

# European Class Actions: The Funder's Dilemma

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## Introduction

It is of course no state secret to remark that litigation funders have taken a very keen interest in the developing jurisprudence in Europe around collective redress. The plethora of litigation funders appreciate that financing large groups of claimants, whether retail or institutional, very much goes to their *raison d'être*. However, such claims are by their very nature novel, cumbersome and inherently unpredictable, which are themselves indicia of cases that are not automatically placed on the top of the pile. The financing of group claims therefore presents a unique set of challenges for litigation funders. With this in mind, the collective excitement that collective redress is generating is not necessarily a reason to jump for joy. The European landscape contains pitfalls for the unwary as well as the prospect of setting out into unexplored territory before reaching a summit.

Most commentators would tend to agree that, within Europe, the laws of England & Wales, Germany and the Netherlands have been the most tested when it comes to pushing the envelope of group action. Whilst it therefore makes sense in this chapter to focus on how we have assessed these three jurisdictions from a funder's perspective, it would be a mistake to consider them in isolation, and so we address some lessons that we have learnt from the other European jurisdictions in which we have assessed group claims. Time will tell as to whether England, post-Brexit, is going to seek to distinguish itself from the continental European modes of practice.

## Overview

### Securities claims

The fact that group claims come in all shapes and sizes is one of their double-edged characteristics. Historically, the continuous obligations of companies, born out of the market abuse regime (as applied throughout Europe via the Market Abuse Regulation), have spawned a number of claims. Recent claims have been brought in Denmark, England, Germany and the Netherlands. However, a central challenge to the EU Regulation is that a significant amount of discretion has been left to the Member States in the various implementing legislation. What you therefore end up with is a patchwork quilt of obligations with little uniformity.

For example, one key point of difference is in relation to how the issue of reliance has been addressed. In England, a gate-keeper issue is whether it is possible, in a non-prospectus claim, to assert with confidence that shareholders relied on the statements that are said to be misleading. Recent case law (in respect of group litigation against Tesco PLC) made it clear that the test of reliance was a relatively narrow one – shareholders needed to point to the precise statements that were misleading and explain how they had relied on them. Contrast this taxing position with that of Germany which, unless claimants are seeking to unwind actual transactions, does not require proof of reliance. These types of significantly differing approaches on the *law* make securities litigation particularly challenging when considering an overall European approach.

### Competition claims

Another central plank to group actions in Europe has been the competition cases, and it is probably in this area where there has been the most activity and the greatest number of developments. There is an inherent attraction to these claims as they are often coupled with some kind of regulatory action – “follow on” claims being those that are based on some kind of decision. As with securities claims, it is necessary to view these developments through both the wide EU lens and the narrower domestic one.

National competition cases have thrown up another key challenge for group claims, being the need to seek rulings from the European Courts themselves (who must interpret the Directives) – for example, a series of Google cases have been referred to the General Court and, in relation to the *Trucks* cartel, a Court in Spain referred to the European Court of Justice the question of whether a domestic subsidiary could, in certain circumstances, be held liable for cartel damages. As many will know, a reference to the European Court will add years to an action and will be one important factor in a funder's decision as to whether to finance a competition claim.

Delay does not merely come from a European referral, however, and the novelty of the group action process can itself cause significant problems. Consider the *Merricks* litigation against MasterCard in England. The claim was commenced in the Competition Appeal Tribunal (CAT) on 21 September 2016. It was finally certified as the first opt-out Collective Proceedings Order (CPO) on

18 August 2021, having been to the UK Supreme Court and back again. The claim has not really got out of the starting gates and five years have gone by. Since *Merricks* is the first of a number of group claims being pursued under novel legislation, a funder can expect to encounter many more obstacles as the case meanders through to trial. However, *Merricks* has undoubtedly operated to clear a path for future matters – the CAT has just issued a CPO on an opt-out basis in an abuse of dominance case against BT which, in fact, was brought on a stand-alone basis (i.e. not linked to a regulatory decision).

Competition claims have thrown up additional challenges for funders as a consequence of the developing market for these claims. In England, only one representative can obtain a CPO, and so an unfortunate practice of hearing carriage disputes is having to develop. The CAT recently had to address the first carriage dispute in connection with the significant claims in the FX litigation – its decision is awaited. Two law firms – and their funders – slugged it out in front of the CAT seeking to make their case for being the preferred firm/funder combination.

