A study abroad: Will Europe adopt the US class action mechanism?

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The class action mechanism in the United States allows groups of individuals or businesses to resolve similar claims against a defendant or group of defendants in a single litigation. The US class action system is, however, a global outlier. European jurisdictions, for example, do not provide mechanisms to resolve mass or collective lawsuits. Companies should be aware of the patchwork of collective, class, and mass action litigation schemes across these and other jurisdictions because they may require different defense strategies in otherwise similar litigation.

This article discusses the history and current state of class actions in the US, with a particular focus on the system’s strengths and weaknesses. In addition, it analyzes the cultural and legal reasons why European countries have not adopted the US class action system. Finally, it summarizes approaches some European jurisdictions have taken to mass or collective action litigation.
**US class actions**

The class action mechanism in the US was formally introduced in 1938, with the enactment of Federal Rule of Civil Procedure 23. The use of class actions has increased dramatically since then, particularly over the last few decades, in both state and federal courts. Parties regularly contest the limits of and rules for class actions. The class action regime itself is embedded in the legal system and culture of the US, however, as are its strengths and weaknesses.

On the one hand, class actions allow parties to resolve thousands of individual claims without disparate findings of fact or law. Class action settlements can be financially efficient and can give defendants peace of mind that they have resolved potential claims fully. From a policy perspective, consumers often benefit from changes in business practices that result from large class action lawsuits.

On the other hand, plaintiffs’ attorneys drive class action lawsuits and reap the financial rewards far more often than do the plaintiffs themselves. Further, an increasing number of class action lawsuits are filed in the US alleging little or no actual harm to the plaintiffs. Statutory penalties and awards of attorneys’ fees can result in millions of dollars in costs—to say nothing of defense counsel fees—where the actions of the defendant companies have not caused any real harm.

There is limited interest among international companies in exporting the Rule 23 framework to jurisdictions overseas, particularly in Europe. Recent multinational litigations have highlighted the differences in the approaches across the Atlantic Ocean and have raised questions as to whether consumers, defendants, and would-be defendants would benefit from European adoption of this traditionally American mechanism.

**Lost in translation: Why not in Europe?**

Approaches to collective actions vary widely across Europe, reflecting a diverse range of legal systems arising from differing historical contexts. Although many countries have explored new procedures to deal with collective litigation in different forms, US-style class actions have yet to gain a foothold in Europe for a variety of cultural and legal reasons.

First and foremost, Europe does not share what it perceives to be the litigation-friendly culture of the US. Instead, Europeans have historically seen regulation, rather than litigation, as the key mechanism for controlling corporate behavior. Relatedly, there exists a widespread perception in Europe that the introduction of a class action system would create an unwanted “compensation culture” in which the odds are stacked too heavily in favor of plaintiffs, with lawyers reaping the rewards. This perception—deserved or not—has made it politically untenable for lawmakers to promote the often criticized US system.

Other features of European legal systems tend to act as a barrier to would-be plaintiffs, reducing further the appetite for group litigation. For example, unlike in the US, most European jurisdictions abide by the principle that the losing party in a litigation bears a significant proportion of the legal costs of the prevailing party. That risk often deters plaintiffs from participating in collective actions where legal costs are higher than in single-plaintiff litigation. Further, European civil claims generally provide for lower potential damages awards than their US counterparts. Punitive damages are not widely available, jury trials for civil actions are rare, and damages are typically imposed in accordance with a codified process. Third-party litigation funding is also heavily restricted in many European jurisdictions, including in France, whereas litigation funding has become more commonplace in the US.

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Finally, and in contrast to the US, most existing European collective action mechanisms operate on an opt-in basis in which each individual member of a defined class must take proactive steps before he or she can become part of the plaintiff group. In the UK, as with several other European jurisdictions, plaintiffs must take steps to have themselves joined to a register before they can participate in a collective claim. To compound this issue, regulations in many jurisdictions make it difficult for plaintiff firms to advertise group actions, limiting awareness.

