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European Class Action Report 2021

Welcome

Welcome to the first edition of the CMS European Class Action Report. European class action risk is increasingly a board level issue. Change is being driven by the introduction of new procedural mechanisms intended to facilitate collective proceedings, a pro-active claimant bar and both by new entrant law firms and the increasing availability of litigation funding.

Identifying the factors that are driving change is helpful, but it does not – in and of itself – shine any light on the contours of the risk: to what extent is class action risk increasing?; in which countries is risk increasing?; which industries are being targeted and for what types of claim (product liability, data protection, competition, etc.)? This unique publication maps the contours. We conducted a major study of collective proceedings filed in Europe over the past five years, gathering information on each qualifying claim. We then identified key trends which we set out in this Report. Our Report is data-driven to give an accurate picture of what is actually happening in Europe.

The Report is intended to be a single resource for understanding the shape of class action risk in Europe. In this context, the trends revealed in our data are key but we also comment on the issues that are driving risk for defendants.

Terminology is important. Europe has a complex patchwork of procedural devices for bringing collective proceedings, so for the purpose of consistency and clarity in the Report we have used a standard definition for the term "class action", being: commercial proceedings brought on a collective basis seeking damages using any relevant local law procedure (opt-in, opt-out, assigned claims, consolidated claims, etc.) where there are five or more economically independent claimants or class members.

It remains to thank the many CMS personnel, lawyers, business development, data analysts and others who dedicated considerable time to this project.

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Hot topics:
5 things businesses should know about European class actions

The number of class actions being filed in Europe is showing a relentless upward trend.

The number of class actions filed increased by over 120% between 2018 and 2020.

The upward trend has been felt across Europe. As explained in our methodology section at page 46, the data has been compressed such that all claims within a jurisdiction that relate to the same underlying facts have been counted once only. This has a dampening effect on the number of claims recorded. For instance, in Germany 'Dieselgate' claims are counted only once.

European Class Actions 2016-2020

The Representative Action Directive: European legislation to encourage class-actions

In December 2020, the European Union passed the Representative Action Directive (the "RA Directive"), which sets out minimum procedural standards for class actions that Member States must have available in their domestic procedural law. This is the first pan-European legislation on this topic, and its intention is to increase the number of consumer class actions.

The RA Directive could bring very significant changes to European class action procedures in the next couple of years, further accelerating the growth of class actions.

At page 15 we provide a more detailed overview of the RA Directive. It mandates that each Member State shall have a functioning opt-in mechanism as a minimum, but countries are permitted to go further and introduce opt-out mechanisms. Member States have 24 months to bring their domestic law into compliance with the minimum standards then a further six months to bring amendments into force. As it happens, even countries with developed class action mechanisms, such as the Netherlands, will have to make at least some changes to their domestic law.

This requirement to change their procedural law will prompt debate and consultations across European countries on how they should implement the RA Directive and the extent to which, if at all, they should go beyond the minimum standards. We are therefore likely to see vigorous debate across Europe between consumer associations on the one hand and business interests on the other, over the extent to which Member States should change their domestic law. Europe has seen dramatic growth in class actions in the past few years even before the RA Directive came into force. That trend will likely accelerate.

The rise of opt-out class actions

Class actions have a range of procedural features, but perhaps the most significant is whether a mechanism operates on an opt-in or an opt-out basis. Opt-in mechanisms have traditionally dominated in Europe; they require a potentially harmed person to elect to "opt-in" to a claim or take another step to vindicate their rights such as assigning their claim. These devices can result in very high value claims, with the emissions standards litigation in particular leading to high aggregate exposure for the defendants. However, opt-in systems have long been criticised as less effective where individualised damages are low, because the low value damages offer limited incentive for persons to join therefore leading to low take up rates.

Opt-out mechanisms are often associated with U.S. class action litigation. They automatically coalesce the entire class with no need for persons to elect to participate. These are therefore very powerful procedural devices that aggregate defendant exposure which can dramatically increase the overall value of a claim beyond what a defendant would face for the same underlying incident if an opt-in device were used. These devices can lead to claims seeking € hundreds of millions and € billions.

In recent years, there has been a significant uptick in the availability of opt-out mechanisms across Europe, most obviously in the UK and the Netherlands.

Increasing availability of U.S.-style opt-out mechanisms in Europe is a major concern for businesses.

Read our overview at page 11 for more detail.