As part of the process, the funder needed to be willing to disclose most of the financial arrangements that underpinned the funding proposition, including the level of insurance cover that the funder had obtained. Such information was important for the CAT to determine which option presented the best outcome for the class that was going to be represented. Since the CAT has not yet ruled on the criteria against which the better option will be judged, it is difficult to predict the actual outcome, but it seems likely that the CAT will have to have regard to the ultimate financial return to the class, and to which option is in the overall best interests of the class itself (when judged against a series of quite disparate factors). Since the carriage dispute is heard relatively early in the process, and the CAT has not had a chance to rule definitively on the substance of the claim, it will have to consider which action appears more suitable to be the lead case, with necessarily limited information.

In circumstances where there are two representatives seeking to be picked (and you could envisage circumstances where more than two could step forward), only one will prevail. The others will walk away disappointed. So too will the funder(s), who will see the not inconsiderable costs thrown away. Since the FX dispute commenced in September 2019, and the CAT has not yet ruled on which representative (and firm/funder) should take the case forward, the case has not only seen considerable delay but also – which funders like even less – considerable uncertainty. Indeed, the only certainty is that one funder will not ultimately be funding the claim.

As competition cases develop, it is inevitable that these types of challenges simply become par for the course – indeed, as we discuss below, much the same kind of carriage dispute has to be followed in the Netherlands via the introduction of its Settlement of Large-scale Losses or Damage (Class Actions) Act (**WAMCA**).

#### Data protection claims

Another seam of group action work has been generated by the litigation that has flowed (or perhaps recently flooded) out of the EU General Data Protection Regulation (**GDPR**). Whilst many initially saw the GDPR just as an excuse for a new corporate policy, the real teeth of the GDPR are now coming through. These claims hinge on Article 82 of the GDPR, which provides for the payment of compensation – “*Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered*” – and such a provision clearly sets the claimants off in the right direction. However, as with other

Regulations in the field of collective redress, there is not yet a sufficient body of case law, following its implementation in May 2018, and so there is little helpful precedent.

There is, however, much claimant enthusiasm to develop such precedent, and this is unlikely to be deterred by, for example, British Airways’ recent announcement that it had settled litigation following the 2018 breach of its security systems leading to more than 500,000 customers’ data being leaked. In England, commentators are patiently waiting for the Supreme Court’s decision in *Lloyd v Google LLC*, which is a representative action on behalf of an estimated 4.4 million individuals (seeking £750 per individual). It is possible that the judgment will provide some guidance both as to the nature of the process to be followed and the applicability of a uniform tariff system group-wide.

The lack of precedent means that it is not yet possible to discern any difference in judicial approach between the claims that allege misuse of data as against those that respond merely to a data breach. Some guidance can, though, be gleaned from the regulators’ position in this regard. There have been over 800 fines by domestic regulators and the majority are relatively immaterial fines. However, recently the Irish regulator fined WhatsApp Ireland Ltd EUR 225m for breaches of the GDPR in relation to the provision of information and the transparency of that information to users and non-users of WhatsApp. Amazon.com, Inc. announced that the Luxembourg regulator had issued a fine of EUR 746m for its subsidiary’s failing to process personal data in compliance with the GDPR. These fines are a reflection of a changing focus in relation to the multinational companies that are growing in power and influence within Europe.

Instinctively, from a funder’s perspective, a case in which there is evidence of data *misuse* by a defendant seems more attractive than a mere data breach case, as the data abuse case should allow a more meaningful case in damages. We will, however, be faced in such circumstances with the genuine possibility of claims being filed in multiple jurisdictions. The nature of the mixed implementation of the GDPR through domestic legislation very much leads to this approach, particularly bearing in mind different approaches between jurisdictions to the ‘injury in fact’ standard and to compensatory actions in general.

#### Other group claims

Unless you have been living in a cave, you will know a little about the Representative Actions Directive (**RAD**). The RAD is the culmination of the EU’s new deal for consumers, and its intention is to provide a framework to allow consumers to bring claims in a wide variety of consumer matters through the auspices of Qualified Entities (**QEs**) – though not for a couple of years. These QEs need to be: legitimate consumer associations; not for profit; independent; and transparent as to their sources of funding. It is very clear that the RAD is not therefore a vehicle for litigation funders to swamp the Courts with consumer claims. However, the national Courts are going to have to embrace these claims.

