Collective actions in Europe

BY SARAH CROFT
partner, Shook, Hardy & Bacon International LLP

COLLECTIVE ACTIONS CAN SIGNIFICANTLY increase litigation exposure for businesses. Progressively, collective action rules are being proposed and introduced in more jurisdictions. The last few months have seen steps at both European and national level towards the adoption of new legislation designed to facilitate actions for collective redress. Sarah Croft, of Shook Hardy & Bacon International, assesses the recent developments.

OPT IN OR OPT OUT?

There are two broad types of class action models – 'opt in' and 'opt out'. The opt-in model requires claimants to take an affirmative step to join the action. Opt-out claims are wider, as all members of a defined group are included in the claim unless they take an affirmative step to opt out. US class actions follow the opt-out model.

The unvarnished US opt-out model has not been widely adopted in Europe. In any event, there are key differences between European and the US jurisdiction which change the legal context within which collective actions work in practice. So, for example, the absence of punitive damages in many countries in Europe makes a collective action here of wholly different proportion than would be the case in the US. Examples of countries in Europe which have collective action rules include:

- Spain and Portugal already have opt-out systems, albeit much more heavily restricted than those in the US.
- Italy's opt-in rule came into force in 2010.
- The Act on the Collective Settlement of Mass Claims came into force in the Netherlands in 2005, allowing courts to declare the terms of a collective settlement agreement binding on all parties covered by the terms, unless they opt out.
- The Belgian House of Representatives approved a new class action law earlier this year which will introduce an opt-in system for personal injury claims.
- The French National Assembly has also recently adopted the French Consumer Act, which will allow opt-in group actions to be brought in consumer claims. The Bill was signed into law by the French President on 13 March 2014, although the class action provisions will not become effective until the publication of the implementation decree, which is expected this summer.

The introduction of these regimes has had an impact on the litigation landscape. For example, in the Netherlands, in January 2012 the Amsterdam Court of Appeal used the Dutch Act on the Collective Settlement of Mass Claims to accept jurisdiction over the settlement of a securities class action involving shares in Converium Holding. The defendant was not domiciled in the Netherlands and only a handful of the class members were based there. The class members were represented by the US plaintiffs firms Bernstein Litowitz Berger & Grossmann, Cohen Milstein Sellers & Toll and Spector Roseman Kodroff & Willis, who reportedly shared $11.7m in legal fees from the settlement of the case using the Dutch class settlement mechanism.

COLLECTIVE ACTIONS AT EUROPEAN LEVEL

The European Commission has been debating Europe-wide collective redress schemes since 2005. In 2013 it finally published a package of proposals including a recommendation on the issue, which was developed from a series of green and white papers as well as a public consultation. The recommendation covers collective redress in the areas of competition claims, consumer protection, environmental protection and data privacy. In addition, it included a proposed directive on damages in competition claims, which is intended to facilitate the recovery of compensation by victims of antitrust infringements. The recommendation is a non-binding instrument that invites member states to harmonise their collective redress systems using common principles outlined by the Commission. So, at this stage, the Commission has decided against introducing an overarching European-wide class action rule to harmonise collective redress. In effect the Commission has sent the issue of collective actions back to the member states, expecting them to implement their recommendations by July 2015. The Commission will at that point review progress and decide whether further

action is needed, including future legislation.

The common principles outlined in the recommendation and which member states are invited to follow include an opt-in model with group members having to be identified before a claim is brought. Further that only 'ad hoc certified entities' would have standing to bring representative actions. The recommendation includes various safeguards aimed at avoiding the perceived excesses of US-style 'class actions' in Europe, specifically, by banning punitive damages, pre-trial discovery and juries. The Commission favours the preservation of the loser-pays rule, but, on the other hand opens the door to the use of contingency fees, subject to national legislation and provided they do not create incentives for filing meritless claims. Third-party funding also appears to be supported, provided it does not allow the funder to exert influence over the litigation, including decisions on settlement.

To reiterate, however, the recommendation is non-binding. So member states can choose to follow these guidelines and build in the safeguards – or not. Member states are not obligated to adopt any measures in response, nor are they compelled to amend their existing laws on collective redress. The recommendation may encourage member states to move forward with class action legislation if they have been waiting on action by the Commission – especially since for now the Commission has decided not to introduce legislation on collective redress.

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UNITED KINGDOM

In the UK, the Consumer Rights Bill was introduced to the UK Parliament at the end of January 2014. The bill contains provisions to allow private competition damages actions. In particular, the bill proposes the creation of a new limited opt-out collective action for competition law claims on behalf of both consumers and businesses in the Competition Appeal Tribunal (CAT). This form of collective action will enable consumers and businesses to seek redress for anti-competitive behaviour via a representative body in respect of an entire class of affected consumer (other than those who actively opt out of the case).

The bill is currently being reviewed at the committee stage of the legislative process in the House of Commons. The proposals appear to be at odds with the European Commission's recommendations for opt-in collective actions and it is likely that this contrast will be a cause of debate during the committee stage. On 10 March 2014, the CAT published a draft set of proposed rules for governing collective actions before the Tribunal if and when the Consumer Rights Bill is passed.

This is a significant departure from existing procedures for multi-party litigation in England and Wales, which generally require potential claimants to make a positive decision to opt in to the proceedings. Under the existing rules, a group litigation order (GLO) may be made by the court where a number of claims give rise to common or related issues of fact or law. The court then has a wide discretion to manage the claims as it sees fit. This is not an opt-out class action mechanism – a GLO serves only to bring together individual claims litigated in their own right. Any further claimants wishing to join the GLO will still need to issue their own proceedings.

There is currently a limited right for designated consumer bodies to bring representative actions on behalf of consumers in competition (antitrust) claims only. Only one such claim has so far been brought, by Which? (the Consumers' Association) in respect of alleged price-fixing of football shirts. The claim was settled and so the mechanism has not been fully tested in court.

CONCLUSION

The debate about class actions can be polarised. At one end of the spectrum fears about class action abuse are often expressed and, at the other, concerns about access to justice. It is fair to say that, while there has not been sweeping change in this area, there have in recent years been a number of incremental shifts which have started to change the litigation landscape.

While Europe does not have systems of law which equate with the US system, the increased availability of collective action regimes across Europe may lead to an increase in potential litigation exposure for businesses. As we have seen already in practice, US-style litigation is making an appearance in some spheres with the ground being broken in the competition and securities fields. The bill currently being considered by the UK Parliament could add further momentum to this trend. Whether these actions may pave the way for claims in other areas such as product liability remains to be seen.

By Sarah Croft, partner,
Shook, Hardy & Bacon International LLP.
E-mail: scroft@shb.com.