Collective redress in Europe – key trends and a look to the future

The principle that harm stemming from anti-competitive conduct can be compensated has long existed at EU law. Whilst the EU's Damages Directive [1] sought to introduce a more level playing field in private enforcement across Member States, [2] the Directive did not provide explicitly for a means for entities harmed by the same conduct to band their claims together. More recently however, the EU's Representative Actions Directive [3]has passed through the European legislative process, which – whilst arguably not the radical reform required – will nevertheless change the EU's collective redress landscape. It is true to say that collective actions have been on the rise across Europe in recent years, and whilst competition law infringements have been central to the developments, other consumer-focused areas of law are beginning to see the benefit of effective procedural tools for redress.

In this Article, we identify some of the emerging trends in collective redress in Europe, and offer some observations on the same, including with a view to what the future may hold.

A look back

Private enforcement of European competition law was, for many years, driven by corporate entities bringing their own damages actions on a 'follow-on' basis [4]after successful governmental enforcement actions. The private enforcement landscape across Member States was subject to the peculiarities of national law and procedure, which resulted in a fragmented regime across Europe, with some jurisdictions being more receptive to (and more attractive for the purposes of) private enforcement than others. Although the Damages Directive was intended to address elements of this imbalance, it only set a minimum threshold or floor. This meant that Member States had a

good deal of leeway when it came to implementation and have ultimately implemented diverging domestic legislation in response to certain features, such as the requirement for minimum limitation periods – in relation to which some countries have gone beyond the minimum five-year requirement.

Nevertheless, whilst some may argue that it is too soon to determine whether the Damages Directive has fulfilled its raison d'être , there is a reported increase in the number of private enforcement claims being brought across Europe. [5]

Against this backdrop, it is interesting to look at how the national courts have handled the follow-on actions arising from the European Commission's (**the EC**) Trucks Decision, [6] as these arguably have tested the boundaries of national courts in handling large- scale group claims. The Netherlands has been favored as a jurisdiction for thousands of hauliers' claims, given the amenability of its courts to collective actions. Indeed, in a large 'bundled' action, the Amsterdam court recently delivered a positive judgment for the claimants, finding a sufficient likelihood of their having suffered harm. [7] In Germany, the issue of legal assignments, i.e., when individual companies would assign their claims to a special purpose vehicle (**SPV**), has come under the spotlight following various challenges to the assignment model in the lower courts, although the recent German Federal Supreme Court judgment in the Air Berlin case has confirmed the legality of the model. [8]

In England & Wales, the claims of various large companies affected by the cartel have, until recently, been case-managed together and are progressing through the UK's Competition Appeal Tribunal (**Tribunal**), with final trials due to take place from April next year. [9] In addition, there are two proposed collective claims currently pending before the Tribunal, one brought by the Road Haulage Association (**RHA**) and the other by an SPV 'UK Trucks Claim' (**UKTC**). The RHA's claim was brought on an 'opt-in' basis, [10] and UKTC's on an 'opt-out' basis [11] or opt-in basis in the alternative. These claims have progressed together, and the two applications for a Collective Proceedings Order (**CPO**) were heard by the Tribunal at a joint hearing in April 2021. The Tribunal has indicated that it will only certify one of the claims [12] and a judgment is awaited.

Consumer redress – UK and Europe

The fact that it has been possible to file two proposed collective Trucks claims in the UK is a feature of domestic legal reform. Following an ineffective opt-in regime, the UK introduced a regime for opt-out collective actions via the Consumer Rights Act 2015 (**CRA**) , which came into force in October 2015. [13] In a very recent judgment in Merricks , the Tribunal has granted a CPO on an opt-out basis for the first time since the introduction of the regime. [14] The recent burst of activity which we describe below in the section on UK competition case developments suggests that the regime has escaped its Merricks-induced 'go-slow' period, and that more certified claims are surely just around the corner.

Recent developments in opt-out redress in the UK can be contrasted with the historic caution shown at the European level, which has for some years been characterized by a misconception of collective redress as somehow being likely to usher in a culture of litigation.