For example, although the French class action process was introduced in 2014, to date you can count the issued claims on one hand. In Spain, there is quite a tradition of collective actions, but mainly by the simple bundling of similar cases rather than under the banner of class actions. Courts are open to this practice and even promote it by having specialised Courts and sample judgments. In common with other European jurisdictions, true class actions are only available in the framework of consumer protection law and for consumer associations. The law is very recent and there is limited practical experience in its workings. The system allows for both stand-alone and follow-on cases, with an opt-out system on the merits phase and opt-in for execution. In Ireland,

litigation funding is not permitted at all, so it remains to be seen how the Irish will seek to give effect to the RAD. Thus, although litigation funding is not going to be the driver for these claims, there will in all likelihood need to be arrangements put in place between QEs and funders so that these claims can be advanced.

The RAD is as important for what is not covered as for what is, and so its impact is limited to the extent that competition claims – and the majority of shareholder claims – will not be covered. It remains to be seen how the RAD will work in practice and what claims are likely to be brought under it – product liability claims and the claims of different classes of passengers would appear to be high up on the list.

### The concept of bundling of claims

Viable group claims are routinely brought in response to specific acts of negligence – whether it be by investors or indeed victims in the widest sense. From a funder's perspective, when a large group of individuals have suffered demonstrable harm from the same set of facts (ranging from a prospectus to an explosion or an accident), their claims immediately are well suited for funding. The challenge for a funder is to ensure that the claim is truly a group claim, rather than a series of individual claims that have been dressed up as a group claim.

The vulnerabilities of group claims tend to be at the causation and quantum stages, and are particularly complicated where a disparate group is bound together in a loose fashion in order to seek to take advantage of the procedural benefits of proceeding as a group. Whilst it has always been said that there is strength in numbers or, as the Native American chief Tecumseh put it, “*A single twig breaks, but the bundle of twigs is strong*”, one only needs to consider what happens when the bundle drops to the floor and the huge effort that is involved in trying to pick up all the twigs and put them together again. A poorly constituted group action can be a gift to a defendant and can be a curse to a funder.

Partly for this reason, funders, and also promoters of group claims (though this terminology in itself raises warning signs), have looked to methods of bundling claims (pun intended) by assignment into special purpose vehicles – a particular benefit to this structure being the consequential ability to frame how instructions are given to the lawyers.

This process is acceptable in Switzerland and, as we discuss below, has been subject to various judicial pronouncements in Germany – though the process is not free from risk. As many will know, the assignment model has perhaps been most tested in the Netherlands, and is currently being used to bundle collectives of claims in anti-trust follow-on claim litigation, for instance relating to the *Air Cargo* cartel and *Trucks* cartel.

Where there are individual issues of reliance or diversity of quantum, such a strategy may not be the most effective to deploy. It follows that a funder is always going to be careful to ensure that a claim's structure is as well developed and reasoned as its underlying merits. It is very difficult, once the foundations have been laid, to seek to unravel a group claim, and instinctively a funder will wish to be involved at the outset rather than being presented with a *fait accompli*.

Having outlined general observations in relation to the group action landscape, below we comment specifically in relation to the key benefits and challenges that we have seen from our experiences of funding group claims in England & Wales, Germany and the Netherlands.

## England & Wales

### The landscape

Unlike many European countries, England has a well-established collective redress regime. Compensatory damages are available to groups via the Group Litigation Order (GLO), the representative action and the CPO mechanism in the CAT. Aside from the CPO, the two other routes are suitable for any claim irrespective of its subject matter. The GLO procedure is opt-in (i.e. potential members of the group are obliged to expressly join) but the claims all start off their lives as individual ones and are only grouped together when a Court considers that they raise similar issues. It is not a certainty that a GLO will be ordered. The CPO can either be opt-in or opt-out (i.e. all potential members of the group are deemed part of the group unless they expressly opt out). Standing (i.e. who can bring the action) is granted to a class member (the representative in a representative action, and the lead claimant in a GLO).

