in 22 different jurisdictions and offices in 9 different cities, including Milan. With a particular emphasis on the Italian market, Giacomo's daily practice focuses on originating, funding and managing diverse funding opportunities. He deals with areas including commercial litigation, securities litigation, arbitration, intellectual property disputes, antitrust litigation, corporate law, and post-M&A disputes. We speak with Giacomo about the Italian class action system and the changes following the RAD's implementation.

New representative actions for consumers

The RAD was implemented in Italy through the Legislative Decree No. 28/2023 (Decree), introducing a new type of representative action. The Decree inserted twelve new articles into the Italian Consumer Code (Article 140-*ter* to Article 140-*quaterdecies*) (Italian Representative Action).

Peculiarities of the Italian Representative Action

The Italian Representative Action may be brought in relation to 68 different types of matters, including matters concerning product liability, unfair terms in consumer contacts, air carrier liability and consumer pricing.

Qualified entities which may bring collective claims under this new regime include i) national representative consumer and user associations, which are included in a list adopted by the Ministry of Enterprises and Made in Italy, ii) independent public bodies designated to enforce EU consumer protection rules, and iii) public and private entities representing consumer interests in other Member States, which are included in a list adopted by the European Commission. "These qualified entities are authorised to bring representative actions before Italian courts on behalf of consumers to obtain injunctive or redress measures against traders who violate the specified provisions of EU consumer protection law," Giacomo explains. To initiate a representative action in Italy, the claim must be filed with the business-specialised chamber of the civil court, located where the defendant that is alleged to have engaged in harmful conduct is based. In cases where the defendant is a natural person, the competent court is determined by the location of the defendant's residence or domicile. The court determines the claim's admissibility within 30 days from the first hearing, considering factors such as *locus standi*, absence of conflicts of interest, the homogeneity of the individuals' rights at stake and the claims' validity.

Some aspects of third party litigation funding (TPLF) have been regulated as part of the RAD's implementation in Article 140-*septies* of the Italian Consumer Code. In accordance with the principle of transparency, the qualified entity must provide the court and the defendant with an insight into the funding arrangement stipulated with the funder. This does not include the funding agreement itself. Under Article 140-*septies*, the collective claim will be deemed inadmissible in cases where the funder is a competitor of the defendant or dependent on the latter. "In this case, the judge, even *ex officio*, must set a deadline for the qualified entity to either reject the funding or amend the funding agreement as to eliminate the conflict of interests. Otherwise, the collective action will be declared inadmissible" Giacomo concludes.

The Netherlands as the EU leader

When asked about the most relevant EU jurisdictions for class actions, Giacomo mentions the Netherlands: "The Netherlands has carved out a prominent niche, earning recognition as one of the most pragmatic jurisdictions in Europe when it comes to class actions. Moreover, the Netherlands offers a robust framework for collective settlement

mechanisms, exemplified by the widely utilised WCAM, which allow for opt-out participation in collective settlements. Furthermore, TPLF is widely accepted and embraced in the Netherlands."

The rise of environmental class actions

Giacomo also points to the increasing awareness and activism around environmental issues in Italy and across Europe: "I anticipate that claims related to emissions and pollution standards will become a fertile ground for class actions in the coming years." He refers to a recent judgment by the European Court of Human Rights (ECHR), in which the ECHR explicitly recognised the rights of individuals to effective protection by state authorities against the serious adverse effects of climate change on life, health, well-being and quality of life.[1] According to Giacomo, this judgment could pave the way to similar collective or class action climate litigation – in the absence of legislative intervention by the EU legislator. He observes, "I expect that most of the climate related collective claims will be brought against public authorities." Giacomo also expects that more claims will be brought in relation to ESG-related matters.

Class actions outside of the RAD

Prior to the entering into force of the Decree, the most important change in the Italian class action landscape occurred with the reform of the class action regime. The was marked by the introduction of Law No. 31 of 12 April 2019, which entered into force on 19 May 2021. This reform was aimed at overcoming the shortcomings and limitations of the old class action regime (Law No. 99/2009). The most significant changes brought about by the introduction of Law No. 31 of 12 April 2019 are the following:

- Every party, including companies and professionals, that shares "homogeneous individual rights" with other individuals or group of individuals may initiate a class action.
- Individuals may opt-in to the class action after the judgment's publication regarding the admissibility of the collective actions, but also after the judgment's publication on the merits in which the liability of the defendant is determined.

1 ECHR 9 April 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (*Varein Klimaseniorinnen Schweis and others/Switserland*).

- Law No. 31 also introduced the obligation for the unsuccessful defendant to pay the representative and the claimant's attorney a 'reward fee' that is set as a percentage of the total amount of compensation due to the class's members. The reward fee is calculated progressively based on the number of members in the class[2] and it is on top of the proceeds. The reward fee ranges from a maximum of 9% for classes with 1 to 500 members to a minimum of 0.5% for classes with over 1,000,000 members. The court may also increase or decrease the fee by up to 50% based on factors such as the complexity of the case, use of assistants, quality of work, diligence with which the activities have been carried out, and the number of class members. Additionally, attorneys who represented the claimants receive an extra fee calculated using the same guidelines.

The current state of class actions

As of May 2024, the Italian Ministry of Justice has recorded 34 class action proceedings brought before Italian courts. "The majority of these class actions are brought by consumers for alleged breach of contract and by workers for alleged violations of labour related legislation," Giacomo observes. "In most cases, the defendant is a large corporation. This indicates that class actions in Italy are primarily in the interests of consumers and workers, even when not covered by the RAD."

The underutilisation of class actions

Giacomo believes that an abuse of class actions is rather unlikely as class actions are still vastly underused in Italy. "Instead, I see the opposite problem. Because they're not well-known and still carry uncertainties, class actions aren't being used when they could be beneficial." One problematic aspect is that until 19 May 2031, Italy will have three frameworks for collective protection (the original framework under Article 140-*bis* of the Italian Consumer Code, Law No. 31/2019 for acts from 19 May 2021, and the

2 The reward fee is calculated progressively based on the number of members in the class:
- 1 to 500 members: up to 9%.
- 501 to 1,000 members: up to 6%.
- 1,001 to 10,000 members: up to 3%.
- 10,001 to 100,000 members: up to 2.5%.
- 100,001 to 500,000 members: up to 1.5%.
- 500,001 to 1,000,000 members: up to 1%.
- More than 1,000,000 members: up to 0.5%.

framework from the RAD). This could create confusion among practitioners. Furthermore, it is important to mention that the RAD has been implemented into the Italian Consumer Code, the latter of which explicitly refers to certain provisions of the Italian Code of Civil Procedure for regulation of the class action. This legislative choice is at least debatable. It is no straightforward matter for legal practitioners to coordinate the special laws of the Italian Consumer Code with the general provisions of the Code of Civil Procedure, as they do not always appear to be compatible and fully integrable with each other. Indeed, the general rules contained in the Code of Civil Procedure do not take into account the peculiarities of proceedings initiated through representative actions. It would probably have been more appropriate to directly amend the Italian class action regulated in the Italian Code of Civil Procedure, making the necessary changes in light of the RAD.

The importance of TPLF

TPLF is only regulated by the Decree, which sets certain disclosure obligations and rules in relation to potential conflicts of interests.

Giacomo explains, "TPLF plays a vital role in collective actions, allowing consumers or corporations to safeguard their rights without bearing the upfront costs or the risks of adverse judgments. They cover all expenses on behalf of the claimants, facilitating access to experienced lawyers and experts." He also highlights the role of litigation funders in promoting class actions and facilitating communication among lawyers, economic experts and claimants. "In the Italian legal market, there are no specialised law firms focusing on class actions. However, the advent of litigation funders is expected to result in an increased presence of law firms specialising in collective actions through collaboration with these funds."

Giacomo also emphasises the key role of funders in providing information and organising collective actions. "In Italy, class actions often fail due to limited participation from potentially affected parties. Litigation funders typically dedicate considerable resources to promoting the collective action to reach the widest possible audience, increasing the number of opt-ins. Moreover, some litigation funders oversee the orchestration of the class action, including the gathering and assessment of court

documents. This role is pivotal, as the action's success often hinges on these documents. Litigation funders facilitate communication among lawyers, economic experts and claimants. For example, they instruct hiring certain experts and issue instructions to lawyers on behalf of their clients and maintain continuous updates for all action participants regarding significant developments."

Giacomo anticipates TPLF's increasing presence in Italian class actions. He notes, "However, it will be important to have greater certainty regarding the class action mechanism. This will allow litigation funders to confidently use this procedural tool, which could undoubtedly lead to numerous advantages such as having a procedural instrument specifically designed for collective actions, offering benefits in terms of organising and managing collective actions more effectively."

Litigation funders are also beginning to employ the assignment model in antitrust damages cases. According to Giacomo, there will be a growing use of this model, particularly in light of recent decisions by the Italian Supreme Court. "According to the Italian Supreme Court, the assignment model remains valid and enforceable even if the litigation funder lacks the authorisation required by Article 106 of the Consolidated Law on Banking (*Testo Unico Bancario*) for Financial Activities, provided that no payment is made for the transfer of the claim at the time of assignment and the payment for services rendered by the litigation funder is contingent upon the recovery of the disputed claim. This was affirmed in four judgments delivered in 2024,"[3] he explains. "In light of these decisions, I anticipate that litigation funders will increasingly adopt the assignment model as another strategy in the future," Giacomo concludes.

The 'loser pays' principle and funder's success fee

In the Italian legal system, the concept of 'loser pays' is a fundamental principle. "This means that the judge orders the losing party to pay the legal fees and expenses of the successful party, a rule that applies even when the collective action is not covered by the RAD," Giacomo explains.

3 Civil Supreme Court, 20 February 2024, No. 4427; Civil Supreme Court, 20 February 2024, No. 4543; Civil Supreme Court, 6 March 2024, No. 6086; Civil Supreme Court, 21 March 2024, No. 7635.

If the defendant loses the case, the court will not order them to pay the funder's success fee. Giacomo elaborates, "Instead, the representative entity deducts it from the total compensation awarded to the claimants, as stipulated in the litigation funding agreement. Typically, the funder's compensation ranges from 10% to 35% of the total proceeds."

The most significant class action in the past decade

Giacomo highlights the Altroconsumo's lawsuit against Volkswagen in Italy, related to the *Dieselgate* matter, as arguably the most significant class action in the past decade. "The class action, similar to those in the United States, underwent an admissibility phase and opt in aggregation of the class," he explains. On 7 July 2021, the Court of Venice ruled in favour of more than 60,000 consumers, granting pecuniary damages and ordering Volkswagen to compensate each consumer who bought a new vehicle EUR 3,000.[4] Additionally, the court considered Volkswagen's conduct as fraud in commerce under Article 515 of the Italian Criminal Code and awarded non-pecuniary damages of EUR 300 for each consumer. In appeal, the amount to be compensated by Volkswagen was reduced from EUR 200 million to EUR 20 million. The Court of Appeal emphasised that civil liability in Italy is compensatory and rejected the claim for pecuniary damages due to lack of evidence of actual harm suffered.[5] Giacomo notes, "While the outcome of the appeal may disappoint class action supporters, it reflects an ongoing debate in Italy regarding the nature of civil liability, whether compensatory or punitive." On 15 May 2024, Altroconsumo announced a landmark settlement with Volkswagen Group, securing over EUR 50 million in compensation for more than 60,000 Italian consumers affected by the *Dieselgate* scandal. "This settlement represents a major victory for Altroconsumo and the members of the class, especially in light of the Court of Appeal decision," Giacomo concludes.

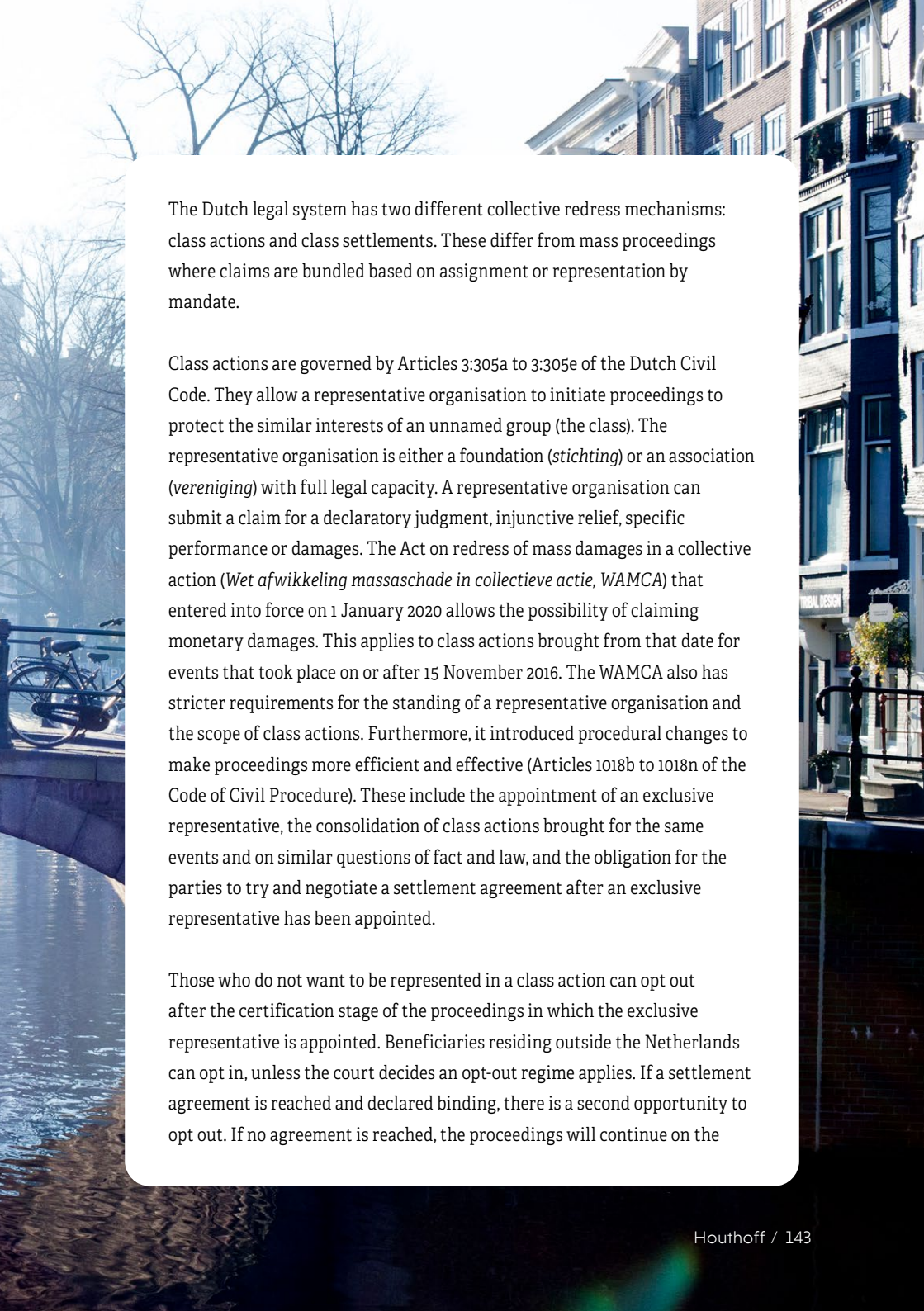
Looking ahead

The number of class actions in Italy remains low to this day. "Instead, the ordinary procedure, which involves grouping multiple claimants in the same proceedings, continues to be the preferred approach." Giacomo believes that the most significant

4 Court of Venice 7 July 2021, judgment no. 1423.
5 Court of Appeal of Venice 16 November 2023, judgment no. 2260.

development will be the advent of litigation funding in Italy: "This is expected to lead to an increase in collective actions." He concludes, "However, unless adjustments are made to simplify the class action tool, it is likely that most mass claims will continue to be pursued either through the ordinary proceedings or the assignment model."

The Netherlands



The Dutch legal system has two different collective redress mechanisms: class actions and class settlements. These differ from mass proceedings where claims are bundled based on assignment or representation by mandate.

Class actions are governed by Articles 3:305a to 3:305e of the Dutch Civil Code. They allow a representative organisation to initiate proceedings to protect the similar interests of an unnamed group (the class). The representative organisation is either a foundation (*stichting*) or an association (*vereniging*) with full legal capacity. A representative organisation can submit a claim for a declaratory judgment, injunctive relief, specific performance or damages. The Act on redress of mass damages in a collective action (*Wet afwikkeling massaschade in collectieve actie, WAMCA*) that entered into force on 1 January 2020 allows the possibility of claiming monetary damages. This applies to class actions brought from that date for events that took place on or after 15 November 2016. The WAMCA also has stricter requirements for the standing of a representative organisation and the scope of class actions. Furthermore, it introduced procedural changes to make proceedings more efficient and effective (Articles 1018b to 1018n of the Code of Civil Procedure). These include the appointment of an exclusive representative, the consolidation of class actions brought for the same events and on similar questions of fact and law, and the obligation for the parties to try and negotiate a settlement agreement after an exclusive representative has been appointed.

Those who do not want to be represented in a class action can opt out after the certification stage of the proceedings in which the exclusive representative is appointed. Beneficiaries residing outside the Netherlands can opt in, unless the court decides an opt-out regime applies. If a settlement agreement is reached and declared binding, there is a second opportunity to opt out. If no agreement is reached, the proceedings will continue on the

merits. The court can order the parties to submit a proposal for settling the claim if it is for money. A judgment will bind the parties and all class members. A judgment in class actions to which the WAMCA does not apply only has res judicata authority between the parties involved in the proceedings. However, it is likely to be followed in individual follow-on proceedings unless the individual claimant objects.

The Representative Actions Directive (RAD) was transposed into Dutch law by the Implementation Act (*Implementatiewet richtlijn representatieve vorderingen voor consumenten*), which was published in Staatsblad 2022, 459. The Implementation Act entered into force on 25 June 2023. Most of the RAD's requirements were already included in the WAMCA. The implementing provisions only changed the WAMCA as far as necessary to comply with the RAD. Specifically, these changes applied primarily to representative actions falling under its scope, with a few exceptions.

The Act on Class Settlement of Mass Damages (*Wet collectieve afwikkeling massaschade*, *WCAM*) allows the parties in a settlement agreement to jointly ask the Amsterdam Court of Appeal to declare the settlement binding on all beneficiaries under the settlement (the class). The Court assesses factors like the reasonableness of the agreed compensation. Class members who do not want to be bound can opt out. The class settlement proceedings are independent proceedings, separate from class action proceedings. So far, nine class settlement agreements have been declared binding since the WCAM entered into force in July 2005.

Class actions | Collectieve acties (including RAD)

Scope	General
Access granted to	Foundation or association with full legal capacity.
Opt-in or opt-out	Since WAMCA: opt-out, but opt-in for beneficiaries residing outside NL unless the court decides that an opt-out regime applies. This exception does not apply to collective actions under the RAD. Prior to WAMCA, neither opt-in nor opt-out mechanisms were in place.
Declaratory relief or damages	Since WAMCA: both. Prior to this, no damages could be claimed.
Frequently used	Yes
Regulatory framework	Articles 3:305a-3:305e Dutch Civil Code; Articles 1018b-1018n Code of Civil Procedure.
Alternatives used in practice	Assignment of claims and representation by mandate.

Class settlements

Binding class members after court approval	Yes, WCAM and WAMCA settlements.
Opt-in or opt-out	WCAM: opt-out. WAMCA: opt-out.
Regulatory framework	WCAM: Articles 7:907-7:910 Dutch Civil Code, Articles 1013-1018a Code of Civil Procedure. WAMCA: Articles 1018g-1018h Code of Civil Procedure.

Third party funding

Regulated by law	Article 3:305a (2)(c) (indirectly) and (2)(f) (for collective actions under the RAD) Dutch Civil Code; Claim Code 2019 (a body of soft law).
Frequently used	Yes, in damages class actions.

Good to know

All class actions on the merits that are brought under the WAMCA are published in the Dutch central register of collective actions (https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen).

Jente Marie Bruins Slot
Business Perspective
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10 July 2024, editors: Rosalie Becker and Albert Knigge

NN's approach to class actions: timing, stakeholder management and ESG risks

Admitted to the Dutch Bar in 2005, Jente Marie Bruins Slot joined NN Advocaten in 2013 after working for international law firms such as Linklaters and DLA Piper in Amsterdam, Rotterdam and Paris, where she specialised in finance litigation. Currently, she is the lead expert in NN Advocaten's expert team for complex litigation. NN Advocaten is Nationale-Nederlanden's in-house law firm. NN Advocaten, established in 2012, offers a cost-effective, highly knowledgeable and specialised alternative to external lawyers. The firm advises on imminent legal proceedings and assists NN and its insured parties where proceedings cannot be avoided. The lawyers at NN Advocaten specialise in life and other insurance and liability law, with additional expertise in general contract law, financial law and duties of care. We had the opportunity to speak with Jente Marie. During our conversation, Jente Marie shared her valuable insights on the class action regime in the Netherlands from a business perspective.

Over a decade of expertise in class action proceedings

Class actions are a topic in Jente Marie's daily work. As lead expert in the expert team for complex litigation she advises and supports NN in various litigious situations, including threatened and ongoing class actions and mass claims. These are often complex and attract a lot of national and international attention. The lawyers that are

part of the expert team have built up years of experience with collective proceedings, most importantly in disputes involving unit-linked insurances. Until recently, three collective proceedings were pending against NN. These proceedings are now on hold pending settlements becoming final. The expert team contributed to the settlement agreements that were reached in January 2024 with the interest groups Consumenten-claim, Woekerpolis.nl, Woekerpolisproces, Wakkerpolis and the Dutch Consumers' Association regarding unit-linked insurance policies sold in the Netherlands by NN, including Delta Lloyd and ABN AMRO Life Insurance.

Jente Marie has been involved in class actions proceedings for quite some time now. She notes "Come to think of it, my start at NN Advocaten in 2013 coincided with the start of the collective proceedings by Woekerpolis.nl. So, for the past decade, my daily work has been – and still is – defined by these collective proceedings and the implementation and execution of the settlement agreement."

NN's class action journey and European impacts

Jente Marie believes that class actions are an irreversible phenomenon and are here to stay. The first collective proceedings on unit-linked insurances were initiated against NN in 2007 by WoekerpolisClaim. These proceedings did not entail a claim for compensation but rather several declarations of law stating that NN had breached its duty of care and should have clarified the cost structure of unit-linked insurances. After a recommendation by the Dutch Ombudsman (which came to be known as the 'Wabeke norm'), these collective proceedings were discontinued when NN reached a settlement agreement in 2008, first with WoekerpolisClaim and then with Verliespolis. This agreement included the introduction of a cost cap for the costs part of the gross premium for unit-linked insurances. This was later followed by 'flanking measures' (*flankerend beleid*) that included the addition of yearly cost caps for NN unit-linked insurances with effect from the Dutch Ombudsman and the industry-wide compensation round could not, however, alleviate policyholders' disappointment, which was mainly caused by lagging investment returns. This resulted in a second round of collective proceedings, which started in 2013 and 2017.

"This shows that in the Netherlands in general – and in particular at NN – we have built up experience with collective proceedings," Jente Marie explains. The Dutch legal

framework with respect to class actions, i.e. the Collective Actions Act (*Wet collectieve acties*, WCA) in 1994, the Collective Settlement of Mass Claims Act (*Wet collectieve afwikkeling massaschade*, WCAM) in 2005 and the Act on Redress of Mass Damages in a Collective Action (*Wet afwikkeling massaschade in een collectieve actie*, WAMCA) in 2020, have made it relatively easy for claim organisations to initiate class actions, leading to an increase in their numbers over the past decade. Although Jente Marie does not consider the implementation of the Representative Actions Directive (RAD) to have dramatically changed the litigation landscape in the Netherlands, she does see this change in other Member States. In this context, Jente Marie quotes a *Wall Street Journal* article entitled 'Companies on the Defensive as European Union Rolls Out Class-Action Lawsuits,' in which Scevole de Cazotte, Senior Vice President for International Initiatives at the US Chamber of Commerce Institute for Legal Reform, stated, "We see trouble ahead…they're not at all used to this aggressive, entrepreneurial way of bringing cases seen in the US."[1]

"Under the new regime, cross-border collective actions will be easier to bring and probably more complex to defend," Jente Marie explains. By way of example, she refers to a situation in which a Slovak company might face claims brought by a Dutch qualified entity representing Slovak, Czech and Polish consumers before a court in the European Union. To address the challenges that such situation may present, NN Advocaten decided to combine the extensive experience in collective proceedings in the expert team for complex litigation and is actively sharing this experience with NN's international business units.

The rise of class actions across the European Union

As a lawyer working for an in-house law firm of a defendant company, Jente Marie feels she is not in a position to comment on the attractiveness of jurisdictions for class actions for claimants involving NN or the insurance and financial industry. However, she does observe that in all European Union Member States,[2] for instance in Hungary[3]

1 R. Vanderford, 'Companies on the Defensive as European Union Rolls Out Class-Action Lawsuits', *Wall Street Journal*, 7 June 2023.
2 'Collective legal actions spread in Europe' and 'Business warns EU against class actions', https://www.ft.com.
3 'Increased litigation; class actions are coming to Hungary as well', https://www.vg.hu/rovat/kozelet.

and Slovakia[4], the RAD is expected to lead to an increase in class actions and mass claims. She mentions coming across 'class actions heatmaps' where Portugal and the Netherlands are shown in red, indicating a high level of class actions in these jurisdictions compared to the rest of Europe.[5]

According to the legal press, law firms across the European Union have already geared up to handle the expected increase in class actions.[6] The Dutch Financial Times (*Het Financieele Dagblad*)[7] has published several articles noting an influx of US claims lawyers in the Netherlands specialising in class actions and mass claims. According to these US claims lawyers, the Netherlands is a front runner in Europe due to the legal framework that has enabled mass claims since 2020. Overall, Jente Marie notes that "the European Union as a whole is perceived as more attractive for class actions because of the implementation of the RAD."

Benefits and drawbacks of third party litigation funding

Jente Marie assesses the impact of third party litigation funding on the class action landscape, noting that in the *Ageas* case the Amsterdam Court of Appeal recognised that class actions can be costly and that it is in the public interest for them to be conducted, so that funding must be found for class actions.[8] "The presence of funders on the claimants' side is therefore a given fact," Jente Marie acknowledges.

Through connections with litigation financiers and venture capitalists, claim organisations are becoming more professional and better able to serve the interests of the parties they represent. Jente Marie generally believes that although class actions can be lengthy and outcomes uncertain, professional and knowledgeable litigation can

4 'Consumers and traders beware: a wave of class actions is also coming to Slovakia', https://www.epravo.sk.

5 'European Class Action Report 2022', https://cms.law/en/nld/ and 'Current Collective Landscape Map', https://www.twobirds.com/en/.

6 'Law firms in the EU gear up to handle increase in class actions', https://www.law.com/international-edition/.

7 M. Pols & J. Piersma, '*Massaclaims zijn een schitterend instrument om de kleine man zijn recht te laten halen*', *Het Financieele Dagblad*, 29 April 2022 and M. Pols, '*Toestroom Amerikaanse claimadvocaten leidt tot groeiend ongemak*', *Het Financieele Dagblad*, 29 April 2022.

8 Amsterdam Court of Appeal 13 July 2018, ECLI:NL:GHAMS:2018:2422, JOR 2018/246 with commentary from I.N. Tzankova (*Ageas*), para. 5.1.4.

help clarify disputes more quickly, benefiting both claimants and defendants. However, she also realises that third party litigation funding may have downsides. In this context, Jente Marie refers to an interview with Eddy Bauw, Professor of Private Law at the University of Utrecht, in Dutch newspaper *De Volkskrant*[9] in 2017. In this interview, Professor Bauw stated that third party funding of claims organisations could make it difficult to resolve a dispute by a collective settlement and that settling must therefore also be made attractive for the claims organisations themselves. In addition, Jente Marie refers to an article – also in '*De Volkskrant*'[10] – entitled 'Taking optimum advantage of aggrieved customers', in which it was noted that third party funding may promote a 'revenue model' for claim organisations that is not necessarily in the interest of the aggrieved parties. This article cited the view that a commercial claim organisation "has nothing to gain" from alternative remedies (i.e. remedies other than financial ones). However, according to Jente Marie, "Sometimes the benefits of class actions may lie in the adaptation or amendment of laws and regulations, product adjustments or other alternative measures." Although alternative remedies can be a beneficial settlement outcome for class members, she is concerned that litigation funding tends to steer claim organisations away from these remedies.

The importance of stakeholder management

Jente Marie explains that class actions are not just another type of legal proceeding taking place in a courtroom. "An integral part of class actions is to create broad support and to exert pressure," Jente Marie notes. In her experience, class actions are also (and sometimes even primarily) about 'stakeholder management', which requires an integrated approach involving various disciplines such as legal, compliance, finance, communications, investor relations and product management. "Managing input from all these disciplines, keeping an overview of all internal and external stakeholders – most importantly the aggrieved customers – I feel is the main challenge of class actions." Jente Marie continues, "For NN, for example, it was important to have a clear and understandable storyline in the collective proceedings on unit-linked insurances, with all these disciplines involved in crafting this storyline." NN's legal defence had to be

9 G. Pols, '*Wildgroei in woekerpolisclaims vertraagt mogelijk rechtszaken*', *De Volkskrant*, 3 April 2017.

10 M. van den Eerenbeemt, '*Maximaal verdienen aan de gedupeerde consument*', *De Volkskrant*, 27 February 2016.

explainable to customers with unit-linked insurances when they called, visited the website, or filed a complaint internally or with the Dutch Financial Services Complaints Board (Kifid). Jente Marie shares with us the valuable lessons she has learnt along the way from NN's communications experts on avoiding legal jargon and from NN's compliance experts on litigating while always keeping the customers' interests in mind.

Key considerations in class settlement discussions

When asked about her approach to class settlement and the decision to settle or litigate, Jente Marie underlines the importance of keeping an open mind and seeking a constructive dialogue with claimants to understand the main issue driving a class action and ascertain what a possible settlement should remedy. In her experience, when entering into potential settlement discussions, it is advisable to engage with all claim organisations. As Professor Bauw had already mentioned his interview in *De Volkskrant*,[11] the increasing number of claim organisations – which he termed a "*proliferation*" – makes it more difficult to reach a settlement. "If a settlement is reached with one organisation on one issue, and a later class action initiated by another organisation then reveals that a completely different issue needs to be remedied, the basis of the settlement agreement that had already been reached will be undermined," Jente Marie notes.

For defendant companies, especially listed ones, it is crucial for settlement discussions to be conducted in a confidential manner. Unfounded public statements on these discussions taken out of context may lead to actual or potential disclosure obligations for defendant companies under the Market Abuse Regulation, which may interfere with these discussions. According to Jente Marie, the main factors influencing the decision to settle include "acceptability, determinability, practicability and finality." She explains, "A settlement should be *acceptable* – especially to claimants, but also to claim organisations. For defendants, it is important that a settlement is *determinable*, meaning that the settlement amount can be determined and provisioned. The implementation and execution of a possible settlement should also be *practicable*. And of course, *finality* is important to resolve the dispute," Jente Marie explains.

11 G. Pols, '*Wildgroei in woekerpolisclaims vertraagt mogelijk rechtszaken*', *De Volkskrant*, 3 April 2017.

Challenges with respect to timing

Jente Marie believes timing may be a concern as regards the current state and future direction of class actions in the Netherlands and in Europe. The evaluation report 'Collective damage repair: can it be done faster and smarter?'[12] presented to the Dutch Parliament by the Minister of Finance in 2022 had already called attention to this issue. "Class actions can take a long time, cost a lot of money, and the outcome is always uncertain," Jente Marie notes. By way of example, she refers to one of the collective proceedings on unit-linked insurances initiated against NN in 2013 that over ten years later had still not been finally resolved when the proceedings were deferred at the beginning of 2024 as a result of the settlement agreement. She recalls that insurers were accused of employing delaying tactics in the collective proceedings on unit-linked insurances to financially destroy claim organisations.[13] Jente Marie understands that aggrieved customers were kept in a state of uncertainty during this period, which may have been very difficult for them. Therefore, NN had an aftercare programme in place to address some of these concerns.

However, there is sometimes a lack of clarity on complex legal questions that need to be addressed to provide all parties involved with a clear understanding. A minimum level of legal certainty on the various aspects in debate is necessary before the sector, possibly together with the claims organisations, can move towards some form of resolution. On a personal note, based on her experience as a lawyer involved in the unit-linked debate, Jente Marie adds that one can also be too quick in trying to reach a resolution, as evidenced by two industry-wide compensation rounds.

ESG risks and NN's Climate Action Plan

When talking about the risks of class actions related to ESG issues, Jente Marie explains that NN has had a Climate Action Plan since 2022, which describes how NN aims to reduce greenhouse gas emissions to net-zero in its operations by 2040 and in its proprietary investments and insurance underwriting by 2050. As NN's CEO David Knibbe commented in NN's 2023 annual report,[14] NN published an update of the plan in

12 Attachment to Kamerstukken II 2021-22, 29507, no. 159.
13 Idem.
14 https://www.nn-group.com/news/download/b75382ba-5630-4d26-80e0-893aff42379e/nngroupannualreport2023ndashaconversationwithourceo.pdf?10000

July 2023, with additional measures such as further tightening NN's stance on proprietary investments in the oil and gas sector to also include conventional oil and gas activities. This demonstrates that environmental, social and governance (ESG) issues have attention at boardroom level.

Nevertheless, NN was named as one of seven companies that Milieudefensie/Friends of the Earth NL was planning to summon in a class action. Although Milieudefensie/Friends of the Earth NL announced in early 2024 that it would be summoning ING Bank and not NN, Jente Marie believes this has not led to a decreased sense of urgency. "Looking ahead, NN still continues to take steps to reach its climate ambition. NN has published an Active Ownership Report, providing an overview of their policies, engagements, and voting activities for listed equity and corporate bond investments. In 2024, NN will continue to publicly report on developments and engage with internal and external stakeholders, including Milieudefensie/Friends of the Earth NL," Jente Marie concludes.

Albert Knigge
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17 July 2024, editors: Rosalie Becker and Isabella Wijnberg

Exploring the landscape of class actions in the Netherlands: shift in focus from liability to enforcement?

Albert Knigge is a well-known defence lawyer in the Netherlands with a focus on complex, multiparty cross-border disputes. He has a strong background in class actions, mass claim settlements and follow-on civil litigation. Legal500 has recognised him as a leading individual in class actions. Albert shares with us his perspectives on the rich history and present state of the Dutch class action regime. We also delve into his thoughts on the future trajectory of this regime in the Netherlands.

Unpacking the implementation of the RAD in the Netherlands

"The RAD has no big impact the Dutch class action system," Albert begins the interview. He explains that the RAD came into force on 25 June 2023 and has been applicable to all collective actions within its scope that started on or after this date. However, it has garnered little attention. "This is primarily because it has not brought significant changes to the existing class action regime, apart from laying down some additional rules in relation to funders and stipulating specific rights and obligations for consumers. The existing system is more extensive and far-reaching than the RAD and remains pretty much intact."

One could even say that the RAD limits the Dutch options. As Albert points out, "Under

the RAD, cross-border claims can only be brought by interest groups designated by a Member State's 'competent authority'." In the Netherlands, this authority is the Minister for Legal Protection (*Minister voor Rechtsbescherming*). Only organisations that have been pre-designated and listed can bring representative actions before the courts in another Member State. Albert further explains, "If an organisation wants to start an action in a foreign country, it must first be registered." After five years, organisations must apply for a renewal of their designation, substantiated with relevant evidence. Therefore, additional requirements apply to cross-border actions. Albert highlights the requirement that the interest organisation has been publicly active in the field of consumer interest protection for at least 12 months: "The Dutch jurisdiction has always allowed ad hoc claim organisation to bring a collective action, and this requirement under the RAD is potentially a restriction for Dutch ad hoc interest organisations that are/were created solely to bring a specific claim for a specific event."

For domestic representative actions in the Netherlands, interest groups must meet the admissibility requirements already in place under the WAMCA. Albert notes, "Designation is then not required in advance but can also be done, as the WAMCA prescribes, during the proceedings." Therefore, representation by an ad hoc interest organisation is still possible in domestic actions.

An intriguing aspect of the RAD, in Albert's opinion, is the transitional law. The WAMCA has a cut-off date of 15 November 2016. In contrast, the RAD does not have an explicit cut-off date and at first sight intends to be applicable to all collective actions related to EU-consumer law listed in Schedule 2 of the Directive, provided that the claim is brought after 25 June 2023. This discrepancy potentially creates complexity for matters to which both EU-consumer law and national law apply and which took place prior to 15 November 2016.

RAD implementation in other European countries

"I am a bit sceptical about the impact of the RAD in most European jurisdictions considering how the RAD has been transposed," Albert states. He continues, "Class action litigation often requires substantial funding, and where the structure does not incentivise or even allow commercial funders, claim organisations will have to rely on

crowdfunding or government funds to initiate collective actions. This seems to be one of the reasons why significant jurisdictions like Germany, France and Italy stay behind in these developments, while countries like the Netherlands and Portugal are becoming hot spots. From what I have seen, the system in Portugal tends to allow an even more generous approach when it comes to admissibility of claim organisations and collective actions than in the Netherlands."

This generous approach to admissibility, is not necessarily a positive development because – at least in the Netherlands – a class action is brought by a self-appointed representative whose action may have a huge impact on the rights of both the persons it claims to represent and the defendant. As a result, Albert strongly believes that courts must take responsibility in scrutinising the admissibility of such actions. In his view, a careful and balanced handling of such claims by the court may lead to more complexity and may cause apparent delay but will prevent issues later on in the proceedings, in settlement discussions and even in a distribution phase. For instance, a thorough debate in the admissibility phase on the representation by the claim organisation, the similarity of interests, and the scope of the class and the claim will streamline discussions in the liability and damages phase, or even the settlement phase. "Collective redress mechanisms can indeed empower consumers, improve access to justice and offer defendants pathways to global peace in certain complex matters. However, in all jurisdictions in which such mechanisms have been introduced effectively, this has led to the rise of a commercial claim industry. This in itself does not lead to a higher level of justice, and at the end of the day, it does not really benefit consumers if courts fail to scrutinise the claimant and the admissibility of its action."

Other EU legislation

Albert anticipates that certain EU legislations are and will be playing a larger role in class actions, such as the GDPR (General Data Protection Regulation) in the field of data privacy, the Unfair Commercial Practices Directive, the new Product Liability Directive and the Corporate Sustainability Due Diligence Directive (CSDDD) in the field of ESG. Albert explains, "All legislation that focus on supply chain responsibility in relation to ESG are gaining prominence."

Developments in the Dutch class action regime

Since 2019, there have been significant changes apart from the RAD. "The most notable change the WAMCA introduced, is not that claims for damages are now admissible but the fact that any judgment will be binding not only between the defendant and the claim organisation, but also between the defendant and all class members, unless they opt out. This shift in the legal landscape is having a profound impact on class action litigation," Albert points out.