However, as noted above, the EU Parliament has recently passed the EU Representative Actions Directive (**RAD**), which aims to go some way to addressing prior missed opportunities to reform. The RAD's purpose is not to be confused with the adoption of a single, pan-European collective regime. Rather, the RAD requires Member States to put in place at least one mechanism allowing for so-called "qualified entities" to bring representative actions on behalf of consumers for injunctive relief and/or compensation. Such qualified entities must provide (amongst other

things) evidence of at least twelve months of actual public activity protecting consumers' interests; they must be not-for-profit; and they must demonstrate that they act independently from those who have an economic interest in bringing any representative action, and act in the legitimate interest of the consumers they represent. [15]

Annex 1 to the RAD sets out the types of infringement under EU law which fall within its scope. The current list spans a plethora of areas, including financial services, data protection, travel, environment and health, and consumer rights for the purchases of goods (such as defective products). However, representative actions brought pursuant to the RAD may only include individual consumers and not SMEs, which does not solve the problem of how SMEs like the claimants in the Trucks proceedings mentioned above can reasonably be expected to bring claims. Whilst the RAD leaves open the possibility of broadening its scope in the future, it is nevertheless significant that competition infringements are currently not included within its reach.

The omission of such infringements is perhaps confused when considered against the Recitals of the RAD, which acknowledge that a lack of adequate mechanisms to enforce EU law protecting consumers can lead to distortions of competition. [16] There is also no opportunity to bring 'follow-on' claims beyond the realm of competition law, as the RAD confirms that final decisions of a national court or administrative authority (for example, a data protection regulator) will only carry evidentiary weight. [17]

Perhaps most significantly of all, the RAD does not mandate the introduction of opt-out, as opposed to opt-in, redress. Rather, Member States can go down either route. [18] Whilst the RAD's minimum harmonization character will not impinge upon Member States that have chosen to go further in any respect, the failure to ensure that consumers in each Member States can resort to opt-out redress is likely to restrict the RAD's effectiveness in improving outcomes for European consumers.

The RAD entered into force on 24 December 2020 and Member States have until 24 December 2022 to transpose the Directive into national law (and an additional six months in which to implement it). In practice, this means that we may not see the first representative action being brought under the RAD until mid-2023 at the earliest. It will nevertheless be interesting to see how Member States choose to exercise their discretion when it comes to implementation, and to what extent each looks to the opt-out regimes of the likes of the UK, the Netherlands, and Portugal when it comes to choosing the path ahead.

Consumer collective actions in Europe

A recent report noted that the number of class actions in 17 jurisdictions in Europe (including England & Wales) had grown by 120% from 2018-2020 across various practice areas. [19] We explore a few emerging trends in such actions below.

Developments in the UK – competition law

After several years of appeal proceedings in the proposed opt-out action brought by Mr. Merricks against MasterCard mentioned above, the UK Supreme Court gave the regime a resounding endorsement at the end of last year by clarifying the standard which proposed class representatives would have to meet to have their claim be certified. [20] With mr. Merricks having very recently been granted a CPO, as noted above, there are twelve proposed collective proceedings currently before the Tribunal. [21] It is expected that the Tribunal will issue further certification decisions in the coming months and in view of the recent Merricks CPO judgment.

Three such opt-out collective claims against global tech companies are currently on foot relating to alleged abuses of dominance. This is unsurprising given the very direct effect that such abuses usually have on consumers. The first such claim was filed against the US-headquartered Qualcomm in February 2021. [22] The proposed claim was brought by the UK's largest consumer organization: 'Which?', on behalf of a class of around 29 million UK consumers who purchased Apple and Samsung smartphones. Which? claims that Qualcomm has abused its dominance in the market for standard essential patents (**SEPs**) and long-term evolution (**LTE**) chipsets by refusing to license rival chipset manufacturers, and by refusing to supply LTE chipsets to smartphone manufacturers unless they agree to pay royalties (for use of the SEPs) to Qualcomm at supra-competitive levels. Which? argues that the increased costs to smartphone manufacturers are passed on to consumers of smartphones in the form of higher prices and/or lower quality products.

