Preface

The global growth of class and collective action litigation shows little sign of slowing, and the consensus amongst practitioners is that group litigation activity will continue its inexorable rise.

One key hallmark of the expansion in activity has been attempts by claimant groups (supported by increasingly experienced law firms, litigation funders and other service providers) to test the boundaries of the procedural routes by which collective actions can be pursued. This development is well exemplified by several recent cases in the United Kingdom – where available mechanisms for so-called 'opt-out' claims are comparatively restricted – in which courts have examined the frontiers of the procedural rules allowing for representative actions.

It is likely that procedural developments of this nature will continue, including within the European Union. A key driver of this may be the EU's Representative Actions Directive (Directive 2020/1828), the deadline for the implementation of which passed on 25 December 2022. While this Directive seeks to harmonise the EU's collective action landscape, Member States retain some discretion with respect to its implementation. In light of variations in Member States' use of that discretion and the limited existing case law examining the provisions of the Directive (and any domestic implementing legislation), it is foreseeable that claimant groups may look to pursue procedurally creative actions that test the limits of the new framework.

Third-party litigation funding continues to underpin (and often, drive) the rise in collective actions. There will be some uncertainty about the impact of a recent UK Supreme Court decision invalidating established practice with respect to certain funding arrangements, but it is reasonable to expect that claimants and funders will seek to minimise any limitations from that decision.

Elsewhere, it is apparent that collective actions are now entering into the public conscience in the United Kingdom and, increasingly, Europe. While interest in class actions was historically transient (typically following major events, like Dieselgate) or confined to certain sectors (such as product liability, particularly in the medical context), the publicising of – and participation in – class actions has increased markedly. This development is attributable, at least in part, to various factors, including (i) a rise in claims of specific types (such as actions following high-profile data privacy breaches), and (ii) increased media attention in respect of other claims (such as high-profile competition actions against water companies and gaming console manufacturers). Public concern about environmental issues (and a perception of governments failing to do enough to tackle climate change) has also generated increased interest in environmental class actions.

Based on these developments, few practitioners would bet against the current trajectory being maintained. In fact, many eyes are watching areas of potential further growth, including in respect of: (i) new areas of commerce, including crypto-currencies and artificial intelligence; (ii) fallouts from recent geopolitical events, such as COVID-19 and the invasion of Ukraine; and (iii) changing regulatory and political environments on matters such as 'greenwashing', ESG and the UK's new 'failure to prevent fraud' offence.

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