GIBSON DUNN

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CLASS ACTIONS TO RESHAPE THE LITIGATION LANDSCAPE IN EUROPE IN 2023

To Our Clients and Friends:

Towards the end of 2022, Europe will likely see a wave of class action legislation. Many member states of the European Union ("EU") will have to either devise new class action regimes or amend their existing provisions on collective redress. They have until Christmas Day 2022 to implement the EU Directive on Representative Actions into national law. The new procedural rules must be applied to new collective claims raised by 25 June 2023.

So far, only the Netherlands has voted to amend its class action regime to comply with the Directive. Most other EU countries will have to take legislative action in the fall. The EU directive, once implemented, will allow for more cross-border mass litigation throughout Europe. Some states will use the opportunity to strengthen their jurisdiction by incentivizing plaintiffs to file cross-border representative actions in their courts, paving the way for cross-border forum shopping in Europe.

1. The EU's Directive on Representative Actions and Its Core Requirements

In 2020, the European Union issued a Directive on Representative Actions (EU Directive 2020/1828), which obliges all EU member states to amend their respective national rules of civil procedure to allow qualified entities to file collective actions for a class of consumers.

The member states enjoy considerable leeway to transfer the Directive's broad requirements into their national legal system. For example, member states are free to implement either an opt-in or an opt-out mechanism for consumers to join the collective action. Consequently, national provisions on collective actions will still differ from country to country. However, for the first time, all of Europe will have some form of collective redress to allow consumers to directly claim compensation from a defendant. Still, the Directive does not change the current European law on cross-border jurisdiction or conflict of laws.

The core requirements under the Directive which each member state must implement at a minimum are:

1. *Relief*? Member states have to provide at least one procedural mechanism by which a qualified entity can sue on behalf of consumers for a variety of redress measures (compensation, repair, replacement, contract termination) or injunctive relief. Some preexisting representative actions in Europe (*i.e.* in Germany) have so far allowed only declaratory judgments for consumers.

2. *Claimant*? Only qualified entities have standing to sue on behalf of consumers; special criteria apply for entities bringing cross-border actions. This procedural setup is designed to avoid abusive litigation. In the legislative ideal, representative actions should be driven by consumer

protection organizations who have the consumers' best interests instead of their own financial interest in mind.

3. *Predicate Laws*? The Directive requires that such representative actions can be filed for the violation of 66 EU laws for consumer protection, which are listed in the Directive's annex. Over the past 30 years, member states have transferred this EU consumer protection legislation into their national laws. Today, core provisions in the member states' civil codes (i.e. contract formation with consumers and defects liability) are based on the referenced EU legislation. The scope of the Directive also includes more ancillary EU legislation regarding claims by consumers arising out of, *inter alia*, unfair commercial practices, air travel, financial services, loans, food safety, electronic communication, and data protection. Seemingly every transaction with consumers in the EU could therefore be subject of a representative action in the future.

4. *Funding*? Qualified entities may be funded by third parties as long as conflicts of interests are prevented. When justified doubts regarding a conflict arise, qualified entities shall disclose their sources of funds used to support the representative action.

5. *Discovery*? In accordance with pre-existing national and EU law, member states shall allow courts to order the defendant or third parties to disclose additional evidence which lies in the control of the defendant or a third party. Some EU jurisdictions already have such procedural mechanisms in place. These mechanisms are generally limited in scope compared to US discovery. For example, in Germany, plaintiffs have to show that they require a specific document that would buttress their case before the court can order the defendant to turn it over. The Directive ensures that member states can keep these pre-existing national procedural provisions. They are also free, however, to vote for procedural rules more akin to US-style discovery, if they desire.

6. *Cost-Shifting*? As is customary in the EU (and unlike the US), the losing party shall bear the costs of the litigation. This is meant to discourage frivolous lawsuits. So if the case is dismissed, the qualified entity that brought the lawsuit on behalf of consumers will have to bear the entire cost of the proceedings. This – theoretically – includes the opposing party's attorneys' fees. However, the recoupable amount for attorneys' fees is often capped by national law. The Directive does not affect these caps and it is unlikely that member states will change them to the detriment of qualified consumer protection entities. Even if successful, defendants will therefore not be able to shift their costs entirely to the plaintiff. The consumers behind the representative action generally will not bear any costs..

7. *Tolling of Statutes of Limitations*? Pending representative actions (both for redress measures and injunctive relief) shall suspend or interrupt the national statutes of limitation for the consumers' individual claims.

8. *Settlements*? Similar to US class actions, all settlements in EU representative actions must be scrutinized by the court. The court will not approve the settlement if it violates mandatory national law or includes unenforceable conditions. Additionally, member states can allow the

court to reject the settlement, if it is "unfair". Settlements are final and binding for the parties as well as the consumers. However, consumers may opt-out of a settlement.

