



FRESHFIELDS BRUCKHAUS DERINGER

# Class actions and third party funding of litigation

An analysis across Europe





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## Introduction

### The development of class actions in Europe

Welcome to our commentary on recent developments in the area of class actions or group litigation, and related 'plaintiff bar' activity, in Europe.

We have seen increasing interest from clients in understanding the risks they face (or may face) from class or multiple claimant actions across Europe. We have been monitoring these developments closely and have set up a working group, throughout our European network offices, to ensure we are on top of them as they evolve. To assist clients, we have prepared this short summary of the current position, looking at the position country by country. We hope it is of value to you.

The factors behind the recent interest include:

- some high profile recent events, not least the European settlement announced on 11 April 2007 by Royal Dutch Shell, for US\$352.6m, of those US class action claims brought against it by its European shareholders, arising from its overstatement of its gas reserves and the dramatic fall in its share price when this was corrected in 2004;
- well publicised changes, or proposals for changes, in the law and procedure in Europe to facilitate group or quasi-class actions;
- a political will to shift the landscape in favour of mass claimants, partially to improve 'access to justice' (typically where many have suffered losses that, at an individual level, might not justify litigation but collectively amount to a large liability for the defendant company);
- a shift in the supply side, with more firms in Europe starting to behave like a plaintiff bar (soliciting claimants, particularly through websites and advertising), US plaintiff bar law firms ostentatiously establishing a presence in London and funds being established to finance plaintiff litigation; and
- considerable sensitivity in Europe to the experience in the US and an increasing convergence of legal techniques across the Atlantic.

At a very high level of generalisation, as the following detailed sections show, the summary position across Europe is as follows.

- There are a number of bills before different parliaments<sup>1</sup>, or recent changes to legislation or court rules, that would, or already do, facilitate mass actions.

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<sup>1</sup> Although there is some political resistance: legislative change may be slower than alarmists claim.

- As discussed below, the European Commission is actively encouraging both collective redress for consumers in the new Consumer Policy Strategy announced on 13 March 2007<sup>2</sup> and private antitrust damages claims, and is consulting on the best approach to follow. Although much of the detail remains to be resolved, the Member States generally support these developments.
- The very recent Royal Dutch Shell case, which uses the new Dutch legislation, and the proceedings under the German KapMuG law against Deutsche Telekom highlight a US-style trend of shareholders suing companies for failure to disclose matters that affect share prices. This form of securities litigation is common in the US but very difficult (for technical reasons) in England & Wales and traditionally rare in Europe.
- There is a genuine interest from plaintiffs, plaintiff bar law firms and some financial parties in creating a more active plaintiff bar and an increasing recognition that the legal technology exists to enable mass actions to be prosecuted, often with external funding (not least through the assignment of causes of action to a single plaintiff).
- However, progress is currently fragmented, and some of it is limited to certain types of claim (for example, product liability, competition law and shareholder claims) and to certain jurisdictions.
- Change is occurring at different rates in different countries – specifically:
  - England & Wales and, particularly, Germany are seeing innovative funding techniques;
  - Germany is reforming its contingency fee rules generally and there are calls to a similar effect in England & Wales in the antitrust area;
  - the Netherlands has adopted a mass settlement route;
  - France and Italy are looking at a multiplicity of class action bills; and
  - many countries look to consumer bodies to front and control multiparty claims as a way of avoiding an extreme class action culture.
- Further, there is an absence of the drivers of, and any will to adopt, the full blown US model, or at least a wish to avoid its excesses. In Europe, damages are usually compensation based and not penal, awarded by judges not juries; lawyers cannot participate to the same degree in the fruits of success (changing the economic incentives); and there are very few (as yet) ‘opt-out’ mechanisms. In ‘opt out’, the claimants define the class (as in the US), subject to court approval, and claimants have positively to act to leave the class; in Europe most group actions are still ‘opt-in’, where claimants have to take a positive step to participate. Most of these features are likely to remain, at least substantively, in place.

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<sup>2</sup> Consumer Policy Strategy 2007-2013.

The two Community level measures can most conveniently be summarised here rather than repeated in each section.

- On 13 March 2007, the EU Commissioner for Consumers, Meglena Kuneva, unveiled the new Consumer Policy Strategy 2007-2013, which sets out more than 20 legislative and non-legislative initiatives aimed at increasing consumer confidence in the Single Market. This package includes measures on how best to strengthen mechanisms for consumers for infringements of consumer protection rules.
- On 20 December 2005 the European Commission published its Green Paper on damages actions for breach of EC Treaty antitrust rules seeking to make it easier to bring damages claims for competition law breaches before the national courts. The Commission is consulting on various solutions to the impediments to damages claims for competition breaches, such as enhanced disclosure rights for claimants, claimants' rights to punitive or non-compensatory damages (including double damages for horizontal cartels, which could be automatic, conditional or at the discretion of the court) and special procedures for bringing collective actions. The European Parliament Report published in April 2007 supported the need for collective action for claimants and private sector compensation for antitrust violations but did not ultimately support the proposal for double damages.

Aside from these Community level proposals, the various developments at the state level give rise to complex cross-border implications in Europe. The possibilities that exist for forum shopping, the effect of decisions in one jurisdiction on rights in another and the conflict of laws issues are only starting to be considered.

Our interest in this area reflects not only the concerns of our clients but our own professional experience. We have been instructed on many of the multiple claims in this area, including: the Lloyd's Names litigation, the electromagnetic frequency radiation and mobile phone claims, the tobacco health claims, the low fat milk producer claims, the Sotheby's/Christie's cartel claims and, currently, the CDC antitrust claims being brought in Germany in relation to the cement cartel.

We would welcome any comment or questions on this guide. We hope to update clients on significant developments in this field on an ongoing basis.



## **Austria**

### **Introduction**

The concept of class actions has developed in Austria over the last few years but the situation is not yet comparable to that in the US. Austrian procedural law does not provide for class actions in a formal sense. However, a lively discussion has recently arisen regarding the question of how, as a matter of Austrian legal procedure, similar claims of several parties may be asserted together. As a result of this discussion, two primary types of class action have been established: first, representative actions regarding the protection of collective interests under the Consumer Protection Act (Konsumentenschutzgesetz, KSchG) and the Austrian Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb) and second, actions arising from individual claims that have been assigned by injured parties to consumer associations.

The Austrian Supreme Court (Oberster Gerichtshof) recently decided to allow third party funders to fund the procedural costs of litigation in connection with these two types of class action. As a consequence, professional financing companies are being established in Austria and this development may encourage class actions.

Legal commentators have proposed further amendments to the Code of Civil Procedure (Zivilprozessordnung). This has meant that the introduction of class actions in tort law is on the new Government's agenda and, in fact, formed part of the political programme of the parties supporting the present coalition in the recent election. Therefore, class actions and third party funding are very topical in Austria at the moment.

### **Summary of options available to plaintiffs**

As well as the two types of class action mentioned above, the Austrian civil procedure law allows for claims to be grouped together in certain circumstances. The courts may decide to connect several separate proceedings conducted by the same parties or different plaintiffs against the same defendant where this will lead to simpler and faster proceedings and reduce procedural costs. However, there is no guarantee of a single judgment in such proceedings because the claims pooled together remain as individual claims in respect of which the courts have to make separate decisions.

### **Representative actions**

The KSchG empowers several consumer associations (such as the Chamber of Commerce, Chamber of Employees, Austrian Trade Union and Association for Consumer Information) to take action to protect the collective interests of consumers and prevent harm from occurring to them as a result of business transactions. Consumer associations are able to file collective actions to prohibit the further use of unfair and unlawful contract terms or illegal practices; for example, action has been taken regarding door-to-door sales, consumer credit and package tour contracts.

### **Collective actions arising from the assignment of individual claims**

In addition to representative actions, consumer associations in Austria have extended their rights of action to include actions arising from individual claims of aggrieved consumers via the assignment of such claims to the association. Following the assignment of such claims, the association can assert them in proceedings commenced on its own behalf. In 2005, the Supreme Court recognised such a procedure for bringing class actions by allowing claimants in general to assign claims to a single plaintiff<sup>3</sup>. However, the Supreme Court also imposed a restriction on this procedure: such actions based on the collective assertion of claims of different plaintiffs are permitted only where the bases for the claims are similar and where they require a decision on similar questions of fact or law. Consequently, only those claimants who specifically join the collective action, ie opt in to the action, may take advantage of any benefits flowing from it.

The main purpose behind these collective actions is to ensure streamlined, faster and more economical proceedings, particularly in cases where injured consumers have a legitimate interest in asserting their claims, but where the damages sought are so low that an individual would rarely sue alone. It could be said that this is part of a general trend in Austria of promoting access to justice for consumers. The main examples of cases where such collective actions have been filed by consumer associations are cases of multiple damages regarding, for instance, mass illness at a holiday resort caused by contamination and the improper calculation of interest affecting the customers of a particular bank. Specific examples from 2006 and 2007 include an action regarding floating interest clauses where bank customers had been overcharged on their loan interest rates<sup>4</sup> and an action by private investors who had lost their money in a large fraud case and sued AMIS (Asset Management Investment Services)<sup>5</sup>.

### **General points on class actions in Austria**

Even in such collective actions, the courts must decide the question of damages according to the general principles of Austrian tort law, which means that damages do not include a penal element. Generally speaking, it may be said that damages awarded by the Austrian courts are very low; in particular, in connection with physical injury the compensation for non-material damage is marginal. Furthermore, the Austrian rules on legal costs apply without modification in the context of collective actions so that the losing party generally has to bear the entire cost of the proceedings. The very low compensation awarded by the courts and the absence of pre-trial discovery do not encourage the spread of US-style class actions in Austria.

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<sup>3</sup> Supreme Court 12 July 2005, 4 Ob 116/05w.

<sup>4</sup> Supreme Court 12 July 2005, 4 Ob 116/05w.

<sup>5</sup> This procedure is still pending.

### **Funding issues**

Funding of litigation in Austria has typically been via legal costs insurance. However, other litigation funders have been established in Austria over the last few years. Consumer associations in particular have encouraged this trend by co-operating with the funders to fund collective actions to promote access to justice for individuals. However, there are still only very few private litigation funders in Austria, most of whom are German companies with an office in Austria. Only a few cases have been funded on this basis; recent examples are the cases mentioned above (floating interest clauses and the action against AMIS). Therefore, such funding has not yet had a large effect on the Austrian litigation market, although it may in the future.

In such cases, the litigation funder will bear the entire cost of the proceedings, including lawyers' expenses, the costs of procuring and assembling evidence, correspondence charges and court costs. If the claim is successful, the funder receives between 20 and 30 per cent of the amount in dispute, after deduction of any costs incurred during the proceedings. Although such agreements for contingency fees would be unlawful under the Austrian General Civil Code (Allgemeines Bürgerliches Gesetzbuch) if concluded by Austrian attorneys, the Supreme Court has ruled that such financing contracts concluded by private litigation funders are permissible, as such entities fall outside the wording of the legal provision, which applies only to legal advisers<sup>6</sup>.

However, these companies typically only finance cases when a complex prior evaluation has already indicated a positive chance of success and the value in dispute is at least €50,000. Legal commentators have suggested that in the context of such third party funding, such funders should not be permitted to interfere in the conduct of the proceedings and should remain liable for the entire procedural costs in the event that the claim is unsuccessful under the 'loser pays' doctrine, although in theory, insurance should be available to the funder at the start to cover any such future costs liability. Unlike in England & Wales, the Austrian courts have not yet considered whether the funder's liability should be limited to the amount of the funding provided. In our view such a limitation would probably not be applied in Austria, as the Austrian courts would regard it as unfair, being to the detriment of the successful party. It remains to be seen if the suggestions of legal commentators will be taken on board to limit the scope of such funding.

We are not aware of the use of creative schemes by funders in Austria such as those in Germany, where a foreign company founded solely for the purpose of acquiring claims and enforcing them has acquired potential claims for damages. This would raise complicated issues in Austria such as the admissibility of claims that have been assigned solely for the purposes of collection, but this is something to watch going forward. In theory, hedge

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<sup>6</sup> Supreme Court 23 February 1999, 5 Ob 28/99z; Supreme Court 13 February 1999, 4 Ob 81/99m.

funds and other private investors who wanted to invest in claims to make a profit should be able to do so in Austria given that professional funding firms already exist. However, this is unlikely to occur given that there is no real money to be made from damages claims in Austria and therefore such funding is unlikely to be worthwhile for these entities.