In England, there is a public register of GLOs that have been made. At the time of writing, 109 GLOs have been registered since the year 2000. In the last three years, only seven GLOs have been registered. From this statistic, it is evident that either there has been a failure to register or the GLO is simply not a well-utilised tool in the claimant armoury.

Contrast this position with the applications for CPOs in the CAT. There have been 13 applications for CPOs in the five years that they have been available. There have been four CPO applications in the last three months. All four are opt-out applications and three of them have been issued by the same law firm.

Based on these statistics, it is impossible to say that the English market is overrun with group actions. Similarly, it cannot plausibly be argued that litigation funders have generated any sense of a febrile atmosphere. Instead, there has been a measured approach to the bringing of collective claims. This caution has, in part, been caused by some setbacks that have occurred along the way. The first application for a CPO failed, and we have already noted how the first CPO has only just been made five years after it was sought. In relation to GLOs, for example, a judge refused to order a GLO in the *Tesco PLC* shareholder litigation. Representative actions have fared no better – in a recent high-profile environmental claim, the High Court struck out the claimants' representative action due to a failure to meet the stringent “same interest” requirement whereby it needed to be shown that all claimants had an identity of interest.

### Positives and negatives

Group litigation may be high-stakes for the defendant, but it is similarly so for the claimant, his legal advisers and any litigation funder. The challenge for a litigation funder is that collective action requires an intermediate step akin to a certification hearing for any of the three possible procedural routes. Whilst a judge will conduct a limited merits-based review at this early stage, it certainly cannot be said that achieving GLO or CPO status places the claimants on the downward run of the litigation. Once the standing issues have been resolved, it is only then that the battle truly commences.

Since defendants are aware of this, there is a natural tendency to seek to argue multiple points before the certification process

in the hope that claimants (and their funders) will become battle-weary. Since certification hearings are very expert-heavy, they become very expensive. The level of work within the CAT is such that it is hard to get early dates in the Court calendar, and so claims are long-running. We have already noted that a funder needs to be prepared to disclose its funding agreement. For all these reasons, a funder is unlikely to seek to fund a collective action unless it is satisfied that the action will actually be certified in whichever way is proposed.

The attraction of opt-out claims is the potential size of the class. The class in *Merricks* was originally stated to be 46.2 million people (comprising everyone who purchased goods or services in the UK when they were resident in the UK and over 16 years of age between 1992 and 2008). The CAT has recently ruled against Mr. Merricks' attempt to increase the size of the class to 59.8 million (by including people who died before the proceedings commenced). From either viewpoint, even the smaller class is "gargantuan" as it was referred to in the Supreme Court. The fact that the CAT has now certified the class should mean that the potential size of a class is never going to be an issue, provided the description of the class is tightly drawn (if that is not a tautologous aim). One of the potential drawbacks to an unwieldy size of a class is the inherent difficulty in proving damages.

Another attraction to CPO cases is that damages can be ordered on an aggregated basis such that there is no requirement to prove individual loss. Such an evidence proposition would have been impossible to contemplate for a class the size of *Merricks* but the exercise is problematic even for smaller groups. The concept of aggregated damages survived a challenge in the Supreme Court and so the combination of the potential size of the class, and the "pot" that could result from it, does represent a significant claim size. It is no surprise, therefore, that a number of law firms are specialising solely in these types of action.

The concept of aggregated damages is perhaps the greatest attraction to the CPO cases, because proof of damage is often the Achilles' heel of group cases. It is therefore a key area for a litigation funder to focus on. In this sense, the s 90 and s 90A Financial Services and Markets Act cases are of some assistance. In the groups that have so far been assembled to sue companies for breach of their corporate notification requirements, the assessment of individual loss is a matter based upon the trading patterns of individual shareholders. Whilst each shareholder will have a different level of damage, it is reasonably straightforward to apply a central formula to a group, even a very large one. Contrast that exercise with the one that faced the Court in the *Samarco* dam case, where 200,000 claimants are claiming disparate losses that have been suffered as a consequence of the environmental disaster in Brazil. The challenge to that quantum exercise severely increases the cost and the risks that litigation funders would have to assess at the outset of a case.

