

EJF Monitoring Report 2021

Annex – 13 Country profiles

Country profile: Austria

Legal developments & rulings in 2020

Source:

CERHA HEMPEL

Legal developments

- So far it had proved politically to be impossible to reach an agreement on a domestic class action regime.
- **The current mechanism is the assignment model (as the “Austrian style of class actions”)**
- Not expected that future collective redress rules will replace alternative existing methods:
 - Plaintiffs still may prefer filing separate court actions, conducting proceedings in parallel to test their case before various judges
 - ADR/Ombuds solutions generally perceived to be different (no judiciary involved)
 - If advantages are limited, plaintiffs may stick to assignment model



Legislation: changes expected



Mechanisms: no general change envisaged

Important class action court cases

- Association of Consumer Information (Konsumenteninformation) vs. Volkswagen:
ECJ handed down a preliminary ruling on 9th July 2020 and confirmed that the place of the occurrence of damage is Austria even if a car manufacturer in another member state has equipped cars with SW manipulating data (exhaust gas emissions)
- Austrian Supreme Court (12.8.2020) ruled in accordance with ECJ that car purchaser may sue car manufacturers in member state where car was bought
- COVID19: Austrian consumer protection association (Verbraucher-schutzverein) has filed a law suit on behalf of 1.000 claimants in the context of virus spreads in Ischgl earlier in 2020. Public Authorities are accused to not have taken promptly protection measures although spreading had been known.

Important out-of-court cases

Disputes solved out of court are generally not public.

However in certain commercial areas ADR mechanisms are in place: e.g. Austrian banking conciliation board. The institution cannot issue any binding decision (only assisting amicable resolutions)

Takeaways:

- **COVID19:** Also entrepreneurs have been investigating means to seek redress for damage suffered following the lockdown imposed in March 2020. Here collective redress not necessarily limited to consumer claims.
- TPLF well established due to (a) court fees are rather high and strong disincentive to take legal actions. Due to applicable bar rules (b) attorneys are restricted to enter into fee arrangements tying the amount of legal fees to the outcome of the case.
- **Conciliation boards face criticism** because:
 - disputes often are merely settled commercially and no case law serves as guideline for future similar cases can evolve
 - such boards are generally financed by defendant companies and this is putting their independence in question.

Country profile: Denmark

Legal developments & rulings in 2020

Source:

Kennedys



Legal developments

- **More and more collective action suits are brought before court:**
- However this does not necessarily mean that the legislation will be changed.
- Danish Administration of Justice Act specifies that courts have to agree that collective actions are the most suitable way to address claims and that claims contained must be uniform
- **“Suitability” potentially weak criteria for admission, although several proposed collective actions have been dismissed by courts.**



Legislation: no change expected



Mechanisms: no change envisaged

Important class action court cases

- An organization called “Class action.now” has brought proceedings against the Danish Court Administration on behalf of a number of homeowners (problem of digitalization of the Danish Land Register in 2009 caused long processing times). High Court and Supreme Court found no liability.
- Compromise is found. The case has been the only collective action case heard by the higher courts in 2020.

Important out-of-court cases

After seven years a group of 40 investors have given up their collective action suit against two members of the windmill producer Vestas’ management.

Takeaways:

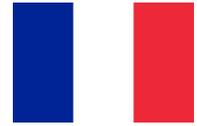
- **If collective redress becomes more utilized, there is a danger that courts start to interpret “suitability” requirement more loosely. Therefore stronger admission criteria supportive against spreading. Proposal in country report to have funders provide security for defendant’s cost.**
- No collective ADR mechanism as such available, but **system works well with representation in court by ombudsman** in case of need. I.e. **also no assignment models.**
- **Electronic platform used by courts to communicate with lawyers assigned to the case.**
- A great number of ADR mechanisms available seeking settlement before litigation in court. In case of no settlement, the consumer ombudsman may take question to ordinary courts on behalf of (a group of similar claims of) consumers while ADR procedures are stayed.