2. The Netherlands Set the Tone with a Plaintiff-Friendly Interpretation of the Directive

Many European countries either remain hesitant to approach legislation on collective redress or are still debating how to allow consumers to effectively resolve their grievances without inviting the specter of a US-style "class action industry" into European courtrooms.

The Netherlands, on the other hand, have already embraced the new procedure and have taken a leading role in its implementation. The Dutch parliament already passed class action legislation in 2020. In June 2022, as the first country in the EU to do so, the Netherlands amended this regime to fully comply with the EU Directive. Rather than simply implementing the Directive's core requirements, the Netherlands have used the legislative leeway afforded by the EU to create a plaintiff-friendly class action regime which will strengthen the position of Dutch courts to resolve cross-border collective disputes. The main staples of the new Dutch representative action are:

1. Its scope goes far beyond the required minimum of sanctioning violations against EU consumer protection law. All subject-matters fit for a civil lawsuit can be litigated. Most notably, this includes climate change litigation, for which Dutch courts have built a plaintiff-friendly reputation with major verdicts against the Dutch Government in 2018 and Royal Dutch Shell in 2021.

2. The representative action is not limited to consumers. Companies can join a representative action as well.

3. For purely national litigation, the Netherlands pose very limited requirements for the representing qualified entities. Even entities which were founded for the sole purpose of bringing one particular representative action will have standing in Dutch courts. In cross-border litigation the requirements will be stricter as set out by the Directive.

4. Similar to a US class action, Dutch plaintiffs will have to opt-out of the class should they not want to participate in the litigation. Dutch representative actions are also open to plaintiffs residing outside the Netherlands, as long as they belong to the class and actively opt-in. International plaintiffs will also be part of any settlement. This will drive up the amounts in dispute compared to representative actions in neighboring countries like France and Germany, which favor opt-in mechanisms. Consequently, representative actions in the Netherlands will be particularly attractive for plaintiffs and third-party litigation funders.

5. Other than the Directive's minimum requirements, the Netherlands have not imposed any restrictions on third-party funding. Litigation funders may not influence litigation strategy and the financial independence of the qualified entity must be safeguarded.

Some significant differences to US class actions still remain. The Netherlands have not introduced US-style discovery into their representative action, which the Directive would have allowed for. Plaintiffs will also not be able to sue for punitive damages.

3. Outlook: A Diverse Litigation Landscape in Europe with Opportunities for Plaintiffs

The European landscape for collective redress will remain diverse even after 2023. Not all EU member states will implement the Directive as broadly as the Dutch. For example, the German Attorney General has already indicated he will propose legislation that will be more narrowly tailored to the underlying EU Directive instead of overhauling Germany's collective redress mechanisms in one legislative swoop.

However, following the example set by the Netherlands, some countries might try to incentivize plaintiffs and litigation funders to sue multi-national companies in their own courts by devising plaintiff-friendly procedural rules.

Even if such a competition among member states will not ensue, any reform of Europe's collective redress system will present new opportunities for plaintiffs, in particular if last-minute legislation to meet the deadline of 25 December 2022 results in loopholes or unprecise statutes. Companies, courts, and law firms will have to adapt to the ensuing new legal challenges. With no or little case law on the books after the reform, plaintiffs have particular incentives to file creative lawsuits.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Class Actions, Litigation, or Appellate and Constitutional Law practice groups, or the following authors:

Markus Rieder – Munich (+49 89 189 33 162, mrieder@gibsondunn.com)
Alexander Horn – Munich (+49 89 189 33 161, ahorn@gibsondunn.com)

Please also feel free to contact any of the following Class Actions Group leaders and members:

Europe:
Eric Bouffard – Paris (+33 (0) 1 56 43 13 00), ebouffard@gibsondunn.com)
Osma Hudda – London (+44 (0) 20 7071 4247, ohudda@gibsondunn.com)

United States:
Theodore J. Boutrous, Jr. – Los Angeles (+1 213-229-7000, tboutrous@gibsondunn.com)
Christopher Chorba – Co-Chair, Class Actions Practice Group – Los Angeles (+1 213-229-7396, cchorba@gibsondunn.com)
Theane Evangelis – Co-Chair, Litigation Practice Group, Los Angeles (+1 213-229-7726, tevangelis@gibsondunn.com)
Lauren R. Goldman – New York (+1 212-351-2375, lgoldman@gibsondunn.com)

Kahn A. Scolnick – Co-Chair, Class Actions Practice Group – Los Angeles (+1 213-229-7656, kscolnick@gibsondunn.com)
Bradley J. Hamburger – Los Angeles (+1 213-229-7658, bhamburger@gibsondunn.com)
Lauren M. Blas – Los Angeles (+1 213-229-7503, lblas@gibsondunn.com)