**A unified approach in Europe?**

The possibility of a unified approach to group actions within the European Union (EU) has been under discussion for some time. In 2013, the European Commission made certain recommendations for common principles in relation to injunctive and compensatory collective redress mechanisms in EU member states. This set out a series of non-binding principles that member states should adopt in order to put collective redress mechanisms in place, including principles regarding standing, admissibility, and funding. A January 2018 Commission report on the implementation of the recommendation reiterated the view that a “clear, fair, transparent, and accessible system” of collective redress is needed. Given the range of pressing political issues facing Europe at present, however, and with divergent views across the 27 EU member states regarding the virtues of increased alignment, a truly unified mechanism for group actions across the EU will likely remain out of reach in the near future.
A brief survey of European jurisdictions

As a result of the factors described on the previous page and the patchwork of legal systems across Europe, each with its own history and characteristics, a wide range of different approaches to multi-party litigation is found across the continent.

United Kingdom. In England and Wales, the primary system for collective litigation is the Group Litigation Order (GLO). Established in 2000, the GLO has not been utilized as much as some commentators expected. That said, there have been a number of significant GLO cases in recent years. For example, the Royal Bank of Scotland Plc faced a collective action from its investors who alleged that the Bank misrepresented the state of its financial health in the financial crisis. Product liability plaintiffs have also utilized the GLO, including women affected by the PIP breast implant scandal (involving the use of non-clinical grade silicone by a French manufacturer of breast implants) and individuals with claims arising from contaminated blood products. As with other systems in Europe, GLOs work on an opt-in basis—individual participants must take steps to have themselves joined to a register in order to participate in the litigation.

The Consumer Rights Act 2015 introduced an opt-out collective action regime in the UK for the first time, albeit a regime restricted to certain forms of competition law claims. Early claims under this new system have faced difficulties. In 2017, the courts rejected a £14 billion class action claim purportedly on behalf of 46 million consumers who used certain credit cards between 1992 and 2008 as too broad.

Italy. In Italy, a class action system is available to certain types of consumers in specific circumstances. Under Article 140-bis of the Italian Consumer Code, there are strict admissibility requirements before a class action can be brought, in that the rights violated must be “homogenous” for the entire class. This system is rarely used.

Germany. German law currently allows for collective litigation on a restricted basis, but only in certain areas of law, including consumer protection laws (the UKaG law), unfair competition (UWG), capital market information claims (KapMuG), and minority shareholder claims (SpruchG).

The new German coalition government plans to introduce a more comprehensive framework for sample proceedings (Musterfeststellungsklage) in Germany. If such a framework is introduced, sample claims could be presented by a qualified institution (a registered association acting on behalf of injured parties). It remains to be seen how this will develop, and many commentators have suggested that consumer groups in Germany acting as the “qualified institution” may lack the equivalent power and funds to proactively pursue substantial claims. This contrasts with class action litigation in the US, where a class representative is usually represented by a law firm that has significant financial resources.

France. After much debate, France introduced a form of class action in 2014. Like the German system, the French system is limited to restricted subject areas as well as certain plaintiff groups (namely, consumer associations accredited by the French state). The French rules include a system under which a judge first rules on whether the action is admissible and the defendant liable. Once the court establishes liability, the court defines—in the same ruling—the group of persons affected by the subject of the class action and the publication methods to advertise the action. Class members will then have the opportunity to opt in to the class action.

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The Netherlands. The Netherlands has two alternative collective redress mechanisms. The first is a system which enables a representative organization to initiate a collective action. This scheme allows an individual member of a class to opt out of being bound by a relevant judgment, but only in limited circumstances. It is noteworthy that the representative organization can only establish liability, and not seek damages. In cases where liability is established, individuals may then file a claim for damages in individual proceedings. The second collective redress mechanism in the Netherlands is a system of judicially approved collective settlements, organized on an opt-out basis, whereby the court is entitled to declare a settlement binding on all members of a class, unless a class member opts out before such settlement is declared. This mechanism is set forth in the Act on the Collective Settlement of Mass Claims, known in the Netherlands as the WCAM.

Conclusion

Despite the European Commission’s efforts to align approaches, a unified European mechanism for collective or group actions seems unlikely in the near future. Further, individual European jurisdictions are not actively seeking to emulate the US class action structure. Given Europe’s skepticism of the US system, this is unlikely to change, particularly with the increasing prevalence of no-injury lawsuits, litigation funding, and outsized attorneys’ fee awards in the US. Companies operating in different countries should tailor their risk and defense strategies accordingly.
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