Country profile: France

Legal developments & rulings in 2020

Source:

Kennedys



Legal developments

- **A report on class actions submitted by an official working group to French National Assembly in June 2020**
- This report recommends changes, among others:
 - introducing up-front injunctive relief
 - all losses be subject to damages, also immaterial losses
 - call for punitive damages to “confiscate” profits (!)
 - a register listing all pending procedures
 - special courts be given jurisdiction over class actions
- **Working Group recommended that criteria to be met by associations bringing collective actions to be lightened to encourage a greater number of actions.**



Legislation: change expected



Mechanisms: no change envisaged

Important class action court cases

It seems that there are no current court judgements that could influence the development of collective actions.

Important out-of-court cases (2018 - 2019)

- CNIL* received complaints, against Google, by two associations, NOYB** and LQDN***, based on breaches of the GDPR. Google is criticized for not complying with transparency and information obligations and for not having a valid basis for processing personal user data. Google fine (January 2019): 50m Euros.
- Two series of breaches in above case:
 - Failure to comply with transparency and information obligations
 - Failure to provide a legal basis for processing of data for personalized advertising

CNIL* Commission Nationale de l'Informatique et des Libertés
NOYB** None of Your Business LQDN*** La Quadrature du Net

Takeaways:

- In the near future: a common framework for all class actions in civil matters to be set out in the French Code of Civil Procedure regardless of legal basis for the action; choice between minimum transposition and global reform.
- Funds for beneficiaries to be paid in full into trust account at national public bank CDC
- Working group mandated by Law Committee of French National Assembly, **therefore good chance that these recommendations will feed into national law in the future. Advocacy needed.**
- **Case publication requires QE with > 10,000 members**
- No case law on collective actions
- However, **foreign collective judgement should be enforced in France** providing that this judgement respects international public order. **Main issue with this enforcement would be the opt-out system.**

Country profile: Germany

Legal developments & rulings in 2020

Source:



Law . Tax

& Dr. Herbert
Wooen



Legal developments

- Currently, German Law does not provide for a class action as such but offers, to a limited extent, special legal mechanisms that either concern specific fields of law or offer representative legal remedies where consumer rights have been violated.
- Main example is the Model Declaratory Action implemented in 2018 due to the Diesel scandal as existing legal mechanisms were found to be insufficient for mass claims.
- The admissibility of an action under an assignment model, primarily used by legal-tech business models, is still under debate. Specific laws for these models do not exist.



Legislation: change expected



Mechanisms: no change envisaged

Important class action court cases

Two court rulings will remain of high interest for the future development of collective actions in Germany and Europe: The Higher Court of Brunswick did not push to decide the Model Declaratory Action but nudged the parties into a settlement which then was unilaterally rejected by VW by setting up their own settlement vehicle in exchange for which the claimant, vzbv, withdrew its action on 30 April 2020 and thus deprived approx. 200K registrants. The Federal Supreme Court in civil matters ruled on 25 May 2020 that VW is liable to buyers of manipulated cars because the company knowingly and intentionally committed fraud. The consequences for future collective actions could be that wisely crafted rules about the burden of proof and the evaluation of proofs suffice

Important out-of-court cases

As agreed in the framework settlement agreement, the vzbv has now withdrawn its Model Declaratory Action against VW. The proceedings have thus been concluded.

Takeaways:

- The Model Declaratory Action introduced in late 2018 showed several deficiencies.
- **Class actions in the EU sense would allow the court to also determine the amount of damages to be awarded. The decision would be made as an overall lump sum and not on an individual basis. This would be contrary to general principles of German damages law.**
- Deficiencies of Model Declaratory Action law: The following out of court settlement between vzbv (German consumer protection association) and VW led to a withdrawal of the action leaving to no court decision for consumers in general.
- The vzbv (German consumer protection association) is financed through public funds of the German government.
- Resources are nevertheless limited in terms of manpower and money available for supporting numerous large mass action cases.

