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Litigation ADVISORY ■

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Across the Horizon: Growing Class Action Risks in the UK and EU

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Large U.S. corporates are already well versed in the litigation risks associated with class actions. Until recently, it would have been reasonable to assume that the risk of significant class action liability would be largely confined to the U.S. courts. However, U.S. corporates with an international customer base would be well advised to keep a watchful eye on UK and European developments, where recent cases and legislation have both expanded the potential for collective action suits and the claims that might form the basis of class action recovery. While those regimes remain some way behind the U.S. in terms of the ease of bringing and continuing a class action, there is no doubt that there are very real opportunities for collective redress in the UK and EU, including against U.S.-domiciled corporates.

Class Actions in England and Wales

The UK litigation market has seen an increase in claims for collective redress across a variety of sectors. These include shareholder claims against financial institutions arising out of the financial crisis, consumer claims for data breaches against tech giants, claims arising out of diesel emissions testing, and environmental damage claims.

Rather than there being a single regime for collective redress, there are multiple ways to bring a class action.

1) **Group litigation orders (GLOs).** This is a court order providing for the case management of claims that give rise to common or related issues of fact or law. GLOs are not strictly a form of collective redress – they are a procedural tool for managing multiple related claims. GLOs are an 'opt-in' regime because each individual claimant must commence an action in its own right and must apply to be entered onto the relevant group register by a specified date.

2) **Representative actions.** In this type of claim, the court is able to direct that if more than one person has the same interest in a claim, that claim may be continued by one of those persons as representative of any other person who has that interest. This does not require any authorization by a particular represented individual and therefore operates as an effective opt-out regime. The 'same interest' must

be a common interest based on a common grievance; but it does not need to be possible to identify all individuals who are within the class when the litigation commences, and it is recognized that individuals who have the same interest may fluctuate over the course of the litigation. Any judgment or order will be binding on all persons represented but can only be enforced against represented individuals with the permission of the court.

- What will constitute the same interest? One of the leading representative actions to proceed in the English courts is *Richard Lloyd v Google LLC* [2019] EWCA Civ 1599. Lloyd brought a representative claim against Google LLC on behalf of a class of 4 million iPhone users. The allegation is that Google covertly tracked those users' internet activity in the 2011 to 2012 period in breach of the Data Protection Act 1998. With Google a Delaware-domiciled corporation, Lloyd needed the permission of the Court to serve Google with the claim; the first instance court rejected this because, among other reasons, Lloyd had not established that the 4 million iPhone users had the same interest to justify a representative action. The Court of Appeal overturned this on the basis that the claimed damage for the iPhone users was limited to the consistent loss of control of the claimants' browsing information and did not include individual damage or distress. The case was heard in the UK Supreme Court at the end of April 2021, and a judgment is expected in the coming months.

- Consistency of damage is therefore an important part of the common interest test: in *Jalla v Shell* [2020] EWHC 2211 (TCC), it was held that because the claimant group (in this case, communities affected by an oil spill on the coast of Nigeria) needed to establish damage individually, with the inevitability that the damage would vary between claimants, the same interest test was not met.

3) **Competition law claims.** The Consumer Rights Act 2015 brought into English law a means of collective redress for private claims for breaches of competition law in the Competition Appeal Tribunal (CAT). The action may be brought by a class representative, but its continuation is dependent on the CAT making a collective proceedings order. In doing so, the CAT will consider the proposed representative, the class of claimant who will be bound by any subsequent judgment, and whether the class will be 'opt out'. This procedure remains relatively new under English law, and there have been few cases brought. However, a landmark decision from the Supreme Court (*Mastercard Incorporated and others v Walter Hugh Merricks* [2020] UKSC 51) has provided clarity on the applicable test when the CAT considers whether to make a collective proceedings order (effectively certification). In that case, a class action was commenced on behalf of 46.2 million UK-resident adult consumers who would have purchased goods during a 16-year infringement period. The issue was whether this claim was suitable to be brought in collective proceedings. That required the CAT to assess whether: (1) it is reasonable for the representative to be authorized to act in that capacity; and (2) claims are brought on behalf of an identifiable class of persons and raise the same, similar, or related issues of fact or law. The CAT decided that the claims were not suitable to be brought in collective proceedings, including because a satisfactory method of calculating damages and estimating individual loss was not presented. The Supreme Court overturned the CAT's reasoning on the basis that the CAT had imposed too high a standard for certification. The essential

test of whether a claim was suitable should be a relative assessment of whether the claims are more appropriately brought as collective, rather than individual, proceedings. The case was returned to the CAT for reconsideration, and it remains to be seen how the relative suitability test will be applied by the CAT to cases going forwards.