#### **Future developments**

In 2005, the Austrian Ministry of Justice (Bundesministerium für Justiz) established a working group formally to develop an economical and efficient procedure for class actions. The working group intends to formalise the opt-in nature of class actions and to that end plans to set up an independent collecting institution in the courts where claimants may register their claims. Such a notification will postpone the date of prescription in respect of these claims and so should make it easier for claimants to take part in such class actions. At the moment, it is not possible to say when exactly these proposals will come into effect, as the project is still in its early stages.

In the competition context, the Austrian competition authorities have criticised the proposals made by the European Commission in its Green Paper and so rejected the introduction of collective actions. They regard it as unfair and unjustified to provide for exceptional provisions in the competition context and so the new European proposals on collective redress for consumers are also unlikely to be welcomed.

#### **Summary of points to note for general counsel**

In summary it may be said that although Austrian law does not provide for class actions in a formal sense at the moment, other tools under the Austrian civil law and civil procedural law facilitate the collective assertion of several claims of different claimants on issues concerning consumers. Furthermore, there are plans to introduce an economical and efficient procedure for collective actions in Austrian tort law. These developments will be supported by the concept of third party funding of litigation by private litigation funders, which is also on the rise in Austria, although any development in this area will be limited as long as the amount of money awarded as damages by the Austrian courts remains so low.

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## England & Wales

### Introduction

The English civil litigation system does not allow for full US-style class actions. However, the Civil Procedure Rules provide specifically for two forms of collective action: group litigation orders (GLOs) and representative claims. The issue of class actions is particularly topical in England & Wales currently: the US class action law firm Cohen, Milstein, Hausfeld & Toll has just opened a London office; moreover, private funding of litigation is on the increase. This raises interesting legal issues as to how far independent third parties who fund litigation (on the basis that they will share in the recoveries) will be liable for the other side's costs if unsuccessful, and how far the courts will allow such funders to control the litigation that they fund. This area of law is shaped by changing public policy concerns. Various forms of group action for consumers are also developing.

### Summary of options available to plaintiffs

Before turning to specifics, it is worth noting that it has long been possible for a group of individuals to bring a claim as a 'joint action', where any number of individuals may be joined as parties to a claim, or one is taken as a test case with tolling agreements for others, or the cases are stayed as a matter of case management. Either the lawyers operate an informal group action or the court achieves a similar result through the use of its case management powers. A recent example of this is the Railtrack litigation, where about 45,000 shareholders of Railtrack led by Geoffrey Weir brought a claim against the Government for its handling of the administration of Railtrack. However, perhaps the best examples are the massive group actions run in the Lloyd's litigation in the 1990s, where a raft of substantial litigation was fought on this basis.

### GLOs

An application can be made to the court for multiple claims involving common or related issues of fact or law to be dealt with by way of a GLO (the GLO issues). A GLO is a case management tool, introduced in 2000, designed to manage multiple claims efficiently.

In brief outline, a GLO will contain directions about the establishment of a 'group register' on which the claims to be managed under the GLO will be entered, specify the GLO issues that will identify the claims to be managed and specify the court that will manage those claims. A claimant must already have initiated proceedings and the court may take one or more claims as test claims. Such GLO claimants are responsible for the costs of their own claim as well as an equal proportion of the common costs with the other group litigants, in addition to any costs they may need to pay to the other party in the event that the claim is unsuccessful. The critical point is that each claimant must positively adhere to the claim (ie opt in); claimants cannot be included by a defined class from which they can choose to disassociate themselves (ie opt out).

Recent GLOs have been issued in relation to personal injury, private nuisance and the application of European law to value added tax assessments, but there is no restriction as to the areas in which they can be used. However, GLOs have not so far been as popular as expected, or intended, upon their introduction in May 2000<sup>7</sup>. This is likely to be for a mix of reasons, including culture, lack of expertise by the claimants and the hurdle presented by the need to opt in and, often, accept a degree of risk and responsibility<sup>8</sup>.

#### **Representative actions – general**

Where more than one person has the ‘same interest’ in a claim, it may be brought as a representative action. It is also open to the court to order that a claim be continued as a representative action. Claimants are more likely to satisfy the less restrictive test of ‘common issues’ and use GLOs instead. A classic case for a representative action is that of shareholders who share the same interest. However, there are also specific procedures for competition claims and unfair contractual terms claims.

#### **Specific regimes**

Under section 47B of the Competition Act 1998 from June 2003, consumer organisations have been able to bring claims on behalf of consumers following a finding of anticompetitive conduct by the Office of Fair Trading (OFT) or the European Commission. Such claims are favourably treated procedurally and are likely to become more so.

The first such case is the current action against JJB Sports brought by Which?, the consumer group, which was filed on 5 March 2007 on behalf of consumers who suffered as a result of a cartel that inflated prices for replica football shirts. Which? is claiming compensatory damages for consumers who overpaid, as well as exemplary or restitutionary damages. (JJB Sports offered relevant consumers a free new shirt and mug if they could prove that they owned one of the affected shirts and consumers who took up the offer had to agree not to join in the Which? claim. The legal timetable has been postponed while settlement discussions continue but Which? has said that if the discussions do not see a result by June, it will be going back to court.)

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<sup>7</sup> Since May 2000, there have only been 58 GLOs issued. Moreover, they do not appear to be gathering pace – in 2001, there were 18 issued; in 2002 there were 11; and since then, there have been between five and seven each year ([www.hmcourts-service.gov.uk/cms/150.htm](http://www.hmcourts-service.gov.uk/cms/150.htm)).

<sup>8</sup> In March 2006, the High Court refused an application for a GLO that split-capital investors had hoped would allow them to bring mis-selling claims against their financial advisers. The application was brought by a law firm against a number of investment firms on behalf of individuals who alleged they had lost money investing in split-capital investment trusts. As a result of this case, it will be very difficult to bring a GLO against financial advisers in future, as it established that a GLO is inappropriate where the question of a mis-sale depends on a suitability assessment that differs in every individual case. This in turn means that US-style class actions for any form of financial mis-selling claims are unlikely in England & Wales, where the claim depends on the individual situation of different claimants. Such individuals will need to bring individual claims.

This points out a feature that we have encountered on a number of occasions recently: a prompt offer of fair compensation may draw the sting from potential mass litigation.

In the context of the proposed cartel damages reforms, Philip Collins, Chairman of the OFT, has commented that a lot can be learned from the US system, but that a measured approach should be taken. He has also said that his agency may lobby judges to waive the ‘loser pays’ rule more often, to encourage more suits, given that the judges have considerable discretion. It is also likely that the Competition Appeal Tribunal will use its procedures to facilitate multiple ‘follow on’ cartel claims. The private enforcement of antitrust claims is particularly active in England & Wales. An informal discussion paper issued by the OFT on 18 April 2007, which deals with how to make redress for consumers and businesses for breaches of competition law more effective, makes it clear that the OFT considers there would be merit in facilitating a greater number of private competition law actions. The proposals include introducing larger success fees for lawyers and making representative actions more broadly available<sup>9</sup>. However, the OFT stresses that it does not want its proposals to give rise to a ‘litigation culture’ that may be harmful to legitimate business activity.

The Unfair Terms in Consumer Contracts Regulations 1999 allow representative bodies to complain in respect of unfair contractual terms to the OFT, which may grant an injunction (this procedure does not allow damages claims).

English company law only allows a company to obtain damages from directors for breach of their duties. However, shareholders have a right to sue the directors in the company’s name if it fails to take action (the derivative action), although this is subject to the fulfilment of strict conditions. This will be replaced by a new derivative action procedure set out in the Companies Act 2006. Shareholders will be able to bring proceedings against the directors in a wider range of circumstances than at present, suing in the company’s name for loss suffered as a result of the directors’ negligence, default, breach of duty or breach of trust. They will also be able to claim against third parties implicated in any breach (again, in the company’s name). However, shareholders will require the court’s consent to sue – and must overcome a number of hurdles before this consent can be obtained. Despite the safeguards, there is still a risk that activist shareholders and pressure groups will seek to use the new procedures at least to create publicity and put decisions of public company boards under even greater scrutiny. The relevant parts of the Act will come into force on 1 October 2007 and so companies should review their directors’ and officers’ insurance in advance to confirm that it covers derivative actions in light of the potentially increased risk of shareholder litigation.

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<sup>9</sup> For further details, see discussion paper entitled ‘Private actions in competition law: effective redress for consumers and business’, April 2007, available at [www.of.gov.uk](http://www.of.gov.uk).

### **General points on class actions in England & Wales**

Unless the court directs otherwise, any judgment or order given in a GLO or representative claim is binding on parties to all of the other claims on the group register/represented in the claim. In a GLO, issues that fall outside the GLO issues (such as damages) are decided individually and a GLO does not ensure finality of claims: potential claimants should opt in to the GLO proceedings, but a failure to do so does not prevent them from bringing a claim at a later stage (subject to limitation periods), although subsequent claims brought might be stayed pending the outcome of the GLO. In a representative action, decisions can be enforced against parties who were not represented with the court's permission. It should be noted that the publicity of a group action might persuade other claimants to come forward if the outcome was successful.

However, there are a number of specific features of litigating in England & Wales that differentiate this regime from the US regime, and in practice limit the risk represented by class actions within the procedures set out above.

- Claimants have to opt in to group actions rather than opt out as in the US. This makes the building of a powerful body with negotiating weight much more expensive and less effective.
- The loser pays: the presumption is that the successful party should recover its costs, which is the biggest deterrent to claimants joining group litigation, although 'After the Event' (ATE) insurance policies may be available to cover for such a contingency.
- The claimants' own cost risk can be limited by a fee deal with the lawyers, but the lawyers' premium is limited by regulation, removing the enormous incentive of the contingency fee, which changes the economics of the case for the plaintiff bar.
- Damages are generally compensatory rather than punitive, being limited to the extent of the claimant's loss. 'Exemplary' damages (with a punitive effect) can be awarded only in very limited circumstances (it should be noted that one area where they are often claimed is in the context of cartels, although the issue has never been tested and there are considerable arguments against this development)<sup>10</sup>.

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<sup>10</sup> *Rookes v Barnard* [1964] 1 All ER 367 sets out the categories of behaviour for which exemplary damages may be awarded, including where the defendant's conduct has been calculated by him to make a profit for himself that may well exceed the compensation payable to the claimant. This may be relevant in the context of cartel cases, as undertakings may have entered into a cartel having made such a calculation. Exemplary damages have never been awarded in a competition case in England & Wales to date.

- In general, civil trials are conducted in front of a judge, rather than a jury, who determines liability and the level of damages, resulting in more moderate awards.

On the other hand, document disclosure can be fairly extensive in England & Wales and there are pre-action disclosure procedures in appropriate cases. In the context of group actions, it may be to a claimant's advantage to see relevant documents at an early stage in an action.

In summary, it is clear that England & Wales is not as claimant friendly a jurisdiction in which to litigate as a group as the US, but new funding options for claimants could nevertheless encourage claims that would otherwise not have been brought.

## **Funding issues**

### **Introduction**

Third party funding generally, including for professional gain, is on the increase in England & Wales and this is breaking new ground.

The rules controlling third party involvement in litigation are motivated by public policy concerns, namely the improper or vexatious encouragement of litigation, to ensure that the courts do not become a channel for financial speculation. However, they are traditional rules and, given the present emphasis placed on access to justice, and reduced public funding, courts may not be willing to find professional litigation funding to be 'wanton' or 'officious' any more – or not so often. There is a strong perception that the approach is changing. However, currently a third party that attempts to exercise control over the conduct of litigation risks finding that its funding agreement with the funded party is unenforceable. It could also find itself open to unlimited costs liability in the event of an unsuccessful claim.

Where there is no issue of commercial gain for the funder, the issue does not arise. Sometimes parties, including non-governmental organisations, do provide funding for litigation and the courts have not imposed liability for costs on those who have contributed as 'pure' funders with no collateral interest in the outcome of the claim in a good cause lest it restrict access to justice<sup>11</sup>.

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<sup>11</sup> See, for example, the libel case of *Hamilton v Al Fayed* [2002] 3 All ER 641, where well-wishers funded Hamilton's side of the litigation. See also the recent case of *Jackson and others v Thakrar and others* [2007] EWHC 626 (TCC), where the court stated that there is a presumption against a costs order against 'pure funders', as opposed to a professional funder (such as an insurer) or one with a financial interest in the outcome of the litigation. This case is interesting because the court also set out the causation principles that would apply in such a case: the relevant test is whether the funding provided by the non-party had caused the applicant to incur costs that would otherwise not have been incurred.