Country profile: Greece

Legal developments & rulings in 2020

Source:



Legal update & developments

- **Class actions are not provided for under Greek law.**
- **A Greek Class Action is a collective /representative action** wherein one or more QEs bring a lawsuit against a legal entity or a natural person whose actions /omissions are allegedly in breach of a law affecting the general consumers' interests or interests of specific (at least 30) consumers in a similar way.
- This mechanism applies **only for consumer claims** and it is pursued **only by QEs** being registered consumers' associations (or chambers, which however may only claim moral harm).
- The **primary competent authority** is the Directorate of Policy and Consumer Information belonging to the General Directorate for Consumer Protection of the Ministry of Development & Investments.
- An **increase of use of collective redress** can be reasonably expected with the transposition of the EU Directive on Representative Actions.

Important collective action court case

Consumer housing **loans in CHF** with a floating rate and dramatic change to the CHF/EUR rate resulting to substantial increase of the borrowers' debt.

Multiple collective claims litigation started in 2015 (apart from individual claims filed) against all systemic banks, it passed through all court levels and it still continues. Although a supreme court decision (4/2019 - plenary session) finally resolved the matter in favour to the banks, a recent Athens multi-member first instance court decision (1599/2020) with an opposite view referred the matter to the CJEU.

Common categories of collective claims:

- abusive general terms and conditions (GTCs), mostly regarding banking & insurance contracts;
- misleading advertising; and
- other law infringements affecting consumers' interests according to the Consumers' Law (law 2251/1994, as in force).

Important ADR proceedings

The two main **ombudsmen**, namely the Hellenic Consumer Ombudsman and the Hellenic Ombudsman for Banking and Investment Services (HOBIS) handle individual disputes as a rule.

Mediation is increasing after it became mandatory for specific type of cases.

Takeaways:

- Collective actions may be primarily filed for **a) the omission** of an alleged breach of law, **b) the request of a special type of moral harm** (adjudicated per the overall circumstances of the breach), which may be awarded only once for the same breach and/or **c) the issue of a declaratory court decision** on the breach of law.
- A class action may seek an **injunctive relief** under the generally applicable law.
- General **funding of QEs** is regulated strictly regarding its source and types. **TPLF** itself is not regulated neither is it common /popular.
- The judgment accepting a collective action produces a unique **erga omnes** (against all) effect under Greek law which may be invoked by any third party (not a litigant) being a consumer suffered damages.
- The **rights of individual consumers** are not affected by the dismissal of a collective action.
- Once a **declaratory judgment** on a collective action becomes irrevocable, **any third party** being a consumer damaged may enforce his/her individual claim against the defendant by simplified proceedings (a court order). Also, the competent Minister may issue a decision enforcing what has been irrevocably upheld by the courts.

Country profile: Poland

Legal developments & rulings in 2020

Source:

Magdalena
Tulibacka



Legal developments

- ‘Collective Actions Act’ in force since 19 July 2010.
- Amended by the Act of 7 April 2017, to facilitate the recovery of claims.
- Second, minor amendment to the Collective Actions Act was introduced by the Act of 4 July 2019 amending the Code of Civil Procedure (CCP).
- No other amendment has been tabled so far.
- The use of the Act has been quite steady and significant – as of early 2020, over 260 cases were brought.



Legislation: no change expected



Mechanisms: change envisaged

Important class action court cases

September 2020, the final judgement of the Court of Appeal of Krakow affirmed liability of the State Treasury and of the regional authorities for mismanagement of the flood prevention system that led to flooding and significant financial losses of the class members (26 class members in total).

The case was brought a few months into the operation of the Collective Actions Act (in September 2010). The judgement on liability can now be used as a basis for the class members claiming compensation on an individual basis.

Important out-of-court cases

The Head of the Office for Protection of Competition and Consumers (OPCC) investigated cases of infringements & imposed injunctions, fines & ‘public compensation’. 1st. decision incl. public compensation adopted in 2015 (TMobile). No significant new decisions in 2020.

Takeaways:

- Poland established an administrative procedure initiated and conducted by the Head of OPCC. He can initiate injunctions, financial penalties, and any other mechanisms “removing the effects of the infringement”.
- Few other EU MS, incl. Malta, Romania & Hungary, selected an comparable administrative procedure with some judicial elements.
- There are concerns about the existing procedure before the Head of OPCC.
- Currently no other body can initiate the procedure or force the Head of OPCC to initiate it. Individuals or consumer associations can inform the Head of OPCC, but he has no duty to initiate proceedings.
- There is no collective ADR procedure.
- Based on concerns of existing OPCC procedure, no other ADR mechanisms, it remains unclear on how other QEs will be integrated in initiating proceedings.