A significant difference with the RAD, is that the Dutch class action regime is not restricted to consumer actions and can also be brought on behalf of, for example, small businesses. This is also reflected in the broad scope of topics for which class actions are brought. Albert observes, "Probably the most important type of class actions in the Netherlands in terms of quantity is currently in the category of judicial review action against the State or other governmental bodies. Not many people are aware of that. Following this category, data privacy-related cases are also growing in numbers. The same is true for the number of product liability cases, including the *Diesel* cases. The remaining class action cases, including ESG-related issues, are a bit more diffuse."

Albert anticipates a steady growth in the use of class actions that are not covered by the RAD. He foresees an increase in securities-related class actions, which are currently less prevalent. ESG-related cases are already present and expected to rise, although they may not be as compelling as the climate actions against Shell[1] and ING[2], but rather more focused against the immediate environment. The major Dutch pension reform will probably also trigger class actions. "And I expect disputes to arise in all areas where there is scarcity and regulation. Especially when these issues affect large groups, there is always the potential for class actions", Albert explains. This suggests a dynamic future landscape for class action litigation.

Alternatives to class actions

Alternative methods of aggregated litigation, such as litigating by mandate or via assignment of claims, are largely available in the Netherlands. Albert asserts, "I expect

1 The Hague District Court 26 May 2021, ECLI:NL:RBDHA:2021:5339 (*Vereniging Milieudefensie et al v Royal Dutch Shell*), currently on appeal.

2 Announced in January 2024 by *Milieudefensie*, https://en.milieudefensie.nl/climate-case-ing.

these methods to continue being an important alternative route due to their potential advantages over the WAMCA. Under the WAMCA, foreign class members must opt in. Furthermore, the 'scope rule' imposes a restriction on which cases can be brought under the WAMCA. This rule requires that the action has a strong connection with the Dutch jurisdiction. Finally, a claim organisation bringing a WAMCA claim has to comply with a set of requirements to be admitted as an adequate representative. These restrictions can be circumvented where book building is feasible. Particularly when acting for pan-European groups affected by an EU-law infringement, it can be more advantageous to bring a claim based on the mandate or assignment model."

Settlement options

We ask Albert to give his opinion on the current class settlement regime (the WCAM). After all, this regime has put the Netherlands on the map as a hot spot for collective redress. Albert answers firmly after some reflection: "I believe that the WCAM system is effectively obsolete. It is too complex and lengthy to obtain approval. Also, the way the Amsterdam Court of Appeal has handled the last two class settlements[3] makes the outcome of the approval too unpredictable. Defendants will think twice before engaging into a WCAM settlement and applying to the court for an approval, as they are uncertain whether the result achieved is final and whether the negotiated outcome will be upheld by the court without all kinds of costly adjustments to the settlement. The outcome of settlement negotiations is always the result of a give-and-take, and the test applied by the court whether this outcome is reasonable, should therefore by definition be marginal. In my view, in the *DSB* and *Ageas* cases, the court failed to restrain itself to such a marginal test. Of course, courts should take the interests of individuals to heart, but let's not forget that an individual class member can also protect their rights by opting out if they believe a better outcome is feasible."

Improper use of the system

Albert, as a lawyer for defendants, acknowledges that the potential for abuse of class actions does exist in the Netherlands. "At least," he adds smilingly, "depending on your understanding of 'abuse'." While class actions, of course, involve the application of law

3 Amsterdam Court of Appeal 4 November 2014, ECLI:NL:GHAMS:2014:4560 (*DSB*); Amsterdam Court of Appeal 13 July 2018, ECLI:NL:GHAMS:2018:2422 (*Ageas*).

and interpretation of regulations, they always involve more than that. Claims for damages are often initiated and driven by commercial parties investing in such action and are almost always about publicity and obtaining huge profits, sometimes exerting pressure without a well-founded claim or class and rallying as large a group as possible to increase the stakes. "This is not what the system is meant for," Albert states. "The role of defendants' lawyers is to guard against this improper use and to push back on this. The challenge lies in drawing the judge's attention to these issues without nitpicking and unnecessarily obstructing the judicial process."

Albert also notes a remarkable influx of ESG-related cases which – apart from identifying a Dutch anchor defendant – have little or nothing to do with the Dutch jurisdiction: "I suspect a perceived sense of overconfidence within the Dutch judicial system in addressing such foreign issues under foreign law. Dutch courts show no reluctance in adjudicating such claims, while it would, in my opinion, be wiser to question whether a) they are in the best position to adjudicate such claims brought before them; and b) fully understand the events that occurred in the country where the events took place." According to Albert, the Dutch class action regime should not be used to solve all of the world's problems.

A comparative analysis between Dutch and US class action litigations

The Dutch and the US class action regimes share some similarities and differences. One of the most significant differences is the 'ad hoc claim organisation' versus 'lead claimant' system. Albert explains: "Under the Dutch regime, an ad hoc claim organisation acts as a self-appointed representative, representing the rights of others. Under the US regime, a selected and court-approved claimant acts as the lead claimant representing their own rights and the rights of their fellow class members. More research is required into the possible consequences of this difference. I suspect that the Dutch admissibility phase under the WAMCA – which in many other aspects is rather similar to the class certification phase in the US – would be less complicated if the legislator had chosen a lead claimant system. But as said: this is something to research." Other important differences are of course the pre-trial discovery system, the jury trial system and – for certain cases – the possibility of punitive damages the US legal system provides for. All these aspects contribute to a rather distinguishable litigation risk profile in the US.

There are also clear similarities between the two systems such as the opt-out regime, the possibility of claiming damages, and a mechanism of a court-approved settlement declared binding on the class. Although with regard to the latter, Albert adds, "The US system, which I experienced at first hand, is much more efficient and effective."

Complexities and debates surrounding third party litigation funding

Third party litigation funding (TPLF) is not explicitly regulated in the Netherlands but is subject to minimal oversight through soft law. It is a widely used and increasingly popular mechanism, with a growing number of UK and US funders becoming active. In certain aspects, this can be viewed as a positive development, as TPLF can enhance access to justice for large groups who would otherwise be without rights. It also introduces a form of natural selection of proceedings, as funders are unlikely to invest in cases they deem hopeless. "However," Albert notes, "the funder tends to be the one in charge of the decisions, while a class action is actually about rights and claims of others than the funder." Albert welcomes the growing awareness among the judiciary that it is important to monitor how funding arrangements are structured and the influence funders have on the actual dispute. He continues: "There are instances where the funding agreements conflict with the rights and legal status of the actual parties in the proceedings. This can only be avoided if the law requires full transparency on the funding arrangements. In my view, it is a good thing that courts seem to take this matter seriously."

To date, it is undecided whether the defendants are liable for the funder's success fee – which is usually calculated on top of the actual litigation costs – in the event they lose the case. Albert says, "I firmly believe that current regulations do not provide a basis for the court to order the defendant to pay such a success fee. There are differing opinions of course, with some suggesting that the existing regulation implies that the total litigation cost award should include the risk premium payable to the funder. However, I see no legal basis for this. The risk premium is an agreement made between the TPLF and the claim organisation, who in turn imposes that on individuals who join the constituency of the organisation. These agreements have nothing to do with the defendant. And individuals do not need to enter into an agreement with the funder." "Obviously," Albert continues, "if the current regulations would allow for the success fee

to be paid by the defendant, there can be no doubt that full disclosure of the funding arrangements needs to be provided, making these funding arrangements a key part of the debate if not in the admissibility phase, then at least in the debate in the main case."

There is no 'loser pays' rule in the Netherlands, at least not fundamentally. This is primarily because it pertains to liquidated costs. The WAMCA does have some regulation regarding an overall litigation cost award. However, the balance of this arrangement is still under question. As it stands, only in instances of abuse does the claimant bear the costs. Conversely, if the claim is upheld, the defendant is responsible for all costs. Albert concludes, "The system does not seem to be quite balanced yet."

Undesirable trend

As a final note, Albert identifies a concerning trend in the realm of Dutch class actions: "The focus appears to be shifting from establishing liability to class actions as a tool for private enforcement. Judges seem to be increasingly adopting this enforcement-focused approach, even though civil litigation in the Netherlands is fundamentally about establishing liability of the defendant towards the claimant for the damage caused by its actions, and enforcement is primarily a task for public law. This trend can result in courts proposing a certain precise settlement amount without any debate having taken place between the parties.[4] Another example of this shift, which is also true for other European jurisdictions, is the idea of introducing the cy-près doctrine: unclaimed or non-distributable funds would be distributed to a charitable organisation or another entity whose work indirectly benefits the class members and aligns with the objectives of the lawsuit. Parties can agree to this in a settlement of course, but if this would be ordered by a court, this would be fundamentally incompatible with private law and civil procedural law."

4 Amsterdam District Court 14 July 2021, ECLI:NL:RBAMS:2021:3617 (*Stichting Volkswagen Car Claim v Volkswagen AG et al*).

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Class actions in the Netherlands: a dynamic future shaped by upcoming court decisions

We have the privilege of speaking with Jurjen Lemstra, often referred to as 'the godfather of class actions' from a claimant's perspective in the Netherlands, and his esteemed colleague Tilly Alberga-Smits. Jurjen and Tilly are partners at Lemstra Van der Korst and are renowned for their extensive work on the claimant side across a wide range of mass claims in the Netherlands. Their expertise and experience provide them with a unique perspective on the complexities and nuances of class actions. In this interview, they share their insights on the evolution of the class action regime, and the impact of the WAMCA and the RAD. They also describe the challenges and opportunities that lie ahead in these pivotal times for the Dutch class action regime.

The Dutch system and the RAD's implementation

Since the last *Class Action Survey* in 2019, the RAD has been implemented in the Netherlands. It came into force on 25 June 2023, in line with the RAD's implementation deadline. The Dutch class action legislation, the WAMCA, effective since 1 January 2020, served as the foundation for the RAD's implementation. "This approach was unanimously agreed upon by all stakeholders," says Jurjen.

The Netherlands has had a system for class actions in place since 1994, which was recently updated on 1 January 2020 with the WAMCA's introduction. The WAMCA's rules largely align with those of the RAD, resulting in minimal changes with the RAD's implementation. This implementation expanded the rules for domestic class actions to include cross-border class actions for qualified entities from other EU Member States. It also enabled representative entities in the Netherlands to qualify for cross-border class actions and amended the WAMCA where the RAD contained more comprehensive rules. As an example, Tilly refers to the obligation under the RAD for interest organisations using TPLF to assess whether their funder is a competitor to the envisaged defendant(s).

The Dutch system for class actions has always allowed ad hoc and experienced entities with a solid track record, such as foundations or associations, to represent the interests of others on an opt-out basis. There are no limitations on the type of beneficiaries or subject of the claims, although monetary relief could not be claimed before the WAMCA. Furthermore, TPLF has been accepted in the Dutch system of class actions for years. The Dutch Supreme Court has also established that interest organisations can interrupt the statute of limitations on behalf of their constituency. These aspects of the RAD have not led to changes within the domestic or cross-border class actions system with its implementation.

According to Jurjen, the RAD's implementation has integrated smoothly into the Dutch legislative system and culture, and it has not brought about substantial changes to the litigation landscape in the Netherlands. "This is primarily because the RAD was implemented shortly after the WAMCA's introduction, and the rules of the two largely coincide," he notes. Consequently, the Netherlands' risk profile has remained relatively stable, with no significant changes resulting from the RAD's implementation. "This demonstrates how well the proposal fits into the existing legislative system and culture of the Netherlands," Jurjen adds.

Expected trend in EU legislation

Jurjen and Tilly foresee that EU legislation will play a larger role in class actions in the coming years. These include the EU Digital Services Act, the EU Corporate

Sustainability Due Diligence Directive, and various updates to existing EU consumer legislation, such as the forthcoming EU Product Liability Directive. Jurjen explains, "All these pieces of legislation have the potential to increase the use of class actions." In the past year alone, seven class actions have been initiated in the Netherlands against big tech companies for alleged violations of the General Data Protection Regulation (GDPR).[1] It is anticipated that the GDPR will continue to play a significant role in collective actions in the future. This reflects the evolving landscape of class actions in the context of EU legislation.

Other class action developments in the Netherlands

"The most significant change in the Netherlands' jurisdiction related to class action litigation since 2019, apart from the RAD, is undoubtedly the WAMCA's introduction on 1 January 2020," Tilly observes. The WAMCA significantly amended the existing class actions regime, enabling interest organisations to claim monetary damages on an opt-out basis. One of the consequences of the new formal requirements under the WAMCA is the anticipated increase in the duration of class action proceedings. It is not uncommon for the 'admissibility phase' to take two years or more before the merits of the case can be discussed. "For example, in the cases of *TikTok*, *Allergan* and *Vattenfall*, it took approximately two and a half years (*TikTok*[2]), fourteen months (*Allergan*[3]), and one and a half years (*Vattenfall*[4]) from the date of the writ of summons until a court decision was reached concerning the admissibility of the Article 305a foundation's collective claims for damages," Jurjen adds. This highlights the WAMCA's impact on the class action litigation landscape in the Netherlands.

Class actions in the Netherlands can be brought on behalf of all natural or legal persons, provided their interests are sufficiently similar. This applies even if they are not covered by the RAD.

1 The class actions against Avast (March 2024), Adobe (December 2023), Meta (November 2023), Amazon (October 2023), X (September 2023), Alphabet (September 2023), and the Dutch State in relation to a data leak (March 2023)
2 District Court of Amsterdam 25 October 2023, ECLI:NL:RBAMS:2023:6694 (*TikTok*).
3 District Court of Amsterdam 14 February 2024, ECLI:NL:RBAMS:2024:745 (*Allergan*).
4 District Court of Amsterdam 25 October 2023, ECLI:NL:RBAMS:223:6683 (*Vattenfall*).

Quantitative analysis

Based on the Dutch register for collective actions,[5] Jurjen and Tilly identify the top five types of class actions in terms of quantity as follows:

1. General interest class actions: 40 (These include actions against the Dutch State and actions of labour unions against employers.)
2. Privacy class actions: 10
3. Diesel emissions class actions: 5
4. Intellectual property violations: 5
5. General consumer cases: 5

These figures highlight the diversity of class actions in the Netherlands, reflecting a broad range of interests and concerns.

Jurjen and Tilly do not anticipate any significant changes in the use of class actions, either in terms of quantity or the type of claims. Tilly notes, "The number of class actions filed each year in the Netherlands has remained relatively stable for several years, and there are currently no indications that this trend will change in the near future."

ESG

The only exceptions to this stable trend are claims related to ESG (Environmental, Social and Governance). In those matters an increase of cases is expected, particularly those concerning companies' impact on the environment. "Class actions are already being utilised for these types of claims," Jurjen observes. "For instance, renowned environmental organisations such as Greenpeace and Extinction Rebellion have initiated general interest class actions against the Dutch government,"[6] he continues. Since 2018, Milieudefensie has been engaged in a general interest class action against Shell over its CO_2 emissions.[7] This year, Milieudefensie also announced a general interest class action against ING, demanding that ING sever ties with companies that are detrimental to the climate.

5 A website of the judiciary in which all the WAMCA cases are published, including the judgments. See: https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen.

6 Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*).

7 Judgment in first instance: District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5337 (*Klimaatzaak*). Appeal proceedings are currently ongoing at the Court of Appeal in The Hague.

Tilly adds, "Moreover, there are ongoing class actions before the Dutch courts against entities domiciled or partly domiciled in the Netherlands, related to environmental damages suffered abroad." Examples include a case brought by former residents of certain neighbourhoods in Maceió, Brazil, against the mining company that extracted rock salt from beneath their neighbourhoods,[8] and cases brought by inhabitants of the Amazon rainforest in Barcarena against a European aluminium company that operates a factory in the area where their community has resided for centuries.[9]

Jurjen and Tilly expect that similar cases will be brought in the future, although these developments will largely depend on environmental organisations' access to external funding. It is also worth noting that the new Dutch government has announced a debate on additional requirements for initiating general interest class actions.[10] "This reflects the evolving landscape of class actions in relation to ESG matters," Jurjen concludes.

Alternative methods for collective redress

There are alternative methods available for collective redress, such as litigating by mandate or via an assignment of claims. These alternatives provide a different route for parties, particularly larger companies, to pursue collective redress. "The appeal of these methods lies in their ability to bypass the WAMCA's procedural requirements," Tilly says. It is expected that these alternative methods will continue to be utilised in the future, maintaining their relevance in the landscape of collective redress.

Class settlements and upcoming changes

Regarding class settlements, Jurjen and Tilly do not anticipate any upcoming changes in the near future. The procedure for WCAM settlements in the Netherlands is already quite well-developed. Despite its infrequent use, it serves as a unique mechanism capable of providing 'global peace' for companies facing claims worldwide. To date, no settlements have been observed within the framework of the WAMCA procedure. Therefore, at present, Jurjen does not foresee any upcoming changes, nor does he believe such changes would be desirable, given that the WAMCA settlement procedure has yet

8 District Court of Rotterdam 21 September 2022, ECLI:NL:RBROT:2022:7549.
9 District Court of Rotterdam 29 May 2024, ECLI:NL:RBROT:2024:4966.
10 Dutch House of Representatives, session year 2022-2023, 36 169, no. 37.

to be tested. "This perspective underscores the established nature of the WCAM settlements procedure and its potential for addressing global claims," Jurjen concludes.

The likelihood of class action abuse

Jurjen and Tilly do not consider abuses of the class action system likely. Apart from a few exceptional cases over the years such as the *Lottery* case where a private individual committed fraud, there has been no empirical evidence of class action abuse or examples of excesses, despite the country's long history with class actions.[11] "There are robust safeguards in place that interest organisations are required to adhere to, which further reduces the likelihood of abuse. Additionally, the Dutch courts have demonstrated over the past years that they are proactive in testing whether interest organisations are genuinely safeguarding their constituents' interests when necessary," Tilly states. This suggests a well-regulated environment for class actions in the Netherlands.

Relevant EU jurisdictions

Jurjen and Tilly consider the Netherlands and the UK the most relevant jurisdictions for class actions in Europe due to their extensive experience with such actions. "In the UK, however, opt-out collective actions can currently only be brought as competition claims," Tilly explains. Both these jurisdictions permit TPLF and monetary damages claims, and they have highly respected court systems. The Netherlands has a distinct advantage in that there are generally no adverse costs involved. The RAD's introduction has not significantly altered this perspective, although it has opened up opportunities for other jurisdictions to gain relevance. For instance, under the RAD, interest organisations could potentially bring cross-border class actions against large companies in countries like Germany, France and Ireland. However, these Member States have imposed obstacles for interest organisations in their implementation of the RAD. "Therefore, it seems unlikely that the Netherlands and the UK will lose their prominence in this area anytime soon," Tilly concludes.

Lessons to be learned from the US class action system

The Dutch system of class actions has been developed with the best practices from the US system of class actions in mind. However, Jurjen believes that there is still room for

11 District Court of Overijssel 27 December 2021, ECLI:NL:RBOVE:2021:4857.

the Dutch system to learn from the efficiency of class actions in the US. He continues, "Generally, class actions in the Netherlands tend to take several years to resolve, even when similar cases have been settled in the US nearly a decade ago. A notable example is the 'Dieselgate' scandal, which was settled in the US as early as 2016, while cases in the Netherlands and other parts of the EU against the Volkswagen group are still ongoing." This comparison highlights the differences in the pace and efficiency of class action resolution between the two jurisdictions.

Third party litigation funding and 'loser pays'

Third party litigation funding has been a part of the Dutch legal landscape for many years. Jurjen and Tilly view this as a crucial element in ensuring proper access to justice for consumers and maintaining a level playing field. The 'Claim Code', a self-regulatory measure first established in 2011 was amended in 2019 (Claim Code 2019) to include principles for the use of TPLF. Jurjen states, "These principles aim to ensure the independence of the interest organisation from the funder and the retention of decision-making authority by the interest organisation."

With the WAMCA's introduction, the class action law now specifically mandates the court to assess whether the interest organisation has sufficient funds to support its class action. The law also mandates the court to assess whether the organisation retains sufficient decision-making power over its claim. This includes the organisation's budget and its independent determination of the proceedings' conduct and potential settlement negotiations.

The Dutch legal system, through the implementation of the RAD, the WCAM, and the WAMCA and its predecessor, provides ample ways of testing whether an interest organisation adequately represents its constituents' interests. It also assesses whether the funder's success fee is reasonable in a collective decision or settlement.

At present, Jurjen and Tilly do not perceive a need for further regulation restricting the use of TPLF, unless such regulation is based on strong fact-based research that concludes that further regulation is indeed necessary. "There has been no evidence of excesses in the market that would suggest that such further regulation is required,"

Tilly observes. However, she believes it's important to note that recent case law[12] has shown district courts taking a diverging approach towards TPLF. This development suggests that more legislative guidance might be desirable, particularly on topics such as disclosure and non-disclosure rules regarding LFA's and funders' fees. Such guidance could improve the predictability of the Netherlands' legal system for TPLF. "This perspective underscores the balanced approach towards TPLF in the Netherlands, while also highlighting potential areas for further refinement," Jurjen adds.

There is a 'loser pays' rule in the Netherlands. However, cost awards are typically based on fixed amounts and do not exceed several tens of thousands of Euros, even in large class actions. There are two exceptions to this standard practice that are relevant in the context of class actions based on the WAMCA:

1. If a court awards damages, it may also include a full cost award, requiring the defendant to pay the full costs of the interest organisation, unless this is deemed unreasonable.
2. If the interest organisation files a claim which, based on a summary debate, is manifestly unfounded, it may be ordered to pay a maximum of five times the fixed amounts of the defendant, unless this is deemed unreasonable.

"These rules ensure a balance between the rights of the claimant and the defendant in class action lawsuits," Jurjen explains.

In the Netherlands, the method of determining and paying the funder's success fee when the defendant loses remains ambiguous. Several interest organisations have petitioned the court to order the defendant to pay the success fee as well as 'other costs'. However, there have been no final court decisions on this matter to date.

12 See e.g. the differences in approach to TPLF (full versus no disclosure and expansive versus marginal assessment) by the District Court of Amsterdam 25 October 2023, ECLI:NL:RBAMS:2023:6694 (*TikTok*); the District Court of Amsterdam 25 October 2023, ECLI:RBAMS:2023:6683 (*Vattenfall*); and the District Court of Amsterdam 14 April 2024, ECLI:NL:RBAMS:2024:745 (*Allergan*). See also the approach to TPLF by the Amsterdam Court of Appeal 5 March 2024, ECLI:NL:GHAMS:2024:451 (*Rabobank* e.a.) and Amsterdam Court of Appeal 18 June 2024, ECLI:NL:GHAMS:2024:1651 (*Oracle* and *Salesforce*).

Historically, success fees of up to 25% of the claimed amount have generally been deemed reasonable by Dutch courts. However, Tilly refers to a recent class action against TikTok where the District Court of Amsterdam expressed its intention to limit the funder's success fee to a maximum of five times the total invested amount.[13] "This decision has sparked controversy and ignited a lively debate. It is expected to lead to new jurisprudence, providing more legal clarity, which is crucial for a well-functioning class action system," she notes. Jurjen and Tilly consider that new legislation on TPLF in this regard might be desirable, although it should not restrict its use.

Most significant class action in the Netherlands

Jurjen and Tilly agree that the climate case against Shell brought by Milieudefensie is the most significant class action in the Netherlands in the past ten years.[14] In the climate case, Shell was ordered by the District Court of The Hague to reduce the CO_2 emissions of the worldwide activities of the Shell group, including of its suppliers and of the end-users of its products, by 45% in 2030. According to the District Court, this duty for Shell followed from the Dutch unwritten standard of care, which it filled in having regard to the facts, widely held views on climate change and its consequences and international standards.

Popularity of class actions

Class actions are gaining popularity outside the US. Jurjen perceives this as a positive development. He asserts, "Class actions fill the gap that public enforcement of consumer, shareholder and other rights cannot fill itself. If used properly, class actions can discourage corporations from acting against the interests of their customers and other related parties." Tilly agrees and adds, "Class actions not only benefit the beneficiaries themselves, but they also serve to protect rule-abiding corporations from unfair competition. They can even have a preventive effect on the market."

For these reasons, the increasing popularity of class actions is also a beneficial development. As for the Netherlands, it is likely to remain a popular venue for class actions. Tilly explains, "The reason for this is that courts and lawyers on both sides in

13 District Court of Amsterdam 25 October 2023, ECLI:NL:RBAMS:2023:6694 (*TikTok*).

14 Judgment in first instance: District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5337 (*Klimaatzaak*). Appeal proceedings are currently ongoing at the Court of Appeal in The Hague. The judgment on the appeal is expected in November 2024.

the Netherlands have extensive experience in resolving mass damages in a collective manner. This expertise makes the Netherlands an attractive jurisdiction for class actions in the future."

The ideal class action

According to Jurjen, "In an ideal world, class actions would never reach the stage of court proceedings because the mass damage would be settled amicably between the parties even before launching formal proceedings." He goes on to explain that this requires both parties to have a solid understanding of their positions. Collective settlements ensure that claimants receive fair compensation swiftly and could benefit defendants' reputation, thus preventing lengthy and costly legal proceedings. Jurjen continues, "If class actions do reach the court, the most ideal class action would be an efficient one." In many cases, the question of whether certain conduct was unlawful can be answered easily, while the debate on preliminary issues lasts for two years or more. It will be key for the future of class actions that the process is further optimised to achieve relatively quick and fair resolution of mass damages.

Reflecting on previous predictions

Reflecting on Jurjen's interview from five years ago, his prediction on the Claim Code 2019's potential to distinguish between serious claim funders and 'claim cowboys' has partially come true. "There have been instances where courts intervened due to the dominant influence of funders on the interest organisation and the conduct of the claims," Jurjen notes. However, the emergence of 'legal tech' in class actions to assist with administrative work related to bulk cases has not fully materialised. "The implementation of legal tech for class actions is still in its early stages, but this could change in the near future, especially with the advancements in AI," Tilly adds.

Future of class actions

Jurjen and Tilly conclude that the most important development in the future of class actions will be the final court decisions regarding collective damages, both material and immaterial, in several consumer cases, as these will establish the benchmarks for future class actions. "This will significantly influence the direction and evolution of class action litigation," Jurjen states.

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1 July 2024, editors: Luce Mulder, Rosalie Becker and Isabella Wijnberg

A shifted perspective on the effectiveness of the WAMCA

Rein Philips is Managing Partner and co-founder of Redbreast, a Dutch third party litigation funder that takes care of the full costs and management of complex legal proceedings on a 'no win, no fee' basis. Redbreast operates in the top market segment, which means that the value of the claim must be at least EUR 5 million. Redbreast focuses mostly on the Dutch market. Redbreast has the financial resources and capabilities to finance major litigation cases independently all the way through.

Rein starts by noting "The rising popularity of class actions outside the US is a positive development. Class actions can be a useful tool for addressing the wrongdoings of large corporations against large groups of people, companies and investors. As opposed to public supervision and enforcement, class actions offer affected parties a direct means of holding corporate perpetrators accountable."

The RAD's entry into force

Rein reflects on the entry into force of the Representative Actions Directive (RAD) in the Netherlands on 25 June 2023: "As the WAMCA was already largely in line with the RAD, we do not see a material shift in the litigation landscape and risk profile in the Netherlands as a result of the RAD's implementation," Rein states. "However," he continues, "the RAD introduces rules on third party funding, preventing funders from

exerting undue influence on representative organisations. It also facilitates cross-border representative actions by recognising foreign entities from other Member States as being qualified to bring such actions in the Netherlands. The implementation does not prohibit the Dutch custom of permitting ad hoc claim entities, but these entities must have a track record of actively protecting consumer interests for at least 12 months before they can bring cross-border claims."

Furthermore, explains Rein, a claim entity wishing to bring a collective action in another Member State will have to disclose its general sources of funding and request a designation from the Dutch State Secretary for Legal Protection. This designation, if granted, lasts for five years, with the designated entities being listed and reported to the European Commission. Further rules and costs for designation are regulated by administrative orders and ministerial regulations.

Under the WAMCA, the default system is an opt-out mechanism for Dutch residents and an opt-in mechanism for foreign residents. However, the court could decide to apply an opt-out system for foreign residents under specific conditions. With the implementation of the RAD, the option for courts to apply an opt-out system for foreign residents is no longer available in cases that fall within the scope of the directive.

Most relevant European jurisdictions

According to Rein, the Netherlands is one of the most relevant European jurisdictions for class actions. It has the advantage of having a comparatively long class action history, especially when compared to countries that have only implemented a class action regime post-RAD. However, access to funding requires claims to be of a certain size. Therefore, funding may be more viable for certain class actions in larger EU markets such as Italy, France and Germany, rather than in smaller countries like the Netherlands. At this stage, however, it is too early to predict which of these countries will prove to be the most relevant in the context of the RAD.

Relevant developments in Dutch class action litigation

In Rein's opinion, apart from the RAD, the most relevant change in the Netherlands since 2019 is the introduction of the WAMCA on 1 January 2020. The WAMCA introduced

collective actions for damages and stricter governance for qualified entities. It also provides for more structured court involvement, including the appointment of an exclusive representative of the class.

Class actions not covered by the RAD are not restricted to consumers in the Netherlands. "They can also be brought on behalf of small and medium enterprises, large corporations and institutional investors," Rein notes. In the Netherlands, the top five types of class actions under the WAMCA in terms of quantity currently relate to (1) consumer rights (excluding privacy), (2) privacy, (3) intellectual property, (4) human rights and (5) employment law (mainly brought by unions).

"Looking ahead, I expect an increase in claims regarding environmental, social and governance matters." Rein explains that this is due to growing awareness and concerns, among both the scientific community and the public, about potential adverse health and other effects of exposure to products or consequences of certain industrial processes, such as microplastics, particulate matter and pesticides. "Earthquakes as a result of gas exploration and damage as a result of groundwater extraction also fall into this category," Rein adds.

A number of environmental damage cases against corporations are already pending before Dutch courts. The first significant case in this category pertains to damage from earthquakes in Groningen since 2012 as a result of decades of gas exploration.[1] More recently, we have seen cases brought and being prepared on matters including per and poly-fluoroalkyl substances, climate change, and health risks associated with the steel industry in the IJmond region.[2]

"In terms of the quantity of class actions, we have not seen a clear increase or decrease in the cases filed each year since 2020." The number of new writs filed in collective actions averages at around 23 per year.

1 Dutch Supreme Court 15 October 2021, ECLI:NL:HR:1534.
2 For example, the class action against Tata Steel initiated on behalf of local residents living in the vicinity of the Tata Steel factory.

Alternative methods of collective redress

In the Netherlands, alternative methods of collective redress such as a bundling of claims through assignment or mandate are commonly used, in particular in anti-cartel cases such as the *Trucks* cases. Rein expects the bundling of claims approach to continue to exist alongside class actions under the WAMCA.

Settlements influenced by the statutory interest rates

With regard to class settlements, Rein states that in recent years there has been a significant rise in interest rates, resulting in an increase in statutory interest on damage claims from 2% to 7%. "We expect that this will increase the inclination of corporations on the margin to settle large and credible claims, which I believe is a good thing," he notes.

Differences between the Dutch and US class action systems

When comparing the Dutch jurisdiction to the US in terms of class actions, several key differences and similarities are worth mentioning.

First of all, there are obviously large general differences between the court systems. For example, the Dutch court system differs from the US in that it does not have standard discovery proceedings, jury trials or punitive damages. With regard to class actions specifically, the main difference lies in the representation of the class. Under the WAMCA, Rein explains, the class representative has to be a non-profit foundation or association with an independent board and supervisory board, each consisting of at least three members. This claim entity may seek third party litigation funding, provided it safeguards its independence. The entity retains litigation counsel at an hourly rate or via an alternative fee arrangement. However, Dutch lawyers are not permitted to work on a fully contingent basis. In contrast, in the US, the class representative is typically a law firm that handles the case on the basis of a contingent fee.

Nevertheless, Rein observes, the Dutch and US systems also share similarities. They both provide a default opt-out system for all potential class members. In addition, the potential types of claims that might be resolved through a class action are very broad and include product liability, securities fraud and consumer protection. Furthermore,

Rein notes that the courts in both the US and the Netherlands have an active role in managing the class action and in certifying classes.

TPLF and costs

Third party litigation funding (TPLF) is permitted and widely accepted in the Netherlands. Indeed, notes Rein, it is often seen as a precondition for litigating certain justified claims. In cases under the WAMCA, the conditions for providing TPLF are regulated to prevent the funder from exercising undue influence on the class representative's decision-making. Opinions on TPLF tend to be polarised. "Critics and proponents of TPLF are generally divided into two camps, with the defendants and their lawyers in the one camp and the representative organisations and their lawyers in the other," Rein states.

In the Netherlands, the general rule is that the unsuccessful party pays adverse costs, determined according to a fixed schedule which generally represents only a fraction of the actual litigation expenses. However, in cases under the WAMCA, the court has the discretion to significantly deviate from this general rule in accordance with the provisions of Article 1018l of the Dutch Code of Civil Procedure (DCCP). "If a claim is considered unsound or frivolous, the court can impose a financial penalty on the representative organisation of up to five times the fixed litigation costs incurred by the defendant." Also, when ordering a collective settlement of the claim, the court may, insofar as necessary, order the unsuccessful party to pay the reasonable and proportionate legal costs and other costs incurred by the successful party, unless fairness dictates otherwise.

As the first case under the WAMCA is yet to be completed, the courts' interpretation of Article 1018l of the DCCP remains unclear. However, Rein considers it likely that the determination and payment of the funder's success fee will form part of the collective settlement ordered by the court, mirroring the approach taken in voluntary class action settlements under the previous regime. It seems that the court has the discretion to order the defendant to pay the funder's fee, either partially or entirely, in addition to any damages awarded. "We anticipate that the court might limit the success fee paid under any collective settlement agreement if it is considered excessively high or disproportionate

to the amount of damages awarded," Rein notes. "However, it remains unclear what the consequences would be of the funder receiving less than it is entitled to under the funding agreement."

The most important class action in the past decade

According to Rein, the *Fortis/Ageas* case is the most important class action in the past ten years.[3] The case concerned the settlement of claims by investors who incurred losses due to misleading information provided by Fortis (now: Ageas) during the financial crisis in the period 2007-2008. In July 2018, the Amsterdam Court of Appeal approved a settlement agreement of EUR 1.3 billion, marking one of the largest investor settlements in Europe. The settlement framework included compensation for eligible shareholders who acquired Fortis shares between 28 February 2007 and 14 October 2008.

The *Fortis/Ageas* judgment also encompassed the settlement of claims by various claim organisations and, by extension, their funders. A portion of the settlement fund was allocated to these organisations as a reimbursement. The court approved success fees for these organisations, ensuring they were reasonable and proportionate to the services provided. In doing so, the court placed strong emphasis on transparency and fairness.

WAMCA: an almost ideal class action

Rein believes that the WAMCA has made significant strides towards the ideal class action, with one important exception: "For-profit organisations with properly incentivised directors should have been allowed to act as class representatives," he argues. In his view, running a class action bears many similarities to managing a company or a start-up, involving strategic thinking, decision-making, marketing, capital raising and risk-taking. The goal is to maximise returns for the stakeholders, being in this case the affected parties represented. He continues, "In the broader market, it is well understood that enterprises are most efficiently and effectively run by organisations with a profit motive, led by founders and directors whose interests align strongly with their shareholders. There is no reason to believe this would be different in the realm of class actions. Dutch civil law, including consumer law and the heavily court-supervised proceedings, offers sufficient safeguards against abuse."

3 Court of Appeal Amsterdam 16 June 2017, ECLI:NL:GHAMS:2017:2257.

Reflection on the interview in 2019

Since our interview with him in 2019, Rein has changed his perspective regarding the effectiveness of the WAMCA as a mechanism for adjudicating collective damages claims, which was initially pessimistic. Although Rein maintains some reservations, as expressed above, he now believes based on the developments to date that the courts are making significant strides in ensuring that the WAMCA works effectively. "I believe the courts are on track to make it work," Rein concludes.

The most important development in the future of class actions

Rein: "The first collective settlement that is ordered under the WAMCA is certainly going to be the most important development in – hopefully – the near future."

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Advancing class actions in the Netherlands: a future of efficiency, effectiveness and enhanced access to justice

Koen Rutten is a partner at Finch Dispute Resolution and his expertise spans across corporate litigation, liability litigation and corporate governance issues. He is also an expert in the field of class actions, having represented investors and other claimants. With his extensive experience and deep understanding of the Dutch legal landscape, Koen is uniquely positioned to shed light on the intricacies of class actions in the Netherlands. We have the privilege of speaking with Koen, who shares his insights in this interview.

Implementing the RAD: no significant change in the Netherlands

"Since the last *Class Action Survey*, the RAD has come into force and has already been implemented in the Netherlands," Koen notes. The Implementation Act was enacted on 2 November 2022 and entered into force on 25 June 2023. Koen adds, "The Netherlands met the deadline for implementing the RAD into Dutch law, an achievement that sets it apart from most EU Member States. As of now, there are no significant developments in the implementation process to report."

The RAD's implementation had only limited impact in the Netherlands, as the Dutch system for collective redress (WAMCA) was already more advanced and developed than

the RAD. As a result, only a few changes were made to the Dutch collective redress system, which primarily focused on cross-border class actions by qualified entities. "In short, the RAD limits the WAMCA's scope on cross-border collective redress for consumers," Koen explains. The RAD has tightened the standing requirements for claims with an idealistic purpose and minimal financial interest. If a claim falls within the RAD's scope, the representative entity must meet additional requirements regarding the claim's funding and the information provided to the claimants. As of 25 April 2024, two organisations qualified: Dutch Association of Stockholders (*Vereniging voor Effectenbezitters*) and Initiatives Collective Actions Mass Damage (*Stichting ICAM*). The latter has brought one claim under the WAMCA prior to being appointed as a representative organisation, which is an opt-out claim on behalf of Dutch residents against the Dutch State for a data hack.

Implementing the RAD has not significantly altered the litigation landscape or risk profile in the Netherlands. "One could even say 'not at all'," Koen comments. The Dutch legislator has implemented the RAD, and that is currently the extent of it. The RAD's scope is limited and it imposes stricter requirements than the WAMCA, as previously mentioned. While the RAD does fit within the legislative system and culture, it is considered less ambitious than the current Dutch legislation.

Most relevant EU jurisdictions and developments

According to Koen, the most relevant jurisdictions for class actions in Europe are the UK, Portugal, Germany, Slovenia and the Netherlands. These jurisdictions are considered front runners in class action legislation, primarily because third party litigation funding is accepted, thereby facilitating access to justice.

"In the UK, collective proceedings orders can be sought from the Competition Appeal Tribunal for alleged competition law breaches on an opt-out basis," Koen explains. The UK also offers opt-in possibilities, such as group litigation orders, which are mechanisms for determining common issues of fact or law in opt-in claims.