### **Conditional fees**

Contingency fees are not permitted in England & Wales; lawyers are not permitted to share a percentage of the winnings. However, claimants are allowed to enter into a Conditional Fee Arrangement (CFA) under which the client only pays his lawyer's fees if the claim is successful, in which case he also pays a success fee as a percentage uplift on the normal costs, to a maximum of 100 per cent. CFAs go some way to allow funding in cases where the claimant does not have the necessary funds, although the 'loser pays' principle means that, even with a CFA, an unsuccessful claimant could face a large legal bill. The introduction of CFAs evidences a shift in the attitude of public policy to the practice of conducting litigation on terms that the obligation to pay fees would be contingent on success, to give effect to another facet of public policy – the desirability of access to justice<sup>12</sup>.

CFAs have not been commonly used in a commercial context and public funding has been restricted. There is a gap in relation to litigation funding for such commercial cases and recent developments show that third party funders are moving to fill this. The culture in the plaintiff bar may also change. The OFT's proposals in the competition law field would mean that firms would be permitted to recover a percentage increase of more than 100 per cent from damages recovered as well as from the losing party directly. This would increase the incentives for lawyers to take cases on a conditional basis without imposing disproportionate burdens on defendants. There is a further suggestion that the parties' liability (presumably usually the claimant's) for each other's costs should be capped at an early stage of the proceedings. As the OFT comments, where the choice is between allowing anticompetitive behaviour to continue and capping the potential costs liability of claimants of small financial means to facilitate their access to justice, it is likely to be in the public interest to cap.

### **Third party funding**

Until the Criminal Law Act 1967 abolished the crimes and torts of champerty and maintenance, these used to attract civil and criminal liability. Maintenance requires 'wanton and officious intermeddling in the disputes of others', whereas for champerty, there must also be a 'division of the spoils'. However, the statute expressly provides that:

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<sup>12</sup> However, this does not mean that the courts will not clamp down on what they consider to be an abuse of the system. For example, in a recent case brought by multiple consumers against a travel operator, the courts were prepared to cap the claimants' costs before the case started. This makes it a less profitable enterprise for the lawyers involved and reduces the risk of a potentially huge bill for costs forcing the defendant to settle where it would not otherwise do so.

‘the abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal’<sup>13</sup>.

The question of whether on the facts there is either maintenance or champerty is one of public policy and the law is kept under review, and is changing, as public policy evolves. Although the crimes and torts have been abolished, an infringing agreement is still unenforceable.

Recent cases show that the issue, theoretically to be separately assessed in each case, is whether the agreement in question has a real tendency to produce the evils against which the law of maintenance and champerty is intended to guard, namely the corruption of public justice. The mere fact that litigation services have been provided in return for a promise of the share of the proceeds is not enough. The pragmatic approach of the courts in this context highlights the importance that public policy attaches to access to justice<sup>14</sup>.

However, third party funding of litigation purely for commercial gain is a slightly different scenario. We have seen that professional funding firms, which fund claims for a share of the recoveries, are becoming increasingly prevalent, and hedge funds and other private investors are also reportedly becoming involved in this market. Such professional funders are not excused from liability for costs in the event of an unsuccessful outcome, as the courts have the power to order a third party to pay the costs where appropriate. However, they may be prepared to take that risk if the economics are right. This practice has been more often seen in the liquidation area where creditor claims have been bought and pursued but it is extending into other areas. One firm with significant funds claims to have undertaken 32 cases, lost two and won or settled the rest, producing a very attractive return.

In the case of *Arkin v Borchard Lines*<sup>15</sup>, the Court of Appeal limited the liability for costs of the professional funder to the extent of the funding provided, thus recognising that the public benefit of access to justice must be balanced against the general rule that a successful party to litigation should recover its costs. The court felt this would also ensure that professional funders considered with even greater care whether the prospects of litigation were sufficiently good to justify the support they intended to provide, which would also be in the public interest. However, this case did not rule out that there will be circumstances in which funding agreements will fall foul of the policy considerations rendering an agreement champertous and unenforceable or that such a funder would risk unlimited liability for costs. This is always a matter of discretion of the court.

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<sup>13</sup> Criminal Law Act 1967, section 14(2).

<sup>14</sup> See, for example, *Regina (Factortame Ltd and others) v Secretary of State for Transport, Local Government and the Regions (No.8)* [2002] EWCA Civ 932 and *Mansell v Robinson* [2007] EWHC 101 (QB).

<sup>15</sup> [2005] EWCA Civ 655.

By contrast, in Australia, in the *Campbells Cash and Carry* case<sup>16</sup> the High Court has recently held by majority that litigation funding is not an abuse of process or contrary to public policy in states where the crimes and torts of maintenance and champerty have been abolished, despite the fact that the litigation funder exercised considerable control over the proceedings. The majority felt that fears about the adverse effects of litigation funding on the litigation process generally and the ‘fairness’ of agreements between the funder and the funded party should be addressed by existing doctrines, including abuse of process, rather than an overarching rule of public policy. Public policy was only relevant to a dispute about the enforceability of the agreement. Significantly, as in England & Wales, the relevant Australian legislation abolishing the crimes and torts of maintenance and champerty provides that public policy and illegality would still be relevant in relation to these issues. The dissenting judges on the other hand felt that the proceedings in question were an abuse of process due to a number of public policy factors, many of which could apply to a case where a hedge fund or other private investor is funding litigation to advance its interests in a speculative investment, rather than to promote the interests of the claimants<sup>17</sup>. Discussion was already underway in Australia as to whether there should be regulation of the litigation funding industry, and it is likely that the views of the dissenting judges will be carefully considered as part of this process.

It remains to be seen whether the English courts will follow the Australian example to prioritise access to justice even further, thus opening the door for further professional funding, where such funders wish to influence how a claim is run. It is not inconceivable that professional funders will want to take control of proceedings where a lot of their money is at stake and this is the outstanding issue where champerty and maintenance may bite to limit the spread of such funding. The English courts said 20 years ago that despite the abolition of maintenance and champerty as crimes and torts in England & Wales, Parliament intended to leave the law as to the effect of maintenance and champerty on contracts unaffected by the abolition of them as crimes and torts<sup>18</sup>. Although this would suggest that English courts may be more sympathetic to the force of the public policy concerns raised by the dissenting judges in the *Campbells Cash and Carry* case, the sense is that the general climate is moving towards a more generous approach.

Funders may also want to sue in their own name via an assignment of the claimant’s cause of action. Company liquidators hold a privileged position in relation to maintenance and champerty and are given the statutory power

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<sup>16</sup> *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41.

<sup>17</sup> The factors included the funder’s motive of profiting from the litigation of others, the fact that the funder sought out and encouraged persons to sue who would not otherwise have done so, the large gains hoped for by the funder, the funder’s control of the litigation and the subservience of the retailers’ interests to those of the funder.

<sup>18</sup> Lord Roskill in *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679.

to sell a cause of action on terms that the assignees will pay over a share of the recoveries by way of consideration. However, there are legal issues for ‘financial’ funders who want to use this route, as the assignment of a ‘bare right of action’ outside of the insolvency context may still be held to savour of maintenance or champerty and so be void. The courts have held that an assignment of rights by the party funded to the funder does not savour of maintenance or champerty where the funder has a genuine commercial interest in taking an assignment of the cause of action and in enforcing it for his own benefit<sup>19</sup>. In addition, it is not fatal to the validity of an assignment that the assignee might make a profit out of it, unless the figures were massively disproportionate. The courts have left open whether any such profit would be returnable by the assignee to the assignor<sup>20</sup>.

However, in the context of hedge funds and other private professional funders who are funding litigation purely to make a profit, this test is less likely to be satisfied. The courts will look at the purported assignment in light of the totality of the transaction to determine its validity, considering whether an agreement poses a risk of corrupting public justice in terms of trafficking in litigation or an officious interference in the disputes of others<sup>21</sup>.

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<sup>19</sup> *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679. In this particular case, however, the assignment was held to be void, as it was a step towards the sale of a bare cause of action to a third party who had no genuine commercial interest in the claim in return for a division of the spoils and savoured of champerty, as it involved trafficking in litigation, which is contrary to public policy under English law.

<sup>20</sup> *Chitty on Contracts*, Volume 1 General Principles, Twenty Ninth Edition, para 16.059, 19.049.

<sup>21</sup> See the recent decision of the Privy Council in *Massai Aviation Services v The Attorney General* [2007] UKPC 12 in relation to a company’s assignment of its cause of action to its sole shareholder, which was found not to be void on the grounds of champerty. The case is significant because it recognised the validity of an assignment to a shareholder who was not also a creditor of the company, and so is a further indication of the trend towards the liberalisation of the laws of champerty and maintenance in this area. The case is also significant because of the qualification mentioned in the judgment. Their Lordships said on the facts of this case, this was not wanton and officious intermeddling in another person’s litigation for no good reason. However, this was not to say that a shareholder will always have a genuine and substantial commercial interest in taking an assignment of the company’s claims. Their Lordships gave ‘an extreme example’ of a minority shareholder buying a substantial claim for a nominal sum in the hope of making a substantial profit, which they said may well be contrary to public policy. Therefore, although the case highlights the liberal approach, it also shows that the courts will only go so far and that public policy concerns still have an important role to play going forward. It follows that an assignment to hedge funds/private equity houses of claims for a nominal sum through which the entities had hoped to make a substantial profit may be held to be contrary to public policy, as this would go even further than the ‘extreme example’ because they would not be shareholders. This leaves open the question of whether such entities would be allowed to take an assignment of claims for a sum that was more than a ‘nominal sum’. What is clear is that the courts will look at the transaction as a whole in determining the public policy issues.

Another practical point to note is that ATE insurance may be integrated into a commercial funding model to further reduce a funder's exposure to adverse costs awards, which may serve to encourage the spread of private funding. On the other hand, potential defendants should be aware of the risks posed to them when faced with third party funded claimants who do not have ATE insurance. It is not inconceivable that a funder will itself be unable to meet its costs obligations and defendants will be left in a worse position than if the claimant had tried and failed to mount a claim on its own.

#### **Recent trends and developments**

In January 2007, a £90m negligence claim was brought against accountancy firm Moore Stephens over its role as auditor to a collapsed British company. This was organised through the specialist litigation funds provider IM Litigation Funding (IM) and is one of the largest claims yet to be funded by an independent third party. IM specialises in funding legal claims for insolvency practitioners in return for a percentage of the proceeds of the legal action, in which context limited litigation funding has been allowed for some time. However, privately funded claims are now being brought outside of the insolvency context and the targets are no longer simply auditors. IM states on its website that it will consider not just insolvency cases but also general commercial litigation that is lacking the funds to pursue a good claim.

#### **Future developments**

The Department of Trade and Industry (DTI) published a consultation paper on 'Representative Actions in Consumer Protection Legislation' in July 2006. The DTI's proposals aim to make it easier for consumers who have suffered similar damage to sue via recognised representative bodies. The DTI appreciates the need to avoid engendering a compensation culture and therefore has proposed a number of safeguards. A response from the DTI to the comments it received is expected to be published soon.

In addition, in September 2006, the Patent Office launched a consultation on representative actions for the enforcement of intellectual property rights, which closed on 18 December 2006. The results of this can also be expected over the next few months.

The Civil Justice Council (CJC) has pressed for changes in funding to increase access to justice. Its September 2005 report on 'Improved Access to Justice – Funding Options and Proportionate Costs' suggested contingency fees should be permitted on a regulated basis and, building on the judgment in *Arkin*, that further consideration should be given to the use of third party funding as a last resort means of providing access to justice.

More recently, in April of this year, the CJC held that third party litigation funding has a major role to play in facilitating access to justice. The Government continues to consider how best to structure funding to achieve access to justice, but has so far not acted on this particular aspect of the CJC's proposals. The Law Society's concerns in relation to the CJC's paper highlight the risk of creating a compensation culture and trafficking of litigation via such changes<sup>22</sup>. On the other hand, the Commercial Litigation Association has also recently said that it supports the conclusions of the CJC that third party funding of litigation should be encouraged within the existing regulatory framework (provided by the Financial Services Authority and Solicitors Regulation Authority).

The OFT discussion paper referred to above also sees a role for professional funding in the competition context to encourage private actions. However, the OFT has highlighted the extent of a professional funder's liability for the costs of the other side as an important issue and notes that such liability, even if only to the extent of funding provided as in the *Arkin* case, is likely to decrease the supply of funding for civil litigation. The OFT notes that while in some areas the professional funder will simply demand a higher share of the sums recovered to offset this increased risk, in other cases funding may become unavailable. It concludes that a balance must be struck between the public interest in ensuring effective access to justice and the interests of the defendants and that this issue, along with permitted percentage increases in normal legal fees in competition cases, merits further consideration.

The consultation is open until June 2007 and a workshop on the issues involved is expected to be held later this year, after which the OFT will make its recommendations to the Government.