One other key factor of *Samarco* and of ongoing group claims against Vedanta and Shell in English Courts (concerning pollution in Zambia and oil spills in the Niger Delta, respectively) is the issue of the jurisdiction of the English Court to try the claims in the first place. These group claims have been commenced in England against the parent companies in circumstances where the conduct complained of relates to the acts of their foreign subsidiaries. Inevitably, jurisdiction is a question that a litigation funder will wish to get his/her head around very early on, and any uncertainty in this respect is likely to be fatal to funding.

In light of the Supreme Court's decision in *Vedanta Resources Plc v Konkola*, accepting that there were triable issues as to whether Vedanta owed duties of care, group claims arising out of activities of foreign subsidiaries can be expected to increase. With these cases, as in any other, a funder needs to look at the long game. Achieving a victory on jurisdiction achieves nothing if

the case ultimately fails on the facts. However, it may certainly be said that post-*Vedanta* these kinds of business and human rights case carry *somewhat* less risk than they did previously.

For a litigation funder in England, therefore, collective actions represent both opportunities and threats, primarily because most group claims contain a two-stage process, with the first stage – whether it be the seeking of certification or the vindication of the group approach – often taking many years, costing a great deal and leading to no certainty that the underlying merits are sound. There is therefore a significant opportunity cost to these claims – it is not impossible that other non-group claims could have been successfully litigated whilst a group claim remains stuck in the procedural mire. What is true, though, is that a clutch of recent cases – with *Merricks* and *Vedanta* being the most important, but with the potential for *Lloyd v Google LLC* to be as crucial – has meant that a very wide range of group claims are now very seriously considered by litigation funders.

## Germany

### The landscape

Unlike in England or the Netherlands, Germany lacks a collective redress regime that allows for group actions in the sense that a lawsuit can be filed in Court on behalf of others who claim damages and who need not be registered/presented in the lawsuit. Despite the implementation of different model actions facilitating multi-party actions in specific areas of law, for the time being the following principle in Germany still remains valid: to seek relief or damages, a claimant must appeal to the Court as an individual and therefore needs to substantiate and prove, in every single case, to have suffered individual damages.

Thus, groups of related damages claims generally cannot be brought before German Courts by individuals or associations in a representative form like in the U.S. or in certain other Member States of the European Union.

Despite lacking a comprehensive legal framework for classic collective redress actions, Germany has nevertheless established a wide group litigation landscape, especially with regard to competition and security claims, over the past few years. The German group litigation landscape is the one that has been tested the most by relevant participants when it comes to multi-party actions. This is not only because of steady (though limited) improvements of legal mechanisms that allow for a kind of class actions model in specific areas of law, but also due to German jurisprudence, which contributes continuously to further clarifications of the legal scope of multi-party actions.

It is therefore not surprising that litigation funders like Omni Bridgeway are taking a close look at investment opportunities being offered by the German multi-party action market. However, given the fact that the outcome of the development of effective action measures remains uncertain, such litigation funding investment opportunities must still be taken with caution.

### The importance of securities litigation

The rise in securities group litigation in Germany has mainly been driven by the implementation of the German Capital Markets Model Case Act (*Kapitalanleger-Musterverfahrensgesetz*) (**KapMuG**) in 2005, which facilitates the establishment of factual and legal aspects of claims on behalf of a group of claimants in securities disputes. The KapMuG was the first collective litigation scheme in Germany, and it was a reaction to the claims that had been brought before the Court by around 17,000 shareholders against

*Deutsche Telekom AG* due to allegedly false statements in the prospectus for a public offering in 2000. It has now been road-tested, as it were, in the multi-billion-dollar KapMuG lawsuits against *Volkswagen AG* and *Porsche SE* as a reaction to 'Dieselgate'.

However, claimants (and funders) in KapMuG proceedings must have staying power: the vast majority of the group litigation proceedings under the KapMuG are still pending. Only recently, the German Federal Court of Justice sent the *Deutsche Telekom* case back for a new round of proceedings before the Higher Court of Frankfurt. Experts now must clarify whether the allegedly false statement in the prospectus had an impact on the rapid decline in the price of the shares of *Deutsche Telekom AG*. That this has taken so long is of great concern to prospective shareholders (and funders) in other cases. Even though the reform of the KapMuG in 2012 simplified and streamlined the model proceedings, and rendered the KapMuG more attractive to shareholders, it remains to be seen whether the KapMuG proceedings, initiated against *Daimler AG* in 2019 in connection with the car manufacturer's alleged involvement in diesel emissions manipulations, will be litigated any faster. Let's hope so.