In Portugal, individuals or suitable associations can seek to bring opt-out class actions for specified breaches of substantive law, including consumer protection law and

competition law. There is no formal certification stage, but the court can order early dismissal of the action where granting the claim is manifestly unlikely.

Slovenia has recently developed a more active class action practice, with several consumer rights cases. "Similar to the Netherlands, ad hoc representative entities may have standing in class actions and the proceedings are brought on an opt-out basis," Koen explains.

The Netherlands offers ample opportunities for claims of different subject matters, with limited restrictions in place. As previously mentioned, implementing the RAD does not change this perspective.

In the coming years, certain EU legislations are expected to play a larger role in class actions. "The existing European legislation regarding consumer protection and ESG legislation will play a larger role in class actions," Koen asserts. For instance, the Unfair Terms Directive (93/13/EEC) is anticipated to have a significant impact on future class actions. Given the recent trend in the Netherlands of holding big tech accountable, the Digital Services Act (Regulation EU/2022/2065) and the Digital Market Act (Regulation EU/2022/1925) could prove to be crucial pieces of legislation for class actions. These regulations may shape the landscape of class actions in the years to come.

Other class action developments in the Netherlands

Apart from the RAD, the most significant change in the Netherlands concerning class action litigation since 2019 has been the WAMCA's entry into force in 2020. This legislation introduced an opt-out class action system that allows damages to be claimed on behalf of the class. "This is a significant development in our jurisdiction," Koen notes.

In addition, the Claim Code was revised in 2019. This code serves as a conduct guide and outline best practices for the governance of representative entities involved in class actions under the WAMCA. The introduction of the first WAMCA cases and the development of the Claim Code 2019's application by Dutch courts have been noteworthy. "Through this application, the Claim Code 2019 has a de facto effect on all parties involved in class actions, including funders, claimants and defendants," Koen

adds. These changes have significantly influenced the landscape of class action litigation in the Netherlands.

WAMCA cases can be brought in the interest of all private persons (consumers) or legal persons. Collective claims pursue both monetary and idealistic interests. However, any idealistic or general interest must be linked to the interest of legal or private persons. "Dutch civil law only regards the interest of legal or private persons," Koen explains. For instance, the independent interest of safeguarding the environment cannot be protected in WAMCA proceedings without the interest of private or legal persons being linked to the case.

Since 1 January 2020 when the WAMCA was introduced, 91 WAMCA claims have been initiated. However, the annual number of claims did not show a rising trend:

- 2020: 18 claims
- 2021: 33 claims
- 2022: 20 claims
- 2023: 20 claims

A large variety of WAMCA cases have been observed. These include cases protecting consumer and human rights, competition law and intellectual property law. In addition, several cases safeguarding public interests have been introduced, such as managing environmental impacts around Schiphol Airport.

In the Netherlands, the top five types of class actions in terms of quantity are product liability, privacy claims, competition law claims, claims related to 'Dieselgate' and claims for investor losses. "In a recent publication, we made a quantitative analysis of the WAMCA after four years of its entry into force,"[1] Koen says. It shows that damages have been claimed in 43 of the total 91 WAMCA cases. In 29 of those 43 cases, the damages have not been estimated yet, but will be substantiated at a later stage in the proceedings.

1 J. Klein et al., Whitepaper. 'Vier jaar WAMCA. Een derde kwantitatieve analyse', www.deminor.com, p. 15.

In the remaining 14 cases, the total amount of damages varies between EUR 7,500 and EUR 10 billion. Five cases estimate the maximum damages below four million euros; one case estimates tens of millions of euros in damages; two cases estimate hundreds of millions of euros in damages; and six cases foresee over a billion euros in damages, with three cases involving damages of five billion euros and more.

According to Koen, the types of class actions that are not covered by the RAD are expected to change over time. This is largely dependent on developments in case law and potential new European legislation. "In recent years, we have seen several cases focused on privacy infringements," he notes. However, towards the end of 2023 and the start of 2024, this type of case might have lost its appeal to funders after several setbacks in jurisprudence, such as the *TikTok*[2] and *Salesforce-Oracle* cases.[3] The setback in *Salesforce-Oracle* recently been corrected by the Amsterdam Court of Appeal, which positively affects the viability of addressing privacy infringements through the WAMCA.[4] Koen states: "The appeal in the Salesforce-Oracle case is the confirmation of the success of the opt-out system."

Looking ahead, Koen expects a focus on ESG-related claims and climate-related claims, in line with the *Urgenda* case[5] and the *Milieudefensie v. Shell* case.[6] "As the recent case against KLM[7] has shown, judgments like these have a catch-on effect in holding companies accountable for their actions in several different areas," Koen adds. These recently successful claims show that successful proceedings build on each other. Each of these cases developed a different aspect of ESG-related and climate-related accountability for States and companies. This suggests a potential shift in the landscape of class actions in the future based on the developments in current case law.

Koen believes that the number of ESG-related claims will increase, particularly concerning companies' impact on the environment.

2 Amsterdam District Court 25 October 2023, ECLI:NL:RBAMS:2023:6694 (*TikTok*).
3 Amsterdam District Court 29 December 2021, ECLI:NL:2021:7647 (*Salesforce-Oracle*).
4 Amsterdam Court of Appeal 18 June 2024, ECLI:NL:GHAMS:2024:1651 (*Salesforce-Oracle*).
5 Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*).
6 Amsterdam District Court 26 May 2021, ECLI:NL:RBAMS:2021:5337 (*Milieudefensie v. Shell*).
7 Amsterdam District Court 20 March 2024, ECLI:NL:RBAMS:2024:1512 (*KLM*).

Koen observes, "Taking into account the recent legislation regarding ESG matters, it is to be expected that more stringent regulation will draw attention to ESG litigation."

There is also a growing awareness of companies' environmental impact, especially in terms of factory pollution and its effects on the climate and the local residents' health. For instance, litigation had been initiated against Chemours for their emissions, which resulted in an interlocutory judgment stating that the emissions are unlawful.[8] Additionally, a foundation has announced its intention to start WAMCA proceedings against steel manufacturer Tata Steel for pollution of the region around the factory.[9]

"In short, class actions, both WAMCA cases and other forms of collective proceedings, have already been used for these types of claims," Koen notes. Class actions protecting the general interest, often initiated by NGOs, have always been a part of the Dutch legal system. This suggests a continued and potentially increasing use of class actions for ESG-related claims in the future.

Alternative methods for collective redress

There are alternative methods for collective redress available in the Netherlands. These include litigating by mandate and via assignment of claims, in addition to the WAMCA proceedings. "Furthermore, it is possible to request the Amsterdam Court of Appeal to declare a collective settlement agreement binding on all class members on an opt-out basis," Koen explains. This method, known as a WCAM settlement, was the basis for collective redress prior to the entry into force of the WAMCA on 1 January 2020.[10]

These methods for collective redress each have their specific place in the Dutch system. WAMCA proceedings are most suited to the interests of larger groups with small and scattered damages where individuals cannot effectively and efficiently address these damages. Mandate or assignment can be a more attractive option for certain types of cases, such as securities litigation of institutional investors and claims related to competition law.

8 Rotterdam District Court 27 September 2023, ECLI:N:RBROT:2023:8987 (*Chemours*).
9 'FrisseWind.nu start massaschadeclaim Tata Steel', www.frissewind.nu/articles/massaclaim-vervolg.
10 Articles 7:907-910 Dutch Civil Code and 1013-1018 Dutch Code of Civil Procedure.

WCAM settlements, being a final and binding instrument to settle a claim, are interesting from the perspective of both the claimant and the defendant. They can be entered into following WAMCA proceedings and the alternative methods for collective redress. "All systems have their benefits and deficiencies. The choice for the right instrument depends on the case itself," Koen says. Therefore, it is not expected that this will change drastically over the coming years.

Abuse of class actions

In the Netherlands, the likelihood of class action abuse is low. According to Koen, there are currently no examples of frivolous WAMCA claims in the Netherlands, Koen states that there are three main reasons for this. "Firstly, claimaint's counsel has a professional responsibility to only defend causes that they believe to be just in good conscience. Secondly, funders are not willing to finance cases that are not viable and just. Lastly, the legislation includes safeguards and the courts verify and monitor the legal requirements contained in the WAMCA." All representative organisations must adhere to strict legal requirements regarding funding, representation of their constituents, and their internal governance and structure. Any frivolous claims will be filtered out by the courts and dismissed. Therefore, the system is designed to prevent the abuse of class actions.

Parallels to the US class action system

The Dutch jurisdiction, particularly with the WAMCA's introduction, shares several similarities with the class action system in the US. For instance, the court in the Netherlands appoints an 'exclusive representative' based on several factors. These include the size of the group and the financial interest the group represents. This appointment mirrors the US practice under the Private Securities Litigation Reform Act of 1995, where the court determines the lead plaintiff. The plaintiff most suited to act as the lead plaintiff is the one who, "in the determination of the court, has the largest financial interest in the relief sought by the class."

Furthermore, the 'motion to dismiss' phase in the US is comparable to the 'admissibility or certification' phase in the Netherlands. Koen thus finds parallels between the class action mechanisms in the Netherlands and the US.

Third party litigation funding and costs

Third party litigation funding (TPLF) is permitted in the Netherlands and is currently not heavily regulated, apart from some aspects of the RAD. "There are specific provisions in the law regarding class actions," Koen explains. For instance, any representative organisation that brings a class action funded by TPLF must adequately inform its constituents. This includes clearly publishing any form of success fee the funder is entitled to on its website.

According to the law, the representative organisation must ensure that it has sufficient resources (funding) to bear the costs of bringing the class action. "The funder must commit itself to at least the costs for the proceeding at the first instance," Koen notes. Additionally, 'sufficient control' on the claim must lie with the representative entity. In other words, the funder may not control the strategy on the proceedings or the decisions to settle. Participation and consultation are allowed, but the representative entity makes the final decision.

The Claim Code 2019, a source of soft law applicable to class actions, contains provisions on TPLF. According to Koen, "Dutch courts value the best practices of the Claim Code 2019 and often refer to the code in judgments. The Claim Code 2019 also provides guidance for representative entities and funders during their funding negotiations."

Furthermore, Dutch courts allow a success fee for TPLF in the form of a percentage of the claim. "A percentage of the claim as a success fee is also described in the Claim Code 2019," Koen adds. He further notes that "Dutch courts have consistently held that a maximum of 25% of the claim is acceptable for consumer cases under the WAMCA.[11] There have been other TPLF cases where higher percentages (40%) were allowed."[12]

"Use of TPLF is almost mandatory for some cases considering the legal requirement of sufficient funding and the necessary investments by the representative entity," Koen states. In his view, this is not an issue because "TPLF allows for cases to be brought before the courts where the claimants do not have sufficient resources themselves."

11 See most recent: Amsterdam District Court 10 April 2024, ECLI:NL:RBAMS:2024:2019, para. 8.70.
12 Amsterdam Court of Appeal 13 December 2011, ECLI:NL:GHAMS:2011:BU8763, para. 3.4.1-3.4.2.

Dutch courts explicitly value the access to justice that TPLF creates. In practice, the total number of class actions using TPLF is relatively low. Since the WAMCA's entry into force on 1 January 2020, only 33 out of the 91 cases (36%) have used TPLF. Among these 33 cases, 20 involve competing claims within the same case. Therefore, the actual number of unique cases is even lower than this percentage suggests.

"Any regulation of TPLF must be based on the economic reality, and the fact that very few cases depend on TPLF," Koen concludes. TPLF regulations cannot be based on fear for 'American conditions' and a 'claim culture', as is often stated in legal literature. Strict regulation of TPLF (e.g. a permit requirement) may limit access to justice for certain cases and consumers. Strict regulation could restrict competition on the TPLF market and push smaller funders out of the market. On the other hand, adequate regulation may create clarity for the parties involved in class action proceedings.

There is a 'loser pays' rule in the Netherlands, but it is quite low. "In general, the court fees and the legal costs are very low compared to other countries," Koen explains. Each case awards 'points' based on the procedural acts, such as a hearing or a statement of defence. The party that loses the case pays a flat-rate amount for the points awarded to the case. The rate per point is related to the claim's size. For cases with claims above EUR 1 million, each point awards EUR 3,431. However, the awarded amounts are relatively low compared to the legal fees in class actions, which are typically higher.

For WAMCA cases, there's an addition to this rule. "If the claim is frivolous, these costs can be multiplied by five," Koen says. However, considering the interests and investments of a class action, this rule doesn't make a significant difference.

If the defendant loses, Koen states that in WAMCA cases, the funder's success fee is a claim against the defendant based on the costs of the proceedings, separate from the claim for damages. "The courts may on the basis of reasonableness limit the amount of success fee to be paid to the funder," Koen explains. However, there has not yet been a WAMCA case in which damages and payment of the success fee as costs have been awarded.

The most important class action in the past ten years

In the past ten years, there have been several significant class actions in the Netherlands. Koen observes, "For other alternative methods of collective redress, the *Steinhoff* case[13] stands out as one of the high-profile cases and boasts the largest settlement in the Netherlands." He continues, "However, the WCAM *Fortis/Ageas* case is considered the most influential case for class actions settlements in general in the last ten years."[14] This case provided relevant insights that contributed to the development of class actions on several topics, including the funding (success fee) and the categorisation. The case continues to be cited by courts in other case law, including in WAMCA cases.

As for the WAMCA, there is no judgment rendered by a higher court yet on the merits of the case. However, several lower district courts have rendered guiding judgments on the development of WAMCA cases. "The *TikTok* case is significant," Koen says. He asserts, "This pioneering case has sparked discussions in legal literature needed to develop class actions in the Netherlands. The *BCW v Allergan* case is currently considered a leading judgment on the possibility of claiming non-material damages in class actions and the damages' categorisation. These judgments are not final and are subject to further litigation before the district courts, potentially before the Court of Appeal and the Dutch Supreme Court. These cases highlight the evolving landscape of class actions in the Netherlands over the past decade.

Class action gaining popularity outside the US

The rise of class actions outside the US is indeed a notable development. It reflects a global trend towards increased access to justice and corporate accountability. Koen notes, "Class actions are a valuable instrument to provide access to justice for individuals that would normally not start proceedings for their damages." According to Koen, bringing these class actions in a jurisdiction that has a balanced system for both defendants and claimants is a positive approach.

13 For further information on this settlement, see https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Amsterdam/Nieuws/Paginas/Rechtbank-bekrachtigt-schikkingsakkoord-van-multinational-Steinhoff.aspx.

14 Amsterdam Court of Appeal 13 July 2018, ECLI:NL:GHAMS:2018:2422 (*Fortis/Ageas*).

The potential for the Netherlands to play a larger role in this area is significant. The Dutch court system is known for its efficiency and affordability, making it an attractive forum for foreign parties. Koen anticipates that "the Netherlands will play an even larger role when the first final judgment in a WAMCA case has been rendered."

Similarly, the class action legislation in Portugal could also gain prominence in the future. Koen notes, "Over the last few years, we have seen an increase in high-profile cases and class actions before the Portuguese courts." He explains, "The country's opt-out system, absence of a certification phase, and the possibility for global compensation of the class make it an appealing jurisdiction for such actions."

Koen believes that it is only natural that class actions are increasing in popularity. "Justice and accountability of companies for their actions are at the forefront of discussions now more than ever," he concludes.

The ideal class action

Koen believes that the ideal class action should have several key characteristics:

1. **Quick resolution**: A class action's overarching goal should be to swiftly resolve collective problems. This is particularly important for genuine collective issues, not frivolous claims. The social impact of some problems is significant, and lengthy proceedings can overburden the judicial system.
2. **Focus on merits:** The discussion should primarily focus on the case's merits, rather than arguments against the representative organisations' suitability. While it is crucial to have safeguards and mechanisms to protect the harmed group and allow defendants to defend themselves, the court should be able to dismiss frivolous defences just as it can dismiss frivolous claims.
3. **The court's active role:** The court should play a more dominant role in resolving disputes, potentially through mediation. This could involve starting discovery proceedings after the admissibility phase or steering towards active mediation.
4. **Cooperation among claimants:** The ideal class action should also involve cooperation among claimants on competing claims in the interest of the group. Any form of competition or "beauty contest" between representative entities should be

avoided, especially if they argue for each other's unsuitability. This does not serve the harmed group's interests nor contribute to the discussion on the merits.

In the context of class actions, certain developments might not be desirable.

Firstly, Koen notes that imposing more stringent requirements on the admissibility of representative entities is not encouraged. Given the current legal framework, which includes both hard and soft law, representative entities already face strict requirements to be deemed admissible in their claims. Additional requirements could lead to prolonged discussions during the proceedings' admissibility phase, which may not serve the harmed group's interests. Instead, the focus should be on enhancing the legal framework's efficiency and effectiveness.

Secondly, Koen expresses concerns about strict regulation on TPLF. "Such regulation could potentially hinder access to justice and the fundability of class actions," he observes. Any regulation of TPLF should be grounded in economic reality, rather than arbitrary constraints.

Desired developments

Koen asserts that class settlement is the ultimate goal for resolving collective problems. He believes that it serves not only the interests of groups of victims, but also the broader societal interest. The WAMCA, being a relatively new instrument implemented to expedite settlements, has given rise to some legal issues and uncertainties, particularly in the admissibility or certification phase.

"Once the legal uncertainties in the admissibility phase have been decided on, parties could reach a stage where settlement could be tried more quickly," Koen explains. To achieve quicker class settlements and address collective problems more effectively, it might be beneficial to adopt mechanisms practiced in the US, such as discovery or active mediation by judges. These mechanisms have been shown to expedite the settlement process. Therefore, changes in this direction could be desirable for the future of class settlements.

The introduction of additional mechanisms in class actions

Koen concludes with his final thoughts on the future of class actions: "From a claimant's perspective, the most significant developments could be the introduction of additional mechanisms. These include discovery or active mediation by judges under the WAMCA, which would further enhance its efficiency and effectiveness."

Poland

Since 2010, Poland has had a class action mechanism called 'group proceedings'. These proceedings can be initiated by a group representative on behalf of a group of at least ten natural or legal persons that are not parties to the proceedings. The representative can be a group member, the District Consumer Ombudsman or, in certain cases, the Financial Ombudsman. In these proceedings, the group representative can seek declaratory and injunctive relief, the establishment of a legal relationship or right (constitutive judgment) and damages. In the latter case, only a standardised amount of money can be claimed for the whole group or for sub-groups of at least two persons. The claims will therefore be adjusted to the lowest amount claimed. Moreover, the court can limit a claim for damages to declaratory relief. When awarding damages, the court will define the exact amount to be paid to each group member. Each member may bring enforcement proceedings for damages against the defendant.

Group proceedings can be brought on the grounds of liability for damage caused by hazardous products, for tortious and contractual liability, unjust enrichment, and consumer protection. In principle, claims based on the violation of personal rights cannot be brought in group proceedings unless they include bodily injury and health disorder, in which case declaratory relief can be sought to establish the defendant's liability.

Group proceedings have a certification phase after which a positive decision on the admissibility of the claims is published, in order to provide an opt-in possibility for persons who did not join the action at an earlier stage to do so within a period set by the court of a maximum of three months. The admissibility requirements include the homogeneity of the group members' claims (e.g. all claims for damages, or all claims for declaratory relief), the type of claim (statute provides for a catalogue of claims which can be pursued in a class action), a common factual basis for the claims, and a minimum group size of at least ten natural or legal persons.

The Representative Actions Directive (RAD) has been implemented in Polish law. The Enforcement of Claims in Group Proceedings (Amendment) Act entered into force on 29 August 2024. The amended Act (the Amendment) introduces a new class action mechanism, consumer representative group proceedings, which could significantly widen the application of class actions in the Polish litigation landscape. The Amendment provides for an opt-in class action mechanism to protect consumers from infringements of consumer law by traders. It envisages that qualified entities in domestic actions will be registered consumer organisations. Under the Amendment, claims must be of the same type and have the same legal basis. No minimum size of consumer group is required. Third party litigation funding is permitted. If the court has reasonable doubt as to whether the funding adversely affects the interests of consumers in the proceedings, the qualified entity may be ordered to disclose the source of its funding and take appropriate action under penalty of change of the qualified entity or dismissal of the claim. The 'loser pays' principle applies, but the qualified entity will be exempted from paying the court fees and other costs of the proceedings, which are to be temporarily borne by the State Treasury.

Class actions | Group proceedings (including RAD)

Scope	Liability for damage caused by hazardous products, for tortious and contractual liability, unjust enrichment and consumer protection.
Access granted to	Registered consumer organisations.
Opt-in or opt-out	Opt-in; no formal possibility to opt-out.
Declaratory relief or damages	Both, and injunctive relief.
Frequently used	No
Regulatory framework	Act of 17 December 2009 on the Enforcement of Claims in Group Proceedings (Journal of Laws of 2010, No. 7, item 44), entry into force 19 July 2010, amended in 2017, 2019, 2022, 2023 and 2024 (Journal of Laws of 2024, item 1237).
Alternatives used in practice	Joined actions of multiple claimants; assignment of claims.

Class settlements

Binding class members after court approval	General rules on the settlement of civil claims apply; the settlement can be concluded with the consent of at least 50% of the class members; the court examines whether the settlement grossly violates the rights of class members.
Opt-in or opt-out	Idem; however, in consumer representative class actions, a class member who does not agree with the terms of settlement concluded by the qualified entity can opt out within two weeks from being notified of the settlement.
Regulatory framework	Act of 23 April 1964 – Civil Code (as amended, Journal of Laws of 2024, item 1061), Act of 17 November 1964 – Code of Civil Procedure (as amended, Journal of Laws of 2023, item 1550), Act of 17 December 2009 on the Enforcement of Claims in Group Proceedings (Journal of Laws of 2010, No. 7, item 44), entry into force 19 July 2010, amended in 2017, 2019, 2022, 2023 and 2024 (Journal of Laws of 2024, item 1237).

Third party funding

Regulated by law	Yes, in the Amendment (2024).
Frequently used	No

Good to know

For class actions, a financial incentive is provided which decreases the filing fee to 50% of the fee amount.

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Poised for change: the future of Polish class actions from a defence lawyer perspective

We have the pleasure of speaking with Joanna Gąsowski and Olga Gerlich, two prominent defence lawyers in class actions in Poland and counsel and senior associate at Wolf Theiss. With over 17 years' experience in litigation, Joanna's practice focuses on commercial disputes. Olga specialises in commercial litigation and arbitration. We are excited to explore the present litigation landscape of Poland with them – a country that was not included in our last survey – and discuss the changes on the horizon.

The latest developments in Poland

The Representative Actions Directive (RAD) has been implemented in Polish law with the amendment to the Act on the Enforcement of Claims in Group Proceedings dated 17 December 2009 (Class Action Act (*Ustawa o dochodzeniu roszczeń w postępowaniu grupowym*)), which entered into force on 29 August 2024 (the Amendment).[1] "The implementation of the RAD through the Amendment is set to significantly change the status of class actions in Poland by introducing a new type of class action – consumer

1 Act dated 28 July 2024 amending the Act on the Enforcement of Claims in Group Proceedings and other Acts (*Ustawa o zmianie ustawy o dochodzeniu roszczeń w postępowaniu grupowym oraz niektórych innych ustaw*), Journal of Laws of 2024, item 1237.

representative group proceedings. This could increase the application of the class action mechanism, which has not been frequently used in Poland so far," they add.

The established procedural mechanism for class actions: group proceedings under Polish law

Joanna and Olga begin by guiding us through the established procedural mechanism for class actions in Poland.

Polish law provides a regulatory framework for injunctive measures related to violations of consumer law. Under the Act on Protection of Competition and Consumers dated 16 February 2007 (Consumer Protection Act (*Ustawa o ochronie konkurencji i konsumentów*)), the President of the Office of Competition and Consumer Protection can issue declaratory decisions stating that a given practice of a trader violates collective rights of consumers, as well as order the trader to take specific measures to end the practices violating these rights. However, the Consumer Protection Act does not allow consumers to pursue a declaratory action and does not provide for redress measures to pursue consumer claims related to these violations.

The procedural mechanism available to consumers to pursue these claims is provided under the Class Action Act, which allows class action proceedings to be initiated through 'group proceedings'. "Such group proceedings must be brought by a minimum of ten individuals and the claims must fall within the list of claims that are admissible in class action proceedings," Joanna and Olga explain.[2] The claims must also have the same factual basis and, if the action concerns pecuniary claims, the claims must be standardised within the group or subgroups.

The introduction of a new class action: the consumer representative collective action

Joanna and Olga emphasise that the Amendment made some extensive changes to the

2 This list includes (i) claims for liability for damage caused by a dangerous product, (ii) tort claims, (iii) claims for liability for non-performance or improper performance of a contractual obligation, (iv) claims for unjust enrichment, (v) claims in other cases relating to consumer protection, and (vi) claims arising out of bodily injury or health disorder. Apart from claims falling in this last category, any claims for the protection of personal interests are excluded.

current procedural mechanism for class actions, by introducing a new type of class action: an action to declare the application of a practice violating the general interest of consumers and to pursue related redress claims (consumer representative collective action).

The Amendment extends the list of claims that are admissible in class action proceedings to include actions to declare that practices violate the general interests of consumers (understood as actions or omissions contrary to the provisions of EU law listed in Appendix I to the RAD) and actions for claims connected with those practices.

"The requirement to form a group of at least ten people has been waived, and an opt-in mechanism has been adopted. A consumer representative class action can be brought for claims with the same legal basis, whereas the general class action mechanism requires a higher standard: the claims must have the same factual basis." Joanna and Olga continue "The President of the Office of Competition and Consumer Protection can join consumer representative class action proceedings, and such action can only be brought by an authorised entity, being a qualified entity according to the list maintained by that President or the European Commission (with ad hoc actions excluded)." Finally, Joanna and Olga mention that specific rules on third party funding have been introduced to avoid abuse and conflicts of interest relating to the consumer representative collective action, adding that a mechanism on discovery of evidence has been provided and that the amounts that can be collected from class members in connection with joining the collective action will be capped by statutory law.

The future of class actions following the implementation of the RAD

As the RAD has been implemented very recently, it is challenging to assess exactly how its implementation will alter the Polish litigation landscape. Joanna and Olga emphasise that Poland has not yet developed a strong class action culture and that the Class Action Act has not proved to be a popular instrument; claimants still predominantly file individual claims as opposed to group proceedings.

However, they believe that the Amendment could potentially increase the popularity of class actions in Poland for various reasons. The consumer representative collective

action could, for example, prove more accessible to claimants due to cost considerations and the professional representation provided by the qualified entities. Additionally, the Amendment introduces new instruments which were not present in the standard rules on civil procedures, such as discovery instruments and the possibility to examine the financing of the class action to avoid possible conflicts of interest.

The future of ESG-related class actions

When we ask Joanna and Olga about claims regarding environmental, social and governance (ESG) matters, they begin by mentioning that in Poland class actions are currently not used in ESG-related matters. However, with the implementation of the RAD and the growing public awareness of the importance of sustainable development, they anticipate that consumers in Poland will increasingly resort to collective redress. "Up until now, most sustainability litigation has centred on climate change and environmental impacts, with a significant portion of climate lawsuits being directed against governments and energy sector companies involved in high-carbon activities, or entities that finance such activities," Joanna and Olga add.

Top five class actions in Poland: from financial institutions to environmental obligations

In Joanna's and Olga's view, the top five types of class actions are currently as follows:

1. Class actions involving claims against banks and other financial institutions or insurance companies, such as the *Polish Swiss francs* case;[3]
2. Class actions against construction developers;[4]
3. Class actions against the State Treasury, related to COVID-19 measures;[5]

3 E.g. a class action brought in 2014 by the Municipal Consumer Ombudsman in Olsztyn on behalf of over 5,000 borrowers against Millennium Bank S.A. for claims related to abusive clauses used in Swiss franc denominated loan agreements, Warsaw Regional Court, case no. I C 1281/15.

4 E.g. a class action brought in 2012 by a class member on behalf of 44 residential premises owners for improper performance of contracts for the sale of premises in a residential building against a developer – Dom Development S.A., Warsaw Regional Court, case no. I C 984/12.

5 E.g. class actions brought by class members acting as class representatives on behalf of restaurant owners against the State Treasury for damages arising from unlawful COVID-19 measures, Warsaw Regional Court (case nos. have not been disclosed).

4. Class actions related to other consumer products, for example, against tour operators;[6] and
5. Although not necessarily in the top five in terms of quantity, there is a recent trend of class actions related to failure to meet environmental law obligations, such as those related to excessive air pollution levels in Poland.[7]

The failure of class actions: Poland's Swiss franc case

In Poland, forming a large class of claimants to pursue claims in a class action is challenging because the claims must be the same. The difficulties involved are illustrated by, for instance, the class action against mBank S.A regarding Swiss franc denominated mortgages. This case constituted the most significant example of class action litigation failure in Poland.[8] Over the past decade, Joanna and Olga explain, Polish courts have been flooded with lawsuits against banks that granted mortgage loans denominated in Swiss francs. These loans were initially seen as a safe and financially beneficial solution due to the stability of the currency. However, when the exchange rate of the Swiss franc to the Polish zloty dramatically increased in 2015, the overall costs of the loan proved much higher than anticipated, leading to a flood of lawsuits once the courts began issuing rulings declaring the invalidity of loan denomination clauses. In 2022 alone, Polish courts received 66,090 lawsuits concerning Swiss franc loans. Since then, a dedicated department for the Swiss franc mortgage loan cases has even been established at the Warsaw District Court.

Joanna and Olga continue "despite initial attempts to structure these cases as class actions, the vast majority of the Swiss franc lawsuits were filed as individual lawsuits,

6 E.g. a class action brought by a class member acting as class representative against Rainbow Tours S.A. for improper performance of a contract for touristic services, Poznań Regional Court, case no. XVIII C 590/18.

7 E.g. a class action brought in 2020 by a class member acting as class representative acting on behalf of a class of over 200 individuals against the State Treasury for damages sustained due to air pollution resulting from Poland's failure to meet the air purity standards under statutory law, Warsaw Regional Court (case no. has not been disclosed).

8 The class action against MBank S.A. was brought in 2016 by the Municipal Consumer Ombudsman in Warsaw on behalf of 1.725 borrowers for claims related to abusive clauses used in Swiss franc denominated loans. In 2018 the Łódź Regional Court dismissed the lawsuit. In 2020 this judgment was overturned by the Łódź Appellate Court and referred to the court of first instance for reconsideration. The Łódź Regional Court dismissed the case for the second time (case no. I C 1219/20, the judgment is not final).

highlighting the weaknesses of the established Polish class action regime, including the lengthy formal phase of the proceedings and the requirement for standardisation of claims." As a result, consumers rarely opt for class action lawsuits under the current Class Action Act regime. For some claimants, the requirement of standardisation of the claims means in practice that they give up part of their compensation, as even the amount of their damages must be standardised, entailing that all members of the group or subgroup must agree to compensation in the form of a lump sum in the same amount.

Class settlement

The Class Action Act did not previously provide for any specific settlement structure. However, it did stipulate that concluding a settlement requires the consent of more than half of the group members in the class action. Furthermore, Joanna and Olga mention that the content of the settlement is subject to the scrutiny of the court, which examines whether concluding a settlement is permissible, thus not contrary to the law or good practices, not aimed at the circumvention of the law, and not grossly violating the interests of the group members.

Looking ahead, Joanna and Olga note the significance of the Amendment, which introduced some distinct solutions applicable only to consumer representative collective actions. When a settlement is drawn up in such collective action, all class members have the option to withdraw from the class if they do not agree with the settlement's terms and conditions. To do so, they must file a statement with the court within two weeks from the notification of the settlement.

Joanna and Olga continue by discussing what they regard as the most significant Polish class action of the past ten years. This action was filed with the Warsaw District Court on 8 November 2021 and involved 279 participants.[9] It aimed to establish the liability of the State Treasury for damage caused by unlawful acts and omissions in the exercise of public authority relating to the occurrence of an epidemic emergency. According to the claimants, these events resulted in losses estimated at more than PLN

9 One of the class actions brought by class members acting as class representatives on behalf of restaurant owners against the State Treasury for damages arising from unlawful COVID-19 measures, Warsaw Regional Court (case no. has not been disclosed).

211 million and led to many human tragedies. On 18 January 2024, the Warsaw Regional Court recognised the class action and confirmed that it met the formal requirements for a class action. The lawsuit is considered the largest class action in Polish history to date.

Similar lawsuits have been filed against the State Treasury by entrepreneurs in the tourism and entertainment industry. Joanna and Olga mention that another interesting class action relates to the *Polish Swiss francs* case, in which borrowers with denominated mortgage loans have also filed a class action lawsuit against the State Treasury,[10] as they cannot claim against the bank involved – Getin Noble S.A. – due to its bankruptcy. The claimants allege that the State Treasury is liable for the failures of the State's financial supervisory institutions which allowed consumers to conclude abusive loan agreements subjecting the loans to high currency rate fluctuations risks. Recently, the Regional Court approved the case for consideration in group proceedings. The merit phase of the proceedings is to be carefully observed as it is likely to have a large impact on the interpretation of the rules determining the State Treasury's liability.

Potential abuse of class actions

When we ask Joanna and Olga if they think that abuse of class actions occurs or is likely to occur in Poland, they answer that such concerns were raised in the public consultations accompanying the legislative works on the Amendment by both businesses and consumer organisations. Their concern was particularly directed towards the possible abuse of litigation rights. According to the Amendment, consumer organisations have the right to bring lawsuits on behalf of consumers as qualified entities, albeit under strict conditions. Such consumer organisations, however, do not have the right that defendants enjoy to request the court to oblige the other party to pay a security deposit for the recovery of legal costs.

Article 8(1) of the Class Action Act allows a defendant to seek a court order requiring a deposit from a claimant, which will be granted only if the defendant makes it plausible that the class action is unfounded and that the lack of security will prevent or seriously

10 A class action brought in 2020 by a class member acting as representative of a class of 370 borrowers for claims related to concluding loan agreements which included abusive clauses in the Warsaw Regional Court, case no. XXV C 2239/20. On 4 June 2024 the Regional Court issued a decision approving the lawsuit for consideration in group proceedings.

impede the enforcement of a judgment on legal costs if the action is dismissed. This provision serves to prevent abuse of the court system. The Amendment however stipulates that this deposit mechanism does not apply to the class actions brought by qualified entities, such as consumer organisations.

Another potential area for abuse concerns the court fee that consumers must pay to join a class action. According to the Amendment, this fee amounts to five percent of the value of the claim, but will be limited to a maximum of PLN 2,000 (approx. EUR 400), or PLN 1,000 (approx. EUR 200) in the case of a non-monetary claim. In addition, a qualified entity that brings a representative collective action on behalf of consumers will be exempt from paying court fees.

In Joanna's and Olga's view, such low costs, or their total exclusion, create room for abuse. After all, it could mean that consumer organisations will not suffer any consequences if they bring groundless actions against a defendant. This may result in consumer organisations filing a large number of actions of which only a portion are justified, forcing defendants to bear significant costs and defend themselves against unfounded allegations.

On the other hand, Joanna and Olga believe that the filing of frivolous lawsuits is rather unlikely due to the fact that class action lawsuits require, by their very nature, a great deal of legal work, meaning that they will never be low cost. This fact alone will act as a deterrent to frivolous lawsuits in their view.

Third party litigation funding

In Poland, there are currently no statutory rules on third party litigation funding, Joanna and Olga explain. The Amendment, however, introduced some regulation on third party litigation funding, aiming to ensure that no conflict of interest arises when funding class actions.

According to the Amendment, a third party litigation funding agreement must be filed along with the collective claims submitted. If at any stage of the proceedings the court has doubts about whether the financing impacts the proper protection of consumer

interests, the court has the authority to examine the sources of financing and the influence of the funder on the decision-making process of the qualified entity. If the results of this examination are not satisfactory, the court may demand that specific measures be taken.

The 'loser pays' principle and the funder's success fee

In Poland, the general principle that the 'loser pays' is applicable to group proceedings. Joanna and Olga state that this principle remains unaltered by the Amendment.

When we ask Joanna and Olga about how the funder's success fee is paid if the defendant loses its case, they answer that "the payment of the funder's success fee is governed by the internal contract between the representative and the claimants, not by a court order. The court does not have any authority to regulate the funder's success fee. However, under the Class Action Act, the success fee of a professional attorney is limited and cannot exceed 20% of the awarded amounts."

Concluding remarks

When asked to summarise their views on the future of class actions in Poland in one sentence, Joanna and Olga answer "in Poland, the class action culture is yet to be developed; therefore, the key development for the future is to increase the awareness of individuals in terms of the class action mechanism and the accessibility of class actions for the general public."

Portugal

Portugal has a well-established tradition of class actions; they are long since recognised in Article 52(3) of the Constitution in the form of 'Popular Action'. The legal framework is set out in the Class Action Act (Law no. 83/95, of 31 August) and specific laws. Class actions can be brought on an opt-out basis by citizens, individually or through associations or foundations, local authorities or by the Public Prosecutor. They can claim injunctive relief and compensation as well as declaratory relief. This class action regime applies on a subsidiary basis now that the Representative Actions Directive (RAD) has been implemented.

The RAD was transposed by Decree-Law no. 114-A/2023, of 5 December, which entered into force on 6 December 2023 and applies to representative actions initiated on or after that date. The implementing Act created a new opt-out regime for representative actions that fall under the scope of the RAD. Domestic representative actions can be initiated by local authorities and by associations and foundations that meet the requirements provided in Decree-Law no. 114-A/2023. Consumer associations bringing these actions may also be subject to requirements in the Portuguese Consumer Protection Act, but this is a matter of some debate. These organisations do not have to be designated beforehand. However, in cross-border class actions, legal standing is limited to qualified entities designated by the General-Directorate for Consumer Protection. For now, only the Portuguese Public Prosecutor, the General-Directorate for Consumer Protection and two consumer protection associations (DECO and Ius Omnibus) are considered qualified entities for this purpose. In representative actions, claims can be for injunctive and/or redress measures. As in the previous class action regime, beneficiaries can opt out until the end of the evidential stage of proceedings, unless they live outside Portugal in which case they must opt in. A proper certification phase is not available, and the courts often decide on the composition of the class – and, hence, on the material legitimacy – in the final judgment.

Before the RAD's implementation, third party litigation funding (TPLF) lacked regulation. There was no consensus on Portuguese law's stance on TPLF. The implementing Act only regulates the funding of consumer representative actions for redress measures, leaving other action types still under debate. Under Decree-Law no. 114-A/2023, the funding agreement must express the independence of the claimant and the absence of conflicts of interest. It must also include a financial summary of funding sources and a list of the funder's costs and expenses. The claimant submits the funding agreement to the court and – according to general principles – also to the defendant. The possibility for the claimant to omit information as proposed in the initial draft implementation bill has been eliminated.