#### **Summary of points to note for general counsel**

Group litigation inevitably brings publicity. Given the court's approach to favour access to justice, litigation funding is likely to increase. Hedge funds and private equity houses are rumoured to be investing in claims that have a good prospect of success<sup>23</sup>. Michael Hausfeld has reportedly said that his firm is looking at competition, cartel enforcement, human rights, employment, investor rights and environmental issues, and is understood to be lining up huge British-based class action lawsuits based on cases underway in the US<sup>24</sup>. If this area develops in the way it appears to be moving now, it could lead to a significant increase in privately funded class actions, spurred on by changes proposed at EU level.

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<sup>22</sup> The Law Society's response to the CJC's paper 'Improved Access to Justice – Funding Options and Proportionate Costs', 27 February 2006.

<sup>23</sup> There are no publicised examples of this in practice, although there is substantial comment that it is occurring in England & Wales.

<sup>24</sup> See article in *The Sunday Times*, 'US class action star targets UK', 11 March 2007.

However, there are safeguards in place in the English litigation system, notably liability for funders for the defendant's costs if unsuccessful, which should cap and check the rise of frivolous claims and should therefore provide some comfort. Also, funders who wish to control proceedings still risk offending the rules on champerty and maintenance and having no ability to enforce their arrangements. Moreover, if the courts do see an increase in frivolous claims that are burdening defendants unfairly, they may set in motion a process to reverse the trend and tighten the very rules that they themselves have relaxed in the interests of access to justice, as the US process is not something they are thought likely to be encouraging.

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## France

### Introduction

Formal class actions cannot currently be brought under French law, although certain existing group proceedings tend to achieve similar results. This issue has been very topical in France and the introduction of class actions into the French legal system was seriously considered over the past two years. This has stalled, mainly for political reasons, and is not expected to resurface on the political agenda before October 2007 at the earliest. The use of private capital to fund litigation is not permitted in France, unlike in some other European countries.

### Summary of options available to plaintiffs

There is currently no procedural equivalent to class action lawsuits under French law.

If multiple claimants can bring joint proceedings against the same defendant in France, such claims will be treated separately, particularly when it comes to assessing damages.

Certain existing group proceedings are, however, often compared to class actions. Under the current system, consumer protection groups, groups of shareholders and groups of investors can initiate proceedings on behalf of consumers, provided they receive the appropriate powers of attorney.

### Collective actions on behalf of consumers

Where consumers are concerned, collective actions may be brought in two situations.

First, authorised consumer protection groups may represent the interests of consumers who suffer a loss as a result of using the same goods or services (*action en représentation conjointe des consommateurs*). This means it is possible to group several cases that could have been filed separately before the same judge. To bring such an action, a consumer protection group must receive powers of attorney from at least two consumers who wish to become claimants. However, unlike class action lawsuits, each consumer who wishes to become a claimant must be named individually in the lawsuit and prove individual loss. Consumer protection groups are not allowed to canvass victims via television or radio and may not post information, distribute pamphlets or send personalised letters to victims.

Second, consumer protection groups may represent the collective interests of consumers (*action exercée dans l'intérêt collectif des consommateurs*). For instance, they may bring an action against a company to achieve the removal of unfair clauses in contracts with consumers or to stop wrongful behaviour. However, when an action is brought on behalf of the collective interest of consumers, any damages paid are awarded to the group itself, not to the consumers individually. As losses suffered by a group of consumers as a whole are difficult to evaluate, French courts tend to award symbolic damages only.

### **Collective actions on behalf of shareholders and other investors**

Generally speaking, shareholders may take legal action on behalf of a corporation against managers who misuse corporate assets (*action sociale*). This is an action for the benefit of the company but in the shareholders' name. However, if the claim is successful, all damages awarded revert to the company and not to the shareholders who bore the costs of litigation.

Furthermore, certain associations of shareholders that have communicated their articles of association to the French Market Authority (Autorité des marchés financiers) may initiate proceedings or even institute a civil action on the shareholders' behalf (*droit de représentation collective des associations d'actionnaires de sociétés cotées*) with respect to facts that allegedly cause a direct or indirect loss to the general interests of the shareholders of the same listed company. It should be noted that French law imposes strict requirements regarding shareholder voting rights and duration of share ownership, so that it is often very difficult in practice to create an association to bring proceedings on shareholders' behalf. Such groups may jointly represent two or more claimants against the same defendant. However, any damages paid are awarded to the group itself, not to the shareholders individually.

A further action exists for investors, who, unlike shareholders, can be from different companies. Authorised associations may initiate proceedings or launch a civil action for the defence of investors' rights (*action des associations agréées en défense des droits des investisseurs*) with respect to facts that allegedly cause a direct or indirect loss to the general interests of investors. To bring proceedings, associations must have been created for a minimum period of six months, comprise at least 200 members and fulfil requirements of honourability and competence. However, the cost of bringing proceedings, their duration and the low levels of damages usually awarded mean these are not frequently used either. Any damages paid are awarded to the association, not to the investors individually.

Moreover, protection groups that are duly declared and whose express aim is to defend investors' rights with respect to securities may jointly represent two or more claimants against the same defendant for damages suffered by them individually (*action en représentation conjointe des investisseurs*). Until recently, such protection groups could not canvass investors for powers of attorney to become claimants. The President of the French Civil Court of First Instance and the President of the French Commercial Court of First Instance can now authorise a protection group to canvass investors. The protection group can then seek powers of attorney from investors who wish to become claimants through various means of communication. As the costs of canvassing are borne by the protection groups, this can discourage them from launching legal proceedings on behalf of groups of investors.

### **Criminal law**

Under French law, a private person can compel an investigation by the Public Prosecutor by filing a complaint for damages (*plainte avec constitution de partie civile*) where the breach of a criminally enforced duty is alleged.

Plaintiffs in mass tort situations are often advised to choose the route of criminal proceedings for filing their individual claims. Among other advantages to a plaintiff, fact finding will be handled by the Public Prosecutor and by an investigating magistrate.

The Sidel case<sup>25</sup> is a recent example of how this procedure operates. The Paris First Instance Criminal Court admitted a collective action against Sidel relating to losses suffered by shareholders who were unable to decide whether to buy, sell or keep shares in Sidel because they were not given accurate information. The court awarded a lump sum of damages of €10 per share to each of the 700 individual plaintiffs in September 2006. These individuals had been represented by shareholders' defence groups ADAM (Association de défense des actionnaires minoritaires) and APPAC (Association des petits porteurs actifs), which had joined in the criminal proceedings as civil parties.

In the Regina Rubens case<sup>26</sup> in January 2007 the Paris First Instance Criminal Court awarded €1.5m to the main shareholder of the company. Some of the minority shareholders were awarded half of the purchase price of their shares, while others were awarded the difference between the purchase price of their shares and the actual price.

### **General points on class actions in France**

Certain factors serve to discourage US-style class actions.

In France, there are no juries in civil proceedings. The courts decide on liability and on the amount of damages. French law requires that damages must compensate the entire loss suffered by the claimant, neither more nor less. Hence, there is no equivalent to punitive or exemplary damages. However, it is common practice for courts to exercise their discretion to assess damages – including so-called moral damages – on a lump sum basis.

Under US law, the ultimate cases for class certification are those in which the court can decide the case once and for all, with the decision being *res judicata* vis-à-vis all individuals in the same circumstances, without a need for further litigation. However, article 1351 of French Civil Code (Code civil) implies that what a court decides in one case can neither benefit nor prejudice a person who was not party to the proceedings.

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<sup>25</sup> Paris First Instance Criminal Court (Tribunal de Grande Instance de Paris), 12 September 2006, *Sidel*.

<sup>26</sup> Paris First Instance Criminal Court (Tribunal de Grande Instance de Paris), 22 January 2007, *Regina Rubens*.

Another fundamental principle of French law that is different to US law is the rule that prohibits court appearance by proxy (*nul ne plaide par procureur*). To bring an action, one must personally have a cause of action. As a consequence, the summons and all other procedural documents must contain the name of each individual claimant. By contrast, under the US class action system, the exact number of persons in the class may be unknown, meaning that all members need not be identified.

In addition, under French law, attorneys at law (*avocats*) may not canvass victims via advertising, as this would constitute a breach of ethical rules<sup>27</sup>.

Lastly, under article 700 of the French Code of Civil Procedure (*Nouveau Code de procédure civile*), the court can order the losing party to pay the other party's legal costs. However, the amounts awarded on the grounds of article 700 do not cover the actual costs incurred and tend to be trivial. Hence, the fact that the losing party can be ordered to pay the other party's costs does not in itself constitute a deterrent to the introduction of class action lawsuits in France.

## **Funding issues**

### **Contingency fees**

French *avocats* would violate ethical rules if they were to handle cases exclusively on a 'no win, no fee' basis.

Furthermore, under article 11.3 of the French Bar rules (*Règlement Intérieur National*):

'*Avocats* can only receive payment from their clients or a person who has been granted powers of attorney [*mandataire*] by their client'.

Payment by third parties is generally viewed with suspicion and *avocats* are advised to refuse such payment.

The use of private sources of capital to fund litigation is therefore not expressly permitted under French law and not customary in our experience.

Legal protection insurance (*assurance protection juridique*) is authorised in France. It provides coverage for the costs of proceedings incurred by the insured and may also entitle the insured to certain services such as advice or defence of its rights.

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<sup>27</sup> For example, the Court of Appeal of Paris decided that a website that proposed to put individual plaintiffs in contact with *avocats* who were willing to act on their behalf had breached ethical rules by canvassing plaintiffs. The website was therefore ordered to remove advertisements, subject to a daily penalty of €15,000.

### **Future developments**

On 4 January 2005, former president Jacques Chirac urged for developments regarding class action lawsuits for the greater protection of consumers. His primary focus was to make class action lawsuits available for consumers in France.

Discussions commenced in the French Parliament about the possible introduction of class actions into the French legal system. Two competing draft bills were under review until the Government decided to withdraw the project in February 2007. Discussions on a new draft bill on class actions are now not likely to be held in Parliament until October 2007 at the earliest. If class actions are to be introduced, there are some concerns as to whether the former draft bills will still constitute a basis for discussions, as there was no real consensus on them.

In the first draft bill, introduced on 26 April 2006, class actions in France were due to be introduced under restricted conditions; access to class actions was to be limited to authorised consumer protection groups; and a judge would have the power to dismiss a claim *prima facie* ie without examining the merits of the case. A two-tier system would be put in place: below a specified level of damages, a consumer could be included in an action unless he opted out, and above a specified level of damages an opt-in would be required for the consumer to be considered a claimant in the action. In this second scenario, the judge could determine what advertising should take place so that additional consumers could have the opportunity to join the proceedings.

A second draft bill was introduced to Parliament on 8 November 2006 as a result of a Government initiative. Its scope was even more restrictive. Only authorised consumer protection groups would be able to initiate class action lawsuits to obtain compensation for losses: (i) of a financial nature (not for personal injury), (ii) suffered personally by several consumers, (iii) caused by a professional in the performance of his contractual obligations (sale of goods or provision of services) and (iv) that did not exceed a certain amount (possibly €2,000). Furthermore, only a restricted number of courts (Tribunaux de grande instance) would be entitled to hear class actions. Procedurally, the draft bill contemplated a two-step process of liabilities and then quantum with a specified settlement procedure. The draft bill was due to be examined by the French National Assembly in February 2007.

In the meantime, the socialist party declared its intention to propose another draft bill on class actions, which would have a much wider scope: (i) class actions would not be limited to consumers but would include professionals, as well as corporates; (ii) class actions would deal not only with consumer law issues but also with a broader range of issues such as environmental law or anticompetitive business practices; and (iii) it would be possible to opt in at any time during the proceedings.

Mainly for political reasons, the Government decided on 1 February 2007 to withdraw the draft bill on class action lawsuits from the National Assembly's agenda.

It remains to be seen what form, if any, new French legislation on class actions will take. In the meantime, recent European initiatives tie in with the general spirit of introducing such actions in relation to the competition sector and to provide redress for European consumers.

**Summary of points to note for general counsel**

Consumers tend not to be able to recover substantial damages and therefore collective actions as they stand in France are not as threatening as US class action lawsuits to companies. However, this may change with the introduction of a new class action procedure. Discussions on a new draft bill on class actions are now not likely to be held in Parliament until towards the end of the year and at the moment it is difficult to tell how far towards the US regime any new procedure would take France.

The use of private capital to fund litigation does not seem to be topical in France for now. This may be because litigation is not as costly in France as in such jurisdictions as England & Wales. Plaintiffs in France often choose the route of criminal proceedings, which is inexpensive, given that fact finding is handled by the Public Prosecutor and by an investigating magistrate. Thus, there does not seem to be a need for funding. In addition, French compensation culture does not attract private funding, as there is no equivalent to punitive or exemplary damages.