### Consumer claims

As a reaction to the litigation claims brought before German Courts in 'Dieselgate' against *Volkswagen AG*, the German legislature implemented another key mechanism in 2018 for something similar to class actions in Germany: the Model Declaratory Action (*Musterfeststellungsklage*) (MDA). The aim of the MDA was to allow qualified consumer associations to pursue only minor damages, i.e. those that a single consumer might not rationally assert in Court. The expected increase in litigation based on the MDA model proceeding did not occur – unsurprisingly, since the model proceeding only ends with a declaratory decision. Consumers still need to seek individual damages before the Court after a declaratory decision is declared binding on the consumers who joined the model proceedings. Thus, unless there is a settlement, as was the case against *Volkswagen AG*, consumers cannot easily hope for compensation in MDA model proceedings.

A further rise in consumer collective actions in Germany will therefore only become a reality once the RAD is implemented in German law in a way that allows for a more effective enforcement of collective rights in a wide variety of consumer matters. Even if the German legislature was only willing to implement the minimum requirements for a consumer class action framework as set out in the RAD, the legal implications of such representative actions would go significantly beyond those of the MDA: European representative actions are not limited to seeking declaratory relief. Instead, direct claims for damages (and other relief remedies) can be awarded. The RAD thus has the potential significantly to shape the group litigation landscape in Germany. To make this happen, the German legislature must take the opportunity to embrace the wide discretion of the RAD in implementing effective and widely applicable class action mechanisms.

Only then will we really know how the landscape of mass data protection claims will develop. Even if these kinds of claim are already on the public radar in Germany, a real group litigation trend to seek damages under Article 82 GDPR has not yet emerged here – consistent German jurisprudence in this area still needs to be further developed.

### Competition litigation

What is true, though, is that bundled private antitrust litigation actions have a long tradition in Germany. In particular, the

business-to-business follow-on competition litigation has steadily developed in this jurisdiction. When the European Commission or the German Federal Cartel Authority (*Bundeskartellbehörde*) renders a decision finding an infringement of (international or national) antitrust law, victims of anticompetitive practices regularly consider their options for seeking antitrust damages. As a consequence, high-volume and complex lawsuits based on cartel decisions following the EC's findings in *Trucks*, *Vitamins*, *Elevators/Escalators* and *Air Cargo* have occupied German Courts significantly in recent years.

Due to the combination of (a) the harmonisation of the law through the EU Damages Directive, (b) a series of landmark judgments of the German Federal Court of Justice on fundamental legal questions, and (c) significant experience of the German Courts in follow-on antitrust litigation, Germany is now one of the preferred jurisdictions for competition claims. However, uncertainty prevailed recently in the German antitrust litigation market over whether the bundling of claims, by assigning them to special purpose vehicles, was legally permitted. Several lower Courts like the *Landgericht München I* in the follow-on *Trucks* cartel litigation rejected this approach in early 2020, arguing that this would not be in line with the Legal Services Act (*Rechtsdienstleistungsgesetz*). From a litigation funder's perspective, this represented a setback because economies of scale can only be realised by aggregating the multiple antitrust damages amounts.

Time will tell whether the German Federal Court of Justice really eliminated all uncertainties about the assignment model in its landmark *AirDeal* judgment on 13 July 2021, when it found such assignments to be permissible and paved the way for German Courts to slowly shift their focus from liability to quantum. Once this step has been taken, the challenge is then to see if German Courts will take a claimant-friendly approach, as in Spain where Courts have already awarded overcharge rates in a double-digit range.

### Potential pitfalls

As with England, these group claims come with strings attached – England requiring a two-stage process, and Germany having one too – with the spectre of individual damages claims having still to be brought. Claimants (and their funders) have to navigate choppy waters, but there is little doubt that Germany's presence as a key collective jurisdiction is secured, and the decisions that will come from the German Courts in the next few years in relation to the KapMuG claims are going to be determinative as to the way forward for those types of claim. In this sense, Germany is in a similar position to England as it grapples with novel approaches for the pursuit of collective justice. There is little doubt that Omni Bridgeway will continue to play an important part in the development within Germany of access to justice for victims of corporate wrongdoing.