Whether or not they fall under the RAD, class settlements are not regulated other than by the general requirements set out in the Civil Code of Procedure. The Class Action Act simply states that, in the case of settlement, the Public Prosecutor can replace the claimant in the proceedings under specific circumstances. Out-of-court settlements can be submitted to the court for approval. Beneficiaries are free to opt out until the end of the evidential stage of the proceedings.

Under Decree-Law no. 114-A/2023, unclaimed redress funds may be used to pay all costs and expenses (including third party funder remuneration) incurred by the claimant. Of the remaining compensation, 60% is allocated to the Fund for the Promotion of Consumer Rights and 40% to the Institute for Financial Management and Infrastructures of Justice.

Class actions | Popular action | Representative actions (RAD)

Scope	Class actions: various interests such as the consumption of goods and services, securities actions for non- qualified investors, competition law; representative actions RAD: consumer law as set out in Annex I of the RAD.
Access granted to	Class actions: citizens, individually or through associations or foundations, local authorities or by the public prosecutor; representative actions RAD: associations, foundations and local authorities.

Opt-in or opt-out	Class actions: opt-out; representative actions RAD: opt-out, but beneficiaries outside Portugal must opt in.
Declaratory relief or damages	Both
Frequently used	Increasingly frequently
Regulatory framework	Class actions: Constitution of the Portuguese Republic (Article 52), Class Action Act (Law no. 83/95, of 31 August), and specific laws such as the Securities Code (Decree-Law no. 486/99 of 13 November), Consumer Protection Act (Law no. 24/96, of 31 July) or the Private Enforcement Law (Law no. 23/2018 of 5 June); representative actions: Decree-Law no. 114-A/2023, of 5 December (entry into force on 6 December 2023).
Alternatives used in practice	Litigating by mandate, assignment of claims, joinder of parties and joinder of actions.

Class settlements

Binding class members after court approval	Yes
Opt-in or opt-out	Opt-out
Regulatory framework	General requirements in Civil Code of Procedure.

Third party funding

Regulated by law	Class actions: No; representative actions: for damages actions.
Frequently used	No, but frequency is increasing.

Good to know

Portugal has a favourable environment for the filing of class actions, not only because Portuguese courts are not very demanding when assessing claimants' procedural legitimacy but also because claimants in class actions are exempt from paying initial fees and may even be exempted from all court costs in some cases.

Miguel Sousa Ferro
Claimant Lawyer Perspective
Professor at the University of Lisbon Law School

10 July 2024, editors: Nadir Koudsi and David Hakhoff

Portugal has already established itself as a popular venue for class actions

Miguel Sousa Ferro is a Professor at the University of Lisbon Law School and a leading claimants' lawyer in class action litigation. With over 15 years' experience in European Union law, competition law and regulatory law, Miguel is the Managing Partner at Sousa Ferro & Associados, a boutique law firm specialising in competition, regulatory and EU law in Lisbon. Miguel is a leader in Portugal in class actions and competition law, with a special focus on private enforcement and consumer protection.

Implementation of the RAD

Since our last Class Action Survey in 2019, Miguel tells us that the RAD has been implemented in Portugal through the enactment of Decree-Law 114-A/2023, which has been in force since 6 December 2023.

Statutory changes and developments

Miguel highlights the most relevant statutory changes with the implementation of the RAD in the Portuguese jurisdiction. "Beyond the requirements of the Directive itself, there have been significant developments," he explains. These include the exclusion of the possibility for individuals to file national consumer representative actions, the explicit recognition of the possibility of third party funding and a mechanism for funder remuneration, plus the indication of potential mechanisms for the distribution

of compensation to consumers, which will be decided by the courts. "Everything else, like the types of qualified entities, the beneficiaries, types of claims, and the opt-out system, remain fundamentally the same," Miguel adds.

The changing litigation landscape

"The implementation of the RAD solidified a tendency already present for opt-out consumer representative actions with third party funding," Miguel notes. Therefore, the RAD fits well into Portugal's legislative system and culture.

European jurisdictions for class actions

When asked about the most relevant European jurisdictions for class actions, Miguel mentions the UK, the Netherlands, Portugal and Slovenia. "These jurisdictions stand out because they are the only ones that already allowed and have practical examples of opt-out representative actions and third party funding jointly," he says. This perspective remains mostly unchanged with the implementation of the RAD.

The role of other EU legislation

Miguel believes that other EU legislation could play a larger role in class actions in the coming years, particularly if the EU decides to legislate on European class action judicial mechanisms or 'Multi-District-Litigation style mechanisms', as well as third party funding.

Miguel proposes a single EU-wide representative action, with an opt-out mechanism for at least the Member States which have allowed it. This should go as far as bundling claims at a single court, instead of atomised litigation spread out throughout many courts of many Member States.

The rise of opt-out consumer representative actions

Apart from the RAD, Miguel tells us that the most relevant change in Portugal in relation to class action litigation since 2019 has been the initiation of a significant number of opt-out consumer representative actions, often not supported by TPLF. These actions span a variety of areas including antitrust, data protection, consumer goods and misleading advertising, and have recently expanded to include opt-out class actions for small and medium-sized enterprises (SMEs).

The top five types of class actions

"The top five types of class actions in our jurisdiction, in terms of quantity, are antitrust, General Data Protection Regulation, consumer law, misleading advertising, and financial services consumer class actions," Miguel shares. The interests that can be represented in class actions, if they are not covered by the RAD, are still a matter of debate and depend on the type of class action. "For antitrust cases, it seems beyond dispute that undertakings may also be represented by their associations."

The future of class actions

According to Miguel, "it is a matter of debate if there are consumer class actions which are not covered by the RAD." Despite this uncertainty, Miguel expects the current trend of significant numbers of new cases to continue, suggesting that the use of class actions may not change substantially in terms of quantity or type of claims.

ESG matters and class actions

Miguel also discusses the expectation of more claims being brought regarding ESG matters, such as companies' impact on the environment. "Portugal has been at the forefront of this issue, initiating a notable ESG case before the European Court of Human Rights (ECHR) (ECLI:CE:ECHR:2024:0409DEC003937120)," he says. However, aside from cases similar to *Dieselgate*, class actions related to ESG matters are currently rare in Portugal.

Alternative methods of collective redress

Miguel tells us that alternative methods of collective redress, such as litigating by mandate or via assignment of claims, are available in Portugal. Miguel adds that "use of these mechanisms is unlikely, unless the type of damage or infringement in question is not apt to be pursued with an opt-out mechanism. They have been used with limited success for SMEs, for example, in the trucks cartel case."

Class settlements

With regard to class settlements, Miguel shares that there has only been one settlement in a class action in the Portuguese jurisdiction, which was by a business association in a small case. "Given the structure of the system and the very high risks that defendants

face in meritorious claims, the first judgment ordering payment of global compensation may generate strong incentives for settlements, but it is still too early to foresee," he explains.

Risk of abuse

Although Miguel would not describe such situations as abuse, he notes that there have been examples of class actions filed with insufficient merit and with disproportionate claims. "Interestingly, these actions were not pursued with a profit motive, as their promoters were not remunerated, nor did they expect to be. Such unmeritorious class actions are frequently dismissed by the courts, before serving the claim on the defendant(s), or when considering the defendants' arguments to throw out the case at an early stage, at the preliminary hearing", Miguel adds.

Portugal is drastically different from the US

Miguel also discusses the relationship between Portugal and the US with regard to class actions. "Our jurisdiction has rules, mechanisms and safeguards in place that prevent the development of the same kind of market logic around class actions as exists in the US," he says. However, there are currently not enough incentives in the system for settlements or friendly resolutions, resulting in class actions that tend to drag on for several years. Even where the decision is final and includes a quantification of damages confirmed during judicial review, defendants in Portugal have shown an unwillingness to settle. Portugal could learn from the US jurisdiction in this area.

Third party litigation funding

Miguel tells us that third party litigation funding (TPLF) is permitted in Portugal, with the mechanism for remuneration of the funder now explicitly established in the RAD transposition. "The funder's remuneration is subject to a judicial review that assesses adequacy, proportionality, and market price," he explains. Similar to the situation in the UK, TPLF continues to face severe criticism from defendants in class actions. However, court rulings have so far have only determined that the presence of TPLF does not affect the active legitimacy or admissibility of the case or have left the issue to be decided at a later date.

The 'loser pays' rule and court costs

In Portugal, there isn't exactly a 'loser pays' rule when it comes to matters not covered by the RAD. "Initiators of class actions are exempt from court costs unless their claims are manifestly unfounded," Miguel explains. According to the majority of judicial practice, class action claimants are required to pay adverse costs, but these are limited to a very small amount. This limitation results from the combination of the general rules of civil procedure, which cap adverse costs at half the court costs, and the rule that sets the value of all class actions at EUR 60.000. This value, in turn, determines a low amount of court costs.

The funder's success fee

In the event that the defendant loses, the funder's success fee is considered an expense of the claimant. "These expenses are paid from the undistributed portion of the global compensation after the court-set deadline," Miguel tells us. The court maintains control over the funder's remuneration, assessing its proportionality and adequacy based on market practices. However, no specific decision regarding the limitation of the success fee has been made in any case thus far.

Significant class actions

Over the past ten years, the most important class actions have been the *Banking Cartel* (2/24.1YQSTR, 3/24.0YQSTR, 4/24.8YQSTR, 5/24.6YQSTR, 6/24.4YQSTR, 10/24.2YQSTR) case in Portugal, notable for its size and potential impact, and the *Merricks v Mastercard* case in the UK (CAT 1266/7/7/16), which has been significant for the precedents it has set.

The popularity of class actions

Class actions have indeed been gaining popularity outside the US, a development that is noteworthy. "As for our jurisdiction, Portugal, it has already established itself as a popular venue for class actions," Miguel shares.

The ideal class action

From Miguel's perspective, the requirements for the ideal class action would be that the infringement has already been declared by a final binding decision and that the global damages have already been quantified by public authorities.

Undesirable developments

Miguel also shares his views on undesirable developments. "From my perspective, a development that would not be desirable is the systematic suspension of all antitrust follow-on or mixed private enforcement actions pending final public enforcement decisions, as this delays justice, can make it harder (or impossible) to meet burdens of proof, dissuades funding and makes it much harder to achieve high rates of distribution to injured consumers at the end of the case."

The future of class actions

"In my view, the most important development in the future of class actions will be the adoption of an EU-wide mechanism for consumer class actions, representing all EU consumers in a single action," Miguel concludes.

Lucas Macedo
Funder Perspective
Senior Investment Manager at Nivalion

10 July 2024, editors: Nadir Koudsi and David Hakhoff

Portugal has all it takes

Lucas Macedo, a senior investment manager at Nivalion, a litigation funder active in numerous European, American and Asia-Pacific jurisdictions, provided his viewpoint on the Portuguese and Spanish jurisdictions. With a rich background as an in-house attorney for multinational groups in the energy sector and experience in law firms in Brazil and Germany, Lucas brings a unique perspective to the table. His insights into the recent developments in the Portuguese class action system are shared below.

Implementation of the RAD

Lucas begins by discussing the recent implementation of the Representative Action Directive (RAD) in Portugal. "The implementation took place on 5 December 2023, via Decree Law 114-A/2023, also known as the 'Implementation Act', which took effect the following day," he explains. "The process of implementation took six months in the Portuguese Congress, through a dialectical implementing process, with contributions from different segments of civil society, including several Portuguese consumer associations, the Confederation of Portuguese Business, and the Portuguese Banking Association," Lucas continues.

Enhancing the Portuguese class action system

The Implementation Act has solidified and improved the Portuguese class action system, which was first recognised in the 1976 Constitution and regulated as an opt-out system

in Law no. 83/95 ('Popular Action Act' or '*Lei de Direito de Participação Procedimental e de Acção Popular*'), Law no. 24/96 ('Consumer Defence Act' or '*Lei de Defesa do Consumidor*'), and Law 23/2018 ('Private Enforcement Act' or '*Lei da Indemnização por Infração ao Direito da Concorrência*). Lucas notes that the RAD implementation provided an opportunity to refine this already progressive framework within the new European-wide requirements.

"The most relevant statutory changes have clarified aspects related to legal standing, redress and injunctive relief, representation, disclosure of evidence, limitation periods, distribution of damages and costs, and third party funding," Lucas shares. "Regarding legal standing, class actions can now be brought by municipalities, associations, and foundations whose statutory purpose fits their claim and which do not exercise any professional activity on the free market."

Independence and transparency

Lucas emphasises the importance of parties' independence in the new system. "The Implementation Act has established a requirement of independence, meaning that the claimant cannot be influenced by parties other than the relevant consumers, especially competitors or companies with an economic interest in the dispute, including third party funders," he explains. The Implementation Act introduces several procedures to control and prevent such influence and other conflicts of interest.

He also highlights the role of transparency in the new system. "Claimants are now required to make available relevant information about filed cases on their website, such as party identification, the procedural stage, decisions, and the outcome of the dispute, including any compensation awarded and the corresponding distribution method."

Financial redress, injunctive relief, and cross-border cases

When we ask about the different types of actions under the Implementation Act, Lucas explains that the Act allows claimants to request financial redress and injunctive relief. "Claimants must consult with the respondent before filing a claim," he says. "In terms of representation, the Implementation Act keeps the opt-out system established by the Popular Action Act. Any consumer who does not want to be represented must expressly

opt-out, except consumers not residing in Portugal, who must actively express their intention to be represented in the class action."

"The Public Prosecutor's Office and the General Directorate for Consumers are designated entities to file cross-border cases, but other national entities can obtain an authorisation from the General Directorate for Consumers if they fulfil certain criteria set out in the RAD," Lucas adds.

Evidence disclosure and limitation periods

"Following the RAD, both claimants and defendants are allowed to request the disclosure of evidence in possession of the other party," Lucas continues. "Judges will consider such requests in light of their proportionality and confidentiality and can impose procedural fines in the case of non-compliance with an order to disclose evidence. Limitation periods are interrupted when a claim for injunctive or compensatory relief is filed, mirroring RAD provisions."

Unclaimed damages

"In the event of damages remaining unclaimed by consumers within a set period, the residual amounts are used to cover expenses and costs incurred by the claimant in bringing the collective action," Lucas continues. This explicitly includes any funders' fees, subject to assessment of justice and proportionality by the court. Any remaining proceeds are shared between the Fund for the Promotion of Consumer Rights (*Fundo para a Promoção dos Direitos dos Consumidores*) and the Institute for Financial Management and Infrastructures of Justice (*Instituto de Gestão Financeira e Equipamentos da Justiça*). As laid down in the RAD, consumers are never liable to pay the costs of the proceedings.

Third party funding and transparency

"The Implementation Act has expanded the regulation of third party funding beyond the RAD, enhancing transparency and court governance control," Lucas notes. "It requires the claimant to present the litigation funding agreement ('LFA') in 'clear and easily understandable Portuguese' to the court, enumerating the sources of funding and expenses to be supported by the funder."

Lucas emphasises the importance of the claimant's independence from the funder. "The LFA is required to ensure the claimant's independence from the funder in all decision-making related to the claim, including the selection of counsel, procedural strategy, and decisions regarding filing, continuing, withdrawing, appealing, and settling the case. The funder's remuneration must not surpass a 'fair and proportional value'."

All these aspects are to be reviewed by the court. If it finds that the standards in question have not been met, the court will invite the claimant to present an amended LFA. If the claimant fails to do so, the court will reject the legal standing of the claimant and the Justice Prosecutors' office may substitute the claimant and continue the claim.

Impact of the RAD

"Prior to the RAD, Portugal already had a progressive opt-out regime, which was particularly put in practice after the Private Enforcement Act 2018," Lucas shares. "Since 2020, various consumer protection organisations have brought at least a hundred popular actions, often as follow-on claims after EU competition authorities had identified competition law violations harming consumers."

However, according to Lucas, no major judgments or settlements have yet become known, and, similar to other EU jurisdictions, several aspects of the regime have been challenged in these actions, from their constitutionality to the role of funders and their compensation. Lucas notes that the RAD implementation is expected to resolve several of these challenges. "Despite Portugal's relatively conservative legal culture in adopting new practices, the class actions filed in recent years have significantly advanced important discussions. The RAD implementation clarified these discussions considerably and will likely further solidify Portugal's status as a class action litigation forum."

Learning from other jurisdictions

"The Netherlands and the UK are considered the most relevant European jurisdictions for class actions, providing valuable learning opportunities for Portugal," Lucas observes. "The UK's relevance is based on its progressive class action regime and recent case law, while the Netherlands, following the regime under the Act on Collective

Damages Claims 2020 (*Wet Afwikkeling Massaschade in Collectieve Actie*), has brought several important debates to the fore from a civil law perspective."

Lucas points out that, since the UK will not have to implement the RAD due to Brexit, Portugal's focus shifts more towards the Netherlands' timely RAD implementation and practice. "This perspective is further reinforced by recent examples such as the 2023 rulings of the District Court of The Hague, which dismissed two class actions against Airbus, highlighting the importance of good governance and representativity."

"Given the cultural similarities in Southern Europe, Portugal will likely also be attentive to the developments in Spain and Italy," he says. "These two jurisdictions are also experiencing rapid evolution in their collective redress systems."

Shift in mindset and actions

Apart from the RAD, Lucas notes that the most significant change in Portugal in relation to class action litigation since 2019 has been a change in the mindset and actions of consumer protection associations and their lawyers, who started filing opt-out class actions under the Private Enforcement Act 2018. Lucas observes that "this change has been further advanced by third party litigation funders who have taken on the risks and costs of several of these actions."

Types of class actions in Portugal

While specific statistics regarding Portugal are not readily available, Lucas shares his impression that the five main types of class actions in Portugal mirror those found in other EU jurisdictions. "These primarily concern competition law violations, product liability, privacy/data protection, financial products and securities, and at least one is related to human rights violations," he explains. "The Private Enforcement Act governs individual legal actions that can be brought by natural or legal persons, not just consumers, affected by competition law violations. Courts have the authority to order the joinder and single processing of such cases."

The role of competition law

Lucas anticipates that the current use of class actions that are not covered by the RAD

will change in the future, particularly in the field of competition law. "Portugal's sophisticated competition authority, Autoridade da Concorrência, is actively investigating anticompetitive behaviour," he tells us. "In 2022 alone, it imposed almost EUR 500 million in fines across various sectors, including wholesale and retail trade, technology, banking, and transportation."

The rise of ESG matters

Lucas also expects an increase in claims regarding ESG matters in Portugal, particularly those related to environmental impact. "This expectation is supported by a case initiated by six young Portuguese citizens before the European Court of Human Rights (ECLI:CE:ECHR:2024:0409DEC003937120) against EU governments for their perceived failure to adequately address the climate crisis," he says. "Although the case was unsuccessful, primarily due to procedural issues, it highlights the growing awareness of Portuguese citizens regarding such matters. This awareness could extend to claims against private entities for their environmental impact."

Alternative methods of collective redress

We ask Lucas about alternative methods of collective redress. "In Portugal, there are alternative methods of collective redress, such as litigating by mandate or via assignment of claims," Lucas explains. "However, these methods have not been the recent practice in the field of collective redress, primarily due to the availability of the opt-out regime. Despite there being no legal prohibition of claims assignment, it is not expected that this practice will change significantly soon."

Class settlements and carriage disputes

Furthermore, Lucas touches on the topic of class settlements. "The Portuguese RAD implementation currently lacks clear guidance on how courts should handle cases with competing representatives, also known as carriage disputes," he observes. "This ambiguity can influence class settlements. Therefore, it would be desirable to have more clarity regarding representativity and the powers to settle in cases of competing class actions."

Addressing concerns of potential abuse

Despite some isolated voices within the legal and business communities suggesting

potential abuse of class actions in Portugal, Lucas assures us that the reality is far removed from this. "In fact, what we are witnessing is the beginning of the practice of a right to popular action, a right that has been enshrined in Portugal's constitution since 1976," he remarks. "The RAD and its implementation have served to elevate consumer protection against large-scale abusive practices."

Lucas points out that the absence of an effective means for consumer redress is only beneficial to parties who profit from unfair competition distortion, harming consumers. "The procedural standing and merits requirements established under EU and Portuguese law enable courts to filter out claims that could potentially be seen as abusive," he adds.

Comparing class actions in Portugal and the US

Concerning US class actions, Lucas notes that Portugal's jurisdiction differs significantly from that of the US, which has a long-standing legal and cultural tradition of class actions. "This difference extends beyond the common law versus civil law distinction and is rooted in the contrasting legal cultures of the two countries," he explains.

For instance, unlike in the US, Portuguese lawyers are not permitted to work on a full contingency fee basis. Additionally, ethical rules and marketing practices vary greatly, with Portugal, like most EU jurisdictions, having more restricted practices regarding service advertisements.

Third party litigation funding and costs

Lucas also sheds light on the role of third party funding in Portugal. "Third party funding is permitted, and was so even prior to the Implementation Act, under the general civil law principle of freedom of contract, provided that it does not violate public order," he explains. "The Implementation Act has further clarified several aspects of third party funding in the context of class actions, particularly indicating that funders' compensation is considered part of the expenses and costs incurred by the claimant in bringing a collective action."

Lucas points out that class actions typically involve complex legal and economic questions that demand extensive work from multiple professionals. "This is amplified

in the face of multinational corporations' legal defence and frequent strategy of outspending claimants," he says. "Third party funding has been instrumental in levelling the playing field for consumers in Portugal."

Lucas also notes an increase in interest for funding in the arbitration space. "The sums and costs involved in arbitration often make third party funding a viable risk-transferring solution, even for parties with the financial resources to bear such costs," he says.

"Well-drafted third party funding regulation is welcome in the class action space, especially in an opt-out regime, to ensure that consumers' interests are properly protected," he observes. Conversely, legal certainty concerning the legality and clear standards of the funder's role, claimant independence and rules regarding the distribution of proceeds help to create a favourable environment for funders to support meritorious cases. "Due to their high costs, these cases would frequently not otherwise have been filed. In other fields, such as arbitration, regulation should be less intrusive and primarily safeguard against conflicts of interest with counsel and tribunals, as already provided for in most arbitral institution rules."

The 'loser pays' rule and exemptions

"In Portugal, there is a general rule that the loser pays. However, these costs tend to be limited at the court's discretion," Lucas shares. "Specifically, in the Portuguese class action system, claimants can be exempt from costs when the courts rule in their favour, even if only partially."

Success fees

Lucas explains how success fees are handled if the defendant loses. "The funder's success fee is paid out of unclaimed damages after a period set by the court," he explains. "The court has the authority to limit the amount of the success fee. According to the Implementation Act, if the court determines that the funder's fees are not 'fair and proportionate' considering the 'characteristics and risk factors of the class action' and the 'market price of such financing', the court will invite the claimant to substitute or amend the LFA."

Significant class actions in Portugal

When we ask about major class actions in Portugal, Lucas highlights the class action *Observatório da Concorrência v Sportv* (Case nº 7074/15.8T8LSB-C.L1), filed in 2015. "It was the first popular action where compensation for anticompetitive behaviour was sought in Portugal under the Popular Action regime," he says. "Despite facing several challenges before Portuguese courts, the case is still pending and now awaiting a final decision."

In the meantime, the Private Enforcement Act has transferred the jurisdiction for such cases to a new specialised court. "The first two cases under this Act, *Ius Omnibus v Superbock* (Case nº 20/20.9YQSTR) and *Ius Omnibus v Mastercard* (Case nº 19/20.5YQSTR), were filed in December 2020," Lucas shares. "These cases are noteworthy as they could potentially be the first instances where Portuguese courts will decide on a series of key aspects of the popular action regime." Lucas also notes the Supreme Court of Justice's decision of January 2024 in *Citizens' Voice v Vodafone* (Case nº22640/18.1T8LSB.L1.S1), determining the liquidation of damages to consumers due to the automatic activation of unsolicited additional services, as a potential significant payout to consumers under the popular action regime.

The rising popularity of class actions

Lucas notes that the rising popularity of class actions is viewed as a positive step towards offering access to justice and collective redress, especially for consumers. In his view, "These actions not only provide direct relief but might potentially prevent corporate misconduct." He continues: "In Portugal, the Implementation Act and the upcoming case law are expected to advance consumer protection, suggesting that the Portuguese jurisdiction will likely gain popularity concerning class actions."

The ideal class action system

Lucas believes that the requirements for an ideal class action would involve legal certainty about procedural aspects. "This is crucial, as it prevents unnecessary expenditure of time and resources during litigation, allowing focus on the merits of each case," he explains. "Clear provisions and case law concerning aspects such as limitation periods, the burden of proof, standing, representativity, and distribution of costs and damages are fundamental for an effective class action system."

"The Portuguese framework has evolved much since the inception of the class action in its embryonic form in the 1976 Constitution, and the Implementation Act is an important step towards creating an environment of legal certainty for all parties involved in class actions," he adds.

Potential challenges for class actions

Lucas also shares his concerns about certain developments that would not be conducive to fostering a healthy class action environment. "Specifically, the proposals outlined in a report to the European Parliament in October 2022, known as the 'Voss Report', which proposes a fixed cap on the amounts funders can claim from damage awards," he says. "The introduction of an arbitrary hard cap on funders' recovery could make it uneconomical for funders to support smaller cases with a complex and costly matrix, even when they are legitimate and meritorious."

Lucas points out that this may already be the case in Germany, as their RAD implementing legislation prescribes a 10% cap for funders. "The system established by Portugal's Implementation Act strikes a healthier balance of fairness and incentives for funders," he opines. "Under this system, the funder is only paid once all interested consumers have received their full compensation, with the particularities of each case's costs and risks being considered. This approach ensures that funders can provide access to justice without jeopardising consumers' redress."

Conclusion

Asked to summarise in one phrase the future trend in class actions in Portugal, Lucas concludes: "In my view, the most important development in the future of class actions will be the courts' application of Portugal's class action framework. Portugal now has the *faca e o queijo nas mãos*' (which literally translates as the 'knife and the cheese in its hands'), meaning it possesses all the necessary elements to solidify its status as a leading jurisdiction for class actions and consumer protection in Europe."

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10 July 2024, editors: Nadir Koudsi and David Hakhoff

The importance of balance

We had the privilege of speaking with Mariana Soares David and Sofia Vaz Sampaio, two prominent defence lawyers in Portuguese class action litigation. Mariana joined Morais Leitão in 2006 and became a partner in 2023. She is a member of the firm's Litigation and Arbitration team. Sofia also joined the firm in 2006, becoming partner in 2020. She heads the Litigation and Arbitration team. Both have an impressive track record in handling litigation and arbitration proceedings and have successfully settled highly complex multi-party negotiations.

Implementation of the RAD

Mariana and Sofia share that, since the Class Action Survey 2019, the Representative Actions Directive (RAD) has been implemented in Portugal. "The Portuguese Government, authorised by the Parliament through Law 60/2023 of 31 October 2023, implemented the RAD via Decree-Law no. 114-A/2023 on 5 December 2023, which came into effect the following day," they explain. Despite the fact that transposition took place after the RAD deadline, the legislative process was straightforward with no opposition votes against the government's authorisation bill.

A public consultation phase took place where changes and improvements to the draft decree-law were proposed and key issues such as scope of application, legal standing,

third party funding, and the representation system (opt-in or opt-out) were discussed. "The approved statute is now fully in effect and generally applies to all representative actions that fall within the scope defined in Decree-Law no. 114-A/2023 and that were filed after 6 December 2023," Mariana and Sofia add. However, the suspension of limitation periods only applies to claims for redress based on infringements that occurred on or after 6 December 2023.

Changes to consumer protection collective actions

"Portugal has had a procedural mechanism for collective actions since 1995, based upon a constitutional right, existing since 1976 and detailed in 1997, which allows any citizen to initiate legal proceedings to defend collective or diffuse interests," Mariana and Sofia explain. This general statute for collective actions (Law no. 83/95 of 31 August, hereinafter 'Portuguese Collective Action Law') enables the filing of collective actions to prevent or challenge offences that affect public health, the environment, quality of life, consumer protection, cultural heritage and the public domain. In addition, there are three other national statutes containing provisions that may be relevant in this context.
"Nonetheless, the transposition of the RAD introduced some relevant innovations with reference to consumer protection collective actions," Mariana and Sofia note.

Unlike other Member States, Portugal has implemented the RAD in a separate statute (Decree-Law no. 114-A/2023) specifically targeted at consumer protection actions. The RAD implementation introduced significant changes to consumer protection collective actions without revising existing statutes, potentially leading to application difficulties.

We ask Mariana and Sofia about the main features of the transposition statute. They first elaborate on the scope of its application: "Although Article 2(1) specifically states that it applies to infringements of the provisions referred to in Annex I of the RAD, the Preamble to Decree-Law no. 114-A/2023 states that this was intended to apply to all infringements of national and EU provisions mentioned in RAD Annex I 'or in other consumer protection legislation in force in the Portuguese legal framework'; this final segment was not included in Article 2(1)."
Mariana and Sofia further explain that claims for injunctive and redress measures are both admitted.

Furthermore, the Portuguese legislature has established different legal standing requirements for domestic and cross-border actions. Legal standing for domestic actions is attributed to local authorities, associations and foundations. This is now subject to stricter requirements, such as legal personality, mention of the protection of the relevant interests in the articles of association, no professional activity in competition with companies or self-employed professionals, independence and absence of influence of non-consumers. Unlike the Portuguese Collective Action Law, the transposition of the RAD does not grant individual consumers legal standing to bring consumer-related collective actions.

For cross-border collective actions, legal standing is limited to qualified entities designated by the General-Directorate for Consumer Protection. "The list of national qualified entities is to be made publicly available, and ad hoc designations are not foreseen," Mariana and Sofia add. The Portuguese Public Prosecutor and the General-Directorate for Consumer Protection are considered qualified entities for this purpose. "In the event of cross-border representative actions filed by qualified entities from other Member States, Portuguese courts are required to accept the lists of qualified entities communicated by the Member States to the European Commission as proof of legal standing and can only verify whether the intervention is compatible with the entity's statutory purpose."

"Despite frequent criticism of the opt-out system provided for in the Portuguese Collective Action Law, the system remains an opt-out one, with an opt-in system applying only to consumers not habitually resident in Portugal," both note. Additionally, provisions on third party funding were introduced for the first time in the Portuguese jurisdiction, requiring claimants to provide the court with a certified copy of the funding agreement, "including a financial summary listing the sources of funding used to support the collective action, which must guarantee the independence of the claimant and the absence of conflicts of interest." The funder's fees are not subject to a cap, but should correspond to a fair amount, proportionate to the characteristics, risk factors and market price for funding. These fees are considered an expense incurred by the claimant for the purpose of allocation of unclaimed compensation.

Lastly, the limitation period does not follow the general rule of the Portuguese Code of Civil Procedure: it is interrupted by the filing of a collective action for redress and restarts once a final and unappealable decision is rendered on the collective action.

Impact of the RAD on collective actions in Portugal

According to Mariana and Sofia, the RAD's implementation in Portugal has not drastically changed the litigation landscape or risk profile. Portugal already had a procedural mechanism for collective actions, and the RAD did not introduce significant changes to this mechanism.

"However, as the RAD was implemented only recently, it is difficult to predict what its impact will be on the number of collective actions filed in Portugal," Mariana and Sofia add. Despite this uncertainty, it is apparent that collective actions are gaining traction in Portugal, with consumers and consumer associations becoming more alert and demanding. Mariana and Sofia further note that the explicit permission of funding could potentially encourage new actions.

The most relevant European class actions jurisdictions

Mariana and Sofia explain that European jurisdictions with opt-out systems are generally considered the most relevant for class actions. "These systems tend to favour an increase in collective actions," they explain. Some jurisdictions also have special rules regarding costs and lawyer's fees to incentivise actions for redress, addressing the issue of limited funding available to qualified entities. For example, under Portuguese law, a claimant in a class action is exempt from paying initial fees and may even be exempted from all court costs in some cases. Lastly, Mariana and Sofia add, jurisdictions that allow for third party funding are likely to be more claimant-friendly, especially after the implementation of the RAD.

The future of class actions in the EU

Looking ahead, several pieces of EU legislation are expected to play a role in class actions. Mariana and Sofia explicitly mention:

- the European Parliament resolution of 13 September 2022 with recommendations on the content of a Directive on the regulation of third party litigation funding

- the Proposal for a Directive on liability for defective products
- the Digital Services Act
- the Digital Markets Act
- the Corporate Sustainability Due Diligence Directive
- the Directive on Green Claims
- the Directive on empowering consumers for the green transition

"This legislation and its approval will probably play an important role in the increase in class actions," Mariana and Sofia note.

Other significant changes in Portugal's jurisdiction

According to Mariana and Sofia, aside from the RAD, the most significant change in Portugal's jurisdiction related to class action litigation since 2019 is likely the implementation of Directive 2014/104/EU. This directive, which governs actions for damages under national law for infringements of competition law provisions, was implemented by the Portuguese Private Enforcement Law in 2018. "This led to the filing of several new collective actions and the establishment of associations for the pursuit of these interests," Mariana and Sofia share.

Types of collective actions in Portugal

In Portugal, there are no specific types of collective actions. The three types of actions provided for in the Portuguese Code of Civil Procedure apply: simple assessment actions (*ações de simples apreciação*), condemnatory actions (*ações de condenação*) and constitutive actions (*ações constitutivas*). As the Portuguese Collective Action Law does not establish specific rules in this matter, collective actions can comprise any of these types. Mariana and Sofia: "Although there is no precise data in this regard, in recent times, the number of collective actions for redress measures seem to have increased, whereas, in the past, collective actions for injunctive measures were predominant."

"Collective actions," Mariana and Sofia explain, "can be brought to defend collective or diffuse interests of Portuguese citizens, local authorities, and also associations and foundations, regardless of whether or not they have a direct interest in the proceedings. However, some of the most significant cases we are aware of relate to competition law,

advertising rules, unfair commercial practices law, the regime of cosmetics and body hygiene products, data protection regulation and environment laws."

The rise of ESG cases

"We expect the use of class actions not covered by the RAD, such as private enforcement and ESG cases, to increase in the coming years," Mariana and Sofia predict. More class actions regarding ESG matters are anticipated, with claims likely to arise in matters of pollution, greenhouse gas emissions, green claims, greenwashing, and infringement of sustainability due diligence obligations.

Alternative methods of collective redress

Alternative methods of collective redress, such as litigating by mandate or via assignment of claims, are available under Portuguese law. The alternatives are hardly used, Mariana and Sofia explain, "because Portugal has had a proper mechanism for redress/compensatory relief for some decades now." One notable case concerning an alternative method of collective redress, however, involved a fund, FRC – INQ – Papel Comercial ESI e Rio Forte, Fundo de Recuperação de Créditos, which was created to acquire credits held by clients of Banco Espírito Santo S.A. to boost recovery and mitigate their losses resulting from or related to the subscription of commercial paper issued by Espírito Santo Internacional, S.A. and by Rio Forte Investments, S.A., traded by BES.

Risk of abuse

"There is a likelihood of abuse of class actions, either by the filing of manifestly unfounded actions or the submission of disproportionate claims to press companies to reach settlements," Mariana and Sofia warn. There are several features of the Portuguese legal framework that can favour abuse of class actions, such as the opt-out system, the absence of a certification stage, the existence of less demanding requirements for domestic actions, the claimant's frequent exemption from judicial fees and costs, and the inclusion of third party funding costs as an expense of the claimant for the purpose of allocating unclaimed damages.

US-inspired class action legislation in Portugal

Mariana and Sofia also highlight the relationship between the Portuguese and the US

jurisdiction in terms of class actions. "These are characterised by several similarities," they say, "including the adoption of the opt-out mechanism, the use of third party funding, and the rise of associations and law firms that specialise in or tend to focus on class actions, a trend that is clearly inspired by the US jurisdiction."

The role of third party litigation funding

Third party litigation funding (TPLF) was unregulated in Portugal until the implementation of Decree-Law no. 114-A/2023, which is only applicable to future proceedings. There has been no consensus on whether national law allows for the financing of class actions by third parties. The funding of representative actions for redress measures has been regulated, requiring claimants to make the funding agreement available to the court. This agreement must guarantee the claimant's independence and the absence of conflicts of interest. The agreement must also include a financial summary listing the sources of funding used to support the collective action, and a list of the various costs and expenses that will be borne by the third party funder. "In the future, third party litigation is expected to play an important role in upcoming collective actions," Mariana and Sofia observe.

'Loser pays' in class action litigation

In civil proceedings in Portugal, the 'loser pays' principle applies as a rule. After a final judgment, the successful party may request the unsuccessful party to pay the judicial costs incurred by the former. However, there are limits to the amount that the successful party may recover from the unsuccessful party. The RAD's transposition introduced additional rules in respect of costs. If compensation is not claimed within the period of time set by the judge, it will be allocated to the payment of all costs, fees and other expenses incurred by the claimant in the action. If there is still compensation remaining afterwards, the amount will revert to the Consumer Protection Fund and to the Institute for Financial Management and Infrastructures of Justice (*Instituto de Gestão Financeira e Equipamentos da Justiça*).

Notwithstanding Article 12(1) of the RAD, according to which "Member States shall ensure that the unsuccessful party in a representative action for redress measures is required to pay the costs of the proceedings borne by the successful party, in accordance

with conditions and exceptions provided for in national law," the Portuguese legislature did not amend national procedural law, nor did it include any rule in the Decree-Law 114-A/2023. Therefore, in cases where the claim is entirely dismissed, the claimant should bear the procedural costs incurred by the defendant, including lawyers' fees, without the limitations to the amounts that can be recovered by the successful party under the Collective Action Law and the Judicial Costs Regulation. Mariana and Sofia note that it may therefore be argued that the current regime violates the principle of equality between the parties in terms of costs.

The funder's success fee

Regarding the funder's remuneration, Decree-Law no. 114-A/2023 does not set a cap. However, the funding agreement cannot determine "a remuneration of the funder that goes beyond a fair and proportional amount, assessed in the light of the characteristics and risk factors of the collective action in question and the market price of such financing." Without further concretisation, this will most probably raise difficulties in the interpretation and application of the provision in each case.

The compensation that is not claimed by the injured consumers within a reasonable period will be allocated to the payment of all costs, fees and other expenses incurred by the claimant as a result of the action, which include the remuneration of the third party financing the collective action, provided that the legal requirements are met. "The court will assess the fairness and proportionality of this remuneration," Mariana and Sofia explain.

The popularity of class actions outside the US

"Class actions are indeed gaining popularity outside the US, and Portugal is no exception," Mariana and Sofia confirm. Since 2019, dozens of class actions for redress measures have been brought against multinational and national companies in Portugal. The Portuguese jurisdiction is likely to become increasingly popular for filing collective actions due to its favourable conditions. These include the ease of initiating a class action, the opt-out system, and the claimant's total or partial exemption from paying court costs. The emergence of new players in the Portuguese market, such as new consumer associations, specialised law firms, and international funders, along with the

entry into force of the Private Enforcement Law, are all examples of favourable class actions conditions.