Jurisdiction of the English Courts over U.S. Corporates

Notwithstanding these steps towards a fuller collective action regime, it will still need to be established that the English courts have jurisdiction over the claims. For a U.S. corporate defendant, this will mean that the permission of the courts will be needed to serve English claims in the United States, which will require an assessment of whether: (1) there is a serious issue to be tried on the merits (2) that the claim falls within one of the recognized jurisdictional gateways (for example, in the context of tort claims, establishing that damage was sustained in England or Wales or resulted from an act committed in England or Wales or, in multidefendant claims, that U.S.-domiciled defendants are necessary and proper parties to the litigation being brought against another defendant the courts of England and Wales have jurisdiction over) and (3) England is otherwise the appropriate forum for the case.

Collective Actions in the EU

The changing landscape for collective redress in England has been mirrored by steps taken in the EU to facilitate consumer rights actions.

Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers ('Collective Redress Directive')

The Collective Redress Directive came into force on 24 December 2020, and EU Member States now have less than two years to implement it. The purpose of the Collective Redress Directive is to protect consumers by providing minimum EU-wide standards for representative actions to be brought on behalf of EU consumers in certain categories of EU law, including in the financial services, data privacy, and energy sectors, among others.

Potential remedies available to consumers under the Collective Redress Directive can include injunctive relief (without having to evidence loss or damage at the individual consumer level) and redress measures including damages.

Under the Collective Redress Directive, only designated qualified representative entities (QREs) will be able to bring representative actions. The criteria for designation as a QRE will vary between domestic representative actions within a Member State where the QRE is domiciled and a cross-border representative action when the action is brought by a QRE in other Member States. In the former case, Member States have a degree of freedom in establishing the criteria for designating a QRE. For cross-border representative actions, the QRE must have a nonprofit-making character and a legitimate interest in protecting consumer interests, must be independent, and can demonstrate 12 months of public activity in the protection of consumer interests before the request for designation.

The Collective Redress Directive does not specify a minimum number of consumers required to form a class in a representative action. In most cases, it is up to the Member States to formulate the rules required for the establishment of a class, including whether to designate an opt-in or opt-out approach. However, when consumers do not reside in the Member State of the court in which the representative action has been brought, they must opt in to that action. Provisions are included to limit the prospect of an individual consumer receiving double recovery in case of parallel opt-out actions against the same trader in Member States.

Representative actions are to be brought against 'traders'. This will include natural or legal persons 'that act, including through another person acting in that person's name or on that person's behalf, for purposes relating to that person's trade, business, craft or profession'. The applicable jurisdiction rules to determine whether a claim can be brought against traders who are not domiciled in the EU will not be altered by the Collective Redress Directive – those rules are still contained within the Brussels Regulation for EU cases. However, the fact that a QRE domiciled in another Member State can bring a representative action in the courts of another Member State may lead to an increase in claims.

The Collective Redress Directive also expressly provides that Member States will implement mechanisms to ensure that courts are able to dismiss 'manifestly unfounded' cases at the earliest stage of the proceedings in accordance with national law. The Collective Redress Directive also requires costs shifting so that the loser will pay the winner's costs (although, save in exceptional cases, individual consumers will not have to pay the costs).

It remains to be seen precisely how individual Member States will craft their regimes in response to the Collective Redress Directive, particularly those Member States that do not yet have a collective redress procedure.

Proposed corporate due diligence and corporate accountability directive

Steps are being taken at the EU level to expand the obligations on corporate entities to assess and report on the human rights, environmental, and governance risks in their operations and business relationships, including both supply chains and customers. Although the legislative process is continuing, these developments potentially open up a new set of liabilities for corporates that could form the basis of future redress actions.

On 10 March 2021, the European Parliament adopted recommendations that included a draft directive for the European Commission's review ('EP Draft Directive'). Although the EP Draft Directive is not binding, the European Commission will take the EP Draft Directive into account when preparing a formal legislative proposal. The latest position from the European Commission is that publication of a formal legislative proposal will be delayed to the autumn of 2021.

Notable features of the nonbinding EP Draft Directive include:

- **Its proposed territorial scope.** The EP Draft Directive covers large undertakings and small and medium-sized undertakings that are either publicly listed or are 'high risk' (presently undefined), which although not established in the EU sell goods or provide services to the EU. The EP Draft Directive also provides that such undertakings will need to fulfil the requirements of the EP Draft Directive as set out in the

legislation of the Member State where they operate – raising the possibility of those undertakings therefore being subject to a number of different regimes if they operate in multiple Member States.