Country profile: Netherlands

Legal developments & rulings in 2020

Source:

HOUTHOFF



Legal developments

- Since 1st January 2020 a new bill entered into force (**WAMCA***), allowing representative entities to seek damages in collective actions. Introduction of:
 - Stricter requirements for the standing of a claim vehicle
 - Procedural changes to enhance proceedings' efficiency and effectiveness
 - The regime applies to actions that took place since November 2016
- Assignment model rather popular: Follow-on proceedings usually based on it or conducted on behalf of claimants with a power of attorney from them.



Legislation: no changes expected



Mechanisms: no general change envisaged

WAMCA* Wet afwikkeling massaschade in collectieve actie – previously only for settlements: WCAM Wet collectieve afwikkeling van massaschades

Important class action court cases

- Stichting UVDTAB / Trafigura Beheer B.V.: A suit lodged by 120,000 people in the Ivory Coast demanding compensation (EUR 280m) for waste dumping.
- Trafigura argued that the claim vehicle had no proper evidence of powers of representation. This led to a demand for declaratory judgement that Trafigura is liable and needs to clean dump sites.
- The Dutch Supreme Court overruled the decision of the court of appeals with a much less formal approach. Trafigura's position should have been further investigated if prejudicial.
- Message of Dutch Supreme Court: not to use simply formal judgement, but all relevant circumstances to be considered.

Important out-of-court cases

Several successful settlement agreements declared since WAMCA entered into force. Most recent case AGEAS (Fortis) Settlement offered compensation for investors for a total amount of EUR 1.3 billion.

Takeaways:

- The new possibility of claiming damages under **WAMCA**, the representative collective action may become an alternative model for proceedings currently based on assignment model.
- **ADR/Ombudsman solutions frequently used for consumers in specific areas**; e.g. Dutch Institute for Financial Disputes offering a form of mediation by its Arbitration Commission for consumers, SMEs and self-employed.
- Out-of-court settlements covered often financial losses like mismanagement, violations of duty of care, as result of insolvency or insider trading as well as equity lease agreements to consumers, but also a pharmaceutical product liability case

Country profile: Belgium

Legal developments & rulings in 2020

Source:



Legal developments

- The actions for collective redress (Action en réparation collective/Rechtsvordering to collectief herstel) is organized by the Belgian law of 28 March 2014 **implementing the Commission Recommendation 2013/396/EU of 11 June 2013**.
- Minor amendment to the Collective Actions Act introduced by the Act of 4 July 2019 amending the Code of Civil Procedure..
- The **Belgian Law has been amended from time to time since its enactment in 2014 and for the last time in 2018**.
- **Except for changes necessary** to ensure adequate implementation (Directive on Representative Actions), **no amendments of the Belgian Law are expected in the near future**.
- The **exclusive jurisdiction granted** to the Brussels Enterprise Court and Court of Appeal **allows the centralization of cases and ensures a consistent case law**.

Important class action court cases

Since the entry into force of the action for collective redress under Belgian law on 1 September 2014, only nine actions have been initiated. This very limited number of cases reflects the legislature's intent that such actions remain exceptional.

Out of the nine cases eight were initiated by Test-Achats/Test-Aan-koop, the main consumers' protection organization in Belgium. E.g.

- **Test-Achat Against three Facebook entities** within the context of the Cambridge Analytica data scandal (still pending)
- **Belgian Ombudsman service for Energy against six energy suppliers** concerning fixed fees found admissible in November 2019.

Important out-of-court cases

Out-of-court settlements are confidential. However, with respect to actions for collective redress, **amicable settlements** have been reached **between Test-Achats/Test-Aankoop and the defendant companies in nearly 50% of the cases**. **Most of the settlements were concluded before any ruling on admissibility** of the actions for collective redress.