Desirable and envisaged developments

However, Mariana and Sofia emphasise the importance of balance in this evolving landscape. "Consumer protection should not be used to justify or give rise to a profit-making activity or a direct and intentional attack on big corporations due to their size and financial health," they caution. Mariana and Sofia believe this is a development that would not be desirable in the context of class actions.

According to Mariana and Sofia, an effective class action system would ideally be based on an opt-in model, supplemented by additional criteria concerning representation and independence. Mariana and Sofia suggest that these criteria might include a specified minimum number of associates, a certain threshold of represented consumers, and a periodic assessment of the claimant's autonomy to oversee the relevant collective action in a real-world context.

Conclusion

When asked to summarise the most important development in the future of class actions in one sentence, Mariana and Sofia conclude: "The increase of consumer and environmental protection collective actions, frequently based on third party funding, but hopefully filed by independent and reliable entities truly focused on the represented community's interests."

Business Perspective
Legal counsel of a utilities company operating in various markets

10 July 2024, editors: Nadir Koudsi and David Hakhoff

Third party litigation funding is driving class actions

We had the opportunity to reach out to the legal counsel of a utilities company based in Portugal operating in various markets, especially in Portugal. In his professional career spanning 28 years as in-house counsel, our interviewee has specifically focused on litigation. Our conversation provided valuable insights into the evolving landscape of class actions, a topic of increasing relevance for companies in Portugal.

Due to the sensitive nature of the topic, the counsel prefers to remain anonymous. We will therefore refer to him as 'Ben'.

The rising tide of class actions

"Class actions have become a significant aspect of daily work, representing a growing reality that needs careful consideration when identifying potential risks," Ben shares. This is particularly true for companies operating across various jurisdictions and markets. Companies are faced with potential class actions increasingly frequently, and these can substantially impact both their reputation and financial position.

Impact of the RAD

When we ask whether the implementation of the Representative Actions Directive (RAD) altered the litigation risk and strategy for the company in its jurisdiction and in Europe, Ben answers: "No, it did not." Instead, the RAD amplified the attention that the issue had already been receiving. "The rise in class actions predates the implementation of the RAD. Nevertheless, the RAD is expected to strengthen the ability of 'qualified representatives' to bring collective actions and seek damages on behalf of groups of claimants," Ben explains.

Class actions across Europe

While there are no specific European jurisdictions that pose a particular challenge or are particularly attractive for class actions involving the company or its sector, public data indicates that the issue of class actions is gaining significant prominence in certain countries. "These include Portugal, the Netherlands and Germany within the EU, and the UK outside of it," Ben notes.

The role of third party litigation funding

The impact of third party litigation funding (TPLF) on the class action landscape in Portugal and across Europe is significant, as it is driving class actions. TPLF represents a growing industry, with financial firms willing to invest in lawsuits in return for a portion of the award if the case is successful. "These funders utilise this type of litigation purely as a business model. While this model raises numerous questions, it is always crucial to ensure the true independence of the TPLF," Ben emphasises.

Challenges and opportunities in managing class actions

As a legal counsel managing class actions, the main challenges and opportunities arise from the potential risks associated with such actions, which can impact reputation, finances, and business operations. "There is also the possibility of the mechanism being abused to achieve other interests. There may be a certain predisposition on the part of the media, and even the courts, in favour of the claimant's position," Ben reveals. "On the other hand, proving alleged damage can present difficulties."

Approach to class settlements

We asked Ben how he deals with the subject of class settlements. "Looking at jurisdictions which have seen a greater increase in class actions, and in our own experience, the question of possible settlement has not typically arisen. However, if the situation does call for a settlement, we will analyse it carefully, based on the specific circumstances, potential risks, and the respective procedural rules," Ben concludes.

Current state and direction of class actions

The current state and future direction of class actions in Portugal and across Europe are significantly influenced by the RAD. The RAD establishes a set of minimum procedural

standards for these claims, allowing Member States to introduce procedures that exceed the RAD requirements. This margin of discretion could potentially increase the risk for businesses. "The recent rise in class action litigation in Europe began even before we started to see the RAD's impact. However, the RAD is expected to further reinforce the emergence of new class actions," Ben notes. It is crucial to ensure that this mechanism is not exploited for other interests.

Risk assessment at boardroom level

As a listed company with worldwide operations, Ben's company takes a proactive approach to risk assessment. This includes the risks of class actions related to Environmental, Social and Governance (ESG) issues. "This proactive approach ensures that all potential risks are considered and addressed appropriately."

Conclusion

In conclusion, class actions are a significant aspect of the daily work of a legal counsel in Portugal and in other countries. The RAD could potentially increase the class action risk for businesses. It requires proactive risk assessment worldwide and experience is key in navigating this complex field. The question of a possible settlement has never arisen.

Business Perspective
Legal counsel of an international food group

10 July 2024, editors: Nadir Koudsi and David Hakhoff

Little room for settlements with associations financed by investment funds

We recently had the opportunity to sit down with the legal counsel of a large international group operating in the food distribution and specialised retail sectors in Portugal. Our interviewee was admitted to the Portuguese bar in 1986 and has been the Head of Legal for the group since 2002. His insights provide a unique perspective on the challenges and opportunities presented by class actions in the current legal environment for businesses. "Class actions are indeed part of my daily work routine," our interviewee begins, highlighting the importance of these lawsuits in his work.

Due to the sensitive nature of the topic, the counsel prefers to remain anonymous. We will therefore refer to him as 'John'.

Impact of the RAD

The implementation of the RAD, according to John, "did not exactly change the litigation risk and strategy for the company in the Portuguese jurisdiction or in Europe." He explains that the first class actions that the group is facing are based on specific domestic legislation from the 1980s. This legislation establishes solutions that are identical or similar to those provided for in the RAD, as well as in the domestic legislation that transposed the RAD (Decree-Law 114-A/2023). Furthermore, there is a specific law related to private enforcement (infringements to competition law) that provides identical or similar solutions (Law 23/2018).

Criticism of the Portuguese legislation

John's primary criticism relates to the preference for the opt-out mechanism over the opt-in mechanism. "Portugal should have implemented an opt-in mechanism." According

to John, the opt-in mechanism allows the judge to calculate the value of the indemnity based on the number of individuals that explicitly declared their wish to be represented. In the opt-out mechanism, indemnity is fixed under general and abstract criteria and the value may rise to a very significant sum (all the people who are being generically represented by the complaint).

Another point of criticism is the insufficient regulation regarding third party funding. Interestingly, he notes that "regarding cross-border class actions, Portuguese law establishes requirements that must be met if an association is to legitimately represent a class. However, the same rules do not apply to domestic class actions."

The role of third party litigation funding

In Portugal, consumer associations, even those financed by investment funds, are generally exempt from paying court fees. This exemption gives them a considerable advantage over defendants who are required to pay these fees. "On the other hand," John adds, "the possibility of having investments funds financing these judicial suits undermines the laudable purpose of the legal exemption that benefits these types of claimants."

Managing class actions: challenges and opportunities

"Managing a class action as a legal counsel presents a unique set of challenges and opportunities," John shares. The primary challenge is the transformation of class actions into massive class actions. This is mainly due to the legal exemption of court fees and the opt-out system, often supported by TPLF. Additionally, when external legal counsel are asked to assist with cases, their responses may not be as fitting as those provided by in-house legal counsel. The latter have a deeper understanding of the particularities of the company and the people involved in the company's operations.

Class settlements: a firm stance

"When it comes to class settlements, our approach is firmly aimed at litigation, with little room for settlements with associations financed by investment funds," John states. This stance is influenced by the perception that these entities often stretch judicial claims and may abuse the system to force a settlement.

The current state and future direction of class actions

The current state and future direction of class actions in the jurisdiction and across Europe are seen as a tool for strengthening consumer protection. However, John points out that "there are areas for improvement. Once the exemption of court fees is guaranteed, it is important that class actions should not be financed by investment funds. There is also a need to measure the legitimacy of associations or entities that assume the representation of the class." Additionally, the opt-out regime is viewed by John as something that should be banned.

The emergence of ESG issues

According to John, the company is actively studying the implementation of ESG measures, as it anticipates that class actions related to ESG issues will soon become a reality in Portugal.

Conclusion

This interview provides a valuable perspective on class action litigation from the viewpoint of a legal counsel deeply involved in class actions in Portugal. It is interesting to note John's criticism of the widely accepted opt-in regime, and his firm stance on class settlements. The interview is a great example of how different actors in the class action field have different approaches to the same subjects.

Business Perspective
Legal counsel of a telecommunications company

10 July 2024, editors: Nadir Koudsi and David Hakhoff

Several areas for improvement

We reached out to a legal counsel at a major Portuguese telecommunications company. The counsel previously also worked as a lawyer at several law firms in Portugal, and is therefore in the perfect position to provide a balanced insight into the Portuguese jurisdiction.

Due to the sensitive nature of the topic, the counsel prefers to remain anonymous. We will therefore refer to him as 'Sam'.

The increasing reality of class actions

"Handling class actions as a legal counsel for a company is increasingly becoming a reality and it is a demanding one," Sam begins. The complexity and extensive filings of these cases often require more resources than a standard lawsuit, making them a demanding aspect of a legal counsel's role.

The impact of the RAD

Sam notes that the implementation of the Representative Actions Directive (RAD) has not yet significantly impacted the class actions handled by his company, since the current class actions were initiated prior to the implementation of the RAD in Portugal. However, Sam anticipates that future class actions, initiated following the RAD's transposition into Portuguese law through the enactment of the Decree-Law no. 114-A/2023, will require a reassessment of their risk analysis and strategy.

Challenging jurisdictions

When asked about the most challenging jurisdictions for class actions involving the telecommunications sector, Sam highlights Germany and the Netherlands due to their strong consumer protection laws and efficient legal frameworks for class actions. Sam

mentions the Model Declaratory Action (*Musterfeststellungsverfahren*) in Germany and the Dutch Collective Settlement Act (*Wet Afwikkeling Massaschade in Collectieve Actie*) as specific mechanisms that facilitate consumer organisations in bringing collective claims and streamline the process for initiating and settling class actions.

Third party litigation funding

The impact of third party litigation funding (TPLF) on the class action landscape is viewed with significant concern by Sam. Despite measures to ensure greater transparency of the funding sources involved (under, for instance, the RAD and Decree-Law 114-A/2023) Sam believes that opacity still prevails in many cases. Sam calls for increased oversight and scrutiny of these funders to prevent situations where actions that appear to defend consumer interests are driven by entities with clear profit motives. "This undermines the regime and spirit of class actions and clogs the courts with massive lawsuits that do not have legitimate objectives," according to Sam.

The challenge of risk assessment

One of the greatest challenges in managing a class action lies in the analysis of the case and the conduct of the risk assessment it entails. "It is crucial to objectively evaluate the action and perform a realistic risk assessment concerning the likelihood of success or failure," Sam explains. This includes considering the claims being made, the amount of damages being sought, the potential defences of the defendant, and the possible reputational damage a negative outcome could cause the company. "This analysis is even more critical in class actions due to the potentially significant compensation involved and the large number of impacted clients," Sam notes. The evaluation forms an important basis on which Sam can advise the company to either adopt a defensive stance and proceed with litigation, or seek to reach a settlement with the opposing party.

The approach to class settlements

Sam explains that the approach to class settlements is influenced by several key factors:

1. **Legal analysis and case merits**: Sam assesses the strength of the claims and the robustness of the possible defence. If Sam believes that there is strong case, he will lean towards litigation. Conversely, if the case presents significant risks,

a settlement may be more prudent;

2. **Legal precedent**: the existence of legal precedents can naturally increase the chances of success in court;
3. **Financial costs**: the financial costs associated with litigation are very relevant, including legal fees, court costs, and the potential for a prolonged trial. Settlements can often be more cost-effective;
4. **Time and resources**: litigation can be lengthy and require substantial company resources. Settling might allow the company to resolve the matter more quickly and allocate resources more effectively;
5. **Reputational risk**: the potential damage to a company's reputation is a significant factor. Prolonged litigation can attract negative publicity and impact the brand image. A settlement can sometimes mitigate these reputational risks by resolving the issue more quietly;
6. **The impact on stakeholders**: "We consider the effects on our stakeholders, including employees, customers, and shareholders. Ensuring their interests are protected is crucial in our decision-making process," Sam explains.

Sam concludes that "by weighing these factors carefully, we aim to choose the path that best aligns with our company's interests and long-term goals."

The current state of class actions

The current state of class actions in Portugal and across Europe is characterised by a noticeable rise, particularly in the field of consumer rights. Sam expects this trend to continue, driven by increasingly consumer-protective legislation and guidelines from community institutions. "Further, a decisive factor propelling this litigation is the funding from third parties with substantial economic capacity, such as investment funds," Sam adds.

Areas for improvement

Sam suggests several areas for improvement in the current class action landscape:

1. **Increased scrutiny of funders**: "We believe there should be greater scrutiny of these funders," Sam explains. Courts should begin case analysis with an evaluation of the funding agreement and a rigorous assessment of the claimants' standing, ensuring

their genuine independence and a lack of influence from non-consumer entities;

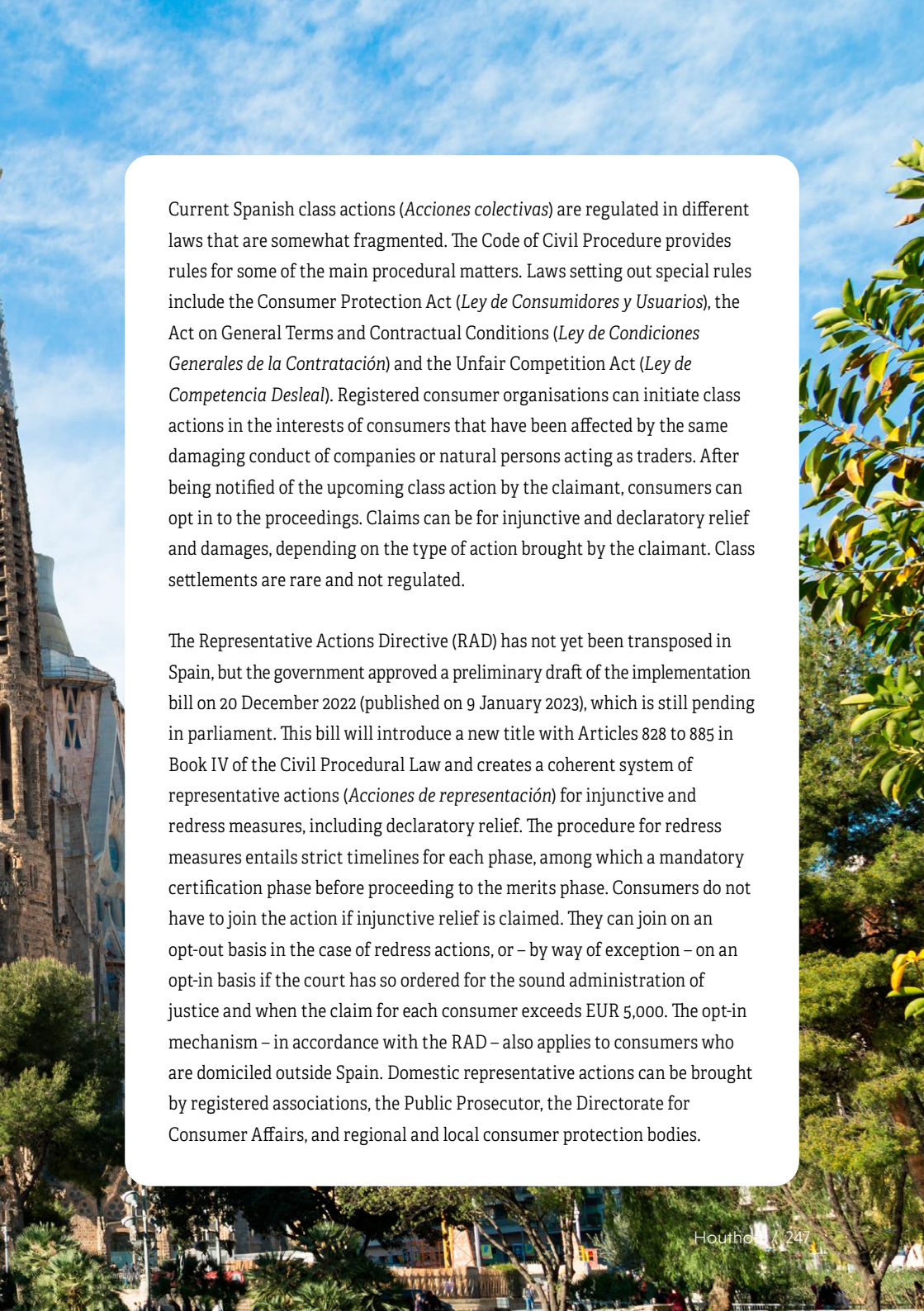
2. **Opt-In model**: Sam advocates replacing the current opt-out model with an opt-in system. Currently, Portugal employs an opt-out model, meaning the claimant does not need a mandate from those affected, and class members may choose whether or not to be represented in the proceedings. An opt-in model would ensure that only those who explicitly choose to participate are included, enhancing the fairness and clarity of representation, according to Sam;
3. **Damages cap**: another aspect Sam believes should be changed is the absence of a limitation on the amount of damages that may be claimed. Implementing a cap on damages would help manage the risks and potential financial impacts on companies, promoting a more balanced approach to consumer protection and corporate liability.

Sam: "These changes would contribute to a more balanced and fairer legal environment for class actions, ensuring that the interests of both consumers and companies are adequately protected."

ESG issues and class actions

Sam notes that their company is progressively assessing the risks of class actions related to environmental, social and governance (ESG) issues. "There are projects underway that we believe will make this analysis more proceduralised," Sam adds.

Spain



Current Spanish class actions (*Acciones colectivas*) are regulated in different laws that are somewhat fragmented. The Code of Civil Procedure provides rules for some of the main procedural matters. Laws setting out special rules include the Consumer Protection Act (*Ley de Consumidores y Usuarios*), the Act on General Terms and Contractual Conditions (*Ley de Condiciones Generales de la Contratación*) and the Unfair Competition Act (*Ley de Competencia Desleal*). Registered consumer organisations can initiate class actions in the interests of consumers that have been affected by the same damaging conduct of companies or natural persons acting as traders. After being notified of the upcoming class action by the claimant, consumers can opt in to the proceedings. Claims can be for injunctive and declaratory relief and damages, depending on the type of action brought by the claimant. Class settlements are rare and not regulated.

The Representative Actions Directive (RAD) has not yet been transposed in Spain, but the government approved a preliminary draft of the implementation bill on 20 December 2022 (published on 9 January 2023), which is still pending in parliament. This bill will introduce a new title with Articles 828 to 885 in Book IV of the Civil Procedural Law and creates a coherent system of representative actions (*Acciones de representación*) for injunctive and redress measures, including declaratory relief. The procedure for redress measures entails strict timelines for each phase, among which a mandatory certification phase before proceeding to the merits phase. Consumers do not have to join the action if injunctive relief is claimed. They can join on an opt-out basis in the case of redress actions, or – by way of exception – on an opt-in basis if the court has so ordered for the sound administration of justice and when the claim for each consumer exceeds EUR 5,000. The opt-in mechanism – in accordance with the RAD – also applies to consumers who are domiciled outside Spain. Domestic representative actions can be brought by registered associations, the Public Prosecutor, the Directorate for Consumer Affairs, and regional and local consumer protection bodies.

Qualified entities must fulfil the same standing requirements for domestic actions as for cross-border actions.

The draft bill also includes a section on court-approved class settlements. Redress settlements reached after class certification bind the parties and the class. Applications for court approval of settlements reached before certification must specify the group of consumers affected by the settlement in question (individually or by setting out the characteristics of the group). The court will reject a settlement when the amount of return to be paid to any funder is considered detrimental to consumers' rights and interests.

Third party litigation funding is accepted under the draft bill. The qualified entity must disclose all sources of financing and submit the funding agreement if ordered to do so by the court. In the certification phase, the court will check that the funder's interests do not prejudice the consumers' interests and rights. A hearing can be held that the parties and the funder must attend. The funder is allowed a share of the total damages awarded, but the court may cap this.

Class actions | *Acciones colectivas* (RAD not yet transposed)

Scope	Consumer law. The rare damages actions only relate to contractual relations.
Access granted to	Registered consumer organisations.
Opt-in or opt-out	Opt-in
Declaratory relief or damages	Both
Frequently used	No
Regulatory framework	Code of Civil Procedure, Consumer Protection Act, Act on General Terms and Contractual Conditions, Unfair Competition Act.
Alternatives used in practice	Joined actions of multiple claimants; litigating by mandate; assignment of claims.

Class settlements

Binding class members after court approval	No, class settlements are not regulated; only general rules on settlement of civil claims apply.
Opt-in or opt-out	Idem

Third party funding

Regulated by law	No
Frequently used	No

Good to know

Although not qualifying as class actions, mass litigation has increased substantially in Spain in recent years.

Irene Arévalo
Defence Lawyer Perspective
Partner at Gómez-Acebo & Pombo

10 July 2024, editors: Nadir Koudsi and David Hakhoff

A new framework for consumer litigation

Irene Arévalo is a litigation and arbitration partner at Gómez-Acebo & Pombo, a leading Spanish law firm. Having obtained her Law and Business Administration degree from the ICADE, (*Universidad Pontificia de Comillas*), Irene specialised in Insolvency law at the ICADE and took an advanced course in Arbitration at the IE Business School (*Instituto de Empresa*). Last year, she was ranked in The Legal 500 as 'Next Generation Partner' in the restructuring and insolvency practice.

Irene helped us find the most relevant interviewees for the Spanish jurisdiction, and also shared her own insights on the significant shift in Spain's class action litigation landscape.

The journey towards RAD implementation

Irene reports that the RAD has not yet been implemented in Spain. The initial steps were taken when the Spanish government's Council of Ministers approved the draft bill for the Collective Protection of Consumers on 20 December 2022. Since then, the draft bill has been in the parliamentary process, undergoing an urgent procedure. It is currently pending before the Spanish parliament, where the initial deadline for the submission of amendments has been extended. After approval by Congress, it will proceed to the Senate for final approval.

Consequently, the RAD will be implemented in Spain with a substantial delay, given that the deadline for transposing the RAD into the internal legal order of EU Member States was 25 December 2022, and the resulting legislation was due to enter into force on 25 June 2023.

The Spanish draft bill: a significant change

Irene explains that the Spanish draft bill is set to introduce significant statutory changes. It aims to consolidate the regulation of collective actions, transitioning from a very fragmented approach to a single title in Spanish procedural law consisting of 58 articles. The bill extensively transposes the RAD from both a procedural and material perspective. It even extends the scope of application beyond the RAD's provisions. It allows the newly termed 'representative actions' to be brought for any type of infringement affecting the collective rights and interests of consumers and users, without limitation. However, in Irene's view, the extent of this expanded scope remains unclear, since it is tied to the concept of 'collective rights and interests of consumers and users', which has not been defined as such.

Irene also notes that the draft bill provides for two types of representative actions: (i) to seek injunctive measures, and (ii) to seek redress measures, which may be domestic or cross border, depending on where the qualified entity acting as claimant is based. Both types of representative actions may be brought together or separately for the same conduct.

Entities with standing and types of representative actions

We ask Irene about the admissibility requirements for starting class actions. She explains that entities with standing to bring representative actions include (i) consumers' and users' associations that meet certain requirements, (ii) the Public Prosecutor, (iii) the General Directorate for Consumer Affairs and the bodies or entities of the autonomous communities and local corporations responsible for consumer and user protection, and (iv) qualified entities in other EU Member States entitled to bring cross-border representative actions.

For a consumer association to be designated/qualified, it must comply with a series of requirements. While the RAD only prescribes these requirements for consumer

associations seeking to bring cross-border actions, the draft bill extends them to national cases as well, with the aim of preventing abusive collective litigation. One key requirement is that, prior to applying for designation, the consumer association must have effectively and publicly carried out activities aligned with its purpose of protecting consumer interests for a minimum period of twelve months. This raises serious doubts about the feasibility of *ad hoc* associations actually qualifying to bring collective actions.

In contrast to the current regime, individual consumer intervention is excluded. However, representative actions have the effect of interrupting the limitation periods for potential individual actions.

The draft bill generally foresees an opt-out mechanism for bringing representative actions. Exceptionally, in view of the circumstances of the case, and only if the amount claimed for each beneficiary exceeds EUR 5,000, the court may choose an opt-in mechanism to ensure the sound administration of justice. This opt-in mechanism also applies to consumers who are domiciled abroad.

The draft bill allows for the possibility of TPLF, provided that the claim provides details of any third party funders involved. During the certification hearing, a check will be performed to ensure that the funder's interests do not prejudice the consumers' interests and rights.

The future of class actions in Spain

The implementation of the RAD is causing major changes to class action litigation in Spain. "Due to the insufficient regulation in Spanish procedural law, the reality was that representative actions were practically non-existent in the Spanish jurisdiction and were, in practice, limited to certain consumer law breaches," Irene explains. However, the legal reform resulting from the RAD transposition is expected to change this landscape significantly, with an increase in representative actions expected in the next few years. In any event, it remains to be seen if the new regime will apply to non-consumer law breaches or not.

Cultural acceptance of the opt-out mechanism

We ask Irene about the switch from opt-in to opt-out. She tells us that the cultural acceptance of the opt-out mechanism, which is more at odds with the Spanish legal tradition than the opt-in mechanism, is yet to be determined. Spain is still awaiting the final regulation, and substantial changes may be made to the draft bill during the parliamentary process. For the time being, it remains uncertain whether the new framework will align or collide with Spain's legislative system and culture.

Class actions in Europe: the UK and the Netherlands

As Spain gradually develops its infrastructure for class actions, we speak with Irene about the leading countries in this area. In her view, the UK and the Netherlands have been Europe's leading jurisdictions for class actions for several years. This is due in part to their well-established regulations and the popularity of TPLF. The Netherlands, in particular, pioneered the implementation of an opt-out mechanism as early as 2020. This mechanism ensures safety and efficacy by controlling two essential aspects: the representativeness of the claimants' associations and the narrow definition of the affected group. "In addition to class actions against the state, the Netherlands jurisdiction has seen prominent class actions against foreign technology companies and against automobile manufacturers," Irene elaborates.

It is too early to predict whether the implementation of the RAD will change this landscape, as these jurisdictions are significantly ahead. "It remains to be seen what new regulations will finally be approved in the EU Member States and how they will be accepted."

Emerging trends in class actions: Portugal and Slovenia

Irene highlights the significant growth in class actions in other EU countries such as Portugal and Slovenia, as forecast in the CMS reports for 2022 and 2023.

Despite having a regulation for class actions since 1995, Portugal has witnessed a surge in their use in recent years, specifically a wave of class actions brought by high-profile associations across various areas. This change was facilitated by an opt-out mechanism, the Portuguese procedural rules, and modest court costs.

Slovenia, on the other hand, saw up to 15 class actions filed in 2022 against banks over 'floor clauses'. Irene: "It is likely that these growth dynamics will continue; in all probability, the RAD transposition will generate significant changes in the EU legal landscape – changes that will depend on the definitive regime to be established in each Member State."

Other relevant changes in the Spanish jurisdiction

We ask Irene about the most relevant change in Spanish class action litigation in recent years. Her response is that, as class action regulation has been marginal, there are no relevant changes to highlight. "However," she adds, "although not qualifying as class actions, mass litigation has increased substantially in Spain in recent years. In addition to the already existing mass litigation against financial entities, courts have faced a boom in mass litigation on cartel damages."

As well as cases addressing revolving credit cards and the interest rate 'floor clauses' in mortgage loans, these regulated collective actions have also included a consumer class action against Volkswagen for emissions and a consumer class action against Facebook. "Moreover, antitrust damage collective claims have been announced in connection with the car cartel case by consumer associations, although there is some dispute about whether these are consumer claims," adds Irene.

Irene expects the current use of collective actions that are not covered by the RAD to evolve. The draft bill – as opposed to the RAD – does not limit the matters that can be addressed through class actions. "Parties without legal standing under the final regulation may see reduced opportunities to use this new mechanism, and claimants will try to conduct the case through a qualified party, as the alternative – the current regime of collective actions – provides much more uncertainty and inefficiency."

ESG and class actions

Irene also touched upon the growing global awareness of climate issues that has sparked environmental litigation. This not only targets states and public administrations, but also targets a broad range of companies across various sectors, extending beyond those involved in fossil fuel production. Class actions related to environmental matters

have been initiated internationally for several years now, with notable cases including *PTTEP Australasia*, *BHP & Vale, Urgenda*, and *Royal Dutch Shell*. As such, ESG is becoming a focal point.

In Spain, while there have been several environmental proceedings against the Kingdom of Spain, ESG class actions have not significantly impacted Spanish litigation, likely due to the lack of regulation. However, with the introduction of the RAD, this could change, as the RAD integrates environmental matters. Irene notes these class actions will be limited to environmental disputes affecting consumer interests and rights. This is a development that we will be keenly observing in the coming years.

Alternative methods of collective redress

We ask Irene whether there are alternative methods of collective redress available, such as litigating by mandate or via assignment of claims, and whether she expects this to change. Her response is that "mandates or assignment of credits have indeed been used as a collective redress mechanism in antitrust damages mass litigation. In addition, the 'test case' mechanism, with certain similarities with collective actions, has recently been implemented to lighten the overload of the Spanish courts."

The 'test case' is a novel provision, which, like representative actions, aims to relieve the burden on the courts in mass litigation cases involving identical grounds for action. "However, because of its limited scope of application, it cannot, and is not intended to, replace representative actions. It is only foreseen for individual actions relating to general terms and conditions, expressly excluding conflicts due to transparency control. Therefore, the scope of application is very limited," adds Irene.

Class settlements

The possibility of a settlement homologated by the court in civil proceedings already existed in Spain. Irene: "The implementation of the RAD introduces more detailed requirements for homologation, which is indeed desirable in collective actions. However, it would be beneficial to establish a more certain framework regarding the role (rights and obligations) of the third party funders intervening in the settlement process."

The risk of abuse

In response to our question whether there could be abuse of class actions, Irene tells us that the existence of regulation – and, consequently, more certainty – on this matter will encourage entities to bring actions. However, some of these actions will likely be insufficiently grounded, especially since the Spanish regulation will presumably not limit the type of infringements that can be addressed through the mechanism in question. "This could have a negative impact in the Spanish economy, with companies becoming embroiled in protracted proceedings and facing substantial financial contingencies for years."

Irene expects the growth in collective litigation to attract TPLF to the Spanish market. "Funders have been very active in Spain for some years and, so far, the pros of their presence in the litigation market have outweighed the cons. Having said that, the regulation of this practice could be very positive and provide a higher level of comfort to claimants."

Spain compared with US

According to Irene, the Spanish and US jurisdictions are not comparable, as the US has long-established express regulation and very helpful and flexible frameworks for class actions, whereas Spain has barely started using this mechanism. Additionally, the potential of this mechanism in Spain cannot be compared to the situation in the US, given the very substantial difference in population, and consequently in the number of consumers potentially affected.

TPLF

As stated above, TPLF is a permitted practice in Spain. "However, there is a lack of specific regulation in the Spanish legal system, as is the case in most EU Member States," Irene notes. "The practice is not as deeply rooted as in countries such as the US or the UK. Although it has been a reality over the last years, especially in antitrust matters, the practice is still developing in Spain as compared with other countries."

Irene notes that EU regulation of TPLF is still very limited. However, in line with the RAD the new Spanish draft bill prohibits conflicts of interests between the TPLF and

consumers. It also restricts the influence and control the TPLF can have over the qualified entities' decisions and over the conduct of the dispute. "Growth in class actions will coincide with rapid growth in TPLF, so there will likely be a need for further regulation at EU level to define and harmonise TPLF regulation," Irene observes. In September 2022, the European Parliament urged the European Commission to present a proposal for regulating this emerging trend but, so far, no actual document has been forthcoming. "Likewise, in Spain, aside from the draft bill no further regulation in connection with consumers is expected shortly. That being said, courts have already rendered some decisions on the role of funders and the limits to third party funding agreements, mostly in the context of insolvency proceedings of the funded party."

'Loser pays' and the funders' success fee

In the Spanish jurisdiction, there is a general 'loser pays' rule. Regarding the funders' success fee, Irene explains that the RAD leaves TPLF regulation to EU Member States, although, as mentioned above, it prohibits conflicts of interest between TPLF and consumers. "The Spanish draft bill does not define the parameters under which the validity of a funding agreement should be measured, nor does it set a limit on the return of the investment, so it seems to allow for contractual return schemes. However, when regulating redress settlements' approval, the bill enables judges to reject a redress settlement when the amount of return to be paid to the financer is considered detrimental to consumers' rights and interests."

The most important class actions in the past ten years: Irene's viewpoint

At EU level, Irene highlights two important class actions:

- The *Urgenda* case (2019, Netherlands): Irene believes this class action judgment deserves recognition as a judicial precedent with great impact. "It was the first case in which the government's climate inaction was condemned as a violation of human rights and a breach of commitments to reduce greenhouse gas emissions. The Dutch Supreme Court therefore ordered the Dutch government to urgently and significantly reduce emissions that cause global warming."
- The *Maverick v Mastercard* case (2016, UK): this case is noteworthy for its magnitude. The case involved over 46 million class members with a total claim exceeding GBP 10 billion.

Shifting her focus to the Spanish jurisdiction, Irene notes that mass litigation on antitrust practices has taken over the Spanish courts in recent years and looks set to continue. She refers to the trucks cartel, cars cartel and milk cartel. "However," she adds, "this cannot be considered to comprise class actions; it is only mass litigation."

Implications of the popularity of class actions outside the US

In Irene's view, the growth in class actions is already a reality. "In Europe, growth is continuing year after year, with further growth set to come with the implementation of the RAD," she explains. "I believe that this could be a positive change if EU Member States are able to implement procedures in domestic regulation that truly protect the interests and rights of consumers by providing them with greater access to justice, protecting their rights through the class actions system. In any case, it will also be essential to limit possible abuses so that neither consumers nor companies are harmed by this growth."

The ideal class action: a delicate balance

We ask Irene for her perspective on the requirements for the ideal class action. She believes that an ideal class action should combine requirements aimed at:

- Ensuring the consumers' and defendants' procedural rights
- Preserving the standards of the material aspects of the claims
- Creating an efficient legal framework necessary to reduce the currently very high workload of Spanish civil and commercial courts.

Irene acknowledges that achieving this balance is a challenging task. It remains to be seen whether the provisions chosen at the pre-legislative stage, if implemented, will achieve this delicate balance.

Irene would find it worrying if some issues in the draft bill were to remain unresolved in the final Act. "To mention just a couple: the need for regulation to ensure the homogenisation of representative actions for injunctive measures in order to avoid unfounded proceedings, and the need to clearly define the obligation to publish representative actions, especially in a regulation with an opt-out mechanism such as the one to be implemented in Spain, to avoid causing irreparable damage to consumers."

The quote

We ask Irene to sum up the most important development in the future of class actions in a single sentence. Irene: "The upcoming implementation of the RAD in Spain will surely open up a completely new framework for consumer litigation in the market, with more certainty and hopefully efficiency, which will benefit both claimants and defendants."

Blas González
Claimant Lawyer Perspective
Managing Partner at Blas A. González

10 July 2024, editors: Nadir Koudsi and David Hakhoff

The Spanish jurisdiction will be very attractive for litigating class actions

Blas González, a leading claimants' lawyer in class actions in Spain, provided us with his view on class actions. Blas currently runs his own complex commercial litigation boutique. With an extensive professional career spanning over 18 years in the Spanish judiciary field, he brings a wealth of knowledge and experience to the table. In the past, Blas worked as a defence lawyer, representing large companies in insolvency, intellectual property and antitrust matters.

The current state of class actions in Spain

"Class actions are indeed a part of my daily work, although it is important to highlight that such actions are quite rare in Spain," says Blas. He explains that Spain sees more 'collective' actions, typically in the area of consumer law. These are not actions filed by an entity representing collective interests, but lawsuits filed by multiple people. "Currently, I am dealing with several collective actions in antitrust matters," he adds.

Impact of the RAD

The implementation of the RAD in Spain is currently in the parliamentary process. "In Spain, class actions are effectively being introduced rather than changed," Blas shares. The present Spanish procedural standard regarding class actions is very brief, fragmented and ineffective, which has led to its very limited practical application to

date. Blas believes that the approach to this type of litigation will be particularly relevant for litigation funders.

Challenges in European jurisdictions

When considering the most challenging and attractive European jurisdictions for class actions, Blas points out that the jurisdictions with the most experience in these types of actions are often the most formidable. He specifically mentions the Netherlands, well known as a popular European jurisdiction for investor litigation and securities settlements, and – from outside of the European Union – the UK. "For Spain, it is crucial to understand and explore precedents in jurisdictions similar to its own, such as other European ones," he advises. The courts must be aware of the importance and usefulness of representative actions, especially in consumer matters, and get accustomed to evaluating crucial moments such as class certification or the execution of verdicts.

The role of TPLF

Blas highlights that TPLF has been a reality in Spain for some years, particularly from the claimants' perspective. "Currently, the most significant class actions in antitrust matters are financed by TPLF", he says, underlining the prominent role of TPLF in these processes. According to Blas, this requires some type of regulation that, while managing the presence of the funder behind the claimant, encourages rather than deters this type of investment. Blas points out that the current draft once again devotes special attention to the TPLF – in fact it is the first express regulation that it receives in Spain – and it is very important that it is a balanced regulation, which imposes obligations of transparency but not excessive judicial control that discourages investments.

Challenges and opportunities

Blas notes that Member States have considerable flexibility under the RAD to decide on procedural issues, and identifies three crucial challenges to achieve uniform European procedural law: (i) preliminary proceedings or measures regarding previous access to evidence ('European discovery'), to solve information asymmetry between the claimant and defendant, (ii) class certification, which has never been available in Spain, and (iii) problems with individual verdict execution in an opt-out system and claim distribution. Blas foresees a serious risk that different Member States might implement the RAD in

ways which are not closely aligned with each other. "The opportunity is clear: forum shopping in the Union," he adds.

The approach to class settlements

We ask Blas how he approaches class settlements, and what the main factors are that influence his decision to settle or litigate. He explains that his approach is influenced by several factors, including the cost and legal diagnosis of the case. He identifies two specific problems. The first is the construction of a solid representative mandate, which duly enables the representative entity to negotiate and settle without legitimation problems. The second is the control of the litigation fund over the ability to negotiate and compromise, which presents very relevant problems in the internal financing relationship, including ethical ones.

The future of class actions in Spain

"In the current Spanish jurisdiction, everything is still brand new when it comes to class actions. However, the sector is preparing for change, and it is clear that the use of class actions is set to increase following the implementation of RAD, especially in terms of consumer protection," Blas predicts. "The Spanish jurisdiction will be very attractive for litigating class actions since it is an important economy without real experience in class actions," he adds.