To continue in the 'tech' vein, two claims have recently been brought against Apple [23] and Google [24] for excessive and unlawful charges in Apple's App Store and Google's Play Store, respectively.

As to the former, the proposed class representative is seeking to bring an opt-out claim on behalf of around 19.5 million UK users of iPhones, iPads, and Android smartphones and tablets. Apple is alleged to be abusing its dominant position by imposing restrictive terms on app developers that require them to distribute apps exclusively via its App Store, and furthermore by preventing users from making app and in-app purchases other than via its App Store Payment Processing System , which usually ensures Apple to receive a 30% commission payment.

As to the latter, the claim against Google is based on a Google requirement that smartphone and tablet manufacturers pre-install the Google Play Store on their devices. This requirement, in conjunction with other contractual and technical restrictions Google imposes on manufacturers, directs users to the Google Play Store and its own payment processing system which, like Apple's, typically results in a 30% commission payment to Google.

It is alleged that Apple's and Google's practices restrict competitors from offering alternative options on their devices, ultimately obliging users to pay the allegedly unfair and excessive commissions.

Developments in the UK – beyond competition law

Outside of the competition law context, so-called 'representative actions' under Part 19.6 of the English Civil Procedure Rules (**CPR**) are proving an increasingly popular route by which claims may be brought on an opt-out basis for damages vote from breaches of data protection law. The Court of Appeal's judgment in Lloyd v Google [25] is credited for breathing life back into this redress mechanism, which has long existed under English law. Whilst this judgment is under appeal to the UK Supreme Court, [26] several other similar CPR 19.6 cases in the English High Court are waiting in the wings.

One such case is Bryant v Marriott, filed in August 2020 against Marriott International following an attack on the IT systems of the Marriott-owned Starwood Hotel group which led to the exposure of 300 million guests' data. [27] McCann v YouTube is another such CPR 19.6 case, constituting a multi-billion-pound claim against YouTube on behalf of 5 million children under 13 and their parents. The claim alleges that YouTube has used the children's data without their or their parents' consent to target the children with addictive content, breaching privacy and data protection rules including domestic and European data protection legislation. [28]

Other CPR 19.6 claims in this sphere include Jukes v Facebook , which relates to personal data claimed to have been unlawfully obtained by third-party app 'thisisyourdigitallife,' and alleging that Facebook failed adequately to protect around a million users' data, [29] and Williams v Experian , [30] which alleges that Experian has unlawfully

processed and monetised data through its business practice of collating data on over 95% of the population in England and Wales, building individual profiles and then selling the profiles on for profit (all without the individuals' consent). [31]

Developments in other European jurisdictions

Consumer-focused claims have also been picking up in pace elsewhere across Europe.

An opt-out collective action in Portugal was filed in December 2020 by Portuguese consumer association Ius Omnibus . [32] The Ius Omnibus claim is a follow-on action to an EC Decision against Mastercard's central acquiring rule, which prevented Portuguese merchants from benefitting from lower multilateral interchange fees (**MIFs**) in Europe. [33] Ius Omnibus alleges that the higher MIFs paid by Portuguese merchants were passed on to Portuguese consumers, and it is claiming aggregate damages of over €400 million.

Meanwhile, an opt-in collective action was brought in Germany earlier this year by circa 2,000 hotels against Booking.com. [34] The action alleges that, since 2004, Booking.com applied both wide and narrow most favored nation (**MFN**) clauses to its agreements with hotels, which had the effect of prohibiting hotels from offering rooms at lower rates or with better conditions through any other distribution channels (including the hotels' own websites) than the rates/conditions offered on Booking.com. This claim also follows public enforcement actions, notably decisions by the German Federal Cartel Office to ban wide MFNs in 2013 against hotel booking platform HRS and in 2015 against Booking.com. [35]The Booking.com and narrow MFN findings were recently upheld by the German Federal Supreme Court. [36]