## The Netherlands

### The landscape

Prior to the introduction of the WAMCA regime in January 2020, the Netherlands already had a developed and tested practice for bringing collective claims in the Dutch Courts.

Under the predecessor of the WAMCA, a collective settlements procedure was already in place which allowed a party that was willing to compensate damages (often after test litigation had established liability) to draw up a draft settlement with an organisation sufficiently suitable to represent the class, and file

that draft settlement with the Court to make it binding on all class members. A second mechanism that has been used since (especially in claims related to competition law) is the bundling of claims, either by claimants providing mandates or assigning their claims to an organisation (often a Dutch foundation), who will then be acting on behalf of the claimant or as claimant itself.

The WAMCA has made the Netherlands an even more attractive jurisdiction to file collective redress claims, providing for a mixed opt-out/opt-in regime.

Under WAMCA litigation rules, the claims can be brought by a representative organisation on behalf of claimants residing in the Netherlands on an opt-out basis. In principle (unless otherwise decided by the Court), those claimants not residing in the Netherlands can participate only on an opt-in basis.

The representative organisation has to meet the suitability criteria established under the WAMCA to become the exclusive representative. These criteria relate to truly being a representative for the victims, independent governance, sufficient funding/financial means and transparency requirements. If more than one representative organisation files a similar claim, the Court will need to determine who will become the class representative. In this respect, the Dutch regime is similar to the CAT procedure in England, with the notable difference that all types of claim can be run via the WAMCA.

It is important to note that the WAMCA does contain so-called scope rules, requiring the claim to have sufficient connection to the Netherlands. These rules can be met by either (a) the majority of the persons on behalf of whom the action is filed residing in the Netherlands, (b) the defendant residing in the Netherlands (and having sufficient connection to the Netherlands), or (c) the circumstances on which the claim is based having taken place in the Netherlands.

#### Untried and untested

It will be important to monitor how the Courts are to interpret these scope rules. From a funder's perspective, it is not very desirable to run the risk of bookbuilding a pan-European claim and seeking to add claims to an ongoing WAMCA litigation on an opt-in basis, only to have those claims (potentially) deemed inadmissible on the basis of a strict scope rule interpretation.

While this has given rise to some level of caution amongst funders, it has not stopped representative organisations, mostly backed by professional international funders, from bringing claims in the Netherlands, especially when these cases are assumed to be viable already on the back of an opt-out Dutch class with sufficient volume.

Most large car manufacturers have witnessed collective 'Dieselgate' WAMCA claims being filed against them; a case against Airbnb has been brought relating to alleged illegal costs charged to consumers; and several large international companies

(*inter alia*, Salesforce/Oracle and TikTok) have found themselves to be the 'first of their kind' to be facing GDPR-based WAMCA claims.

In several of these WAMCA cases, there have been multiple representative organisations filing similar claims, which will mean there will undoubtedly be fierce competition to become (appointed) class representative. Once it has become clear how such a carriage dispute will play out, it will provide more clarity to a funder on what the determining factors will be, and thus how to assess and mitigate the risk of 'betting on the wrong horse'. It will be interesting to see whether the Dutch Courts will look to the approach of the CAT, or *vice versa*, to guide its own approach.

Undoubtedly, the WAMCA has changed the playing field for consumer/privacy-related claims in the Netherlands. But many parties are eyeing and investigating application of this Act for securities and competition claims too, and it will only be a matter of time before those types of collective redress case will join the others in the official register of collective action cases filed in the Netherlands.

## Conclusion

The rise of collective actions throughout Europe will only increase once the RAD kicks in over the next two years. The growth in the appeal of group actions has inevitably led to more investment being made in the sector because the legal budgets and adverse cost liabilities, as well as the rewards, are significant. In turn, this increased investment and oversight from litigation funders – coupled with the EU's desire for consumers to be the beneficiaries of these group claims – has contributed to the renewed enthusiasm from within the EU for regulation of litigation funders; that is a subject on which we will comment in the future.