Takeaways:

- **Difficult discussions** may be on some provisions of the Directive, specifically to
 - the **expansion of the scope** of the action (current Belgian action for collective redress is limited to con-sumer disputes, i.e. narrower in scope)
 - the **funding of the action** (currently not addressed in the Economic Law Code).
- The Belgian Law strikes a **balance between facilitating access to justice and ensuring adequate safeguards** against abusive litigation.
- The litigation procedure starts with an **admissibility phase which acts as a „filter“**.
- **Punitive damages and contingency fees are prohibited**.
- Belgium is one of the states in EU **having a proper alternative dispute mechanism focused on mass harm situations**.
- It can be expected that the **current use of ADR mechanisms will increase in the future** as they offer simple, fast and low-costs out-of-court solution to disputes.

Country profile: Ireland

Legal developments & rulings in 2020

Source:

Kennedys



Legal developments

- **There is currently no legislative framework or legal procedure in Ireland to allow collective redress or class actions** akin to those found in other jurisdictions. Analogous procedures are, however, provided by the Rules of Court under Irish law and consist of
 - **representative actions** (pursuant to Order 15, rule 9 of the Rules of the Superior Courts (“RSC”) ...
 - is brought by a named individuals,
 - court must be satisfied that each individual member of the class has authorized the named party,
 - parties have same interest (rather than common or similar),
 - cannot be used in actions founded on tort.
 - Any order or judgement binds all persons represented
 - and **test cases** with same set of circumstances but where only a single case is run – **no formal rules are governing.**

Important class action court cases

Class actions are not permitted in Ireland. Class actions have, however, **been on the political and societal agenda** for quite some time.

Important out-of-court cases

The **Central Bank of Ireland (CBI) Tracker Mortgage Examination**:
The Examination is the largest, most complex consumer protection review ever undertaken by the CBI. It arose out of a number of tracker mortgage issues having been identified, and in turn pursued with lenders, by the CBI since 2010. The issues identified included, for example, where borrowers had switched from their tracker rate and/or lost their right to revert to a tracker rate when they came to the end of a fixed-rate period on their mortgage. As new tracker mortgage issues continued to emerge over time, the CBI took the decision to carry out an industry-wide review.

Takeaways:

- Given the strict limitations that apply, representative actions are not commonly brought.
- Test cases are the preferred approach to representative actions.
- Currently, the torts of maintenance and champerty prohibit TPLF in Ireland, any future changes will have to be legislative.
- January 2020, a **report launched** by Chief Justice Frank Clarke assessed **whether the lack of TPIF & class actions in Ireland is a barrier to litigation.** The European Bar Association & the Irish Society for European Law recommended in the report that proper provisions be made in Ireland for class actions.
- By the end of May 2019, **approximately 40,100 customers had been identified as having been affected by the tracker mortgage “scandal” and €683m has been paid by lenders in redress and compensation.** The CBI has conducted enforcement investigations against various lenders and/or individuals at regulated entities, which has resulted in significant fines imposed.

Country profile: Portugal

Legal developments & rulings in 2020

Source:

PLMJ Transformative
Legal
Experts



Legal developments

- The new Directive on Representative Actions **could lead to the amendment or revocation of law on injunctions** for the protection of consumers' interests..
- **There is a preliminary project for a Consumer's Code, which simplifies the provisions regarding collective protection of the consumer** and intends to revoke the statutes on general contractual terms and consumer protection. The Draft Bill, however, has not yet been approved.
- **The current use of different ways for collective redress is not expected to change in a near future** as there are no publicly known proposals for legislative amendments in that regard.
- **Cross-border issues: no specific provision restricting forum shopping.**
- **TPLF is not prohibited and mainly socially accepted.**

Important class action court cases

As regards the year 2020, there are no court judgments handed down that could influence the development of collective actions.

In September 2019, the Portuguese Competition Authority fined 14 of the leading banks a total of 225 mio Euro in connection with the practice of exchanging sensitive commercial data on credit products in retail banking, DECO announced the possibility of commencing a popular action against all 14 banks for damages arising from infringement of competition law.

Important out-of-court cases

Use of ADR mechanisms have significantly increased (e.g. retail investors, consumer safety and protection). Filing injunction claims tend to be more effective.