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## Germany

### Introduction

Although there are no class actions in a formal sense in Germany, recent legislative projects and discussions show that this is very much a hot topic in Germany. Germany is considering new procedural routes to increase the efficiency of court proceedings and to handle disputes that typically concern a large number of plaintiffs. One statute provides for a lead case treatment (*Musterverfahren*) in particular securities disputes, and representative actions (*Verbandsklagen*) are also permitted in certain areas. It is expected that consumer protection associations in particular, which may bring actions, provided certain conditions are met, where consumers have assigned their claims to them, will push for further reform to facilitate the enforcement of damages claims.

At the same time, we have observed a significantly increasing number of competition-related actions for damages. Cases pending before the German courts highlight that new models of grouping claims together are being developed together with third party funding. If these models are approved by the German courts they may also be applied to other kinds of civil cases. This area is very topical in Germany in light of a recent decision of the German Federal Supreme Court (Bundesverfassungsgericht), which has decided that the current general prohibition on contingency fees violates German constitutional law and has emphasised the importance of access to justice.

### Summary of options available to plaintiffs

References to the term *Sammelklage* in press coverage suggest the existence of proceedings in Germany akin to US-style class actions. In fact, German civil procedure does not provide for class actions in a formal sense. Under German law, multiple plaintiffs may jointly sue one or more defendants in the same court proceedings if the claims have a common basis, in which case the proceedings are run as a joint trial. Separately, a court may order that two or more separate proceedings are connected with each other. In both instances, the various claims are still considered to be individual claims and the court must reach a decision in relation to each one.

### Lead case treatment in securities litigation

The Act on Lead Cases of Private Investors (Kapitalanleger-Musterverfahrensgesetz, KapMuG) came into force on 1 November 2005. The KapMuG only allows for litigation relating to specific public information on capital markets but, significantly, it introduced a lead case procedure into German civil law for the first time. The decision to introduce such a procedure was a reaction to thousands of actions filed by shareholders of Deutsche Telekom with the District Court (Landgericht) in Frankfurt, claiming that certain public information regarding the company was incorrect. It would have been extremely time consuming and costly to take evidence and render a decision in every single case where the very complex disputed facts were common to all of the individual lawsuits.

Under the KapMuG, parties to an action for damages arising out of allegedly incorrect public information on capital markets may request the trial of a lead case, provided that the questions at stake are relevant for other similar cases and the parties to at least 10 other cases also request a lead case treatment. If such treatment is admissible, the Higher Regional Court (Oberlandesgericht) will decide upon precisely defined fundamental questions of fact and/or law common to the pending lawsuits in one sample proceeding, while all the other pending cases relating to the same public information are suspended. The final decision rendered in the lead case is binding upon all courts of first instance regardless of whether a particular plaintiff has actively participated in the lead case, or whether the individual case raises exactly the same issues that were dealt with in the lead case. Once the decision in the lead case is binding and no longer subject to appeal the courts of first instance will resume the pending proceedings and decide them on an individual basis. There is no issue of opt-in or opt-out mechanisms: once the process is set up, it is autonomous and there is no need to opt in, nor is there any possibility to opt out. The judgment binds all. Plaintiffs who wish to benefit from the decision in the lead case must still file individual actions for damages. The legislation does not allow a claim to be brought in the name of an unidentified group of plaintiffs.

The German courts are handling the first lead cases under the KapMuG. The most prominent case in which sample proceedings have been instituted is the claim by thousands of shareholders against Deutsche Telekom that the company overstated, in its listing prospectus, the value of its real estate by €2.8bn (US\$3.4bn), among other things. Applications for sample proceedings have also been made regarding several other lawsuits, most of them concerning a failure to report information to the market on a timely basis or the reporting of incorrect inside information, including the action brought by private investors against DaimlerChrysler. In the DaimlerChrysler case, the Regional Court in Stuttgart held on 15 February 2007 that it did not support the investors' view that the company had failed to inform them immediately about the resignation of its former chairman of the board<sup>28</sup>. This decision is subject to appeal, but, given that the ruling is based on the particular facts of the case, it is unlikely to affect the lead case approach generally and does not suggest that future cases using this technique will be unsuccessful.

The KapMuG will remain in force for an initial trial period of five years, expiring on 1 November 2010, unless the legislator decides to extend this period. The intention is for the legislator to monitor the effects of this new procedural tool and consider whether an extension of the lead case treatment should be made to other areas of law that typically involve a multitude of cases based on the same set of facts. There are no definitive statements as to the legislator's intention on this matter as yet and so this

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<sup>28</sup> OLG Stuttgart, 15 February 2007, case no. 901 Kap 1/06.

will be an area to watch going forward. Associations representing the interests of small investors, as well as lawyers who specialise in acting for private investors, have criticised the KapMuG for not going far enough and have called for the introduction of US-style class actions. In summary, the KapMuG has already attracted considerable public attention and may act as a catalyst for further litigation.

#### **Representative actions (*Verbandsklagen*)**

Several statutes governing specific areas of law provide for representative actions by organisations on behalf of groups of individuals, who do not necessarily need to be identified.

Under the German Act on Actions for Injunctions (*Unterlassungsklagengesetz, UKlaG*), which has been in force since 2002, certain qualified representative organisations, for example consumer protection associations and chambers of commerce, are permitted to file actions in the interests of consumer protection. Such proceedings primarily relate to the use of invalid provisions in standard terms and conditions or similar violations of consumer rights. Although there are several judgments in relation to the UKlaG, it does not seem to play a significant role in German consumer law. In particular, the UKlaG does not provide for any special method for filing claims for damages, as the scope of its application is limited to actions for injunctions aimed at stopping violations of consumer rights. It is possible that the scope of representative actions will be reassessed in the light of the European Commission's policy in this area (discussed elsewhere).

Representative actions also exist in the field of unfair competition and antitrust law.

#### **Collective actions arising from the assignment of consumer claims**

In 2002, the legislator allowed consumer protection associations to enforce consumer claims that have been assigned to them, provided they relate to the issue of consumer protection. For this purpose the legislator amended the German Act on Legal Advice (*Rechtsberatungsgesetz, RBerG*). At first, the German courts interpreted the relevant provision under the RBerG extremely restrictively and limited its application to exceptional cases. The Higher Regional Court in Düsseldorf, for example, held that collective actions arising from the assignment of consumer claims may be permitted in exceptional cases only<sup>29</sup>. However, in November 2006, in a case brought by a consumer protection association that raised the claims of 19 customers of a bank regarding a misuse of debit cards, the German Federal Court (*Bundesgerichtshof*) confirmed that although a collective interest of consumer protection is required, the bar should not be set too high<sup>30</sup>. In this ruling, the Federal Court confirmed its intention to encourage consumer claims that would not otherwise be brought by individuals due to the low

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<sup>29</sup> OLG Düsseldorf, 17 October 2003, case no. 16 U 197/02.

<sup>30</sup> BGH, 14 November 2006, case no. XI ZR 294/05.

sums in dispute. This complies with the current proposals of the European Commission in its Consumer Policy Strategy 2007-2013. As a consequence, an increasing number of actions brought by consumer protection associations to which consumers have assigned their individual claims may be expected going forward.

#### **Competition-related disputes**

The German Competition Authority (Bundeskartellamt) in general supports the EU initiative to increase the role of private damages in cartel cases, although it does not agree with several of the detailed proposals. Overall, the Competition Authority takes the position that the existing tools under German law are sufficient to deal with collective actions, also referring to the KapMuG (see above).

We have, however, seen an increasing number of civil damages claims regarding alleged infringements of competition law in Germany. This development is supported by the Seventh Amendment of the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB), which came into force in summer 2005. This Act aims to facilitate the private enforcement of claims. However, as the former GWB also allowed claims for damages regarding infringements of competition law, it is difficult to say why there is this new trend. It is possible that some high profile cases (and the record fines imposed by the EU) mean that people are more aware of infringements of competition law. US law, which is well-developed in this regard, may also be influencing the European plaintiff culture in this area.

In most cases in the competition context, there is no grouping together of claims; instead, one plaintiff sues one or more entities that have allegedly infringed competition law. Recently, however, we have been involved in court proceedings in connection with the so-called cement makers cartel before the District Court in Düsseldorf. Unlike in any previous actions, the claims were raised by a foreign corporation that was founded solely for the purpose of acquiring and enforcing competition-related claims for damages. This entity accordingly purchased potential claims from a multitude of the cement makers' customers. The German courts will have to decide on the admissibility of this method of bringing claims and if deemed acceptable, this could lead to an increase in the involvement of third parties in litigation in Germany, as described below.

#### **General points on class actions in Germany**

The general German rules on damages remain applicable to both lead cases and representative actions, meaning that there are no punitive damages or other penal elements to awards of damages. The German statutes on payment of legal costs apply without modification and the general 'loser pays' rule also applies in this context. Other elements of the German civil law and German law of civil procedure do not lend themselves to the promotion of US-style class actions by claimants, for example the absence of pre-trial discovery and the inadmissibility of contingency fees.

However, new funding models could facilitate claims that would otherwise not have been brought, as explained below.

### **Funding issues**

Both contingency fees and conditional fees are prohibited under section 49b of the German Act on Lawyers' Remuneration (*Rechtsanwaltsvergütungsgesetz*). To that extent, there is no third party funding of litigation through plaintiffs' lawyers in Germany.

However, several of the statutory restrictions on lawyers' remuneration are being put to the test in lawsuits before the Federal Supreme Court, which published a decision in March 2007 ruling that the current general prohibition on contingency fees violates German constitutional law. The legislator has been ordered to enact a new statutory provision by 30 June 2008<sup>31</sup>. The court held that contingency fees need to be admitted if the individual circumstances of the client so require it to enable claimants to enforce their rights.

The German legislator must now decide how the provisions on lawyers' remuneration are to be reformed to implement this decision. Its options include dropping completely the prohibition on contingency fees, modifying the prohibition or introducing rules governing when contingency fees would be allowed. The rules on lawyers' remuneration are likely to undergo significant changes and may well lead to new possibilities for third party funding of litigation, and thereby encourage lawyers to raise claims for clients who would not otherwise sue. In this regard, the Federal Supreme Court confirmed the importance of enabling people to enforce their rights.

Besides the classical legal aid (*Prozeßkostenhilfe*) and litigation funding through legal protection insurance (*Rechtsschutzversicherungen*), which is widespread in Germany, financing by specialised litigation financing entities (*Prozeßfinanzierer*) has become more and more popular since the late 1990s, when the first litigation financing company, Foris, was founded in Germany. Today, there are several financing companies, either subsidiaries of insurance companies or independent corporations, that cover all court and attorney fees for a share of up to 50 per cent of the recoveries in successful claims. It is reported that more and more of these companies are procuring refinancing via private capital, for example by floating closed funds. Although there are no statistics showing the number of lawsuits financed by third parties, it can be expected that, overall, the popularity of these financing methods will increase and that individuals and small or medium-sized entities will have better chances to raise claims as a result. Also, in a typical case, the party to the litigation funded via a litigation financing company currently remains, in accordance with the general 'loser pays' rule, directly liable for any court fees or lawyers' fees incurred by the other side. The funder does not become a party to the litigation by providing financing and so is not liable for costs vis-à-vis the court or the opponent. The purpose of such funding is to remove any risks for the funded party and so, typically, the funder will bear these costs, though of course this depends on the individual terms of the funding agreement.

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<sup>31</sup> BVerfG, 12 December 2006, case no. 1 BvR 2576/04.

As mentioned above, a relatively new model of funding entered the German litigation scene recently: the acquisition of potential claims for damages by a (foreign) company founded solely for the purpose of acquiring claims and enforcing them in court proceedings in Germany. The permissibility of this kind of grouping of claims is still to be examined by the German courts, especially in light of the restrictions under the RBERG.

### **Future developments**

There are intense discussions underway about reform of specific areas of law in Germany. For example, the Major Convention of German Legal Practitioners (Deutscher Juristentag) discussed reforms of tort law and the effect of US law in their annual meeting in autumn 2006. As discussed above, initiatives of the German legislator confirm that enhanced efficiency of court proceedings is being considered. Although such projects have not gone so far as to propose typical US-style class actions in Germany, consumer protection associations may take the initiative to promote further reform in this direction.

Generally speaking, the majority of German legal practitioners are reluctant to introduce US-style tort litigation in Germany. Unlike in the US, German lawyers do not formally divide into plaintiffs' or defence lawyers, which means there is no organisation equivalent to the American Trial Lawyers Association or a plaintiff bar in Germany to promote lobbying projects. However, in recent years several lawyers have specialised in acting for plaintiffs, primarily in the area of securities disputes but also in connection with mass tort claims raised following catastrophes or accidents. In contrast to the position in previous decades, such lawyers often maintain connections with US plaintiffs' law firms and have attempted to bring actions before the US courts.