Like in the UK, the increase in collective actions has not been confined to infringements of competition law. The Volkswagen emissions scandal has resulted in cases being brought against various OEMs in several jurisdictions. By way of example, a series of related, cross-European collective actions coordinated by consumer organization Euroconsumers were brought against Volkswagen following the 2015 Dieselgate scandal. [37] In January 2021, a Madrid Commercial Court ordered Volkswagen to pay damages of €16.3 million [38] (an appeal is ongoing), whilst in July 2021 an Italian court also ruled in favor of the class claimants, ordering Volkswagen to pay over €200m in damages (which Volkswagen also intends to appeal). [39]

Conclusion

Whilst progress in certain areas has been slow to arrive, the trend towards collective redress in Europe is clear. The growth in consumer claims particularly stands out and such actions are now a firm feature of the private enforcement landscape. There is, of course – further to go. The effectiveness (or not) of the RAD remains to be seen, and there are doubtless myriad ways in which improvements can and ought to be made to facilitate greater access to justice. But, as this overview demonstrates, the trend is only going in one direction—increased enforcement in the private and public spheres.

Footnotes

[1] Damages Directive 2014/104/EU .

[2] The Damages Directive had an implementation deadline of 27 December 2016 for all EU Member States (per Article 21(1)), although footnote 9 to page 2 of the European Commission's 14 December 2020 report on the implementation of the Damages Directive notes that it was only by January 2019 (and after the European Commission had pursued enforcement measures) that all Member States fully implemented the Directive.

[3] Directive on Representative Actions 2020/1828/EU .

[4] Ie, owing to a finding of an infringement of competition law by the European Commission or national competition authority.

[5] See p. 3 of the European Commission's 14 December 2020 report on the implementation of the Damages Directive .

[6] European Commission Decision of 19 July 2016 (Case AT.39824 - Trucks) identifying the existence of a price-fixing cartel between 1997 and 2011.

[7] Amsterdam District Court, judgment dated 12 May 2021, ECLI:NL:RBAMS:2021:2391 (**Trucks**). Hausfeld represents some of the claimants in these proceedings and the **Trucks** proceedings in Germany.

[8] German Federal Supreme Court, judgment dated 13 July 2021 - II ZR 84/20, (**Air Berlin**).

[9] The joint trial for the **Royal Mail Claim** (Case No. 1284/5/7/18 (T)) and the **BT Claim** (Case No. 1290/5/7/18 (T)) will be listed to start from 26 April 2022 per President Roth's Order dated 29 October 2020 , whilst the joint trial for the **Ryder Claim** (Case No. 1291/5/7/18 (T)) and the **Dawsongroup Claim** (Case No. 1295/5/7/ 18 (T)) will be listed to start from March 13, 2023, per President Roth's Order dated December 3, 2020 . Hausfeld represents the claimants in related **Trucks** proceedings (Cases No. 1292/5/7/18, 1293/5/7/18 and 1294/5/7/18) for which a trial date has not yet been set.

[10] Ie, where consumers would have to actively sign-up to participate in a claim.

[11] Ie, where all consumers falling within the definition of class are automatically included in the claim, unless and until they expressly 'opt-out'.

[12] See Global Competition Review article, ' CAT will certify only one trucks class action, Roth says '.

[13] Section 81 of the CRA brought into force Schedule 8 of the CRA (thus amending parts of the Competition Act 1998) and gave the Tribunal authority to hear both opt-in and opt-out collective actions, whether on a follow-on or standalone base.

[14] **Walter Hugh Merricks CBE v Mastercard Incorporated and Others** [2021] CAT 28 (18 August 2021).

[15] Article 4, RAD.

[16] Recitals 2 and 6, RAD.

[17] Article 15, RAD.

[18] Recitals 43-46, RAD.

[19] See page 5 of the ' CMS European Class Action Report 2021 '.

[20] Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent) [2020] UKSC 51 (11 December 2020), see here . For a previous Hausfeld article outlining views on the wider implications of the Merricks judgment on the UK collective actions regime, 'Merricks v Mastercard and the future of collective redress in the UK: perspectives from leading collective redress practitioners', see here . Hausfeld represented the Consumers' Association (known as 'Which?') in its intervention in the Supreme Court hearing.