The rise in cross-border class actions

Increasingly, defendants are facing class actions arising out of the same issue in multiple jurisdictions simultaneously.

There are some obvious factors at play here, including that a more globalised business environment leads to cross-border impacts on mass harm events, as can be seen in claims such as those relating to 'Dieselgate' and to certain medical devices which have been pursued in multiple jurisdictions. This trend is only likely to continue as class actions relating to circumstances brought about by the COVID-19 pandemic are filed.

Perhaps less obviously, the rise in cross-border claims is being driven by claimant firms and litigation funders who are leveraging their experience beyond their domestic markets, whether by opening offices in new jurisdictions or collaborating with domestic firms. The key class action jurisdictions that corporates are best aware of are the U.S., Canada, Australia and Israel. In Europe, we need to add the UK and the Netherlands to this list, with more European names to be added in the coming few years. See our section at page 20 for more details.

The rise of the mega-claims

In addition to the increasing number of class actions, claims seeking extremely high damages awards are also being filed more frequently. Examples of these mega-claims include: *Merricks v Mastercard*, a UK competition class action seeking £14 billion; *McCann v YouTube*, a UK data protection claim seeking £2 billion+; *Oracle and Salesforce*, UK and Dutch data protection claims seeking €15 billion+; and *Gomes v Mastercard*, a Portuguese competition class action seeking €400 million+.

Each of these very large claims are being brought using opt-out devices, but opt-in mechanisms can also lead to high quantum claims. For example, media reports state that as of January 2021, 16,000 data subjects had joined the data protection claim against British Airways arising from its September 2018 data breach. The claimants are seeking £2,000 each, which would value the claim at £32 million. In February 2020, VW agreed to pay €830 million to be distributed to 240,000 German consumers concerning emissions claims.

Unlike the U.S., punitive damages and jury trials are typically not available in European civil claims, but the figures claimed in Europe demonstrate that exposure can be very significant even where damages are calculated on a compensatory basis.

The lack of punitive damages is welcome, but it does not solve the broader problem.

What is driving growth:
New players and new mechanisms

What is driving growth?

There are a number of factors driving the rise of class actions in Europe. Most important is the increasing availability of new procedural mechanisms that facilitate group claims, whether operating on an opt-in or opt-out basis.

Other factors that are driving growth include:

— increased activity from claimant law firms, whether foreign (often U.S.) firms setting up in Europe or the establishment of new claimant-focussed boutiques; and

— the ever-expanding role of third party litigation funding. The expansion of claimant law firms and litigation funders service the demand for claims, but they also create demand in and of themselves through proactively building claims of their own volition. We discuss these stimuli in brief below.

Claimant law firms:

The UK in particular has seen significant growth in the claimant law firm bar in recent years. Numerous U.S. claimant law firms have set up offices, including Scott + Scott, Strange and Butler, Hagens Berman and others. Indeed, Scott + Scott's stated objective on launching its London office was to target antitrust class actions. The Brazilian/U.S./English firm PGMBM has been particularly active in data protection, product liability and foreign mass torts claims.

Another significant driver has been the growth of boutique claimant law firms.

Typically, boutiques are launched by partners from larger firms to focus purely on disputes whilst avoiding conflicts created by a full-service offering. Boutique firms aggressively target claimant opportunities through both their existing and new networks. Claimant law firms have also been expanding into new sectors. For example, Hausfeld's UK office initially focussed on antitrust claims and then expanded into general commercial disputes. Recently it has been targeting data protection class actions and it is now also pursuing vehicle emissions mass tort claims.

There are similar trends in Continental Europe. In the last two years claimant firms Scott + Scott and Hausfeld opened offices in the Netherlands and PGMBM is planning to open an office this year.

Litigation funders and funding arrangements:

Litigation funding is increasingly part of the mainstream of litigation culture in Europe. Precise figures on growth are difficult to come by, but from 2009 to 2014 assets under management from funders active in the UK grew from £180 million to £1.5 billion (up by 743%).[1] On the supply side, class actions are attractive for funders; while the costs may be high, careful case selection has the potential to generate significant returns. These returns are particularly attractive where contrasted with the relative underperformance of other asset classes in recent years.

Continental Europe is increasingly important to the funding market, as demonstrated by the recently-established European Association of Litigation Funders choosing Amsterdam as its headquarters.