Key player here is DECO, the Portuguese Association for Consumer Protection.

Takeaways:

High LegalTech level used by all actors: judges, Public Prosecutor, bailiffs, lawyers and solicitors:

- **Computer applications allow judges and public prosecutors to perform judicial acts by electronic means**, as well as to manage their proceedings. The judicial secretariats also have an IT tool that allows them to process proceedings: the H@bilus.

Reasons that the Portugese popular action mechanisms so far is rarely used, although on the rise:

- Primary challenges of the popular action procedure is the **backlog of court proceedings**.
- Also the commencement of proceedings often suffer delays because of **uncertainty over the legal standing of the association or foundation filing the claim**

- DECO requests consumers **to sign petitions or support any consumer protection action** that promotes the general welfare of consumers, **through the website**.
- DECO **requests the participation** of consumers in collective actions in which their rights are at stake, **through its website**.

Country profile: Spain

Legal developments & rulings in 2020

Source:

URÍA
MENÉNDEZ



Legal developments

- **Several proposals have already been made by relevant members of the judiciary with the goal to expedite civil proceeding** in light of the increasing multicase litigation that is expected to bloom as a consequence of the Covid-19 crisis.
- The approval of the Directive on Representative Action will further **fuel those and other to come initiatives.**
- **Clear voices also want to provide incentives for ADR and regulatory redress mechanisms.**

Important class action court cases

In 2010, the consumer association ADICAE started an injunction action against 40 Spanish banks to challenge the validity of a standard clause that set an interest-rate floor in consumer loan and credit contracts. ADICAE encouraged consumers to join the litigation by aggregating their individual claims for reimbursement of excess payments. Almost 9,000 claimants joined the litigation. As a result, the proceedings became complex and difficult to manage for the judge, and it took six years to get a decision at first instance on both the injunction action and the individual reimbursement claims

Important out-of-court cases

The vast majority of conflicts are resolved by court litigation. However, parties to a commercial agreement can submit disputes to judicial tribunals, arbitration or mediation. Recent trends indicate increasing use of arbitration to resolve large commercial disputes, such as corporate, construction, finance and banking disputes.

Takeaways:

Key topics remain:

- **opt-in or opt-put mechanisms,**
- **implementation for „loser pays“ principle** (rarely enforced and actually only involving a portion of the costs of the defendant),
- **Third party litigation funding.**
- Legal standing to bring collective actions is very restricted (limited to consumer associations and the public prosecutor) and that funding of those is subject to scrutiny of government -and of the public in general- makes it highly difficult for litigator funders to develop their business in Spain
- Academics and judges themselves realised that permitting the **aggregation of individual claims to injunction actions puts the efficiency of injunction relief at serious risk.**
- This is accompanied by indications to more out-of-court settlement.

Country profile: Switzerland

Legal developments & rulings in 2020

Source:



Legal developments

- Collective redress is **so far not available** under Swiss law.
- Class actions have no tradition and have often been perceived as something alien, dangerous and unfitting for Switzerland. When the **new Swiss Civil Procedure Code (CPC) was introduced in 2011**, it was a conscious decision not to include provisions for collective redress, as it had been feared that this could endanger the entire legislation project.
- Yet in **March 2018**, in view of the developments in the EU, the Swiss Federal Council (SFC) proposed **the introduction of means of collective redress in a first draft** of an amendment to the CPC.
- However, in the **second draft published in February 2020**, the SFC removed all proposed instruments of collective redress from its draft amendment. The government explained that the respective part of the draft had been discussed controversially in the consultation phase. The SFC stated that it intends to address this topic of collective redress separately at a later stage.