[21] They are: UK Trucks Claim Limited v Stellantis NV (formerly Fiat Chrysler Automobiles NV) and Others ; (Case No. 1282/7/7/18), Road Haulage Association Limited v Man SE and Others (Case No. 1289/7/7/18); Justin Gutmann v First MTR South Western Trains Limited and Another (Case No. 1304/7/7/19); Justin Gutmann v London & South Eastern Railway Limited (Case No. 1305/7/7/19); Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others (Case No. 1329/7/7/19); Mr Phillip Evans v Barclays Bank PLC and Others (Case No. 1336/7/7/19); Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others(Case No. 1339/7/7/20); Justin Le Patourel v BT Group PLC (Case No. 1381/7/7/21); Consumers' Association v Qualcomm Incorporated (Case No. 1382/7/7/21); dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd (Case No. 1403/7/7/21); David Courtney Boyle & Edward John Vermeer v Govia Thameslink Railway Limited & Others (Case No. 1404/7/7/21); and Elizabeth Helen Coll v Alphabet Inc. and Others (Case No. 1408/7/7/21). Hausfeld represents the proposed class representatives in Cases No. 1304/7/7/19, 1305/7/7/19, 1336/7/7/19, 1382/7/7/21, 1403/7/7/21 and 1408/7/7/21.

[22] Consumers' Association v Qualcomm Incorporated (Case No. 1382/7/7/21). Hausfeld represents the proposed class representative in these proposed collective proceedings.

[23] Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd (Case No. 1403/7/7/21). Hausfeld represents the proposed class representative in these proposed collective proceedings.

[24] Elizabeth Helen Coll v Alphabet Inc. and Others (Case No. 1408/7/7/21). Hausfeld represents the proposed class representative in these proposed collective proceedings.

[25] Lloyd v Google [2019] EWCA Civ 1599 (2 October 2019).

[26] A judgment is awaited but is expected to be handed down by the end of 2021.

[27] Bryant v Marriott International Inc and others (High Court Case No. QB-2020-002882). Hausfeld has been instructed by the Representative Claimant in this action.

[28] McCann and others v. Google Ireland Limited (High Court Case No. QB-2020-000393). Hausfeld has been instructed by the Representative Claimant in this action.

[29] Jukes v Facebook Inc. and another (High Court Case No. QB-2020-004691). Hausfeld has been instructed by the Representative Claimant in this action.

[30] Williams v Experian Limited (High Court Case No. QB-2021-00706).

[31] The Experian claim followed a two-year investigation and 27 November 2020 enforcement notice by the Information Commissioner's Office, which found that Experian was " **trading, enriching and enhancing people's personal data without their knowledge** " and threatened a multi-million pound fine against Experian unless it changed its business practices: see ICO press release ' ICO takes enforcement action against Experian after data broking investigation '.

[32] See https: /iusomnibus.eu/ius-omnibus-v-mastercard/ .

[33] European Commission Decision of 22 January 2019 (Case AT.40049 – MasterCard II).

[34] See https: /www.hotel-kartellschadensersatz.de/ueber-das-verfahren.html .

[35] Additionally, the European Commission's proposed Digital Markets Act is intended to address dominance and encourage competition across Europe in respect of online platforms.

[36] German Federal Supreme Court, judgment dated 18 May 2021 - KVR 54/20, (**Booking.com**).

[37] See https: /www.euroconsumers.org/activities/dieselgate-our-battle-continues . Such claims have been brought by consumer groups Organization of Consumers and Users (Spain), Altroconsumo (Italy), Test Aankoop/Test Achats (Belgium) and Deco Proteste (Portugal).

[38] See Euroconsumers press release, ' Euroconsumers wins €16M Class Action Lawsuit against Volkswagen '.

[39] See Altroconsumo article ' Class action Dieselgate: Volkswagen condannata al risarcimento di 63mila consumatori in Italia '.

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