Generally speaking, it is possible for third parties to acquire claims of individuals and enforce such claims in their own name provided the restrictions in the RBERG are observed.

### **Summary of points to note for general counsel**

Germany does not yet provide a procedural tool comparable to class actions in the US sense. Several well established elements of the German civil law and civil procedural law discourage the introduction of US-style class actions, for example the absence of pre-trial discovery, punitive damages and contingency fees. However, recent developments confirm that Germany is considering new means to enhance the efficiency of court proceedings and introduce tools to handle disputes that concern a large group of individuals. The statutes on lawyers' remuneration may undergo significant changes following the decision of the German Federal Supreme Court.

The German legislator has explicitly expressed its intention to test the lead case procedure to consider its extension to other areas of law. Therefore, and in light of more creative means of third party funding of litigation, companies should be aware that the German litigation culture regarding class actions, and more generally, may change in the not too distant future.

Especially in the area of consumer protection, further initiatives at EU level may also influence the litigation culture in Germany.

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## Italy

### Introduction

Italy has no specific legislation governing the filing of class action claims for damages. However, consumer associations can file limited claims on behalf of groups of consumers, and procedures are in place for shareholders to bring actions against directors.

The issue of class actions is very topical in Italy. The introduction of class actions is on the new Government's agenda and formed part of the political programme of the parties supporting the present coalition in the 2006 elections. Several draft bills are under scrutiny, although it is unclear when this legislation will be passed and become effective. In contrast, third party funding of litigation has not yet been seen in Italy, unlike some other European jurisdictions, although there are routes by which some private financial support may be provided.

### Summary of options available to plaintiffs

In theory, any number of people could initiate an action with the same writ of summons against a single defendant. However, in such a case, each claim will remain separate and judges have the power to treat the proceedings separately. In practice, judges usually do so, especially where monetary damages are sought, as any single claimant must prove his specific loss to be awarded the appropriate amount of damages.

### Collective actions by consumer associations

Consumer associations in Italy can file claims on behalf of groups of consumers, enabling them to obtain judicial orders against corporations that cause injury or damage to consumers. These orders can compel certain types of behaviour, such as a change in general terms of trade in contracts with consumers, or prohibit certain types of behaviour, such as illegal activities, but it is not possible for associations to claim compensation or damages on behalf of consumers. This means that individuals must bring their own actions for damages if they want compensation. In certain cases, injunctions may also be sought by chambers of commerce and professional associations<sup>32</sup>.

This position could change dramatically in the coming years, reflecting the various draft bills on class actions before the Italian Parliament (see below). These developments reflect wider policy changes in Europe, including the possible reform of antitrust law and recent comments of the EU Commissioner for Consumers, Meglena Kuneva<sup>33</sup>.

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<sup>32</sup> The latter may also seek injunctions curtailing the damaging behaviour of one or more competitors in a case of unfair competition (article 2601 of the Italian Civil Code). However, once again, monetary damages cannot be sought.

<sup>33</sup> See introduction.

### **Shareholder actions**

Directors' liability suits can be promoted by shareholders who hold a fifth of the aggregate share capital (or 1/40th of the share capital in a public company). The action is brought on behalf, and for the benefit, of the company and so any compensation awarded by the judge is attributed to the company and not to the plaintiff shareholders.

In addition, dissenting shareholders and/or those who refrained from voting and/or those who did not participate in the meeting, provided they hold 5 per cent of the aggregate share capital (or 1/1000th of the aggregate share capital in the case of public companies)<sup>34</sup>, can oppose shareholders' resolutions that are unlawful or contrary to the articles of incorporation of the company. In such a situation, monetary damages can be sought by the shareholders, but they will only be granted to shareholders who participated in the proceedings. The same principles apply to bondholders with reference to bondholders' resolutions.

### **Other methods of enforcing collective rights in Italy**

Both public and private non-profit entities that promote the protection of collective rights and interests can join criminal proceedings and, under some circumstances, seek monetary damages on behalf of the injured party in those criminal proceedings. This principle has been applied in the context of consumer associations, associations for the protection of the environment, trade unions and even municipalities<sup>35</sup>.

In addition, a statutory provision allows the Italian securities regulator (Consob) to join proceedings relating to market abuse and insider trading and to seek damages relating to a 'violation of integrity of the market'. The damages awarded are often symbolic, as it is difficult for Consob to prove any real and actual loss. However, in a recent notorious case of market abuse<sup>36</sup>, the Tribunal of Milan awarded damages to Consob in the amount of €6m. So far this appears to be an isolated case but it could set a precedent.

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<sup>34</sup> It should be noted that these requirements can be excluded by the articles of incorporation of a company.

<sup>35</sup> In one case, the Region of Campania and other entities, including WWF Italia and Legambiente, joined criminal proceedings involving environmental crimes regarding the illegal development of a state-owned piece of land by a private developer without any authorisation or licence. The perpetrator was found guilty and monetary damages will be sought in separate proceedings as requested by the claimants (Tribunal of Santa Maria Capua Venere, 14 July 2006, no 1104).

In another case, the association Movimento federativo democratico – Tribunale dei diritti del malato (Federal Democratic Movement – Tribunal for the Rights of Ill Persons) was given standing to join in criminal proceedings relating to a surgeon's malpractice (Court of Cassation, 17 February 2004).

<sup>36</sup> Tribunal of Milan, 23 November 2006, no 11400.

### **General points on class actions in Italy**

A number of features of litigating in Italy work against claimants wanting to bring US-style class actions. First, punitive damages are not allowed in Italy and so damages awarded are compensatory only, with the intention of returning the party to the position he was in before the damaging event occurred. Second, the general rule for costs is that the 'loser pays', and the risk of being held liable for the costs of the other side acts as a significant deterrent for claimants. Finally, there is no pre-trial discovery and there are no juries: it is the judges who decide and evaluate issues of both law and fact.

### **Funding issues**

Litigation funding has been slow to develop in Italy, although a big change occurred with the introduction of contingency fees in 2006.

### **Contingency fees**

The statutory provision prohibiting contingency fees in Italy was abrogated by Law Decree of 4 July 2006, no 223. Contingency fees have played a part in encouraging class actions in the US and therefore this development might be thought to be the start of a new wave of litigation in Italy driven by plaintiff bar action<sup>37</sup>. However, the Italian Lawyer's Code of Conduct contains the principle that 'fees have to be proportionate to the activity carried out'. It is unclear whether that will permit the economic incentives that galvanise US lawyers but it seems likely that the benefit will relate to the lawyers' effort (say, a multiple of usual fees) and not to a percentage of damages recovered.

This same Decree dramatically widened a lawyer's right to advertise, which is likely to mean that law firms will become more active in promoting their services and trying to win clients, and assist in bringing a multiple claim in the absence of a court defined opt-out class. However, there are some safeguards here too in that publicity cannot include the names of clients; comparative advertisements are prohibited; and advertisements must be 'truthful and correct'. It will be for future case law to develop these safeguards further in the context of both contingency fees and advertisement of legal services, for example by defining the concept of 'proportionality' in terms of what percentage of recoveries may be paid to lawyers and the ambit of 'truthfulness and correctness'.

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<sup>37</sup> We do not have any data showing whether the introduction of contingency fees has led to an increase in litigation in Italy but the statutory modification was passed only a few months ago (see *Mercato e consumatori*, February 2007, p.13, published by the Italian Ministry of Economic Development, which stated that the effects of the recent legislation could not yet be assessed).

### **Third party funding**

There is no established concept of third party funding of litigation in Italy.

In theory, a third party funder could acquire the claims of individuals by means of assignment and then litigate on their behalf, although we are not aware of any examples of such funding to date. The assignment of claims is not specifically regulated by the Italian Code of Civil Procedure (Codice di procedura civile), although the Civil Code regulates the assignment of 'credit'. The concept of credit has been widely interpreted by the courts so as to include claims and some judgments have stated that a claim for monetary damages can be assigned to a third party. As these judgments all refer to damages relating to contractual liability, it is not clear to what extent and degree the same principle could apply to tortious liability. In a commercial context, this is unlikely to be a problem unless a third party funder is interested in running what would be considered a 'personal' claim, for example in relation to personal injury. There is nothing to prevent an entity from funding individual claims (without an assignment) where it is agreed that the funder will receive back the funds it provides plus a share of the compensation; however, we have no knowledge of this type of transaction in Italy to date.

If all the claims assigned to a funder were brought with a single writ of summons, each claim would remain separate, as judges would need to compute damages on an individual basis, as described above. However, the management of those claims would, clearly, be simplified.

The lack of specific statutory regulation and of settled principles of case law makes this area of law very uncertain for claimants and it seems very unlikely that the business of funding litigation will become common in Italy in the near future. It should be noted that the issue of litigation funding has never been topical in Italy and, despite its development in some jurisdictions, is not being discussed in the press, by scholars or in Parliament.

### **Recent developments**

After several notorious financial scandals (such as the Parmalat, Cirio and Giacomelli scandals) and other events (including the insurance company cartel discovered in 2002 and the national electric blackout of 2003), a huge number of claims – often very similar in nature and value – have flooded the Italian court system over the last few years. The Italian courts have encountered many problems with such claims, especially in light of the length of judicial proceedings in Italy.

Such cases have led to a number of bills before the Italian Parliament, although the dramatic differences between them prevent a clear forecast of the likely features of future class actions in Italy.

One draft bill submitted by the Government would give consumer associations, professional associations and chambers of commerce the right to sue in any business area on the basis of both contract and tort. The object of such an action would be a judgment declaring that certain behaviour caused damage to individual members of a class. Such a judgment would specify the criteria for assessment of any damages. Individual members

could use that judgment as the basis for an application for summary judgment with damages to be assessed according to the criteria established, provided that the mandatory alternative dispute resolution procedures set out in the bill did not result in a settlement. The bill does not provide for the introduction of punitive damages nor for full contingency fee-based agreements with lawyers.

Several other draft bills submitted by Parliament members are being considered by Parliament. These bills would, generally, give standing to individuals and to the associations listed above with the effect that, once any collective action had been brought, there would not be any need for additional action on the individuals' part. Some of these bills contemplate that lawyers' fees for bringing the class action would be a percentage of the compensation received (capped at 10 per cent) but also provide that, in case of a favourable judgment being obtained by claimants, they are paid by the defendant. Although the current majority coalition has passed some consumer-friendly statutes and one of its goals is to pass the legislation on class actions, it is unlikely that any of these bills has a realistic chance of being passed within the next few months.

Responses to the proposed reforms have been mixed. From a legal standpoint, it has been argued that judgments can be effective only against parties who actually participated (or were in a position to participate) in the proceedings (*estensione del giudicato*) and that the right to participate, argue and reply in proceedings (*principio del contraddittorio*) is infeasible in light of the Italian Constitution. Not surprisingly, the corporate sectors (especially the financial sector) are concerned at the risks that these changes would pose, in part recognising some of the defects of the US experience.

Finally, in addition to the Government, many institutions support the introduction of class actions. For example, the President of the Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato), Antonio Catricalà, publicly welcomed this type of action and defined it as 'useful and necessary'<sup>38</sup>, which ties in with the European Commission's proposals for reform of the private enforcement of competition law in its Green Paper of December 2005.

### **Summary of points to note for general counsel**

At this stage, class actions are not possible in Italy and it seems that no private entity in Italy has shown much interest in funding mass litigation (or even individual claims). However, a new class action procedure of some kind is probably on its way, although it is too early to anticipate exactly how far towards the US class action regime the new procedure will take Italy. It

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<sup>38</sup> See the article 'Class Action. Approvare legge contro le pratiche commerciali scorrette' of 13 December 2006 issued online by the Italian press agency, Help Consumatori.

should be noted that Italy is a country with a high tendency to litigate. Recent statistics show that civil proceedings initiated in 2005 numbered 4,330,305 and in 2004 there were 4,252,875<sup>39</sup>. Therefore, reform in relation to class actions could have a far-reaching effect and lead to a high number of proceedings being instituted, especially when combined with the availability of contingency fees.

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<sup>39</sup> See the latest report issued by the Italian Ministry of Justice and published on the website [www.giustizia.it](http://www.giustizia.it).