- **The obligations placed on undertakings.** Extensive obligations are envisaged by the EP Draft Directive. The three risk categories emphasized in the EP Draft Directive include human rights, the environment, and (in a notable expansion) good governance risks. The present drafting on what they encompass is wide, although further detail is expected on the adverse impacts that are intended to be covered. The steps that are required to be taken include:
  - Due diligence on operations and business relationships: In-scope undertakings will be required to establish a monitoring methodology and (unless it publishes a risk assessment statement confirming that it has no potential adverse impacts) due diligence strategies that allow them to assess, monitor, and prevent or mitigate the actual and potential adverse impacts on human rights, the environment, and good governance of their operations and business relationships.
  - Value chains: Undertakings are required to map their value chains that 'with due regard for commercial confidentiality' should publicly disclose relevant information about the undertaking's value chain (covering direct or indirect business relationships up- or downstream). This may include names, locations, and types of products/services supplied. Value chain due diligence is to be carried out in a way that is proportionate to the severity of the adverse impacts, the size of the value chain, and the size of the undertaking itself.
  - Business relationships: Undertakings are required to ensure that their 'business relationships' (meaning subsidiaries and commercial relationships of an undertaking throughout its value chain, including suppliers and subcontractors that are directly linked to the undertaking's business operations, products, or services) put in place and carry out human rights, environmental, and governance policies that are in line with their due diligence strategies. This can include concluding framework agreements and agreeing codes of conduct or contractual obligations with accompanying regular verification by the undertaking of compliance by its subcontractors and suppliers.
  - Disclosure: An undertaking's due diligence strategy is to be publicly disclosed. Confidentiality obligations will need to be considered when publicizing value chains. The EP Draft Directive also requires stakeholder engagement in the due diligence strategy, including with trade union and worker representatives.
- **The remedies.** A number of mechanisms for enforcement are contemplated by the EP Draft Directive.
  - Grievance mechanism: Stakeholders are to be provided with a mechanism to voice reasonable concerns over the existence of an adverse impact. The EP Draft Directive sets out certain minimum requirements for such mechanisms.
  - Extra-judicial remedies: If an undertaking has identified that it has caused or contributed to an adverse impact, it must provide for a remediation process. The results of that process may include financial or nonfinancial compensation, reinstatement, public apologies, restitution,

rehabilitation, a contribution to an investigation, and/or the provision of guarantees for future conduct. Neither the grievance mechanism nor the remediation process will prejudice the right of victims to go to court.

- Supervision and investigations: Member States will designate national competent authorities to supervise the application of the EP Draft Directive. Those authorities will be entitled to investigate an undertaking's compliance with the EP Draft Directive. Interviews with stakeholders and on-the-spot checks may form part of those investigations. As part of the investigation process, the authorities may require that remedial action is taken or interim measures are adopted, including the temporary suspension of activities, which could mean a ban on operations in the internal market.

- Sanctions: Member States are to provide for proportionate sanctions for infringements. The sanctions may include proportionate fines calculated on the basis of turnover, exclusion from public procurement, and potential seizure of commodities.

- Private civil liability: The EP Draft Directive requires Member States to ensure that there is a liability regime in place at the Member State level under which undertakings can be held liable for any harm arising out of 'potential or actual' adverse impacts on human rights, the environment, and good governance that the undertakings or their subsidiaries have caused or contributed to. It shall be a defense for undertakings facing liability under this regime to establish that they took all due care to avoid the harm in question (beyond simply performing due diligence) or that the harm would have occurred even if all due care had been taken. It is not at this stage clear how the concept of 'potential' adverse impacts will translate into civil liability regimes that require actual losses to be established.

It will remain to be seen how much of the EP Draft Directive will remain a feature of the European Commission's legislative proposal in the coming months.

Conclusion

For U.S. corporates, the prospect of transatlantic class action liability is now a very real one, and one global event (be it a data breach or faulty product) could leave a U.S. corporate defending class actions in multiple jurisdictions, including the UK and EU. Particular growth areas for collective redress claims include consumer rights, personal data claims, and environmental actions. In facing such cases, potential defendants should keep in mind any available jurisdiction challenges and that the relatively untested nature of some of the more recent collective regimes may present opportunities to challenge claims brought under them.

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