Lucas Macedo
Funder Perspective
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Significant changes in Spain: a progressive opt-out scheme

For the viewpoint of a litigation funder, we had the privilege of reaching out to Lucas Macedo, a Senior Investment Manager at Nivalion, a litigation funder active in numerous European, American and Asia-Pacific jurisdictions. Lucas brings a great deal of experience to the table, having served as an in-house lawyer for several years with multinational groups in the energy sector, handling complex litigation and arbitration cases. He has also worked at law firms in Brazil and Germany. Lucas is admitted to the Brazilian and Portuguese Bars.

The RAD implementation in Spain

Lucas shared that the RAD has come into force but has not yet been implemented in Spain. "The Spanish government published a first draft of the RAD implementation on 9 January 2023, introducing significant changes to the Spanish collective redress landscape," he says.

On 12 March 2024, a draft bill addressing measures on judiciary efficiency, as part of a larger judicial reform known as Justicia 2030, was approved by the Council of Ministers and sent to the Spanish Congress. This draft bill, referred to as the 'Draft Implementation Act', provides further details on the new class action system in Spain. "The Draft

Implementation Act proposes a progressive opt-out scheme aligned with the RAD, applicable to actions where consumers are represented," Lucas explains.

Significant changes in the Spanish class action landscape

The Draft Implementation Act brings about significant changes in the Spanish class action landscape, which previously relied on rules from various Acts, such as the 1991 Unfair Competition Act, the 1998 Act on the General Terms and Conditions of Contracts, the 2000 Code of Civil Procedure, and the 2007 Consumer Protection Act. Some of the main changes refer to the publicity of procedures, legal standing, limitation period, jurisdiction and appeals system, certification phase, class settlements and payouts, and third party funding.

"The Act addresses significant gaps in the existing class action system. For example, it introduces a public register on collective actions managed by the Consumer Affairs Ministry and an online tool for claimants to publish relevant case information, allowing consumers to opt out of the action," Lucas tells us.

Spanish consumer associations interested in filing collective claims will need to meet strict standing requirements, as the standards originally set in the RAD for cross-border claims will apply extensively to Spanish domestic claims. The Consumer Affairs Ministry and other consumer protection government agencies also have legal standing to file class actions. The limitation period is suspended by the filing of damages claims concerning infringements committed on or after 25 June 2023.

The first-instance courts in the places where defendants have offices or commercial premises will have jurisdiction for hearing the class actions. "A significant change introduced as part of the Justicia 2030 project is that the actions will no longer be heard by single judges but by a collegiate body of all first-instance judges of a given territorial jurisdiction," Lucas concludes.

Certification phase and class settlements

Lucas further elaborates on the Act's provision for a certification phase. This phase consists of a hearing to assess the claimant's legal standing, and the homogeneity and

commonality of the claim, also checking that the action is not manifestly baseless and that there are no potential conflicts of interest regarding third party funding. "If these requirements are met, the hearing concludes with a certification order that determines the scope of the process, including which consumers are affected," Lucas explains.

Furthermore, the Draft Implementation Act introduces a procedure for class settlements, addressing previous uncertainty in the Civil Procedure Code and case law. "Following the RAD, the Act recognises the possibility of class action settlements. The competent court should authorise a settlement that indicates the amounts to be paid to each consumer or consumer category and the corresponding distribution mechanism. It should not be prejudicial to the interest of the represented consumers," Lucas tells us. If the settlement is approved before the certification phase, consumers will be granted a time limit to opt out of the settlement. However, a settlement approved after certification will be binding on all represented consumers.

Regarding the payment of any compensation, the Draft Implementation Act stipulates that compensation should be paid directly to consumers whenever possible. Where it is impossible to determine the specific beneficiaries – as is often the case – the defendant will deposit a lump sum, and the judge will appoint a liquidator. If the claim has been funded, the third party funder's compensation is also reserved at that stage.

The Draft Implementation Act contains several provisions regarding third party funding, including disclosure and conflicts of interest. For example, the court may request the claimant to present the litigation funding agreement ('LFA') to assess the "consequences for the consumer" at a hearing with the participation of the funder. The court may also take measures to protect the commercial confidentiality of the LFA at this hearing. If the court finds that the LFA terms are detrimental to the interests of relevant consumers, the claimant and funder will be requested to amend or enter into a new LFA.

Shift in the litigation landscape and risk profile in Spain

"The RAD Implementation Act is expected to position Spain at the forefront of consumer redress in Europe," shares Lucas. Filling the previous gaps in legislation will help foster

a class action culture in Spain. The Spanish legal environment counts on proactive lawyers and consumer organisations that have been so far filing claims under various creative procedural settings, such as via joinder of individual actions or bundling of claims. These claims particularly address product liability and competition violation practices.

Relevance of Portugal and Italy

Lucas considers Portugal particularly relevant for Spain in terms of European jurisdictions for class actions. This is due to Portugal's more established opt-out class action system, where the RAD implementation was concluded in December 2023.

Given the countries' cultural similarities and geographical proximity in Southern Europe, Spain is anticipated to draw from Italy's experiences too, and vice versa. This is particularly relevant in cases with a cross-border component, such as the cardboard cartel litigation currently underway in Spain following the Italian Competition Authority's investigation into the relevant market.

The Justicia 2030 plan

Lucas also highlights other significant developments in Spain's class action litigation landscape. "Apart from the RAD, the main improvement in Spain in relation to class action litigation since 2019 has been the implementation of the Justicia 2030 plan," he shares. This plan has already incorporated several procedural and digital efficiency measures, leading to significant changes to the Code of Civil Procedure in 2023, with other modifications still pending approval in Congress. These include the increase and regulation of oral trials and the online submission and review of procedural acts, and are expected to significantly improve the Spanish courts' efficiency.

Types of class actions in Spain

In Spain, the majority of collective redress cases are related to financial services, followed by the automotive, healthcare and technology sectors. "Apart from the Implementation Act regime, both natural and legal persons can bring aggregate claims via joinder. Additionally, the assignment and bundling of claims is possible under Spanish law, provided the assignment occurs before a claim is filed."

Evolution of class actions

"Private enforcement of damages following decisions by competition authorities is well underway in Spain, where numerous cases are progressing through various litigation stages," Lucas informs us. These include high-profile claims involving cartels in the automotive, dairy and other manufacturing sectors.

Spain has gained recognition as one of the most active jurisdictions in the European Union for antitrust matters. The Spanish courts, including the commercial, appellate, and supreme courts, have issued more than two thousand decisions related to cartel damages and have referred several legal questions to the Court of Justice of the European Union. As these legal issues are resolved, the volume of private enforcement cases in Spain is expected to continue to rise.

Increase in ESG claims

"An increase in claims concerning ESG issues is anticipated in Spain," Lucas notes. This expectation is illustrated by the recent *Iberdrola v Repsol* dispute, which presented a new approach to addressing ESG violations from a competition law perspective. Furthermore, consumers are being equipped with new tools, such as the EU Directive Proposal 2022/0092, aimed at "empowering consumers for the green transition through better protection against unfair practices and better information."

Additionally, already existing frameworks such as the EU Regulation 2022/1925 (Digital Markets Act) provide mechanisms for accountability, enabling collective actions to promote and enforce sustainable practices.

Alternative methods of collective redress

"In Spain, alternative methods of collective redress are available, such as the aggregation of claims through the joinder of multiple actions under the Code of Civil Procedure when the claims are based on identical facts," Lucas explains. This approach has been notably employed in the trucks cartel litigation, where Spanish courts have facilitated the joinder of actions to prevent inefficient claim processing and the risk of contradictory rulings. Additionally, claims aggregation can also be achieved using special purpose vehicles (SPVs) that receive claims assignments, allowing for a more streamlined and collective approach to pursuing legal redress.

Innovations in class settlements

"The primary innovation in class settlements in Spain is the implementation of the RAD," Lucas tells us. Historically, there has been uncertainty around the possibility of settling class actions, as the Code of Civil Procedure and existing case law only addressed the settlement of individual actions. The court's supervision and approval of any settlement agreement will enhance legal certainty for both claimants and defendants, while ensuring that the best interests of consumers are observed.

"If certification has not already occurred, the approval of a settlement is conditional upon meeting certain requirements," Lucas explains. The court will assess whether a proposed settlement is prejudicial to the rights and interests of consumers. In this assessment, the Draft Implementation Act stipulates that the court will consider the evidence presented at the given stage of the proceedings, the amount of compensation, and other potential compensatory measures, including any difficulties regarding access to these. If a third party has financed the action, the court will also review the funder's proposed compensation. If the court ultimately rejects the settlement, the case should move forward from the same procedural stage as it was in before the settlement review. "Looking ahead, a significant forthcoming development in class settlements will be how courts interpret the fulfilment of these consumer protection standards," Lucas adds.

Safeguards against abuse of class actions

"It is unlikely that abuse of class actions will occur in Spain," Lucas affirms. The Draft Implementation Act establishes a series of safeguards, such as an early certification phase, to ensure that only meritorious cases are allowed to proceed. Furthermore, the courts will play an active role in preventing potential abuses with various tools, such as the imposition of procedural fines and adverse costs.

Comparisons with the US class action landscape

"While there are obvious differences between Spain and the US with regard to class actions, primarily due to common and civil law distinctions and the long-established tradition of US class actions, there is a degree of similarity in the attitudes of claimant-side law firms," Lucas notes. Particularly since the Spanish Supreme Court eased rules on contingency fees in 2008, an entrepreneurial approach has been observed in law

firms specialising in specific types of consumer claims, such as those related to financial products and cartel damages. These law firms often provide or organise a full suite of claim auxiliary services, including customer support, data handling and economic experts.

Third party litigation funding and costs

"Third party funding is generally permitted in Spain under civil law principles," Lucas explains, "as long as the agreements do not infringe public policy." This has been confirmed by the Spanish courts, which have acknowledged the legality of third party funding under the Civil and Commercial Codes at least once (in 2020). The Implementation Act marks the first instance of third party funding regulation in Spain. The provisions of this Act provide legal certainty, paving the way for the continued growth of this significant tool for Spanish consumers to access justice.

The 'loser pays' principle

Spanish law applies a general loser-pays rule on a costs-follow-the-event basis. These costs include fees of lawyers, court agents and experts, plus expenses and judicial fees. "The recoverable lawyers' fees typically adhere to the guidelines of each Spanish bar association," Lucas explains.

The total adverse costs are capped at one-third of the claim amount, and if the claim is only partially successful, no costs are awarded, meaning that each party has to bear their own costs. In exceptional cases, the court may decide not to impose adverse costs if it determines that a case presents serious questions of fact or law. "This was evident in the envelopes and trucks cartel follow-on litigation, where despite some claimants having their action fully dismissed for not substantiating their damage, Spanish courts mostly waived adverse costs, deciding that the defendant's behaviour had instigated the actions," Lucas shares.

Funder's success fee and confidentiality measures

"If the claim is successful, the Draft Implementation Act stipulates that the funder's fees should be reserved from the total compensation," Lucas tells us. The court has the authority to limit the funder's remuneration, particularly during the class certification

stage where it can review the LFA terms. "The examination of the LFA is conducted at a hearing attended by the claimant, defendant(s) and the funder," Lucas explains. To maintain the confidentiality of any information contained in the LFA, the court can implement measures such as in-camera hearings or the production of redacted versions.

Significant class actions in recent decades

Lucas highlighted the history of collective redress in Spain. "The 1997 *Toxic Rapeseed* judgment by the Spanish Supreme Court stands as an important milestone. The case resulted in compensation of more than EUR 3 billion in criminal proceedings where the OCU (*Organización de Consumidores e Usuarios*) represented over 20,000 consumers affected by oil poisoning," he shares.

More recently, the June 2023 Spanish Supreme Court rulings in the trucks cartel litigation have clarified several aspects in follow-on antitrust damages cases, including in relation to overcharge presumptions, while confirming previous decisions by the local courts. Another case worth following is the *Dieselgate* claim also filed by OCU, where a favourable decision to consumers was overturned on appeal in June 2023.

Increasing popularity of class actions outside the US

"The increasing popularity of class actions outside the US is a positive development that upholds the rule of law," Lucas states. Class actions, especially in consumer-related cases, are fundamental tools in guaranteeing redress. The US, having a more established class action system, often sees different results in similar situations compared to other jurisdictions. For instance, in the *Dieselgate* scandal, while many European consumers have still not received compensation after almost ten years of the scandal, class actions in the US were settled as early as 2016, resulting in significant payouts to consumers.

The ideal class action and legal certainty

"Legal certainty is welcome in any class action system, especially in a nascent one," Lucas notes. Potential consumer class actions in Spain have been pursued by multiple entities on an individual bookbuilding level. An opt-out class action system should allow some level of competition between consumer organisations and their lawyers to become class representatives in future class actions. "Regrettably, while the Draft

Implementation Act grants significant discretionary power to courts, it does not establish a governance procedure and criteria for addressing potential overlapping class actions, such as those being developed in the UK in the so-called carriage disputes," Lucas observes. Therefore, case law guidance, including from other EU opt-out systems such as the Dutch and Portuguese, will be crucial in establishing a reliable class action system in Spain.

Developments in third party funding

"Certain developments may not be desirable," Lucas shares. For instance, the proposals to regulate third party funding in the October 2022 report from EU MEP Axel Voss would not support an effective class action system. Imposing an arbitrary cap on the funder's recoveries could potentially hinder many meritorious cases from being filed.

On the other hand, the Draft Implementation Act, which allocates significant powers to judges and introduces an innovative and dialectical process allowing the funder to be heard regarding the terms of the funding agreement, could be a positive development. "This is provided that commercial confidentiality is respected with the solutions already prescribed in the Draft Implementation Act and Civil Procedure Code," Lucas explains. Such a system could allow courts to make informed decisions on the fairness and proportionality of LFA terms, considering the risk matrix of each case as well as the market price of the funding.

The future of class actions: practice makes perfect

In Lucas' view, "*La práctica hace al maestro*" (practice makes perfect). While the Draft Implementation Act emphasises the courts' supervisory role in consumer class actions, all stakeholders involved, including civil society and consumer organisations, lawyers (both for claimants and defendants), and funders, should be responsible for establishing a reliable and effective collective redress mechanism in Spain.

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10 July 2024, editors: Nadir Koudsi and David Hakhoff

Spain is just beginning to see the practice of class actions take root

Rodrigo Martínez has been Head of Legal for Iveco España and Portugal since 2014. He started his career in Madrid in 1999 at the mid-size law firm Briones, Alonso y Martin, specialising in Corporate & Commercial Law. Having subsequently worked for Baker and McKenzie from 2000 to 2005, he joined CNH Maquinaria Spain, S.A. in 2005, where he headed the legal department.

Iveco is based in Turin, Italy, and designs, manufactures and markets a wide range of light, medium and heavy commercial vehicles, as well as quarry/construction vehicles. Rodrigo shares his experiences and insights regarding class action litigation. Class actions are an integral part of his daily work routine at Iveco, providing him with a unique perspective on the subject.

Impact of the RAD

We ask Rodrigo about the implications of the Representative Actions Directive (RAD) for his daily work. He shares that the implementation of the RAD has not significantly altered the litigation risk and strategy for his company, either domestically or across Europe. This is primarily because most of Iveco's products are sold to non-consumers, and the RAD is only applicable to consumer cases.

Attractive jurisdictions for class actions

When discussing the most attractive European jurisdictions for class actions involving his company or sector, Rodrigo highlights the UK and the Netherlands. "The extensive experience and tradition in handling class actions in these countries gives the Netherlands and the UK an edge over other jurisdictions," he remarks. In contrast, Spain is just beginning to see the practice of class actions take root.

Third party litigation funding

Rodrigo highlights both the positive and negative aspects of the impact of third party litigation funding (TPLF) on the class action landscape. On the one hand, it creates lucrative business opportunities for both the financing and financed companies, generating added value. On the other, TPLF can sometimes lead to unfounded claims. Overall, Rodrigo considers TPLF to be a beneficial tool, creating efficiencies. When we ask how Rodrigo deals with the presence of funders on the claimants' side, he notes that no particular adjustment of approach is needed, apart from implementing appropriate mechanisms to prevent abuses.

Challenges in managing class actions

Rodrigo identifies three main challenges that he faces in his role as legal counsel managing class actions. First, he has to consider and analyse all the circumstances of the particular case. Second, he has to try and save costs to the maximum extent possible. Finally, having regard to all the circumstances, he has to analyse whether and when to settle claims.

Approach to class settlements

The approach to class settlements and the issue of whether to settle or litigate involves careful consideration of several factors, Rodrigo explains. These include the time and money involved in litigating these cases, the potential for a positive or negative outcome, and the understanding that the settlement could have both positive and negative implications for other cases.

Current state and future direction of class actions

According to Rodrigo, the new regulation appears to pave the way for a growing class

action litigation industry in the EU. Consequentially, since class actions in Spain are not yet common practice, the RAD will drastically change the domestic class action industry.

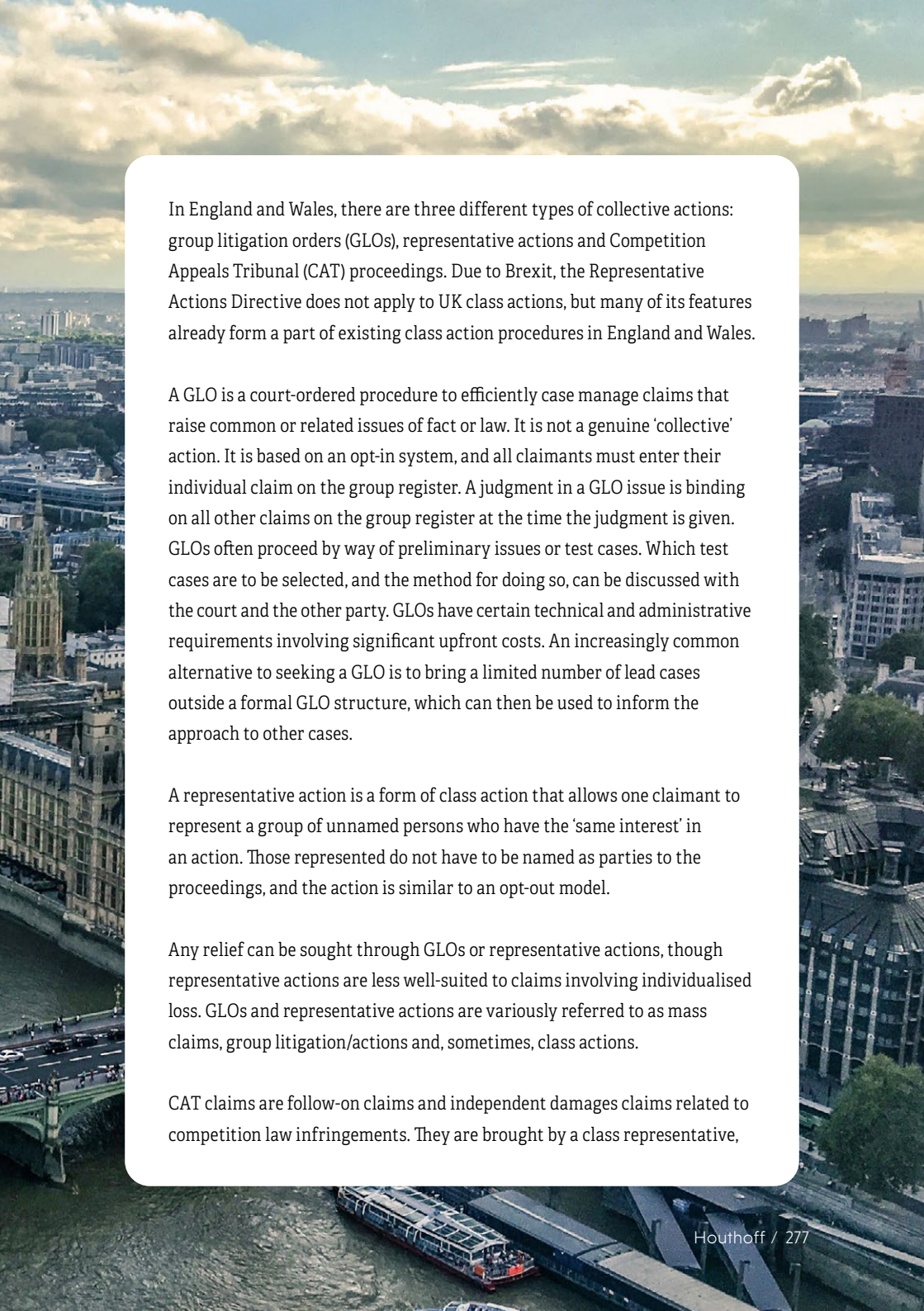
ESG issues and class actions

When we ask how Iveco is influenced by class actions related to Environmental, Social and Governance (ESG) issues, Rodrigo expresses a keen interest in the topic. ESG issues are always on the agenda for Iveco and its parent companies. And the group is increasingly assessing risks related to these issues.

Conclusion

In conclusion, Rodrigo's insights provide a valuable perspective on Spain's class action landscape, shedding light on the challenges and future directions of this complex field of law from a business perspective.

United Kingdom



In England and Wales, there are three different types of collective actions: group litigation orders (GLOs), representative actions and Competition Appeals Tribunal (CAT) proceedings. Due to Brexit, the Representative Actions Directive does not apply to UK class actions, but many of its features already form a part of existing class action procedures in England and Wales.

A GLO is a court-ordered procedure to efficiently case manage claims that raise common or related issues of fact or law. It is not a genuine 'collective' action. It is based on an opt-in system, and all claimants must enter their individual claim on the group register. A judgment in a GLO issue is binding on all other claims on the group register at the time the judgment is given. GLOs often proceed by way of preliminary issues or test cases. Which test cases are to be selected, and the method for doing so, can be discussed with the court and the other party. GLOs have certain technical and administrative requirements involving significant upfront costs. An increasingly common alternative to seeking a GLO is to bring a limited number of lead cases outside a formal GLO structure, which can then be used to inform the approach to other cases.

A representative action is a form of class action that allows one claimant to represent a group of unnamed persons who have the 'same interest' in an action. Those represented do not have to be named as parties to the proceedings, and the action is similar to an opt-out model.

Any relief can be sought through GLOs or representative actions, though representative actions are less well-suited to claims involving individualised loss. GLOs and representative actions are variously referred to as mass claims, group litigation/actions and, sometimes, class actions.

CAT claims are follow-on claims and independent damages claims related to competition law infringements. They are brought by a class representative,

on an opt-in or opt-out basis, under the Consumer Rights Act 2015. To proceed as a class action, the case must be certified by the CAT by way of a collective proceedings order. No CAT class action proceedings have been finally concluded to date. Monetary damages and injunctive relief can be claimed, but exemplary damages cannot. In recent years there has been a significant increase in the number of CAT claims.

Class actions | GLOs/Representative actions (RA)/CAT proceedings	
Scope	GLO: general; RA: general; CAT: competition law infringements.
Access granted to	GLO: individual claimants; RA: representative claimant; CAT: class representative.
Opt-in or opt-out	GLO: opt-in; RA: opt-out; CAT: opt-in or opt-out; foreign class members must opt in.
Declaratory relief or damages	GLO: both; RA: both; CAT: both.
Frequently used	GLO: yes; RA: less frequently; CAT: yes, increasingly.
Regulatory framework	Mainly Civil Procedure Rules (CPR), Practice Directions, CAT Rules, Competition Act 1998 and Other Enactments (Amendment) Regulations 2017.
Alternatives used in practice	Bringing a limited number of test cases; compensation schemes.

Class settlements	
Binding class members after court approval	RA: Yes; CAT: approval required in opt-out proceedings, no approval required in opt-in proceedings.
Opt-in or opt-out	CAT-approved settlements: opt-out, but opt-in for class members domiciled outside the UK.
Regulatory framework	CPR Rules; CAT Rules.

Third party funding

Regulated by law	CAT Rules; Code of Conduct for litigation funders was published by the Civil Justice Council in November 2011, updated January 2018.
Frequently used	Yes

Good to know

In *PACCAR v CAT* (26 July 2023) the Supreme Court precluded opt-out collective actions from being funded by third party litigation funding which provides for a reward-based return. In opt-in proceedings, such agreements must comply with the formal requirements of the Damages-Based Agreements Regulations 2013 to be enforceable. In practice, parties have sought to avoid this issue by amending their agreements so that they are based on a multiple of the funder's investment. While this has been approved at first instance, at the time of writing, the legality of this approach remains under appeal.

Simon Day
Defence Lawyer Perspective
Partner at Macfarlanes

30 April 2024, editors: Aimée de Goede, Phebe Franssen and Isabella Wijnberg

A view on the major growth in competition collective proceedings

We interview Simon Day, a prominent defence lawyer in the UK and partner at Macfarlanes. Simon specialises in competition litigation and collective actions, and his insights provide a unique perspective on the current state and future of class actions in England and Wales. Simon's expertise lies in advising in relation to High Court trials, proceedings in the Competition Appeal Tribunal (CAT) and alternative forms of dispute resolution. His particular experience in group litigation, both in the context of commercial disputes and in private damages actions for competition law breaches, makes him a respected figure in the field. In 2019, Simon's colleague Simon Nurney participated in the first edition of the Class Action Survey. The present interview was conducted in March 2024 by questionnaire.

Three main procedural mechanisms for bringing class actions in England and Wales

Simon starts by flagging that, while the Representative Actions Directive (RAD) will not be implemented in England and Wales, many of its features are already reflected in the existing class action procedures there. "These include mechanisms for the courts to dismiss unmeritorious claims at an early stage, a disclosure regime, the 'loser pays' principle in relation to costs, and a range of potential remedies for claimants." However, in England and Wales, there is no real equivalent of the RAD's "qualified entities"

requirement, although individual claimants can bring a representative action and some data protection claims can be brought by non-profit organisations on behalf (and with the authority) of data subjects.

Simon highlights three main procedural mechanisms for bringing class actions in England and Wales:

- **Competition collective proceedings:** These are collective proceedings for competition law infringements under the Competition Act 1998 (as amended);
- **Representative actions:** Here, a single representative brings an action on behalf of a class of individuals who have the "same interest" under Rule 19.8 of the Civil Procedure Rules; and
- **Group litigation orders (GLOs):** This mechanism entails bundling individual claims which raise common issues of fact or law under Rule 19.21 of the Civil Procedure Rules.

European jurisdictions and legislation

When asked which other European jurisdictions he encounters the most frequently in a class action context, Simon names the Netherlands, Germany, and to a lesser extent, Portugal. "These jurisdictions" he explains, "have (each to a greater or lesser extent) established class action regimes and a substantial class action litigation market." The growth in types of claims in these jurisdictions, particularly those regarding product liability, competition, data protection, environmental, social and governance (ESG), and financial securities, mirrors recent growth areas in England and Wales. The RAD's implementation has not altered Simon's perspective on the relevance of these jurisdictions.

We ask Simon whether there is any other EU legislation that he believes will play a significant role in class actions in the coming years. "The Directive on Liability for Defective Products,"[1] he answers. "This directive introduces key changes that are likely to result in more product liability class actions in Europe. In particular, the proposed extensions to what constitutes a 'product' and to the group of entities potentially liable for a defective product seem likely to lead to more claims. Those claims may also present

1 European Parliament legislative resolution of 12 March 2024 on the proposal for a directive of the European Parliament and of the Council on liability for defective products (COM(2022)0495 – C9-0322/2022 – 2022/0302(COD)) 2022/0302(COD).

challenges for defendants given the proposed changes to assessing the burden of proof, and the requirement for disclosure." Simon notes that although this directive will not be implemented in England and Wales post-Brexit, some of its reforms might be mirrored in future legislation in this jurisdiction. "The UK government has recently closed a consultation on reforming the UK's product safety rules, the outcome of which is currently awaited."

Relevant changes in the United Kingdom in relation to class action litigation since 2019

Since 2019, the most relevant change in the jurisdiction of England and Wales in relation to class action litigation has been the substantial growth in competition collective proceedings. This increase is attributed to the statutory mechanism introduced in 2015 through amendments to the Competition Act 1998, which has now become well-established in the legal regime. Over 40 new applications for competition collective proceedings have been made in the CAT, seeking over approximately GBP 40 billion in aggregate damages. Significant High Court decisions have also emerged regarding the scope of representative actions. Although attempts to bring data protection class actions using this mechanism have been unsuccessful, they have sparked questions about whether the representative action regime should be less restrictive for claimants.

Simon highlights a landmark Supreme Court ruling in this context, where consumer rights advocate Mr. Lloyd's high-profile claim against Google was dismissed.[2] Mr Lloyd sued Google as a representative of all iPhone users affected by the so-called Safari workaround. "To bring the claim, Mr Lloyd had to establish that all affected users had the 'same interest' in the case (in other words, that the claims were identical in both legal nature and damages sought – a key requirement for bringing a representative action). He sought to overcome the problem of users having been affected to varying extents by claiming only baseline 'loss of control' damages, which he argued were the same for everyone affected" Simon explains.

The question of whether Mr Lloyd was entitled to sue on this basis went all the way to the Supreme Court. Its ruling, dismissing Mr Lloyd's claim, was an important decision

2 *Lloyd v Google LLC*, [2021] UKSC 50UKSC 2019/0213.

that provided an authoritative examination of the history and development of the representative action regime in England and Wales, and of how key concepts of the regime should be applied moving forwards. In particular, it provided guidance on how to assess whether the represented class truly have the 'same interest' in a claim.

Rejecting Mr Lloyd's argument that all affected iPhone users' interests were fundamentally the same, the Supreme Court held that an individual assessment of each user's position would be required for a claim to be advanced on their behalf. Consequently, the representative action procedure was inappropriate.

However, the Supreme Court's decision arguably reflected a less restrictive approach to determining 'same interest' compared to previous rulings. Indeed, recent decisions suggest that the courts in England and Wales may now be adopting a more liberal approach in this regard, potentially allowing more representative actions, though this is a long way from "floodgates" territory due to the generally restrictive nature of the regime as explained further below.[3]

Top five types of class actions in the United Kingdom

According to Simon, the top five types of class actions in the United Kingdom are as follows:

1. Competition law
2. Consumer protection
3. Product liability
4. Data protection
5. Environmental claims

In the context of class action litigation, competition collective proceedings are often the most attractive mechanism for class representatives and litigation funders due to their opt-out basis. A notable example comprises the collective proceedings against Mastercard alleging unlawful interchange fees, which constitutes a competition law class action.[4] Interestingly, there is a trend for theories of harm to be framed as infringements of

3 See, for example, *Commission Recovery Limited v Marks and Clerk*, [2024] EWCA Civ 9
4 *Walter Hugh Merricks CBE v Mastercard Incorporated and Others*, CAT 1266/7/7/16

competition law, even when they do not obviously or primarily raise competition issues, to take advantage of this opt-out regime (for example, some of the abuse of dominance claims directed at tech companies or public service providers).[5] Other types of class actions that are gaining prominence relate to consumer protection, product liability, data protection, and environmental damage, including mass tort claims. Class actions can be brought on behalf of both natural and legal persons, and are not limited to consumers. The potential class members include consumers, employees, shareholders, and businesses.

Expected developments in the use of class actions

The recent significant court decisions, as mentioned above, suggest that the courts may allow more class actions to proceed in the future. "There is also the possibility of future legislation providing a more detailed, comprehensive, and modern framework for such actions, which might result in more of those claims."

An observation from Mr Justice Knowles in the *Marks & Clerk* judgment is particularly telling in this respect.[6] He noted: "we are still perhaps in the foothills of the modern, flexible use of CPR 19.6, alongside the costs, costs risk and funding rules and practice of today and still to come. In a complex world, the demand for legal systems to offer means of collective redress will increase not reduce. It will be the legal systems that actively prepare, but choose well in that preparation, that are likely to fare the best. The Courts, the common law and equity all have their part to play. The case for further development through legislation may also be strong, in this area and areas connected with it. If legislative policy is to take this in steps then it may be time for next steps."

"However," Simon explains, "while the outcome of *Lloyd v Google* suggested a less restrictive approach to representative actions overall, for data protection cases specifically, it has made life much more difficult for claimants and funders." The number of data protection claims being pursued has dropped off significantly and, absent legislative change, Simon considers their resurgence unlikely. Nevertheless, the steady flow of competition collective proceedings looks set to continue. When the first of these

5 *Gormsen v Meta* [2023] CAT 10 (20 February 2023), *Roberts v Severn Trent*, CAT 1603/7/7/23
6 *Commission Recovery Ltd v Marks & Clerk LLP & Anor* [2024] EWCA Civ 9 (18 January 2024)

claims reach the trial and judgment phase, they may provide valuable lessons for ongoing and future claims.

Emerging trends in ESG-related class actions and environmental claims under English law

We go on to discuss trends in the field of ESG. Simon mentions that in recent years, there has been a proliferation of creative avenues for bringing ESG-related claims under English law, including class actions. One such avenue involves pursuing English parent companies in England for alleged torts committed by the English company's subsidiaries, even if these torts occurred thousands of miles away. In the case of *Vedanta Resources PLC v Lungowe*,[7] the UK Supreme Court confirmed that an English company can assume a duty of care to third parties affected by the foreign subsidiary's alleged negligence on foreign soil, provided the English company has assumed a sufficiently close proximity and intervention over the management of subsidiaries. The latest trend in this area is the use of competition collective to bring environmental claims. A series of claims have been brought on behalf of over 20 million customers against several water companies for allegedly misleading regulators and overcharging customers, including in relation to sewage spills into rivers and lakes.[8] If successful, these claims could encourage further development of litigation in this area.

An alternative: the group litigation order (GLO)

As noted above, the third main procedural mechanism for seeking collective redress in England and Wales is the GLO. Introduced in 2000, the GLO allows for the collective case management and disposal of multiple claims that share common legal or factual issues. "However, the number of claims granted GLO status has not been high (only 123)[9] and there hasn't been a significant increase in the last 5 years," Simon observes. This is partly due to the difficulty in funding GLO claims in an economically viable way, as they are opt-in claims requiring significant upfront costs, making them unattractive for claimant firms and funders. An increasingly used workaround is the 'lead claimant' model, where class actions are managed outside of a formal GLO mechanism. This model

7 *Vedanta Resources PLC and another v Lungowe and others*, [2019] UKSC 20.
8 *Roberts v Severn Trent*, CAT 1603/7/7/23
9 HM Courts and Tribunal service maintain a register of the GLOs made at Group litigation orders - GOV.UK (www.gov.uk).

does not involve formally determining a class; instead, common issues between a number of cases are identified and litigated via a small number of lead claims. The other claims are stayed to be settled or resolved in a more simplified process once judgment in the lead claims is delivered, with appropriate case management directions for disclosure and witness evidence. Simon adds "We expect to see this approach adopted more regularly by parties and the Courts moving forwards."

Navigating the uncertainties of collective settlements in the CAT

Simon explains that in the context of class settlements, there is a statutory mechanism for opt-out collective settlements in the CAT. "These settlements require the Tribunal's approval based on specific criteria to ensure that they are "just and reasonable," particularly for class members." Simon notes that the first collective settlement was approved in a car shipping cartel case in December 2023.[10] However, since it was only a settlement with a single cartelist with a very low market share, the Tribunal deferred distribution of the settlement sum until the distribution stage of the substantive litigation. The second collective settlement hearing took place in April 2024 in a claim relating to rail ticket fares.[11] There remains much uncertainty about how collective settlements will operate and provide sufficient comfort in practice as to the terms of the proposed settlement, including for non-settling defendants. In relation to this final point, the second (*Gutmann*) settlement original sought the inclusion of a barring provision to reduce the risk of the settling Defendant being exposed to contribution claims from non-settling defendants. This initially generated certain objections from the non-settling defendants in relation to which agreement was ultimately reached. "It is to be hoped that as the Tribunal considers and rules on more collective settlement applications, further clarity will develop."

Abuse of class actions

We go on to discuss the potential abuse of the class action system. "The potential for abuse of class actions in the UK is a concern that has been acknowledged by legislators when introducing a class action regime for competition claims," Simon explains. This

10 *Mark McLaren Class Representative Ltd v MOL (Europe Africa) Ltd and Ors*, 1339/7/7/20, 6 December 2023

11 *Justin Gutmann v First Mtr South Western Trains Limited and Stagecoach South Western Trains Limited*, CAT [2024] 32 (10 May 2024)

awareness of the risks posed by such regimes has been factored into the judicial interpretation of the relevant rules. Simon notes that recent cases have underscored the importance of the CAT's 'gatekeeper' role. One safeguard in the competition collective proceedings regime is that the CAT is expected to consider at the certification stage whether the likely overall costs of the claim outweigh its benefits, taking into account the potential return for the class members. Despite these measures, the potential threat of unjust class actions is increasingly becoming a 'fact of life' in the UK, particularly for major corporations with large numbers of consumer or small business customers. "That is all the more the case as claimants and funders look to test the boundaries of the regimes."

Comparison with the US class action system

While not explicitly modelled on the US system, the UK's competition class action regime bears a distinct resemblance to it, particularly in relation to the opt-out class action mechanism in competition cases and the initial class certification stage. Simon explains: "There are also significant differences, such as the potential to award treble damages and the use of juries in the US. When the CAT in the UK has sought guidance from foreign jurisprudence for articulating the tests under UK collective proceedings law, it has typically looked to Canada, whose regimes have the most similarities with the UK, rather than the US."

Third party litigation funding (TPLF)

"Since 2019, an established litigation funding industry has developed in England and Wales, where TPLF is allowed," Simon explains. "Funding is available for claims using any class action mechanisms and is likely to be central to the claims, both in enabling claimants to prosecute their claims and in demonstrating that claimants would be able to meet an adverse costs award if such an award were made against them. These issues receive particular scrutiny in the context of competition collective proceedings when determining whether it is just and reasonable for the proposed class representative to represent the class."

He continues "The industry operates on the basis of a voluntary code of conduct overseen by the Association of Litigation Funders (ALF). Adherence to the ALF Code is

generally considered a benchmark for ethical and commercial standards in the market, and the ALF urges claimants and their lawyers to work only with litigation funders that are approved ALF members. The Civil Justice Council is currently reviewing the UK litigation funding industry and considering whether regulation is required." However, recent turmoil in the industry has arisen due to a Supreme Court ruling that TPLF agreements may be 'damages-based agreements' and thus unenforceable under English law. This triggered attempts by parties to amend their funding agreements. The UK government has recently indicated that it will await the outcome of an ongoing review of the litigation funding market in England and Wales before deciding whether to reintroduce draft new legislation on litigation funding which might address the position post-PACCAR.

Understanding the 'loser pays rule' and TPLF

'Loser pays' rule is the general rule in England and Wales. However, Simon notes that the Courts have full discretion as to costs and can make a wide range of orders regarding the payment of costs as between the parties. "That said," he continues "in practice, it is very rare for even a completely successful party to recover 100% of their costs – the usual expectation is between 50% and 70%."