Important class action court cases

The most recent attempt at a class action-like suit was initiated by the **Swiss consumer protection organisation** (Stiftung für Konsumentenschutz) before Zurich Commercial Court (ZCC) **against Volkswagen and Swiss car dealer AMAG** on behalf of ca. **6.000 diesel car owners**. In July 2018, the ZCC decided not to consider the first suit on the grounds that the procedural requirement for the plaintiff to have a legitimate interest was not satisfied. In December 2019, the ZCC decided not to consider the second suit on the grounds that the plaintiff had no standing to initiate proceedings. The purpose of that foundation does not include the filing of a large damage claim, based on claims assigned to it (safeguarding the interests of consumers would not mean to protect the interest of certain individual consumers). **Decision 2020 confirmed by Swiss Supreme Court.**

Important out-of-court cases

Many Swiss cantons and local authorities have ombuds entities. Besides, other institutionen (e.g. some hospitals) and sectors (e.g. banking, insurance, travel agencies, telecoms, etc.) have ombuds solutions.

Takeaways:

The **first draft** of an amendment to the CPC (published in March 2018), the Swiss Federal Council **suggested the following instruments**:

- **Expanding the possibility for organizations to file representative actions**, including damage claims (with an opt-in rule); and
- introducing collective redress in form of a collective **settlement procedure** (with an opt-out rule).

- **Current absence of admission criteria.**
- As a general rule, **foreign judgements in class action proceedings are eligible for recognition and enforcement in Switzerland.** *
- Likewise, Swiss courts will normally entertain requests for **judicial assistance by foreign courts** dealing with class action proceedings.*

* Lenz & Staehelin, 4th edition Class Action Review, 2020

- There is only very limited discussion on this topic and no leading case law is available. In principle, the enforcement of foreign decisions in foreign collective actions is possible in Switzerland if the requirements stipulated in the Swiss International Private Law, respectively the Lugano Convention, are fulfilled.

Country profile: United Kingdom

Legal developments & rulings in 2020

Source:

C/M/S/
Kennedys

SHOOK
HARDY & BACON



Legal developments

- Due to **Brexit** it remains to be seen how the Directive may interact with developments in the UK.
- A **new class action mechanism was introduced in Scotland** on 31 July 2020, pursuant to the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. Claims have already been issued against VW under this new regime, and more are expected. The Scottish Civil Justice Committee has stated that it will explore whether this regime should be adjusted to operate on an opt-out basis, although the timing for this review is unclear.
- **Current UK government consultation on the operation of the ‘representative’ actions provisions** of the Data Protection Act 2018 which allow individuals to ask non-profit organisations to act on their behalf when their data rights have been infringed.

Important class action court cases

Competition: 11th December, the UK Supreme Court allowed **the Merricks case to go ahead against Mastercard** for allegedly causing retailers to over-charge all resident UK adult consumers for 15 years by setting anti-competitive fees. In doing so, the Court **cleared the way for US-style class action** suits to proceed in Britain and may serve the basis for several other pending cases to come to court. **This is Britain’s biggest ever damages action.**

Data Protection: In April 2021 the Supreme Court will hear the appeal in **Lloyd vs. Google**, which – depending on the judgment – **may prompt further data protection class actions**

Important out-of-court cases

The **Scottish vaginal mesh litigation** (product liability) concerned over 500 claimants each of whom had been implanted with a synthetic mesh product from one or more of approx. 8 manufacturers and claimed to have suffered injuries as a result of the mesh product being defective. Agreement was reported to have been reached in July 2020 between one manufacturer (J&J) and the majority of those claimants suing it in the Scottish courts.

Takeaways:

- **Lloyd vs. Google:** In October 2019, the Court of Appeal approved a mechanism for bringing US-style class actions for data protection claims. **First**, and most obviously, such organisations could face class actions with significant financial impact. **Second**, increased legal risk impacts behaviour; the spectre of large-scale litigation/class actions could reduce willingness to share data, with consequential impacts on research and use of data for service delivery.
- **Merricks vs. Mastercard:** This is a very important decision as it gives guidance on how the UK courts will decide whether or not a proposed competition class action is suitable for the regime (i.e. whether or not it should be certified). The Supreme Court has taken a decisively claimant-friendly approach to certification. The Supreme Court has lowered ..
 - ... lowered the certification standard, which will encourage further class actions to be filed.
- In the UK the sectorial ombuds solutions are quite successful (e.g. Financial services Ombudsman) by creating early warning transparency on abusive practices. Besides, a first private and fully digitalised out-of-court solutions is gaining grounds as alternative.