## The Netherlands

### Introduction

Collective actions for recovery of damages are a hot topic in the Netherlands. While true US-style class actions are unknown to the Dutch legal system, the Dutch legislator recently introduced a mechanism that allows a large group of individuals to seek recovery from defendants in a simplified way via a settlement agreement. This mechanism, which has been applied twice in the last year, is now being dramatically applied in the US\$352.6m Royal Dutch Shell settlement announced in April (see below) and is expected to be used more frequently in future. More widely, the Dutch Civil Code (Burgerlijk Wetboek) allows for collective actions by associations or foundations representing the interests of injured parties. Further developments in this area are expected in the not too distant future as legislative committees and private institutions explore new ways to deal with mass claims.

To date, there has been no real sign of third parties funding group claims in the Netherlands. Even though hedge funds are becoming more active on the Dutch (securities) market, we have not yet seen examples of private capital being used to fund litigation. Rather, collective actions in the Netherlands have so far been organised by non-profit making associations and foundations. In individual claims, the Government sometimes provides funding for legal costs for people on very low incomes and insurance is sometimes available to cover legal costs. These factors reduce the demand for third party funders to enter the Dutch litigation market.

### Summary of options available to plaintiffs

US-style class actions whereby a generally defined class of injured parties seeks compensation through damages in court do not exist in the Netherlands. However, under Dutch law, companies that are potentially liable for causing damage to a number of injured parties face two types of legal action:

- individual actions from injured parties seeking compensation for the damage they have suffered; and
- collective actions from associations or foundations representing the interests of injured parties seeking a judicial declaration that the defendant is liable for the damage it has caused. Such a collective action is declaratory and does not result directly in an award of damages, which is a serious limitation. However, individuals can assign their claims to the association or foundation or bring personal damages claims on the back of the liability finding.

Collective actions can be initiated only by associations or foundations that state in their articles of association that they represent the interests of the injured parties. In addition, an association or foundation will not be able to bring its claim if the court considers it has not tried sufficiently to reach a settlement with the defendant.

Multiple claimants may jointly bring a claim against the same defendant. These are separate actions and, insofar as the circumstances under which the alleged injury has occurred may be different for each individual, the outcome of such proceedings will differ for each claimant. Although this may not be the most efficient way of claiming compensation, such a judgment can be used as leverage and provide a basis for settlement negotiations leading up to a court approved settlement.

Importantly, as discussed below, a new court approved settlement agreement mechanism has been introduced to deal with mass damage claims. This new procedure has some parallels to the US class action in which a settlement agreement is declared binding by the court on all parties who have not opted out.

#### **The court approved settlement agreement**

The 2005 Act on Collective Settlement of Mass Damages (Wet collectieve afwikkeling massaschade, the CSMDA)<sup>40</sup> is the most important development in this area. It provides that associations or foundations representing injured parties may negotiate a settlement with a defendant for the payment of damages that may be approved and declared binding by the Amsterdam Court of Appeal. The defendant and the representatives of the injured parties jointly request the settlement agreement to be declared binding.

The CSMDA was primarily enacted to deal with the situation of the DES victims<sup>41</sup> (a mass product liability tort case discussed below) but can be applied to all victims of mass damages, irrespective of the cause of damage. It has so far been invoked and applied in one other instance, the Dexia<sup>42</sup> case regarding share lease arrangements.

Most recently in the financial sector the CSMDA is being applied in the context of the settlement reached between Royal Dutch Shell and non-US investors who were claiming damages for loss suffered as a result of the overstatement of the company's oil and natural gas reserves between 1997 and 2003. The settlement, which marks Europe's first ever class settlement of securities fraud claims, was reached with investors across Europe, although Royal Dutch Shell insisted that this is not in any way an admission of guilt on its part. The settlement is a direct result of the opt-out lawsuit filed in the US in January 2006 by Dutch pension funds. The parties lodged an application with the Amsterdam Court of Appeal under the CSMDA requesting that the settlement, together with the compensation destined for past and present shareholders, be declared binding upon all parties. The procedure is expected to take a year or more and will take effect only if a US court decides that it does not have jurisdiction over the non-US investors.

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<sup>40</sup> The Act came into force on 27 July 2005.

<sup>41</sup> DES case, NJ 2006, 461, Amsterdam Court of Appeal, 1 June 2006.

<sup>42</sup> Dexia case, LJN: AZ7033, Amsterdam Court of Appeal, 25 January 2007, 1783/05.

Although injured parties are not allowed to sue collectively under the CSMDA, the benefit of the court-approved settlement mechanism is that all injured parties will be bound by it as long as certain prerequisites are met. Injured parties who do not wish to be bound by the settlement remain entitled to have their individual claims determined by the courts through ordinary proceedings. However, it is expected that most injured parties will be discouraged from commencing individual actions if they can easily and without cost accept the settlement.

To centralise such requests and so guarantee a uniform application of the law, only the Amsterdam Court of Appeal can hear such a joint request. According to the CSMDA, injured parties must be represented by a foundation or an association that has been specifically set up to represent the interests of these injured parties. Under Dutch law, these foundations and associations may not operate for commercial gain. This seemingly excludes commercial private funding of litigation but considerably empowers claimants, as such an association is relatively easy to create.

The Amsterdam Court of Appeal will review whether the amount of compensation agreed in the settlement agreement is reasonable under the circumstances by looking at a variety of factors. The court's decision must then be widely publicised and it will set a date for at least three months later until which date injured parties can opt out from the settlement. The right to opt out is considered necessary to prevent an infringement of the right to free access to a judge (covered by the European Convention of Human Rights and also enshrined in the Dutch Constitution). After the opt-out period, the settlement is binding upon all other injured parties.

In cases concerning consumers, the Authority for Consumer Protection, a department of the Ministry of Economic Affairs (Ministerie van Economische Zaken), may also request the Amsterdam Court of Appeal to declare binding a settlement agreement under the CSMDA. However, the legislator intended that this Authority should exercise its power with restraint because it considers the settlement of mass claims to be a matter for private rather than public organisations. The circumstances in which this Authority may submit a request for court approval of a settlement agreement are likely to be restricted to exceptional ones where there is a particular public interest in the claim. Actions that may be brought by the Authority include the protection of consumers against faulty goods or services.

#### **General points on class actions in the Netherlands**

There are certain features of litigating in the Netherlands that companies should bear in mind when assessing the scope for US-style class actions. Generally, punitive damages are not available under Dutch law. The costs of litigation tend to be reasonable and insurance for legal costs and expenses is fairly common. The Netherlands does not have a strict 'loser pays' rule but rather a Dutch judge has a wide quasi-discretionary power to order one of the parties to bear the other party's legal costs (including experts' costs). Legal costs are in principle calculated on the basis of liquidated costs in accordance with a fixed schedule, which does not, by quite a long way, equal the actual costs incurred. It is only in exceptional circumstances (such as a

case of clear abuse) that the losing party may have to pay the actual costs of the other. Generally, the losing party will bear the liquidated costs or costs are shared between the parties. This reduces one of the risks associated with mass claimant litigation (potential liability for the other side's costs).

#### **Recent examples**

Before Royal Dutch Shell, there have been only two cases so far in which a settlement agreement has been declared binding by the court.

The DES case was the famous Dutch product liability case that triggered the discussion about the efficiency of the Dutch legal system to handle mass damages claims. It involved the prescription of a synthetic female hormone (DES), which was later found to result in severe side effects. Around 15,000 people have been registered as victims of DES.

Victims successfully initiated tort proceedings against several pharmaceutical companies obtaining compensation for damages. Successful negotiations between the foundation representing the other injured parties who had not sued and these companies led to a settlement agreement. The question that then arose was whether it would be possible to declare this agreement binding upon all injured parties. This was impossible under the applicable law at the time. However, the enormous effect of the case on the Dutch community prompted the Dutch legislator to enact the CSMDA. The Amsterdam Court of Appeal declared the settlement binding in 2006.

A few months after the entry into force of the CSMDA, the Amsterdam Court of Appeal was requested to approve and declare binding a second settlement agreement in a case of mass claims. The case concerned financial lease products sold by the Dexia bank (Dexia) in the Netherlands, which resulted in more than 400,000 (potentially) injured parties and a total amount claimed of more than €1bn. Four foundations representing the rights of the aggrieved individuals came to a settlement agreement with Dexia providing for partial compensation for various categories of the injured parties. This settlement agreement is commonly known as the Duisenberg settlement, as the negotiations were facilitated by the former European Central Bank President. On 25 January 2007, the Amsterdam Court of Appeal declared this settlement agreement binding on all injured parties, giving individuals six months to opt out of the agreement.

However, on 1 March 2007, the same Amsterdam Court of Appeal rendered an appeal judgment awarding a former Dexia client (who had opted out of the settlement) full damage compensation from Dexia, exceeding the partial compensation awarded under the settlement agreement to the category to which this particular Dexia client belonged<sup>43</sup>. This outcome obviously questions the effectiveness of the Duisenberg settlement. It is not unlikely

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<sup>43</sup> LJN: AZ9721, Amsterdam Court of Appeal, 1 March 2007, 483/05.

that a number of injured parties will use the possibility to opt out of the Duisenberg settlement before 1 August 2007, in light of this decision.

In the context of collective actions, proceedings have also been instituted against other banks regarding share lease agreements. The foundations bringing these claims have been assigned all (future) claims from injured parties, which means they will be able to claim damages as compensation, as well as declaratory relief, although it may be difficult for them to establish the individual circumstances of those for whom they are claiming damages. These cases highlight the increasing popularity of class actions in the Netherlands.

### **Funding issues**

#### **Contingency fees**

Contingency fees and 'no win, no fee' arrangements for lawyers are not generally permitted in the Netherlands. A Dutch lawyer may only charge his client a percentage of the proceeds of the case in debt collection procedures. However, 'milder' conditional fee arrangements are permitted whereby a lawyer may agree in all types of case to charge a higher hourly rate if a certain result is achieved or a lower hourly rate if it is not. The hourly rate must in any case be reasonable and cover the actual costs incurred by the lawyer plus a reasonable profit.

#### **Third party funding**

Only foundations and associations may act on behalf of claimants regarding settlement agreements and collective actions, and these organisations do not operate for commercial gain. The Authority for Consumer Protection, which may also institute collective proceedings, is a public organ that also acts on a non-profit basis. As these organisations cannot operate for commercial gain, they normally ask for a small amount of money to cover the expenses involved in representing the injured parties in court. Some associations or foundations will agree on a success fee with the individuals, but always on a non-profit basis. The fee charged by such associations may therefore include an entrance fee supplemented by a percentage of the winnings or a fixed amount. There may be a close relationship between the representing organisation and its attorneys (for example, some organisations have been set up and are managed by practising attorneys).

It is difficult to see a role in the Netherlands for hedge funds and other professional or private funders in the class action market, which are becoming more active in other parts of Europe. Such private funding of litigation is currently non-existent in the Netherlands and is unlikely to be welcomed.

Dutch law does, however, provide for the possibility of assigning a cause of action to a third party, as well as granting a third party a power of attorney to invoke rights on behalf of an individual. Undisputed claims may also be assigned to a third party so it can collect the compensation. In theory these options could be open to private investors wanting to get involved in Dutch litigation.

### Future developments

Following the (anticipated) success in the Dexia case, legal proceedings have been commenced against other banks. Associations representing injured parties' rights have been established in other cases of mass damages, such as in equity-linked insurance and investment based mortgages (so-called *woekerpolissen*, usurious policies). According to financial analysts, insurers will probably be liable for damages to an amount of €1bn if it is found that the risks associated with these products were unacceptably high. These cases are a direct product of the introduction of the CSMMDA and more claims can be expected.

There has also been a recent trend for parties who have opted out of the Duisenberg settlement agreement to restart negotiations with the defendant or start individual claims. It remains to be seen how courts will react to individual claims aimed at higher compensation levels than those in the court-approved settlements. Depending on the actual results for those who have opted out, the CSMMDA may prove less effective in concluding issues of mass damages than had been intended by the legislator (see the Dexia case decided on 1 March 2007 referred to above).

The Dexia case is actively debated by lawyers, politicians and the media. A group of advisers to the Minister of Justice issued a report in 2006 on Dutch civil procedural law in which it considered the scope of the CSMMDA to be too limited, but no concrete legislative proposals for change have been issued to date. The advisers called the CSMMDA a first step in the right direction. One major concern is that the CSMMDA does not contain provisions about the procedure that leads to the execution of the settlement agreement. A recent dissertation by a practitioner assisting this advisory group<sup>44</sup> proposed a procedure for a 'court-annexed' collective settlement for an agreement to be declared binding. Under this procedure, a judge would be assigned a proactive role in customising the pre-trial procedure leading to the settlement of the case at hand. This paper also contains a proposal to introduce an obligation on individuals who apply to opt out of the settlement to state their reasons. With respect to access to justice through better co-ordinated funding, the paper suggests that the possibility of 'no win, no fee' arrangements should be reconsidered or alternatively that private or public arrangements should be considered to fund collective actions.