In the event of a successful claim, the return for the funder is typically structured through a third party funding agreement. This agreement generally stipulates that the funder agrees to pay the claimants' legal costs, usually in accordance with an agreed budget, in exchange for a fee payable out of any damages recovered if the claimants are successful. The terms of the agreement, not the court, determine what the third party funder recovers and when. However, in opt-out competition collective proceedings, the return for the funder will ultimately be subject to the court approval. There is a mechanism for the class representative to apply for all or part of any undistributed damages to be paid to it to cover costs and expenses incurred in connection with opt-out proceedings, which may include the funder's return and any conditional fee agreement (CFA) success fee and/or after the event insurance (ATE) premia. However, it has also been established that, in circumstances where undistributed damages are likely, it is also possible for the funder to be paid before distribution to the class, subject to court approval.

Landmark case

Simon expects the *Lloyd v Google* case discussed above to be cited in a representative action context for many years to come. And as regards competition collective proceedings, the aforementioned Supreme Court's 2020 judgment in *Merricks v Mastercard* constitutes a landmark decision. Endorsing a relatively low bar to certification, this judgment is widely seen to have opened the door to more collective claims.

Growth in class actions

"The increasing popularity of class actions outside the US is a reflection of the world we live in today." Simon continues: "Technological advances in the mass provision of goods and services mean that errors, defects and unlawful acts have the potential to affect millions of people within a very short timescale. These same technological advances make it easier for large groups to coordinate, seek legal advice, publicise their stories, and even exert political pressure, as seen with the ongoing Post Office scandal in the UK, which was previously the subject of a GLO. This trend makes it inevitable that we will see more class actions worldwide and more legislation like the RAD aimed at increasing access to justice."

Although not on a US scale, the Courts of England and Wales have a long history of class action litigation. The available regimes in this jurisdiction are expected to continue to develop and evolve, as they have done in recent years, first with the introduction of GLOs, then with the introduction of competition collective proceedings. In the *2019 Class Action Survey*, Simon's colleague Simon Nurney rightly predicted that Brexit would have a limited impact on class actions in England and Wales. "There has been no noticeable drop off in claims or substantial evidence of European jurisdictions poaching English class actions."

Simon Nurney's call for a well-established body of case management approaches and guidance on class actions, to give defendants more certainty, has gone relatively unheeded. "If anything, the number of potential approaches has proliferated and it remains difficult to transpose case management decisions made in one case to others."

The ideal class action

From a defendant's perspective, the ideal class action should primarily promote access to justice by reducing costs for both sides through greater procedural efficiency in handling multiple claims. However, according to Simon, there is significant doubt about whether this goal is being achieved in many class actions, highlighting the need for careful evaluation and potential reform.

Undesirable development

In Simon's view, it would be undesirable to develop a class action regime specifically for data protection cases. Despite repeated calls for such a regime by consumer rights advocates and claimant groups, Simon is not convinced that there is a real consumer appetite for it, except in relation to serious breaches where remedies are already available (for example through a GLO process). In the context of competition collective proceedings, the CAT is required to consider the overall costs and benefits of any application at the certification stage. "I am not convinced that most applications for more minor data breaches, if assessed in the same context, would overcome such a threshold," he concludes.

The most important development in the future of class actions

When asked to predict key future developments, Simon responds: "AI. And more specifically how AI tools can be used by claimants, defendants and the courts to litigate group actions more efficiently." "Is that a development that you expect or hope for?," we ask. "Both," he responds with a smile, "but we will see in five years."

Ben Lasserson
Claimant Lawyer Perspective
Partner at Mishcon de Reya LLP

2 September 2024, editors: Aimée de Goede, Phebe Franssen and Isabella Wijnberg

The ideal class action according to a claimant competition litigator

Ben Lasserson is a partner in the Competition group in the Innovation department of Mishcon de Reya LLP. Ben's expertise lies in claimant competition litigation, commercial litigation, international arbitration, and other dispute resolution procedures. He has a wealth of experience acting for major multinational businesses across a broad range of sectors. Ben is particularly adept at advising clients on third party funding arrangements and managing the financial risks of litigation.

In 2019, Ben's former colleague, James Oldnall, participated in the first edition of the Class Action Survey. Fast forward to April 2024, we revisit this topic with Ben, conducting an interview via a questionnaire. The insights gleaned from this conversation shed light on the significant changes that have occurred in the UK's class action litigation landscape since 2019.

The changing landscape of class action litigation in the UK

Since the UK is no longer in the EU, it obviously has no RAD transposition. However, that does not mean nothing has changed. Since 2019, the most relevant change in the UK jurisdiction in relation to class action litigation has been the significant increase in the number of collective actions for competition damages in the UK's Competition Appeal Tribunal (CAT), according to Ben. He continues by explaining: "Collective actions in the

CAT are brought by a class representative on behalf of a class of claimants and can be brought either on an opt-in or opt-out basis, with the latter being the most common in practice. Over 40 collective actions have been commenced in the UK since 2019, representing a material uplift since the collective actions regime was introduced in 2015."

The types of collective actions being in the CAT have expanded. Ben explains, "Currently, claimant lawyers are testing the boundaries of competition law and exploring the intersection with data privacy, environmental and consumer protection laws. This is due to the current position in the UK that opt-out collective actions are only permitted in relation to competition law claims. As a result, there has been a high degree of creativity amongst claimant lawyers to bring cases in the CAT."

An example of this is an opt-out claim brought by Dr Liza Lovdahl Gormsen on behalf of Facebook users against Meta, alleging that Facebook charged unfairly high prices in the form of extensive personal data for the provision of its social networking services.[1] This claim, which might be considered a matter of data protection, has instead been framed as a competition law dispute.

Environmental claims: a new frontier in class actions

"Another example," Ben continues, "are a number of opt-out damages claims that have been brought in the CAT against water companies in England, arising from the companies' alleged unlawful discharges of untreated sewage."[2] These claims, brought by Professor Carolyn Roberts on behalf of affected UK households, are based on the water companies' alleged abuse of their dominant position within the relevant market. These are the first collective action claims commenced in the CAT that can fairly be described

1 1433/7/7/22 *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others.*

2 1628/7/7/23 *Professor Carolyn Roberts v (1) United Utilities Water Limited and (2) United Utilities Group PLC*; 1603/7/7/23 *Professor Carolyn Roberts v (1) Severn Trent Water Limited and (2) Severn Trent PLC*; 1629/7/7/23 *Professor Carolyn Roberts v (1) Yorkshire Water Services Limited and (2) Kelda Holdings Limited*; 1630/7/7/23 *Professor Carolyn Roberts v (1) Northumbrian Water Limited and (2) Northumbrian Water Group Limited*; 1631/7/7/23 *Professor Carolyn Roberts v (1) Anglian Water Services Limited and (2) Anglian Water Group Limited*; 1635/7/7/24 *Professor Carolyn Roberts v (1) Thames Water Utilities Limited and (2) Kemble Water Holdings Limited.*

as 'environmental claims'. In the claims brought by Professor Roberts, all six defendant water companies have been individually accused of under-reporting the number of times they caused pollution incidents, such as spilling or discharging sewage into waterways, causing several breaches of environmental law.[3] These are huge cases. Ben explains: "The opt-out nature of the claims means that by default all households which pay bills to any of the six water companies are included as class members, unless they take active steps to opt-out of the proceedings. As a result, Professor Roberts represents 20 million bill-paying households that have allegedly been overcharged by the relevant water companies."

Other developments relating to ESG

Ben expects an increase in claims related to environmental, social, and governance (ESG) matters, particularly those concerning companies' impact on the environment. "Parties in the UK are already utilising group claim mechanisms to bring ESG-related claims. Examples of this include the 'Dieselgate' litigation, which involves ongoing proceedings under the Group Litigation Order (GLO) regime in the High Court against various vehicle manufacturers in relation to alleged diesel emissions fraud." [4]

Another instance of group litigation in England, as Ben explains, is an action brought by claimants against mining group BHP over a 2015 mining disaster in Brazil.[5] This case concerned the collapse of a dam in Brazil which caused significant damage to the local area and communities. Proceedings have been brought before the English courts on behalf of affected claimants against BHP's England and Australia-incorporated entities[6]. Over 720,000 claimants are currently involved in these proceedings.

Ben continues to note that securities litigation under Sections 90 and 90A of the Financial Services and Markets Act 2000 (FSMA) may also be utilized more frequently to

3 As alleged in the claims filed with the Competition Appeal Tribunal, and as extensively reported in the British media.

4 *Various Claimants v Mercedes-Benz Group AG and Others, Volkswagen AG and Others, Dr.Ing.H.C.F. Porsche AG and Others, and Others* [2023] EWHC 3173 (KB)

5 *Munícipio de Mariana & Ors v BHP Group (UK) Limited & Anor.*

6 BHP Group Limited, an Australian entity, is the ultimate parent company of BHP Billiton Brasil Ltda (the Brazilian entity) and operates as a single economic entity under a dual-listed company structure with BHP Group (UK) Limited.

bring ESG-related claims, where shareholders seek to hold companies accountable for their actions in this area.

Top four types of class actions in the UK

According to Ben, the top four types of class actions in the UK, in terms of quantity, are as follows:

1. Collective actions for breaches of competition law in the CAT;
2. Multiple joint claimants using a single claim form under Civil Procedure Rule (CPR) 7.3, which can be used where the claims can be conveniently disposed of in the same proceedings;
3. Multiple claims managed by the court under a GLO, which provides for the collective case management of claims that give rise to "common or related" issues of fact or law[7], and
4. "Same interest" representative claims under CPR 19.8, where one or more claimants can represent other claimants with the same interest.

These types of group claims may be brought by natural or legal persons and are not confined to being brought by associations.

Increase in collective actions for competition damages

Ben expects the current use of class actions in the UK to evolve in the future, both in terms of quantity and type of claims. "It is anticipated that the number of collective actions for competition damages in the CAT will continue to increase. However, a legislative shift is likely to occur to allow a broader range of opt-out collective actions to be brought outside the remit of competition law."

This shift made evident in the discussions by UK legislators during parliamentary debates on the Digital Markets, Competition and Consumers Act 2024 (DMCC Act), as Ben sets out. "The legislators, including the former Master of the Rolls and Head of Civil Justice, the Rt Hon Lord Etherton KC, Baroness Kidron, and other members of the House

7 Common disputes dealt with via GLOs include those relating to data breaches, product liability, environmental damage, industrial disease, nuisance by emissions, financial services, and shareholders' actions. To date, 123 GLOs have been granted by the courts in England and Wales.

of Lords, have noted the absence within the DMCC Bill of mechanisms for consumers to seek collective redress when a single breach affects numerous parties." However, during the remaining days of the UK parliament prior to the general election in July 2024, the DMCC Act was passed without containing any provision for collective redress by consumers. So, this remains an issue that still requires legislative intervention.

Alternative ways to seek collective redress

Ben observes, "In the UK, alternative methods for collective redress, such as litigating by mandate or via assignment of claims, are generally not utilised for group claims. The expectation is that this practice will remain unchanged in the foreseeable future."

Settlements

Currently, there are no anticipated changes to the manner in which settlements are managed in group claims. This pertains specifically to the collective actions regime of the CAT, where the rules necessitate the CAT's approval for a settlement. Ben points out, "These rules are relatively untested, but this is expected to change due to the increasing number of collective actions progressing through the CAT." The first such settlement, approved in December 2023, was related to the "roll on/roll off" claim concerning the deep-sea carriage of new motor vehicles.[8] Notably, this settlement involved only 1[9] of the 12 defendants to the claim, Compañia Sudamericana de Vapores S.A." Since then, the CAT has approved settlements in a couple of other collective proceedings claims. For example, the CAT is reported to have approved a £25m payment to affected class members by Stagecoach South Western Trains.[10]

Abuse of class actions

According to Ben, the likelihood of class action abuse occurring in the UK is very low. This is due to the robust approach to case management taken by both the High Court and the CAT. In the CAT, collective actions cannot begin until the class representative's

8 1339/7/7/20 *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others*.

9 See https://www.catribunal.org.uk/judgments/13397720-mark-mclaren-class-representative-limited-v-mol-europe-africa-ltd-and-others-8

10 Stagecoach South Western Trains is one of the defendants in the rail fares collective proceedings in the CAT: 1304/7/7/19 *Justin Gutmann v First MTR South Western Trains Limited and Another*, 1305/7/7/19 *Justin Gutmann v London & South Eastern Railway Limited*, and 1425/7/7/21 *Justin Gutmann v Govia Thameslink Railway Limited & Others*

claim has been certified and a collective proceedings order has been granted. Ben observes that this is not an easy exercise: "This certification process involves a demanding level of scrutiny from the CAT, including in relation to the proposed expert evidence, to ensure that the class representative has a 'blueprint to trial' of proposed methodology for calculating loss." Not an easy exercise.

"As for GLOs," Ben continues, "the court, when considering whether to grant a GLO, will assess whether the claims present common or related issues of fact or law, and whether granting a GLO would enable the court to achieve its overriding objective of dealing with cases justly and proportionately." He adds that GLOs are always on an opt-in basis which makes abuse even more unlikely.

"More generally, the potential exposure to adverse cost orders in this jurisdiction deters spurious and speculative claims. The need for third party funding for mass claims means there is little scope for unmeritorious claims to proceed," Ben explains.

Comparison with the US class action system

Ben asserts that the US has a well-developed class actions regime, which allows for any claim to be commenced initially as a putative class action. This results in a large volume of claims being filed daily, with an estimated 10,000 new class actions filed each year. In contrast, the UK has several mechanisms for bringing group claims, with the closest analogy to US-style class actions being the opt-out collective actions regime under the CAT. However, the UK does not come close to the US class action system.

Ben highlights a significant difference between the two jurisdictions: the 'loser pays' principle under English law, which applies to litigation in the UK. This principle exposes claimants in UK group proceedings and their litigation funders to potential adverse cost orders for a significant percentage of the litigation cost, as explained below, if the defendant successfully defends the claim. This is not present in US class actions. Also, the procedural hurdles to bringing a claim in the UK are higher compared to the US, with particularly high upfront costs for collective actions in the CAT. Applying for a collective proceedings order involves substantial front-loaded expenses, including the need to file detailed expert evidence. The application hearing is also significant, as

experts from both sides are likely to be questioned by the CAT. Another difference lies in the damages awarded in class or group actions. In the US, courts can award treble or punitive damages to claimants, a possibility not available in the UK.

Third party litigation funding (TPLF) in the UK

TPLF is permitted in the UK. This is a shift from historical norms where it was considered unlawful due to common law principles of maintenance and champerty. This change is contingent on the funding arrangements not contravening public policy, such as by allowing the funder to exercise excessive control over the litigation or limiting the independence of the law firm, which could hinder effective legal representation. The TPLF market has expanded in recent years, both in terms of funder capacity and the number of funding companies. Ben notes that as of November 2023, 80% of litigators in London were engaged in legal cases where at least one side was financially supported by a third party funder.[11]

"The UK Supreme Court's decision in *PACCAR* had the effect of rendering unenforceable the litigation funding agreements (LFAs) which entitled funders to recover a percentage of damages awarded."[12] This decision caused significant uncertainty in the UK TPLF market, leading to amendments to existing LFAs to bypass the problem. The issue was particularly acute in relation to collective actions in the CAT because damages-based agreements (DBAs) are not permitted for opt-out collective actions. A legislative solution appeared to be in prospect with the introduction of the Litigation Funding Agreements (Enforceability) Bill in the UK parliament on 19 March 2024.

The draft bill, sought to address the uncertainty created by the *PACCAR* decision, but it was not passed by the UK parliament prior to the general election in July 2024.

The new UK government recently indicated that it will not table legislation to address the issues caused by the PACCAR judgment until after the UK's Civil Justice Council finalises its report on TPLF, which is not expected before summer 2025.

11 LSLA (London Solicitors Litigation Association) Annual Litigation Trends Survey 2023

12 *s R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28.

Regardless, the use of TPLF for group claims in the UK is expected to continue to increase. TPLF in the UK is overseen by the Association of Litigation Funders, a self-regulatory body, with additional scrutiny from the judiciary during legal proceedings. The *Post Office Horizon* case[13] recently highlighted the topic of TPLF, sparking a debate over the fairness and ethical standing of the industry due to the substantial share of the damages taken by the funders (reported to be potentially as high as 80%). During the second reading of the Litigation Funding Agreements (Enforceability) Bill, members of the House of Lords largely agreed that regulation with adequate consumer protections is necessary. However, some warned of the risks posed by excessive regulatory measures that might impede or limit the industry. As noted above, the UK's Civil Justice Council is currently reviewing TPLF in the UK at the request of the UK's Lord Chancellor.

Cost apportionment in the UK

In the context of litigation, there is a rule that the losing party must cover the winner's costs. However, it's important to note that the losing party typically pays only about 60-70% of these costs, rather than the full amount. This applies to group litigation and other types of civil litigation. Claimants are often funded by TPLF in group litigation scenarios. Additionally, claimants usually have insurance policies to protect against adverse costs, with After The Event insurance being the most common type.

Success fee if a defendant loses

In the event of a successful claim, the funder is typically entitled to a fee, which is paid from the proceeds recovered from the litigation. This fee is usually contingent upon recovery from the defendant and is generally not payable unless an award in damages is paid out. The court has the authority to limit the amount of the success fee. This was recently demonstrated in the cases of *Neill v Sony* and *Kent v Apple*, where the Tribunal ruled that it has various tools at its disposal to ensure that any features of funding arrangements do not unduly interfere with the interest of class members.[14] These tools

13 *Alan Bates and Others v Post Office Limited* [2019] EWHC 3408 (QB)

14 *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited and Sony Interactive Entertainment Network Europe Limited* [2023] CAT 73; *Dr Rachael Kent v. Apple Inc. and Apple Distribution International Ltd* [2024] CAT 5.

include the control of costs and the continuing oversight of the class representative's independent conduct of proceedings. The Tribunal specifically noted in Kent v Apple that, post certification, it will have ample opportunity to ensure that any fee payable to the funder is proportionate and appropriate.

Landmark case

Ben cites the *Justin Le Patourel v BT Group PLC* case[15] as a landmark case of the past ten years. This was the first collective action to reach trial in the CAT, and the hearing took place from January – March 2024. The 2.3 million class members include BT landline-only customers and those who took landline and broadband but not 'bundled together' in the same contract. The claim seeks to recover GPB 1,307 million. The class comprised vulnerable, elderly individuals and the claim progressed extremely quickly to trial with that in mind. The overriding emphasis was that this is a claim brought on behalf of consumers who could not otherwise act on their own behalf. In other words, it is the exact type of class action that the regime was intended to cater for. Judgment is awaited. This case should set a precedent to encourage more such consumer collective actions in the future.

The ideal class action

Ben points out that, from the perspective of a specialist claimant competition litigator, the ideal class action would be an opt-out collective action in the CAT. This action would have strong merits and could be a standalone claim, not necessarily a follow-on claim. It would involve a clearly and readily identifiable class with a high quantum. The action would also require a suitable proposed class representative and strong economic evidence and methodology.

Impact of the *PACCAR* case

Ben points out that, from a litigation perspective, another decision similar to the *PACCAR* case would be undesirable. This particular case caused significant uncertainty in the TPLF market, leading to a noticeable decrease in the number of group claims being funded since the judgment was handed down in the summer of 2023, although

15 1381/7/7/21 *Justin Le Patourel v BT Group PLC*.

this has changed since the CAT has handed down a number of decisions "pro-funding" since[16].

Key future development in class actions

In Ben's view, the most significant future development in the realm of class actions would be the introduction of UK legislation that permits collective redress on an opt-out basis for non-competition mass claims.

16 See for example: *Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe Ltd and others* [2023] CAT 73; D*r. Rachael Kent v Apple Inc. and Apple Distribution International Ltd* [2024] CAT 5; *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others* [2024] CAT 10; *Commercial and Interregional Card Claims I Limited v Visa Inc. & Others*, *Commercial and Interregional Card Claims II Limited v Visa Inc. & Others*, *Commercial and Interregional Card Claims I Limited v Mastercard & Others* and *Commercial and Interregional Card Claims II Limited v Mastercard. & Others* [2024] CAT 16; and *Mr Justin Gutmann v Apple Inc., Apple Distribution International Limited, and Apple Retail UK Limited* [2024] CAT 18

Robert Rothkopf
Funder Perspective
Managing Partner of Balance Legal Capital

27 June 2024, editors: Aimée de Goede, Phebe Franssen and Isabella Wijnberg

The essence of class action litigation: collective redress and accountability

In the dynamic world of class action litigation, one name that has been making waves is Robert Rothkopf, the founder of Balance Legal Capital (BLC). Established in 2015, BLC provides financial backing for commercial disputes and group/class actions in the UK and Australia. Catering to businesses, law firms, insolvency professionals, and groups of individuals alike, BLC's capital is instrumental in covering legal fees and disbursements associated with pursuing a claim.

Before embarking on his journey with BLC, Robert held a pivotal role as a litigator in the International Dispute Resolution and Arbitration Group at Herbert Smith Freehills LLP. Here, he honed his skills advising multinational companies on commercial and investment disputes, laying the groundwork for his future endeavours.

Top five types of class action in England and Wales

"Class actions" in the sense of "representative proceedings" in England and Wales are currently only available in the Competition Appeal Tribunal (CAT) for cases that engage competition law. Such class actions can be brought for consumers and businesses. There is a more limited "representative proceeding" in the English High Court under Civil Procedure Rule 19.8 for other claim types but these actions are proving impractical.

"There is a clear need in England and Wales to expand the representative/opt-out regime to cover more claim types outside of competition actions," according to Robert.

The increase in ESG-related class actions

Robert was sceptical as to whether there is an increase in environmental, social and governance (ESG) related actions or just an increase in the use of the ESG label. ESG-related claims are usually conducted as group actions – by which Robert means "opt-in" groups of claimants – for example, shareholders claiming against a listed entity for share price damage arising from revelations of bribery, or environmental harm, or the diesel emissions claims brought against car manufacturers. These claims do not fit within the representative action machinery of the CAT because they do not (for the most part) engage competition law.

An exception to this is the collective action against the UK water companies in the CAT – *Professor Carolyn Roberts v Thames Water Utilities Ltd and others (1635/7/7/24)* – where it is argued that the water companies abused their dominant position in allegedly misleading the regulators regarding frequency of sewage spills which then gave them the right to overcharge consumers. This case both fits into the class action regime of the UK's CAT and can be classified as an ESG case.

Alternative methods of collective redress in England and Wales

When asked whether England & Wales permits alternative ways for collective redress such as assignment of claims, Robert responds that currently, assignment of claims is only possible from insolvent entities, or through insurance subrogation. However, there have been limited exceptions to this in England and Wales. Robert believes that this area is ripe for review as it may well provide a better aggregation mechanism than the opt-in group claim regime which can be uneconomic for low value claim book builds, or the flawed CPR 19.8 regime which so far requires identical claims and losses for each class member, or the CAT which is currently restricted to competition cases.

Desired change for future class actions

A desirable change in the class action regime in the UK would be to expand the claim types that can be brought under the collective action procedure so that consumers and

groups of business can assert their rights and hold defendant corporations to account outside of the competition context and in a more cost effective way.

Litigation funding is an essential part of any collective action regime as the cost of bringing these actions is beyond the reach of most claimants and the cases are risky.

Is there the potential for abuse of class actions?

Robert does not consider it likely that abuse of class actions will occur in England and Wales. As he puts it, "it is not economically viable to "abuse" class actions". The financial risk and costs of litigation are too significant to embark on class actions without conviction in the merits. Cases with weak merits make bad investments. With a multitude of regulated professional lawyers involved on both sides, including solicitors and barristers, and judges at the heart of the process, the risk of 'abuse' is purely theoretical.

Interestingly, Robert notes that the real area of abuse lies not in the initiation of class actions, but in the conduct of the defendants: "Attritional defence tactics intended to cause delay, such as withholding evidence, bare denials, and attacks on funding arrangements are often deployed. These moves simply drive up costs and adverse costs risk. Defendants would rather fight on every front other than the substantive dispute, and this tendency is the real challenge to a timely and cost effective result." Robert would like to see procedural timelines kept short, and for defendants who abuse the system to receive adverse costs orders along the way. "The *Post Office* Case is probably the best-known example of abusive defendant conduct in UK group litigation where litigation funding was crucial to exposing a huge scandal. Sadly, we see unreasonable sharp conduct by defendants in other cases. As we continue to navigate this complex landscape, it's clear that maintaining the integrity of class actions is a joint responsibility that requires vigilance and ethical behaviour from both claimant and defence-side participants."

Comparison with the US

The UK and US legal systems differ in many ways. For starters, there are no "adverse costs" in the US. Whereas a losing litigant in the UK is liable to pay the winning party's

costs (which disincentivises spurious claims), parties in the US can bring claims without any liability for the other side's costs if they lose. This may be why the US is more litigious than the UK.

Another difference is that the US class action regime covers many more claim types, whereas in the UK it is currently limited to competition actions.

The US also has jury trials for civil matters and punitive damages whereas the UK does not. That said, damages awards in the CAT are intended to more than merely compensatory but to deter misconduct by the defendant.

Third party litigation funding (TPLF) – is further regulation required?

In jurisdictions such as England and Wales, TPLF is not only permitted but is also positively regarded by the judiciary and the government as an important component of access to justice.

Litigation funding is self-regulated by the Association of Litigation Funders of England and Wales (ALF), which mandates that members demonstrate sufficient capital to meet obligations under funding agreements and have limited termination provisions in their funding agreements.

Regulation on anti-money laundering (AML) checks falls under the purview of other regulators, such as the UK's Financial Conduct Authority, if the funder is regulated by them. Solicitors accepting funds from a funder are required to satisfy themselves as to the AML checks under their own professional conduct rules.

Given the existence of a competitive market for fundable cases, the involvement of regulated legal professionals in all cases, including solicitors and barristers on both sides, as well as judges at the heart of the case, it is unclear what further TPLF regulation would be required in this jurisdiction.

Payment of success fees

Funders generally advance capital to claimants to meet litigation costs on a non-

recourse basis – meaning that if the cases loses, the investment is lost, but if the case settles or wins, the funders' capital outlay and a return is paid out of the settlement or judgment proceeds.

If the proceeds received turn out to be less than hoped, the claimant might receive less than 50% of the proceeds after the capital is repaid to the funder together with any lawyers' success fees and adverse costs premiums. This can also be a function of costs having been higher than forecast at the outset of the litigation, generally driven by optimistic claimant lawyers at the start or the defendant's strategy of outspending the claimant side and obfuscating the process. Obviously, the more the claimants have to spend in responding to attritional defence before the case is resolved, the more capital has to be reimbursed to the funder. Funders try to limit risk of disappointing quantum outcomes at the case selection stage but this is one of the risks of any litigation, and the risk is shared by the claimant and other stakeholders in the litigation through a priority payment waterfall in the finance documentation.

The problem of some claimants being disappointed with the distribution of proceeds at the end of a case could well be solved by granting the courts discretion to order the defendant to cover the funding costs, (and any lawyer success fees and adverse costs premiums) particularly where the defendant's conduct leading up to the dispute or indeed in the conduct of its defence has been unreasonable or egregious. While such jurisdiction clearly exists in English commercial arbitration, as evidenced by cases such as *Essar* v *Norscott* [2016] EWHC 2361 (Comm) and *Tenke v Katanga* [2021] EWHC 3301 (Comm), some lawyers believe it also applies in English litigation. Robert continues "I think this should apply outside arbitration cases. The express grant of this discretion to the court would bring in a moral hazard for defendants before they use scorched-earth defence tactics."

Increasing popularity of class actions

The rising popularity of class actions is a significant development in the global legal landscape. These collective legal proceedings are increasingly recognised as crucial for providing effective redress for consumers and businesses, and for holding defendant corporations accountable. There is a growing consensus that the UK needs to support

and develop its class action regime, expanding it beyond the realm of competition claims so that more legal rights can be upheld.

Undesirable development

We ask Robert what he would consider an undesirable development in the field of class actions. His answers refers to a subject very dear to him: "The introduction of regulations that limit access to litigation funding under the guise of consumer protection. For instance, imposing express caps on litigation funding returns would simply provide an advantage to defendants. This would reduce the scope of cases that can be funded, enabling defendants to avoid addressing the substantive merits of a dispute. Such a development would undermine the very essence of class action litigation, which is to provide a platform for collective redress and accountability which only works if there is litigation funding available to take the risk from the hands of claimants who can't finance their claims themselves. Unless of course, litigators, barristers and experts would be willing to work pro bono."

Key development

When asked what he thinks the most important development in the future of class actions will be, Robert responds: "I foresee for the near future, in appropriate cases, the recoverability of funding and adverse costs insurance from the defendant, and the expansion of the opt-out regime to claim types outside of competition law."

Business Perspective
Assistant General Counsel at a major healthcare company

9 July 2024, editors: Dawit Bakker and Isabella Wijnberg

Class actions: a rising tide in Europe for businesses

We speak with an Assistant General Counsel at a major healthcare company. Due to the sensitive nature of the topic, he prefers to remain anonymous. We will therefore refer to him as 'John'.

The growing preoccupation with class actions

"Class actions have become a significant aspect of daily work," John tells us. The rise in mass litigation in both the USA and in Europe has led to an increased focus on this issue within the company. Mass litigation has a significant impact from a costs, reputation and resources perspective; therefore, it is no longer viewed as an issue confined to the purview of the legal department. Mass litigation has become a priority for the company as a whole to address, including business leaders.

The impact of the RAD

The implementation of the Representative Actions Directive (RAD) has altered the litigation risk and strategy for the company across Europe. "The level of collective claims risk has escalated, particularly in those European Member States that did not have class action laws prior to the RAD," John explains. These heightened litigation risks, when coupled with Europe's already complex and stringent regulatory framework, negatively impact innovation and the economic security of the EU for the company. Innovation is impacted because, for instance, more extensive testing has to take place to cover the legal risks and prepare the possibility of defence. Economic security is impacted because of the risk that funding could originate from entities (possibly state-owned) from outside Europe that could be used to support litigation to cause disruption to critical businesses or infrastructure or to obtain trade secrets, key technology or intellectual

property. Mass litigation further impacts competitiveness and the EU's attractiveness as a location for investment by global companies.

In John's view, this is particularly true with regard to the lack of regulation concerning third party litigation funding (TPLF) – regulation that could enhance transparency and prevent predatory litigation and other unintended consequences harmful to both consumers and businesses in Europe. He observes that the RAD has not achieved harmonisation in this area; rather, it has led to increased fragmentation and erected barriers to the deepening of the single market. The EU should conduct a comprehensive and objective evaluation of the RAD, considering these broader risks, as stipulated by Article 23 of the directive. Failure to do so, he notes, may prompt even more businesses to consider investing or launching new products in other regions.

Challenging jurisdictions for class actions

When assessing the most challenging European jurisdictions for class actions involving the company or sector, the UK stands out. "This is currently the most attractive jurisdiction for claimants. Its high volume of cases, opt-out mechanism for certain types of collective actions, and strong claimant bar and litigation funding industry make the UK a significant player," John notes. Other countries, including the Netherlands and Portugal, are also significant due to the availability of funding, opt-out mechanisms, and loose criteria that permit the use of ad hoc claim vehicles. Furthermore, adds John, several other European countries are emerging as increasingly attractive jurisdictions for class actions, driven by a pro-consumer agenda and claimant-friendly laws.

The role of third party litigation funding and settlements

Third party litigation funding has significantly impacted the class action landscape in both the USA and across Europe. "TPLF has evolved into a multibillion euro industry and continues to exhibit robust growth," Johns tells us. This increases the number of claims brought, even if the class members have no incentive or motivation to bring claims. Predominantly driven by profit motives rather than a concern for access to justice, TPLF introduces numerous complex issues. These include conflicts of interest between the TPLF providers and the class members and their lawyers, ethical dilemmas, and transparency risks. And also it tends to encourage the development of longer, larger,

more complex and costlier cases, since it is in the funders' interest to have a class as big as possible.

The presence of funders on the claimants' side can exert increased pressure on defendants. The defendant knows that the claimant has enough financial backing to support a long and complex case. This could potentially lead to abusive settlements even in the face of unfounded claims, which is problematic because the company's approach to class settlements is primarily driven by considerations of patient or customer safety. "This is evaluated based on the outcome of a rigorous internal review and quality investigation to assess whether there is fault and any related health risk," John explains. While secondary factors such as cost, the likelihood of additional claims, and duration are also considered, the decision is chiefly guided by the objective merits of the case. However, the company has also considered the pros and cons of entering into settlements that were basically an economic buyoff of the claimant. That has nothing to do with justice.

The future of class actions in Europe

The current state and future direction of class actions across Europe are characterised by strong growth in both class actions and the litigation funding industry. However, the benefits of this growth are likely to be reaped primarily by claimants' lawyers and funders, rather than consumers, as is further explained in the compelling Swiss Re Institute report.[1] The implications of integrating common law private litigation into the traditional enforcement regime, which in most EU countries is overseen by public authorities and adheres to a strict regulatory framework, have not been adequately evaluated. Risks highlighted by numerous trade bodies across all sectors have been summarily dismissed by policymakers. "There is a need for a more balanced approach to collective redress, along with the introduction of appropriate safeguards and regulation of TPLF to enhance transparency and prevent predatory litigation," John argues.

1 Swiss Re Institute, *US litigation funding and social inflation; the rising costs of legal liability*, December 2021.

ESG risks and strategic decisions

A topic that will likely see a steep increase in class action claims is 'environmental, social and governance' (ESG). "The company already actively assesses the risks of class actions related to these issues and they are becoming an increasingly important factor in the strategic decisions made at the boardroom level," John concludes.

Business Perspective
Head EU Legal Counsel for a major pharmaceutical company

6 August 2024, editors: Albert Knigge, Rosalie Becker, Dawit Bakker and Isabella Wijnberg

Always expect the unexpected

Our interviewee is the Head EU Legal Counsel for a major pharmaceutical company and a seasoned veteran in the field. She has a wealth of experience in product liability litigation and representative action litigation. She prefers to remain anonymous, so in this interview we call her 'Victoria'.

The class actions conundrum

"Class action risk is a critical topic," Victoria begins. But it is not just about defending and managing claims. In her view, class actions also play a role in ongoing legal risk management for the pharmaceutical industry in areas such as competition law, ESG and product liability. Victoria believes it is important that companies have a clear view on the litigation risk profile of the countries in which they operate. It is also important to monitor the countries where potential class or representative action style reform is on the horizon, such as England and Wales.

The impact of RAD on litigation risk and strategy

One of the topics that has Victoria's attention is the implementation of the Representative Action Directive (RAD). One of the key elements she has been monitoring is which countries have chosen or are choosing an opt-out system. She explains, "The system chosen by the state is likely to affect the size of the constituency of the claim organisation. From a business perspective and as an industry subject to class actions, this is a very relevant development to watch since it also influences the potential exposure and settlement possibilities. It is therefore a point of particular interest." Also, the requirements imposed on claim organisations to be recognised as a 'qualified entity' is an aspect she closely monitors. She says, "I am, however, content with the RAD advising not to award punitive damages." This exemption will set Europe apart from the US.

High-risk jurisdictions and the perfect storm

Turning to the subject of European jurisdictions, Victoria identifies Portugal, England and Wales, and the Netherlands as high-risk areas for class actions. "We have seen big industry specific cases in Germany too," she adds, "but Germany is less of an immediate concern in the area of class actions." In her view, the legal culture in Germany shows a reluctance in embracing collective forms of litigation. Additionally, considering how the German system for compensating lawyer fees is structured, the system favours bringing individual claims. According to Victoria, the question of why some jurisdictions are more popular than others therefore requires a nuanced answer: "The development of a specialised plaintiff's bar and the expected profitability of bringing a class action are clearly related. That is one of the reasons why US law firms are setting up shop in particular jurisdictions like England. Also, whether courts in a particular jurisdiction are willing to explore the boundaries of their powers by applying broad and open legal concepts – such as novel competition law theories of harm or an unwritten standard of care imposing duties on companies – can make that jurisdiction more attractive for bringing a collective action than a jurisdiction where courts assume less discretion."

Third party litigation funding: a driver behind class actions

Apart from US plaintiff firms setting up shop, the availability of third party litigation funding (TPLF) for class actions in a particular jurisdiction is also a clear indicator of an increased risk of class action litigation. She observes, "Where there is a high level of funding, we see more class actions. Those jurisdictions apparently favour forms of collective redress and impose limited or no restrictions on the funding of such actions." The fact that in many jurisdictions funding is almost entirely unregulated, paves the way for various issues. TPLF and the rules it should abide by should be carefully considered and discussed, preferably EU-wide. She believes that the current situation, where in many jurisdictions claim vehicles are not supervised and the few existing rules are not or hardly enforced, is not sustainable.

Managing future class actions

We ask Victoria about the main points for managing any future class action as a Europe-based counsel. She answers, "One significant point of concern is the influence of the US and the litigation culture it has brought to Europe."

There are, however, EU-specific topics. In this respect, Victoria highlights the importance and challenge of considering the implementation of European legislation, particularly the Product Liability Directive and the AI Liability Directive. Victoria explains that for a pharmaceutical company patient and product safety are pivotal, and a potential product liability class action therefore may have a huge impact on the business. "Potential product liability claims can question and undermine clinical trials, and often the safety and efficacy assessment carried out by regulators, especially with a new product. Ongoing monitoring of a product's safety post-approval is not only a legal obligation but also an ethical one," she adds. "This is even more stringent since the reputational risks that companies endure when faced with class actions are enormous. Class actions shape how regulators and the public can view you as a company," Victoria concludes.

To settle or litigate? That is the question

"The main consideration, in my view, is the impact on patients. Patient and product safety is of utmost importance and will always be leading," Victoria explains. "However, this does not always make it clear which alternative is preferred," she admits. "Most US class actions end in settlements, as you might know. Given the reputational risks, along with the significant time and money that litigation requires in the US, it is understandable that companies might prefer to settle matters out of court and, when possible, on an individual basis," Victoria says. However, other factors should play a role as well, such as the precedent value of a settlement, and the question whether it may prompt the attention of the regulator, plaintiffs' bar or claimants in other jurisdictions. "Therefore, the potential impact on other ongoing litigation or investigations is also a clear point of consideration."

