

FUTURE OF DISPUTES

Class Actions and Consumer Claims

Thursday 19 November, 4.00 - 5.00 pm

Key Takeaways...

from Baker McKenzie's Future of Disputes spotlight session

There is a wider trend in the UK and across Europe toward class actions, with increasing focus on digital services as well as products purchased online. The European Commission has provided for recovery on behalf of a class by representative bodies in its [New Deal for Consumers](#)¹ and platform-to-business directives and is about to vote on final draft text of a directive introduce collective redress for consumers across areas of law including consumer rights, data protection, financial services, travel and tourism, energy, telecommunications, environment and health (to be implemented within two and half years by Member States).

Some European jurisdictions have already acted to introduce some mode of collective recovery - for example, the UK has an opt in structure for most types of claim (opt out available for competition damages) and both Italy and the Netherlands have introduced opt out class action structures.

The ability for consumers to recover in mass harm situations, like data breach/misuse or product liability situations, will further be boosted by:

- consumers' rights and enhanced consumer protection² in relation to products, data and provision of services online are being expanded under EU law
- rise in litigious consumer associations across EEA
- increased availability of funding and firms with a business model based on being paid a slice of damages rather than up-front fees

Data Misuse and Breach Claims

Class actions for data breach and misuse are key developing areas of law and the market.

We have seen a number of actions being filed as representative actions (e.g. Lloyd, Caprio, Bryant) and Group Litigation Orders (British Airways, EasyJet).

Importantly, the claims being brought are not limited to traditional data breach claims but also encompass cases where defendants have allegedly misused personal data (see Lloyd, Oracle & Salesforce). Following the landmark Schrems II decision this year, we may also see actions being brought for non-compliant international data transfers.

The rise in privacy class actions has mainly been driven by claimant and personal injury law firms repurposing themselves as data specialists and funded by litigation funders who see the emergence of data breach and misuse claims as an opportunity for investment. Such firms are incentivised to file claims as soon as possible, regardless of the merits of the case, in order to 'lock in' the potential damages recoverable and to avoid future carriage disputes.

1 See also [Leveraging the Lessons Learnt from the GDPR in the New Deal for Consumer](#)

2 [Modernising consumer protection: the EU's New Deal](#) (This article first appeared in the January/February 2020 issue of PLC Magazine)

Coordinating and Developing a Litigation Strategy

Our discussion illustrated the different facets through which class action are likely to arise. Often, businesses operating in multiple jurisdictions may deal with several civil actions utilising different collective mechanisms, and often with additional multi-jurisdictional regulatory enquiries. There is also a global trend towards regulators toughening up on enforcement, and we can expect to see increased fines rivalling those previously only seen in competition cases.

It is therefore integral that firms develop a global litigation and settlement strategy to pre-empt and resolve class actions.

Drive down litigation costs

Centralise management of day-to-day litigation to ensure consistency of approach and quality. Applying project management methodology and technical solutions can help to ensure efficiency.

Mitigate mass action risks

Careful drafting of dispute resolution clauses (where possible) and jurisdiction or applicable law clauses could assist you in directing disputes to your forum of choice. Adopt proactive remediation strategies, such as establishing your own global scheme administered by an independent third party, partnering with representative bodies.



Coordinate disputes across jurisdictions

Establish a playbook and team to meet multiple action and claims with a coordinated, consistent response. Divide and rule by using test cases and taking out stronger claims by using strike out on issues or funding, and consider settlement where appropriate.

Adapt strategy to subject matter and commercial position

Different strategies will need to be adopted for competition, consumer and data privacy claims. Align with regulatory and legislative engagement strategies to keep up to date with how other processes will impact each stream of activity.

And finally...

On 24 November the European Parliament approved the final text of the EU Representative Actions Directive. The approved directive will enter into force 20 days after its publication in the EU's Official Journal. Member States will then have 24 months to transpose the directive into national law and an extra 6 months in which to apply it. The new rules will apply to representative actions brought on or after its date of application. The Press Release issued by the European Parliament can be found [here](#).

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