In the context of funding and access to justice, the Dutch Government has shown interest in supporting the position of individuals who seek mass damages. For example, the Minister of Finance proposed to finance research by certain foundations into the issue of usurious insurance policies. However, this was not supported by the Dutch Parliament, which took the view that potential claimants should not be funded by the Government.

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<sup>44</sup> Ianika N Tzankova, 'Toegang tot het recht bij massaschade', *Recht en Praktijk* 150, Kluwer, Deventer, 2007.

Nevertheless, this shows the attitude and commitment of the Dutch Government towards injured citizens.

The Dutch Competition Authority (Nederlandse Mededingingsautoriteit) has welcomed EU proposals encouraging the private enforcement of competition law claims, as this complements public enforcement. The Competition Authority and the Government have expressed their desire to address this issue within the EU.

**Summary of points to note for general counsel**

The CSMDA, combined with collective actions for declaratory relief (if necessary), is likely to become a popular method of resolving mass claims in the Netherlands, in light of recent cases. However, the ability to opt out is causing issues where these claimants bring new proceedings to claim more compensation than they would have been entitled to under the settlement agreement, and it will be up to the Dutch courts to decide whether to allow this or not. Generally, the absence of punitive damages and jury trials in the Netherlands remains to the advantage of defendants, along with the fact that only limited redress is available to claimants wanting to bring a collective action via court approved settlement agreements and collective actions for declaratory relief. As yet, there is no litigation funding from private parties in the Netherlands. Despite the increased funding options becoming available through third party funders across the rest of Europe, this is unlikely to change in the near future.

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## Spain

### Introduction

The Spanish Procedural Code (SPC), which came into force in 2001, brought in a more extensive regime of group actions in Spain. Although no US-style class action regime exists, consumer associations may bring actions on behalf of groups of consumers, identified or not, harmed by the same damaging event. Before the SPC, collective actions were limited to: (i) the defence of certain collective interests (such as the environment or public health), usually by consumer groups and associations and (ii) those brought by consumer associations exclusively in representation of their members.

The SPC introduced the possibility of bringing group actions in the interests of:

- groups of consumers where the members are unidentified or unnamed – this type of group action constitutes the furthest reaching innovation for the Spanish legal system, as it introduces a quasi-class action system (quasi-class actions); and
- groups of consumers where the members are identified or easily identifiable (collective actions).

Although group proceedings are still not very common in Spain, they are becoming more and more popular and consumer associations have brought successful claims regarding recent events where such actions would have been inconceivable a few years ago. This area is developing as consumer associations gain experience and know-how regarding this type of action.

Private capital as a source of funding for group litigation is, however, not common practice in Spain. No substantial developments have taken place regarding the funding of group actions since they were introduced in 2001.

### Summary of options available to plaintiffs

Group actions can be commenced only by consumer entities. These may be existing consumer associations, ad hoc groups of consumers representing the majority of those affected by the same damaging event (where the members are identified or easily identifiable) or other types of consumer entity.

If a group action is not commenced, multiple claimants can still join in proceedings against the same defendants as joint claimants. However, this does not have an impact on other parties affected by the same event who have not intervened in the proceedings. It should be noted that if a group action and an individual action (based on the same event) are filed, these are usually combined in a single set of proceedings.

### Quasi-class actions

The SPC introduced in 2001 the possibility of bringing group actions in the interests of groups of consumers where the members are unidentified or unnamed. Such groups of consumers can be represented only by consumer associations, which must be 'representative in accordance with the law'. The only consumer associations entitled to bring quasi-class actions (at a national

level) are those who are members of the Council of Consumers and Users (Consejo de Consumidores y Usuarios), which are in turn designated by the Ministry of Health and Consumption (Ministerio de Sanidad y Consumo).

Quasi-class actions give rise to procedural issues regarding publicity and the intervention of affected parties. Article 15 of the SPC provides that, once the court has admitted the claim, a maximum of two months (which suspends the proceedings) will be allowed to enable affected consumers to join the claim (the opt-in mechanism). Once this period has elapsed, the proceedings will continue with the participation of consumers that have responded during that period. No further intervention in the proceedings will be permitted thereafter.

Parties not intervening in the proceedings will nevertheless be bound by the final judgment of the Spanish court, which will list not only the individual (named) beneficiaries but also the conditions that need to be fulfilled for any other party to benefit from the judgment, not having been a party to the proceedings. However, affected consumers who have not joined the proceedings cannot ask for the provisional enforcement of the judgment in their favour<sup>45</sup>.

Unlike the US class action system, there is no opt-out mechanism. In a sense, the position is actually stricter: if affected parties who meet the conditions laid down in the judgment do not wish to benefit from it, they are not actually entitled to take separate action on their own. Any individual claimant wishing to have compensation must wait until the final judgment, which will then be fully applicable to him – he is not able to take individual action during or after the group proceedings<sup>46</sup>. The judgments resulting from group actions are *res judicata* for consumers affected by the harmful event who did not take part in the proceedings.

The SPC does not specify whether representative consumer associations are entitled to settle group procedures or what the effects of an eventual settlement would be on consumers who are not taking part in the proceedings.

It is doubtful if consumer associations could validly settle the proceedings, as, apparently (under article 11 of the SPC), they are only entitled to defend the interests of consumers at a trial. Moreover, it should be noted that in order to validly settle a procedure on behalf of a third party, a special power of attorney (which is different from the one needed to bring an action) is required.

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<sup>45</sup> If a judgment is challenged, a provisional enforcement can be requested until the challenge is resolved.

<sup>46</sup> If individual proceedings are already underway when a group action based on the same damaging event is commenced, the procedures should be accumulated further to article 78 of the SPC.

Finally, it should be noted that it is standard practice for several consumer associations to take part in the same proceedings as joint claimants. Many consumer associations have been involved in the large quasi-class actions of the past few years. For instance, in the case of *Opening*<sup>47</sup>, the group action was brought jointly before Civil Court No. 17 of Madrid by the following consumer associations: AUSBANC, OCU and ADICAE.

A recent example of this procedure in practice is the case against *Europistas* regarding highway AP-1, where the Court of Appeal of Burgos ordered *Europistas* to compensate users who got trapped on the highway for up to two days due to snow. The number of affected consumers was between 4,000 and 6,000 and the final compensation could reach €600,000<sup>48</sup>. This judgment has raised possibilities for other similar claims in future; for example, a consumer association is preparing a claim regarding the disruption caused by a strike in July 2006 at Barcelona Airport<sup>49</sup>.

#### **Collective actions**

The SPC also allows actions to be brought in the interests of groups of consumers where the members are identified or easily identifiable (for example, victims of a train crash or, in certain cases, users of a defective product). These groups can be represented by consumer associations, other entities aiming to defend such specific interests or even the group of affected consumers itself (as long as it represents the majority of those consumers). The procedure is quite similar to the quasi-class actions procedure but there are some specific points to note.

Before the claim is filed, the claimant (or claimants) must notify each affected consumer of the approaching filing of a claim to defend their collective interests. Once the claim has been filed and admitted by the court, the affected consumers will be called in accordance with specific rules so that they can join the proceedings. Unlike quasi-class actions, where a collective action is brought, the public calling will not suspend the proceedings. Affected consumers may join the proceedings at any time but may participate only in those parts of the procedure that have yet to take place. As above in quasi-class actions, affected consumers who have not joined the proceedings cannot ask for the provisional enforcement of the judgment in their favour and will be bound by the final result of the proceedings.

The main advantage of collective actions is that they can be commenced by a wider range of entities. In light of this, it is more likely that a collective action will be brought than a quasi-class action. However, they suffer from

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<sup>47</sup> *Opening* was an English language company with schools all over Spain that became insolvent in 2002. As a result, 45,000 students had their courses cancelled, even though they had already paid for them.

<sup>48</sup> Judgment of the Provincial Audience of Burgos 347/2006 of 31 July. *La ley Juris* 1658/2006.

<sup>49</sup> These proceedings have not yet commenced.

the major disadvantage of having to identify and name the claimants and, accordingly, the question of which kind of group action should be brought is not a matter of choice but rather is determined by whether the affected consumers can be identified or not<sup>50</sup>.

#### **General points on class actions in Spain**

Both of these types of group action can be brought only in the interests of groups of 'consumers', which, according to Spanish law, refers to final consumers of a product (including services) who do not subject the product or services to a production, transformation or marketing process.

Spanish legislation does not provide for the possibility of punitive damages in civil proceedings and damages are determined by the courts on a compensation basis.

In Spain, there is no straightforward 'loser pays' rule. Whether or not litigation will be cost-free for a party must be analysed on a case-by-case basis. In practice, a successful party often does not recover all of its costs.

#### **Funding issues**

##### **Contingency fees**

The General Statute of the Legal Practice prohibits attorneys' fees that are exclusively composed of a percentage of the final recoveries in the proceedings. Spanish case law has, however, confirmed that this kind of agreement between clients and lawyers is nevertheless valid and enforceable between them, although it may lead to the imposition of sanctions on the individual lawyer by the relevant Bar Association.

Even this rule does not mean that contingency fees are forbidden in Spain, as variable or conditional fees are permitted as long as a minimum fee to cover the costs of the legal advice is agreed. Therefore, there are circumstances in which lawyers may be entitled to participate in a claimant's damages and this serves to facilitate access to justice, and so to encourage litigation.

##### **Third party funding**

There are restrictions on the funding of consumer associations that aim to maintain the independence of these associations. As such associations are the only entities entitled to bring quasi-class actions and are usually the ones that commence collective actions, this is an important limitation on third party funding of group litigation in Spain.

These entities do not exist to make a profit and, in accordance with article 20 of Law 26/1984 on the General Defence of Consumers and Users, are not allowed to accept members who wish to make a profit.

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<sup>50</sup> In some cases it is clear which kind of action should be taken, whereas in others this can be a difficult question. However, the entity wishing to commence a group action may request the court, in preliminary proceedings, to take the relevant measures to identify the affected consumers. Depending on the results of such measures, a collective or a quasi-class action will be commenced as appropriate.

This provision, together with the fact that when a consumer association brings a group action, the affected consumers do not have to incur much by way of costs, makes the private funding of group litigation rare in Spain. Also, most consumer associations are financed, to a large extent, through public subsidies, which can even be granted for special purposes (for example the €2m subsidy provided to consumer associations to deal with the recent case of collective damage caused by investment entities Afinsa and Fórum Filatélico).

Therefore, the use of private sources of capital to fund group litigation has not been a common practice in Spain. However, in theory, it is possible for third parties to take an assignment of causes of action of individuals and sue in their own name because Spanish legislation, in broad terms and subject to some restrictions, provides for the possibility of assigning rights of credit (including a right to compensation) and civil actions.

This has to be at a preparation stage because once a claim has been filed and the defendant has answered the claim (litigious credits) the debtor has the right to extinguish the credit by paying the assignee the price paid for the assignment. In addition, article 1459 of the Spanish Civil Code forbids the assignment of litigious credits to certain persons, including lawyers and court representatives representing the claimant.

This, in theory, leaves scope for this method of assignment to be used commercially by hedge funds and private equity funds or other third parties. There could be practical factors that prevent this approach from becoming common, for example the difficulty in proving causation between the event and the damage suffered by a consumer who is not present in the proceedings. We are not aware of any precedent of third party funding of group actions.

### **Future developments**

The recent judgments in favour of group actions have not led to any great debate regarding the future of class actions in Spain. The procedures are still relatively new and people are watching to evaluate the experience of this new system. However, this is something to monitor going forward, as it is clear that such group actions on behalf of consumers are on the increase.

It is difficult to be sure about the intentions of the legislator but it seems that in the short term no substantial changes to the area of group proceedings will take place. The Government has announced its intention to consolidate the consumer legislation, but apparently this will entail a consolidation of the existing law without any amendment to its content, although the latter cannot be completely discounted.

### **Summary of points to note for general counsel**

Although there are no US-style class actions in Spain, representative consumer associations are entitled to bring actions representing groups of consumers where the members are unidentified. Consumer entities and groups of consumers can also bring actions representing groups of consumers where the members are identified or easily identifiable. In both cases, a public announcement will be made and, significantly, the final

judgment will be binding on parties that have not joined the proceedings. These group actions are a relatively new development for the litigation regime in Spain and are certainly on the increase.

The fact that no punitive damages are available in Spanish civil proceedings and that there is public funding for consumer associations through public subsidies means that there has not been much incentive or scope for private third party funders to enter the Spanish litigation market. Nevertheless, it cannot be discounted that this may change in light of the increased funding options becoming available through third party funding across the rest of Europe, and may lead to increased litigation. If these options result in further protection for consumers, it is likely that they will be implemented in Spain.

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