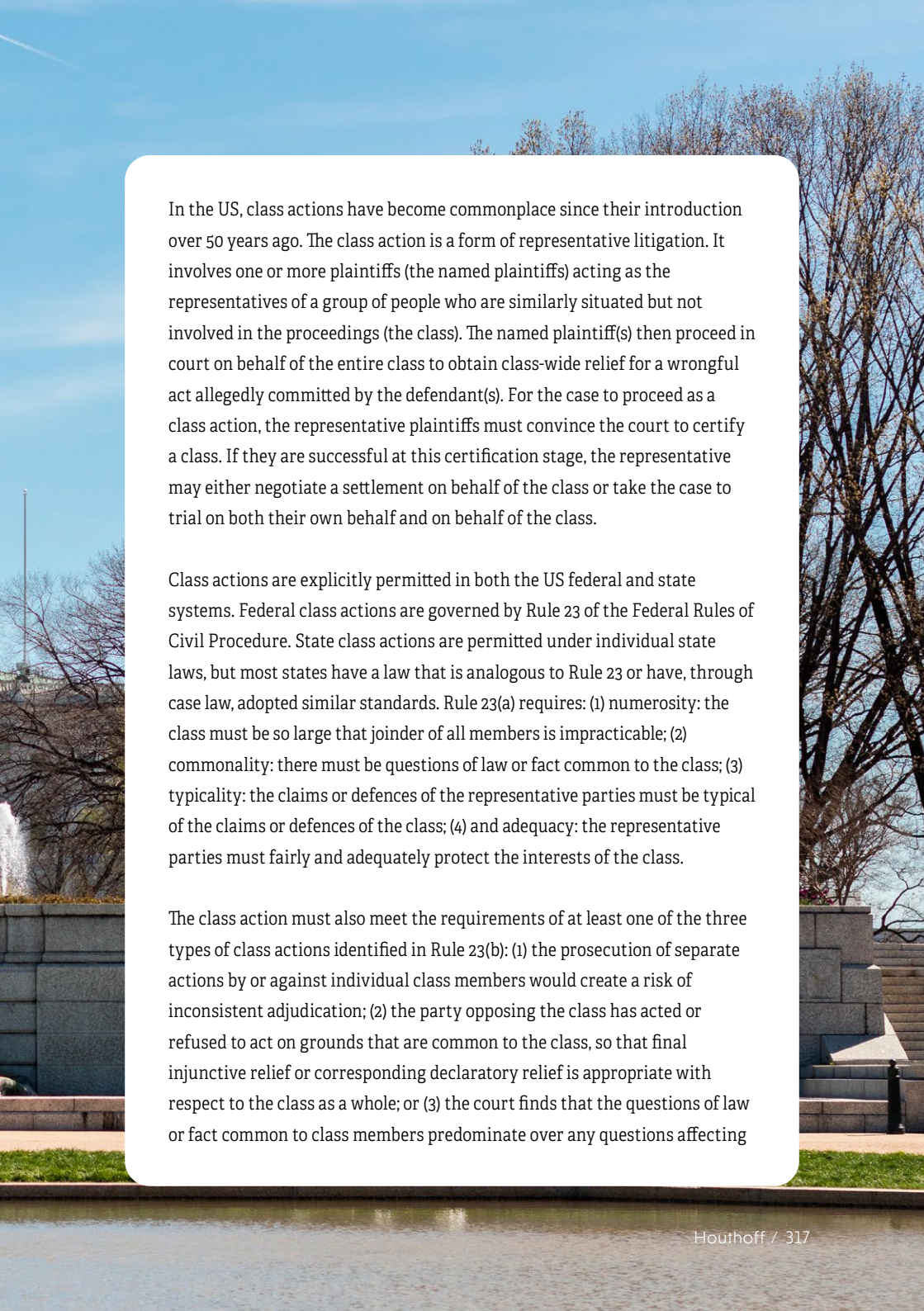
The future of class actions in Europe

Looking to the future, Victoria sees potential challenges and changes on the horizon, particularly in areas such as AI, product liability, ESG, CSRD and CSDDD and other legislation which requires disclosure by large organisations: "The complexity of environmental law and the potential for NGOs cannot be ignored. I do expect a rise in class actions in that area, although it is always difficult to predict the future."

Embracing uncertainty

As our conversation draws to a close, we ask Victoria for a final quote regarding the future of class actions. She leaves us with a piece of wisdom that encapsulates her approach to her work, and the unpredictable nature of the legal landscape in general and her job specifically: "Always expect the unexpected."

US



In the US, class actions have become commonplace since their introduction over 50 years ago. The class action is a form of representative litigation. It involves one or more plaintiffs (the named plaintiffs) acting as the representatives of a group of people who are similarly situated but not involved in the proceedings (the class). The named plaintiff(s) then proceed in court on behalf of the entire class to obtain class-wide relief for a wrongful act allegedly committed by the defendant(s). For the case to proceed as a class action, the representative plaintiffs must convince the court to certify a class. If they are successful at this certification stage, the representative may either negotiate a settlement on behalf of the class or take the case to trial on both their own behalf and on behalf of the class.

Class actions are explicitly permitted in both the US federal and state systems. Federal class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. State class actions are permitted under individual state laws, but most states have a law that is analogous to Rule 23 or have, through case law, adopted similar standards. Rule 23(a) requires: (1) numerosity: the class must be so large that joinder of all members is impracticable; (2) commonality: there must be questions of law or fact common to the class; (3) typicality: the claims or defences of the representative parties must be typical of the claims or defences of the class; (4) and adequacy: the representative parties must fairly and adequately protect the interests of the class.

The class action must also meet the requirements of at least one of the three types of class actions identified in Rule 23(b): (1) the prosecution of separate actions by or against individual class members would create a risk of inconsistent adjudication; (2) the party opposing the class has acted or refused to act on grounds that are common to the class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting

only individual members (predominance requirement), and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy (superiority/manageability requirement). Most monetary actions are brought under this last category.

Many courts also impose an ascertainability requirement, which means that class members must be identifiable by objective criteria. Ascertainability is often described as an additional 'implicit' requirement of Rule 23.

In the federal system, there are generally no limitations on the type of relief available in a class action. That is, a class member may be entitled to any relief that would be available to them in an individual action. This may include monetary damages (including punitive damages), restitution, or injunctive or declaratory relief. At the same time, in contrast, some states limit the types of relief that can be obtained in a class action. For example, New York law does not allow class actions to recover a penalty unless expressly authorised by the statute creating the penalty (New York's Civil Practice Law and Rules, Section 901(b)).

Settlements on behalf of the entire class are possible and common, and will be reviewed by a court to determine whether the collective settlement is fair, reasonable and adequate. A collective settlement on behalf of the entire class (and that binds the class) requires approval from a court to take effect, and parties are generally given the opportunity to opt out or object.

Class actions

Scope	General
Access granted to	Representative plaintiffs ('lead plaintiffs').
Opt-in or opt-out	Opt-out
Declaratory relief or damages	Both, including punitive damages; some state laws limit the type of relief.
Frequently used	Yes
Regulatory framework	Rule 23 of the Federal Rules of Civil Procedure; specific state laws.
Alternatives used in practice	Mass actions, which are single lawsuits with a large number of individually named plaintiffs, or mass arbitrations, which involve large volumes of individual arbitrations bringing similar claims.

Class settlements

Binding class members after court approval	Yes
Opt-in or opt-out	Opt-out

Third party funding

Regulated by law	Not on a federal level, but sometimes aspects of third party funding are regulated by state law.
Frequently used	Yes

Good to know

Contingency fee agreements are more frequently used by plaintiffs' lawyers. The funder – if involved – gets paid out of the contingency fee awarded. However, the court determines how much lawyers and investors get from the case, which makes the return risky. Plaintiffs' firms can also still borrow money from banks to fund cases, as an alternative to litigation funding.

Scévole de Cazotte
Business Perspective
Senior Vice President International Initiatives at the US Chamber of Commerce Institute for Legal Reform

29 July 2024, editors: Isabella Wijnberg and Dawit Bakker

Europe, prevent the Americanisation of class action litigation!

Scévole de Cazotte is Senior Vice President International Initiatives at the US Chamber of Commerce Institute for Legal Reform (ILR). His daily work revolves around the strategic development of advocacy efforts to address litigation and liability issues in Europe. With a rich background in international regulatory practice and a focus on EU matters, Scévole is at the forefront of the fight against the export of US-style litigation practices, particularly class actions.

The global expansion of US-style litigation

"Class actions – and their US exportation – are a significant aspect of daily work at ILR," Scévole begins. ILR represents a diverse range of businesses, both large and small, from all sectors of the economy. As the US-style litigation culture continues to expand globally, ILR is actively advocating for balanced legal systems. "This advocacy aims to prevent the costliness and wastefulness of the American lawsuit system from spreading to places like the European Union and the UK," he explains. Scévole's work primarily focuses on the largely underestimated growth of class action laws and mechanisms and third party litigation funding (TPLF).

The impact of the RAD

The implementation of the Representative Action Directive (RAD) has influenced the

litigation risk and strategy for ILR's company members, not only in their own jurisdiction but also across Europe. "We actively participated in the consultation phase on the RAD alongside other business associations," Scévole shares. We ask him about ILR's measures to assist European legislatures with RAD implementation. "ILR produced a guideline[1] in multiple languages with 12 recommendations to implement the RAD in such a way that the legal and investment climate stays healthy in the interest of both companies and consumers," Scévole explains. Once the RAD was adopted, ILR engaged in its implementation across all EU Member States.

The Netherlands: a hotspot for class actions

The Netherlands has emerged as one of the most challenging yet attractive jurisdictions in Europe for class actions, according to Scévole. This is largely due to its US-style opt-out Act on class actions for all fields of law, known as the WAMCA.[2] "The Netherlands has seen a surge in class actions, with more than 100 cases against both public and private entities, including multinational companies," he notes.

The role of third party litigation funding (TPLF)

TPLF has significantly impacted the class action landscape in both the Netherlands and the UK, driving an upswing in US-style litigation. "Since the UK implemented US-style opt-out class action legislation for competition cases, the Consumer Rights Act (CRA), in 2015, it has seen the number of litigation funders quadruple to over 70," Scévole reveals. The Netherlands is no different, he continues, "The number of litigation funders has doubled to almost 50, and at least 17 US claimant law firms have started operating in the Netherlands since the entry into force of the WAMCA in 2020." According to Scévole, both in the UK and in the Netherlands – and indeed across the whole of Europe, except for Slovenia – funders are largely unregulated. Scévole identifies a fundamental difficulty with TPLF: "The rudimentary problem with TPLF is that it is an opaque industry, with no or little disclosure requirements on who the funders are, where their funds are originating from, how their funding agreements are set up, and whether the interests of litigation funders are prioritised over the interests of the claimants."

1 US Chamber Institute for Legal Reform, '12 Recommendations for the Implementation of the EU Directive on Representative Actions', November 2020.
2 The Act on collective damages claims (*Wet afwikkeling massaschade in collectieve actie*).

The challenges of managing a class action

ILR member companies managing a class action encounter several challenges and opportunities. "One of the main challenges is the low class certification standards in the Netherlands and the UK, as reported by defendants," Scévole notes. "This low threshold often leads to the filing of borderline or potentially abusive class actions."

The future of class actions in Europe

The current state and future direction of class actions in jurisdictions such as the UK and the Netherlands, as well as in Europe more broadly, are areas of concern. "Recent trends and observations suggest a need for additional structural and procedural safeguards to prevent the litigation environment in Europe from becoming overly Americanised," Scévole states. However, there are encouraging signs, such as the European Parliament's Resolution on Responsible Private Funding of Litigation. Adopted by an overwhelming majority in September 2022, this resolution includes a draft Directive proposing nine regulatory safeguards. "These are the changes and improvements that are considered necessary to enhance the class action landscape," Scévole concludes.

The rising tide of ESG litigation

"Companies are becoming increasingly aware of the risks associated with environmental, social and governance (ESG) litigation," Scévole observes, "particularly in light of well-publicised cases in Europe and a series of newly enacted related EU legislation." This trend has been reported in the media, with instances such as the New York-based hedge fund Gramercy investing GPB 450 million in the British claimant law firm Pogust Goodhead to launch climate litigation in the UK and other jurisdictions worldwide.

Another example is the Children's Investment Fund Foundation investing USD 65 million in environmental NGOs like Client Earth to file ESG-related litigation. "Academia is also studying this trend," Scévole notes, citing the book *Litigating the Climate Emergency* (Cambridge University Press, 2023), which suggests a shift in climate litigation from demanding policy changes to claiming monetary damages based on quantified scientific evidence, actual or future damage caused by extreme weather

events, and arguments that listed companies' annual reports are not in line with the objectives of the Paris Agreement.

"The book even proposes allocating climate reparations of USD 5.5 trillion to the world's twenty largest oil, gas and coal producers," he adds. Law firms are preparing their clients for a new wave of ESG cases, predicting that litigation over plastic pollution could reach the proportions of asbestos, tobacco, or opioid litigation.

"Given these trends, it is reasonable to speculate that companies are reassessing their ESG litigation risks and taking all possible precautionary measures," Scévole concludes. "If a particular country becomes a magnet jurisdiction for these types of cases, it is likely that boardrooms will reassess their investment levels in those jurisdictions, potentially leading some companies to move out of certain jurisdictions or reduce their exposures."

Roger Cooper
Defence Lawyer Perspective
Partner at Cleary Gottlieb Steen & Hamilton

Lina Bensman
Defence Lawyer Perspective
Partner at Cleary Gottlieb Steen & Hamilton

16 July 2024, editors: Lucas Dröge, Julie Luitwieler and Isabella Wijnberg

Exploring the world of US class actions: the future is increasingly global and interconnected

We have the privilege of interviewing Roger Cooper and Lina Bensman, partners at Cleary Gottlieb Steen & Hamilton and prominent defence lawyers in US class actions. Roger is internationally recognised as a leader in corporate litigation and has broad experience in class actions, particularly in defending clients in disputes brought by investors. He was a lead partner in the largest US securities class action ever brought against a foreign issuer. Lina has recognised expertise in commercial disputes and class actions, focusing on complex and cross-border civil litigation. Her practice focuses on complex civil litigation and class actions, including coordination of litigation strategy across state and international borders as well as management of simultaneous high-stakes litigations, arbitrations, and criminal investigations.

Introduction

Roger and Lina begin by stating: "There has not been a single, seminal change in class action law in the US since 2019 comparable to the RAD's introduction in the European

Union. Class actions have become a standard practice in the US since they were introduced over 50 years ago."

Roger and Lina clarify that, unless expressly limited by statute or in common law, any claim that satisfies the requirements of Federal Rule of Civil Procedure 23 (the statutory basis for federal class actions) may be brought as a class action in the US. They note, "Common categories of class action lawsuits in the US include securities claims, antitrust claims, mass torts, consumer fraud, employee rights, product liability claims, civil rights claims, environmental law claims and pension disputes."

The interests represented in US class actions

When we ask Roger and Lina in whose interest class actions can be brought in the US, they answer that to represent the interest of a class, named plaintiffs must satisfy the requirements of standing common to all lawsuits in the US. They must also meet certain additional requirements specific to establishing that the named plaintiffs adequately represent the putative class.

They continue explaining these standing requirements: "Under US federal law, to bring any action, a plaintiff must show it has (i) suffered an 'injury in fact', or a concrete, particularised harm that is actual or imminent, not conjectural or hypothetical, which (ii) is traceable to an action by the defendant, and which (iii) can be redressed by a favourable decision from the court."

To bring the claim as a class action, the named plaintiff must demonstrate the numerosity and commonality of the claims within the class. They must also demonstrate that their claims are typical of the class and adequately represent the class's interests. As to the requisite type of "interest" in the suit, the named plaintiff must have suffered the same alleged injury as the rest of the proposed class. Roger and Lina add, "To seek injunctive relief, the named plaintiff must also be at risk of future harm."

Volume and variety of class actions since 2019

As mentioned in the previous edition of this survey, while class actions have been well-developed in the US since the 1960s, Roger and Lina highlight that the volume

and variety of class actions continue to evolve and varies with contemporary legal developments. For example, they note that the overall volume of filings for securities-related class actions (which tend to be regularly tracked) increased in 2023. However, certain trend-specific categories of filings, namely special purpose acquisition company (SPAC), COVID-19 and cryptocurrency-related filings saw a decrease from their record highs in 2022.[1]

They explain, "Since 2019, the US Supreme Court also clarified what constitutes a real 'injury' for federal standing in a class action brought for statutory violations." *TransUnion LLC v. Ramirez*, 594 US 413 (2021) was a class action brought by individuals whose credit reports erroneously categorised them as being on a US government list of terrorists and serious criminals. However, some of the putative class members' inaccurate credit reports were not provided to third party businesses. The Supreme Court thus held that those individuals did not suffer a concrete harm sufficient to establish standing to sue. The Supreme Court described as "persuasive" the argument that "in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm – at least unless the exposure to the risk of future harm itself causes a separate concrete harm".[2]

Roger and Lina emphasise that this case provides defendants with additional bases for defending against previously viable 'no injury' class actions, and particularly on consumer class actions. Many of these are based on statutes like the Fair Credit Reporting Act and the Telephone Communications Protection Act that impose penalties for statutory violations.

They further observe, "We have also seen a trend towards 'mass' arbitrations. In the wake of a series of US Supreme Court decisions finding that arbitration clauses must be enforced, notwithstanding any efforts to bring a class action lawsuit."[3] They explain that plaintiffs' lawyers have attempted to overcome limitations on class actions by filing

1 Cornerstone, Securities Class Action Filings: 2023 Year in Review (Jan. 10, 2024), https://www.cornerstone.com/wp-content/uploads/2024/01/Securities-Class-Action-Filings-2023-Year-in-Review.pdf.

2 Id. at 415, 431.

3 See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 US 333, 339-344 (2011); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1630-32 (2018).

"mass" arbitrations, where a large group of individuals collectively bring similar or identical claims against a corporation through arbitration.

Political influence on class actions

Class action reform remains a highly political issue in the US. Roger and Lina explain "Republicans generally propose reforms favouring defendants, and Democrats favour plaintiffs. While these efforts have not been successful thus far, Democrats have introduced bills in the past few years to limit the applicability of arbitration agreements in class action contexts."

These include the Democrats' attempts to ban pre-dispute arbitration agreements in employment, consumer, antitrust and civil rights disputes. The Democrats have also attempted to eliminate class and collective action waivers, thereby reversing the Supreme Court's 2018 decision that upheld such waivers.

The increasing scope of class actions

Roger and Lina emphasise that another relevant recent trend in US class actions is the increasing scope of class actions: "As mentioned before, the US Supreme Court recently clarified that at least at the damages phase, members of a class must establish that they have suffered an 'injury in fact' to collect damages." They continue, "Nevertheless, at the certification stage, where it's often questioned whether the proposed class definition may include uninjured members, there is a general trend in lower courts to permit a 'mixed' class of injured and non-injured class members to be certified, independent of damages." Some courts have suggested that, provided the number of uninjured class members is de minimis, the class as a whole can still be certified.[4]

They explain that plaintiffs' counsel may also try to characterise new-found or unconventional forms of harm as sufficient grounds for class action claims. "For

4 See *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624-25 (D.C. Cir. 2019), denying class certification where 12.7% of putative class members were uninjured according to plaintiffs' damages model, which was over the 5% to 6% threshold where individualised proof of injury and causation would not defeat predominance. Other courts are more lenient. They allow class certification even when the number of uninjured plaintiffs exceeds the de minimis level, as long as the district court still finds that common issues predominate. See *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022).

example, in the data breach and data privacy setting, more sensitive information is accessed improperly as attacks on digital networks increase.

Courts are becoming increasingly amenable to recognising these events as legitimate forms of harm under Article III," they add. It is clear that if sensitive data – especially economic data – is stolen, and a concrete economic impact can be shown, that satisfies orthodox standing principles. But this is less clear in cases where less sensitive data is stolen, or sensitive data is stolen but does not have any concrete economic impact. The Third Circuit issued a test based on three "non-exhaustive factors" to determine when there is a sufficient risk of future harm from present data breaches to satisfy Article III's injury-in-fact requirement. These "non-exhaustive factors" are (i) intentional access to the data by the threat actor; (ii) misuse of the data; and (iii) access to the types of data that could be used for identify theft or other fraud.[5]

Available alternatives

Because of the increased scrutiny and scepticism levelled by some at class actions, multidistrict litigations (MDL) play an important role as an alternative to class certification in the US. This is particularly true in the mass torts and product liability context, where the specific harm to each plaintiff or class member can vary and require individualised proof unsuitable for class treatment. Roger and Lina mention that MDLs consolidate or coordinate multiple lawsuits filed in federal court that share a factual basis. Under 28 U.S. Code § 1407, a single court that will handle pretrial proceedings can consolidate such cases before the actions are remanded to the court where each action was originally brought for trial purposes.

They add, "In practice, MDL judges often try to settle or dismiss their cases as part of their pretrial responsibilities instead of sending the case back for trial." Roger and Lina also observe that MDLs are estimated to have comprised roughly half of the federal civil actions pending in the US in 2022. In the last decade, antitrust, securities, intellectual property, and sales practices MDLs have decreased. However, products liability cases have grown in total and as a percentage of all MDLs.

5 See *Clemens v. ExecuPharm Inc.*, 48 F.4th 146, 153–54 (3d Cir. 2022).

Roger and Lina suggest an alternative approach: "In some states, individual plaintiffs with similar claims can aggregate their claims without forming a class, through a 'claim aggregation' process. These individual plaintiffs may seek to consolidate their claims to meet the threshold for the amount in controversy. This allows them to bring their claims in federal court and obtain greater bargaining power for settlement purposes."

Rising frivolous class actions

Roger and Lina note, "There continues to be – according to some – an uptick in frivolous suits. For example, *The New York Times* has reported on such an increase in New York City. This increase follows changes in state law that potentially encourage more litigation by increasing statutory damages in consumer protection cases."

According to the *Times* article, consumer class actions tripled in New York state between 2017 and 2020.[6] This trend occurs contemporaneously with plaintiff-side litigation firms bringing class actions in new areas of law. For example, a greater number of false advertising cases have been brought against companies for misleading claims regarding their sustainability targets and achievements. Similarly, complaints challenging the 'natural' claim of beauty products or other consumer items have begun to appear in courts.

Roger and Lina add, "The increasing availability of litigation funding also has the potential to drive an increase in class actions seeking minimal recovery per plaintiff, as funders look to overall aggregate settlement payouts."

Overall, they find that class actions are solidly established in the US legal system. US lawmakers and the judiciary generally favour class actions as an efficient and fair mechanism for handling complex cases. Roger and Lina observe, "They are viewed as promoting judicial efficiency. This is because they consolidate numerous individual suits that would otherwise consider the same issues based on the same evidence and involve the same or similar parties."

6 Britta Lokting, Lawyer Up: Class Action Suits Are Thriving in New York, NY Times (Apr. 27, 2023), Available at: New York State Bill Could Give Class-Action Lawsuits a Boost - The New York Times (nytimes.com).

They continue, "On the other hand, class action suits have been criticised for placing undue pressure on defendants to settle weak claims. This is due to the substantial expense associated with complying with broad US discovery. Additionally, defendants may face extremely high potential liability from aggregated class action damages claims."

For some time, lawmakers have also raised concerns about a tendency towards lawyer-driven litigation in class action cases. This concern is due to the high legal fees often sought by the plaintiff class's counsel. Roger and Lina conclude, "There have been some efforts in recent years, particularly from the judiciary, to rein in the availability of class action suits, mostly at the class certification stage. But in practice, these efforts have had only a limited impact."

The US versus Europe

Another interesting trend Roger and Lina mention is plaintiffs' counsel in the UK and European Union adopting US-style class action strategies in pursuing collective actions to aggregate claims. They elaborate, "You see, for example, many US plaintiff law firms opening offices in the UK and Europe."

Conversely, they think that new regulations and developments in the class action framework in Europe may influence future reforms in the US. For example, RAD addresses third party funding for class action, an increasingly relevant aspect of US litigation for which the regulatory framework is still evolving.

The role of ESG-related class actions

According to Roger and Lina, ESG-related claims, particularly consumer claims for alleged 'greenwashing', are already a meaningful part of the US legal landscape and often filed as class actions. For example, in *Garland v. The Children's Place, Inc.*, two concerned parents brought a suit on behalf of a proposed class against a clothing manufacturer who was allegedly manufacturing school uniforms that contained hazardous chemicals and misleading consumers regarding the presence of PFAS.[7] While the court found that the nationwide class had standing, it dismissed the claims because

7 See No. 23 C 4899, 2024 WL 1376353, at *1 (N.D. Ill. Apr. 1, 2024).

they were not viable under the state statutes that the plaintiffs claimed had been violated.

Another recent example is *Earth Island Inst. v. BlueTriton Brands*, in which claims were filed against a bottled water company for allegedly violating the D.C. Consumer Protection Procedures Act by falsely marketing itself as sustainable while simultaneously continuing to engage in environmentally harmful practices.[8] The D.C. Superior Court denied BluTriton Brand's motion to dismiss, and the case ultimately settled in 2024. "Still," Roger and Lina conclude, "the expectation has been that ESG class actions would substantially increase, but we have not seen a substantial boom in ESG cases thus far."

Third party litigation funding

Third party litigation funding (TPLF) has been growing rapidly in the US, although contingency fee agreements with plaintiff lawyers have traditionally been more common. Historically, TPLF was widely believed to be prohibited by champerty laws. In recent years, a number of states have sought to abolish or narrow those prohibitions, but this is not yet settled. There remains significant ambiguity as to what forms of TPLF may be permitted in many states. At the federal level, members of Congress have introduced legislation to require the disclosure of third party litigation funders in civil suits, although they have not received much traction thus far. Roger and Lina emphasise, "The law as to TPLF remains unsettled and is an inconsistent patchwork across jurisdictions. Therefore, practitioners should understand the approach taken in the states whose laws may apply to a relevant TPLF arrangement."

Funder's success fee

While federal law does not regulate TPLF, many states have allowed for litigation funding. These states have also instituted limits on success fees along with the interest rates that funders can charge consumers. Roger and Lina explain that in most cases, the funders receive no return if plaintiffs lose their case. If the plaintiff prevails, the plaintiff reimburses the funder and provides the additional return on investment as outlined in the funding agreement. Defendants are not required to pay such fees when they lose.

8 See No. 2021 CA 003027 B (D.C. Super. Ct. filed Aug. 27, 2021).

The 'loser pays' principle

The default 'American rule' is that each side pays its own legal fees, although case-specific considerations or applicable state or federal laws could allow for fee-shifting.

The future of class actions: a global perspective

Roger and Lina conclude with what they believe lies ahead: "The future of class actions is becoming increasingly global and interconnected, with matters not only proceeding in parallel in multiple countries and jurisdictions, but also with the potential for the parties to litigate class definitions, and negotiate and defend settlements that transcend borders. The US experience with class actions, and the law and practice that has developed around such claims, will undoubtedly be influential."

David R. Scott
Claimant Lawyer Perspective
Managing Partner at Scott+Scott

17 September 2024, editors: Lucas Dröge, Julie Luitwieler and Isabella Wijnberg

The US as a class action haven for plaintiffs

We have the opportunity of interviewing David R. Scott. David is the Managing Partner of Scott+Scott, an international law firm with offices in major cities like New York, Amsterdam, and London. He specialises in high-stakes, complex litigation, representing multinational corporations, hedge funds, and institutional investors in areas such as antitrust, commercial, and securities actions. David has been instrumental in designing corporate policies for global recoupment of losses and transatlantic private enforcement programs.

US class actions: developments since 2019

David begins by stating that "the number of filed class actions and the claimed damages have continued to grow since 2019. This trend has been particularly fuelled by the rapid growth of privacy and other technology-related class actions, combined with strong filings of traditional class actions, such as those related to securities and employment." David further explains that the turnover of the presidential administration in early 2021 also resulted in a resurgence of federal government enforcement activity, which bolstered the general trend of increased class action filings. "Whether this regulatory trend will continue will likely depend on the outcome of the US 2024 presidential elections," David adds.

Top five class actions in the US

According to a recent survey by a prominent class action defence firm, the top five types

of class actions filed in 2023 in the US were:

1. labour and employment;
2. consumer fraud;
3. securities;
4. product liability; and
5. statutory violations.

David continues, "Class actions may be brought in the interests of any ascertainable group, although there are strict requirements for commonality and predominance of common legal questions across the class, as well as standing requirements that apply to the representative plaintiff."

A further increase in ESG-related class actions

According to David, there is a general expectation that class actions will increase in the future. This is due to the rise in certain types of claims (particularly those related to data privacy and the increased usage of generative AI and other technologies). Additionally, plaintiffs' law firms are now more capable of obtaining and leveraging larger and more complex data sets at lower costs.

"ESG-related class actions have increased in recent years and will likely further increase in the future. There have been class actions filed in the US challenging companies' contributions to climate change, claims of positive or neutral environmental impact, and statements about the origin or environmental friendliness of products," David explains.

Of note, David mentions that class action lawsuits concerning microplastics, such as BPA, and "forever chemicals", such as PFAS, have increased over the last several years. He adds that there have been class action lawsuits challenging company diversity and other equity policies, although whether these lawsuits continue may depend on the U.S. political climate.

"There is already legislative and judicial pushback against certain emerging types of class actions." David continues, "For example, Florida, Tennessee, and West Virginia have recently passed legislation making it more difficult for consumers to bring class actions

arising from cyberattacks and cybersecurity breaches." He elaborates that similarly, the US Supreme Court's 2023 decision regarding race-based preferences in college admissions in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023), will likely affect corporate diversity, equity and inclusion (DE&I) programmes, as well as class actions regarding those issues and make them more difficult to bring.

Different approaches to collective redress

When asked about alternative ways for collective redress in the US, David explains that there are mechanisms – commonly seen in mass tort cases – that allow for the coordination of large numbers of individual claims against common defendants arising from a common product or occurrence for pre-trial proceedings without use of the formal class action mechanism.

"These mass actions often proceed analogously to class actions, and plaintiffs are often differentiated into various groups based on the characteristics of their claims. Assignment of most types of claims is permissible under federal law and was endorsed by the US Supreme Court in its 2008 decision in *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269," David adds. He elaborates that despite this decision, the use of claims assignment in the class action context is not widespread. Moreover, there is doubt in some courts over whether certain types of claims – most notably, federal securities claims – can be assigned, and certain state laws prohibit or restrict the assignment of certain types of claims.

Changes on the horizon for American class actions

According to David, the increased complexity and size of class actions going forward will likely continue to drive current settlement dynamics.

Third party litigation funding: a common practice on the plaintiffs' side

David clarifies that third party litigation funding (TPLF) is permitted under US federal law. He further explains that there are increasing attempts to require disclosure of TPLF arrangements, either as part of the initial discovery disclosures to the opposing party or to the court in camera, and certain federal and state courts (or individual

judges, in certain cases) have adopted disclosure requirements. "In addition, TPLF arrangements, depending on how they are structured, may arguably run afoul of state attorney rules of professional conduct or state laws prohibiting champerty," David adds.

According to David, lobbying and other non-governmental organisations, including the US Chamber of Commerce, have raised concerns about the increase in TPLF. It is likely that these efforts will result in more courts and judges adopting disclosure rules, especially concerning TPLF arrangements where the funding source is located outside the US.

The success fee is paid based on the TPLF arrangement without court involvement.

The 'loser pays' rule

Under US federal law, there is no 'loser pays' rule, meaning each side is generally responsible for its own attorneys' fees and costs. "Nearly all states also do not have a 'loser pays' rule. The only exception is Alaska, which has a 'loser pays' rule for most categories of civil actions," David clarifies.

The most significant class action of the last decade

When asked about the most significant class action in the last ten year, David answers, "The emergence of privacy class actions, including under state laws (most notably, Illinois) prohibiting the collection of biometric information without consent." As an example, David indicates that in 2023, the Illinois Supreme Court held that the Illinois Biometric Information Privacy Act is violated the first time a company collects biometric information without consent, as well as each subsequent time biometric data is collected.[1] The limitations period for claims under the statute is five years.

Concluding the interview, David tells us, "These decisions have led to a marked increase in filings under the Illinois statute, as well as under analogous statutes in other states. In addition to biometric information laws, Illinois and other states also have similar laws with respect to the unauthorised use and disclosure of genetic information, which have led to increased class action filings that will likely grow in the coming years."

1 https://www.stopspying.org/bipa-litigation-tracker

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Albert specialises in handling complex international disputes. He has considerable experience in advising financial institutions and companies in different sectors confronted with cross-border mass claims. Albert helps such clients manage the risks that these claims entail and find strategic solutions to minimise their impact on the business, taking into account the constant regulatory changes and developments concerning collective actions and mass claims. As head of the Competition Litigation Team, he is also involved in almost all of the seminal cartel damages cases currently before the Dutch courts. To that end, he works closely with the lawyers in our EU Competition practice group.

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Huib specialises in civil liability matters, mainly in the context of health and safety law. He litigates, advises, and conducts confidential internal investigations for clients in relation to compliance with health and safety regulations. Huib is an experienced litigator and acts as a defence counsel in complex, media-sensitive cases, particularly relating to health and safety claims. His work involves class actions, as well as product liability and compliance in the area of employer liability. Huib advises industry organisations and companies faced with the consequences of a large-scale accident or disaster.

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Rick specialises in competition litigation (private enforcement) with a specific focus on follow-on cartel damages claims. He also advises on and litigates contractual and other competition law disputes in civil proceedings, including disputes on access to distribution networks and the performance and termination of contracts.

In what are often complex cartel damages claims, Rick helps clients determine the right strategy. This frequently involves a combination of cross-border claims. He uses his legal and practical skills and expertise to create an overview for the client by fulfilling a coordinating role at the required central or pan-European level.

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Paul specialises in corporate, commercial and private international law. His focus lies on complex cross-border disputes, including competition law follow-on litigation, international mass claims, and proceedings concerning shareholder liability. His challenges lie in determining an international strategy in matters where several possible courts may have jurisdiction and foreign parallel proceedings are sometimes already pending. In this context, he advises on motions contesting jurisdiction, cross-border discovery, attachment, and the recognition and enforcement of foreign judgments. He also focuses on the question of which law applies to bundles of claims or contracts, particularly where strategic possibilities exist on the boundaries of procedural law and substantive law, and on the boundaries of company law and civil law.

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Lucas specialises in liability law (including collective actions) and focuses in particular on product liability and product safety.

He frequently advises on and litigates complex and media-sensitive matters related to national and international insurance and liability law, in which context he represents companies, their directors and insurers. In 2015, Lucas won the Rotterdam Young Bar Association moot court competition.

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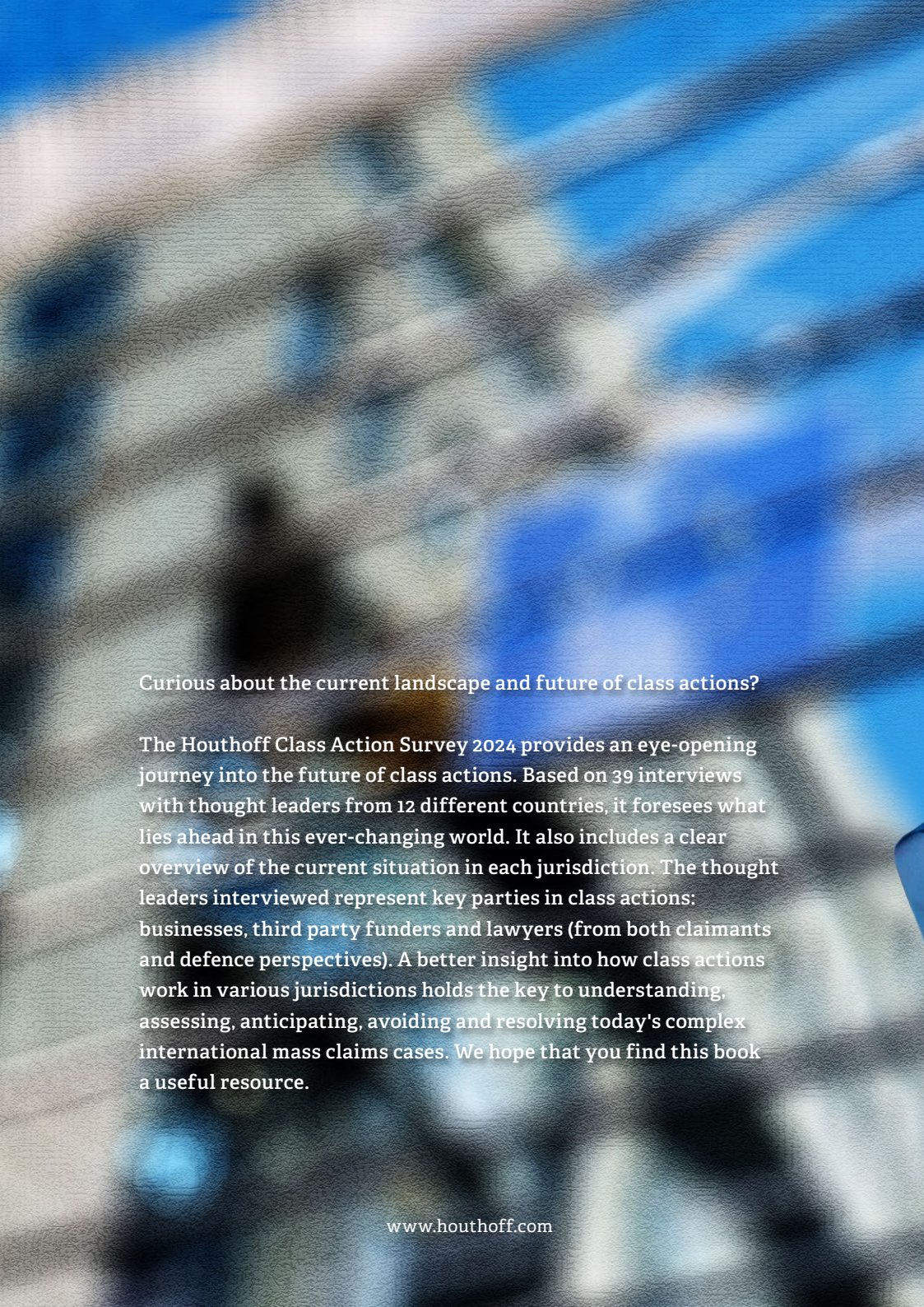
Isabella specialises in dispute resolution with a focus on corporate litigation, class actions and complex disputes relating to commercial contract law. Isabella acts as defence counsel for corporate, semi-public and financial institutions with a particular focus on class action litigation, particularly regarding the admissibility of claim vehicles. She has a broad experience in translating in-depth factual and fraud research into legal defence arguments resulting in the inadmissibility of claim vehicles. Isabella is also a business mediator. She specialises in mediations to settle collective damage. Isabella is part of a multidisciplinary team with experts in corporate governance and regulatory and corporate litigation, carrying out governance stress tests to improve and reinforce governance practices.



Curious about the current landscape and future of class actions?

The Houthoff Class Action Survey 2024 provides an eye-opening journey into the future of class actions. Based on 39 interviews with thought leaders from 12 different countries, it foresees what lies ahead in this ever-changing world. It also includes a clear overview of the current situation in each jurisdiction. The thought leaders interviewed represent key parties in class actions: businesses, third party funders and lawyers (from both claimants and defence perspectives). A better insight into how class actions work in various jurisdictions holds the key to understanding, assessing, anticipating, avoiding and resolving today's complex international mass claims cases. We hope that you find this book a useful resource.