As things stand at the moment, Omni Bridgeway will continue to fund group actions that provide access to justice, level the playing field and allow for small claims – that could never be pursued individually – to be recovered in a proportionate and effective way. We, however, have our antennae firmly in place – whilst prospects of pots of gold at the end of rainbows may encourage the uninitiated, we become much more wary and so will continue to proceed with maximum caution while staying at the forefront of exploration of the new frontiers in collective redress.

As can be shown from an analysis of the regimes in the key European jurisdictions, whilst consumers are marching forward for justice, the Courts are having to play catch-up, and litigation funders and lawyers are having to acknowledge that the state of the law in key areas, from a due diligence perspective, is still very much up in the air – this is as much from a procedural position as a legal one. There is a certain irony that even in claims where liability has been established, the quest for justice is not for the faint-hearted – and deep pockets are still required. Will we be retired before the *Deutsche Telekom AG* shareholders get any recompense?



**Jeremy Marshall** is a Senior Investment Manager at Omni Bridgeway responsible for origination, due diligence and management of funded cases in England and across the EMEA region.

Jeremy was previously the Chief Investment Officer of Innsworth Advisors, specialising in financing commercial disputes and arbitration. Prior to joining Omni Bridgeway in 2018, Jeremy spent nearly two decades in private legal practice in London, including approximately 10 years with international law firm Hogan Lovells, and a decade with a large national commercial law firm where he was head of the London office. Jeremy's legal practice focused on professional negligence claims, banking litigation, shareholder disputes and international fraud and insolvency litigation. He created the firm's General Counsel forum, building it to a highly successful membership of 200 in-house counsel. Jeremy has played a key role in the development of dispute finance in the UK and Europe. He has considerable experience building and managing large institutional shareholder actions, including working on the funding of significant cases such as *Tesco PLC* (UK) and *Volkswagen AG* (Germany).

Jeremy was admitted as a solicitor of the Supreme Court of England & Wales in 1995.

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**Anna-Maria Quinke** specialises in litigation with a strong focus on antitrust and cartel damages proceedings and is based in the company's Cologne office.

Anna-Maria works in the overall EMEA and German cartel team, where she focuses on financing follow-on claims related to cartels or abuse of dominant market position. She is also highly involved in multi-party claims, portfolio funding, and high-value commercial litigation. Anna-Maria has vast experience in handling domestic, international, and cross-border disputes.

Prior to joining Omni Bridgeway, Anna-Maria practised law at the globally active law firm Clifford Chance for 10 years, where she handled litigation proceedings and enforcement matters, with a focus on antitrust claims. She also looked after clients in antitrust investigations and mounted their defence against cartel damages claims, as well as recourse claims under Directors' & Officers' liability insurance. In her role as Senior Associate in the Litigation and Dispute Resolution practice of the firm, she advised clients on national and international plant construction, as well as commercial and liability disputes and arbitration. During her time at Clifford Chance, she was deployed on secondment to the headquarters of a leading beauty/laundry/home care manufacturer for a period of six months.

Anna-Maria completed clerkships with the Federal Ministry for Economic Cooperation and Development in Bonn, in the Litigation and Dispute Resolution Group of the mid-sized law firm Redeker, Sellner, Dahs & Widmaier, and at the Higher Regional Court of Cologne.

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**Maarten van Luyn** is responsible for managing the sourcing, assessment and coordination of high-value strategic litigation finance solutions throughout Europe, with a focus on group claims and LegalTech solutions for such claims.

Prior to joining Omni Bridgeway, Maarten was the former Director/General Counsel of Aegon Netherlands, an international financial services conglomerate. He was also formerly a Partner in the Amsterdam office of leading international law firm Baker McKenzie, where he managed an international practice in corporate law and litigation, finance, banking and securities. He was also previously a Partner at boutique litigation firm BarentsKrans, based in The Hague.

In private practice, Maarten specialised in strategic litigation involving regulated industries. He acted in commercial transactions and litigation spanning structured/corporate finance, capital markets, and financial services.

Maarten is fluent in Dutch and English, and proficient in German.

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Omni Bridgeway is the global leader in financing and managing legal risks, with expertise in civil and common-law legal and recovery systems, and with operations around the world. Omni Bridgeway offers dispute finance from case inception through to post-judgment enforcement and recovery. In operation since 1986, it has an established record of financing disputes and enforcement proceedings.

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