1. *"Third Party Litigation Funding in the United Kingdom: A Market Analysis"*, Justice Not Profit.

Claimant law firms work closely with litigation funders to offer "no-win/no-fee" propositions for opt-in class actions. Arrangements are often case-specific, but funders are also providing portfolio funding for suites of claims or directly investing into claimant law firms to provide working capital, including for "bookbuild" projects to bring class actions. The claimant law firm will often share risk and "upside" with the litigation funder, whether by recovering an uplift on its hourly rates or under a contingency arrangement where it takes a share of any damages award or settlement.

The majority of European countries operate a "cost shifting" regime, whereby the losing party is ordered to pay some or all of the winning party's costs. The impact of cost shifting is blunted where there are statutory caps on the amount of costs recoverable,[2] but for other countries where cost shifting represents a significant risk, "after the event" (ATE) insurance products can cover the claimant's liability to pay the defendants' costs in the event the claim is unsuccessful. Litigation funders will fund the cost of these premiums for suitable cases, or they may provide a direct indemnity to cover adverse costs risks.

Claimant law firms and funders both see class actions as attractive opportunities.

Funders provide capital not only to bring claims per se, but they also facilitate claims that push the boundaries to further develop class action procedures and allow subsequent claims to be brought. The two most significant class action claims in the UK of recent years are *Merricks v Mastercard* and *Lloyd v Google* and they have the potential to amend class action procedures to materially increase corporate risk. Both claims are supported by litigation funders, and are very unlikely to have been brought without funding.

2. Such as in the Netherlands and Germany.

The rise of opt-outs: A step change in risk

The rise of opt-outs

Traditionally, European procedures have operated on an opt-in basis, with potentially affected persons taking a positive act or election to join a group or to assign their claim. In this section we outline the rise of opt-out mechanisms, consider developments at country and EU level and examine the broad impact of those claims.

Opt-out mechanisms automatically aggregate class members unless or until class members choose to "opt-out" and leave the class. Opt-out class action litigation is most typically associated with the U.S., but Australia, Canada and Israel also have developed opt-out class action mechanisms.

A relatively small number of European countries have long-established opt-out or quasi opt-out mechanisms, including Bulgaria, Romania and Portugal. There is a significant trend towards opt-out class actions in Europe, with the UK, the Netherlands and Slovenia introducing far-reaching mechanisms in recent years.

Our study shows a steady growth of opt-out class actions in the UK, and a sharp increase in the Netherlands in 2020 following introduction of their new class action device that year.

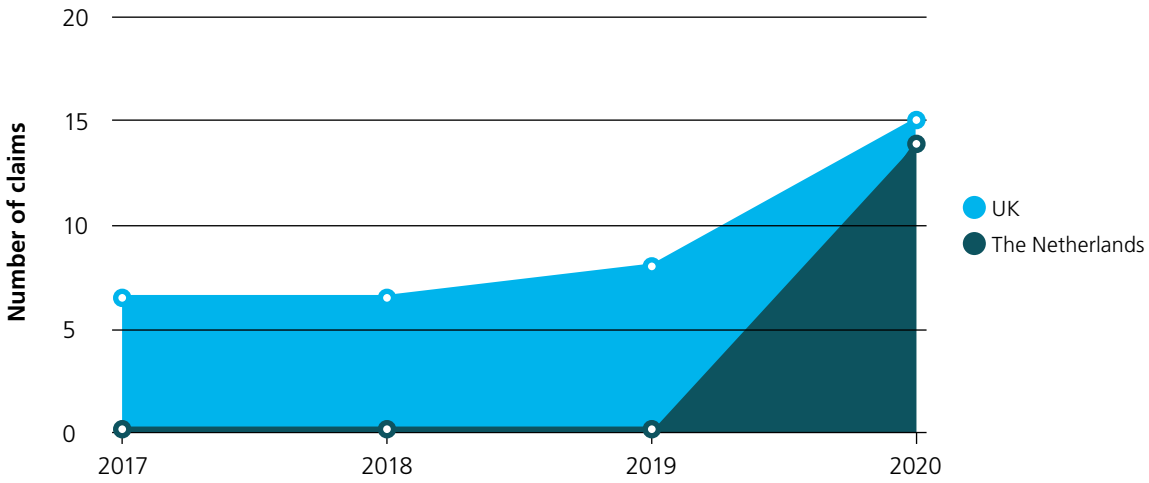
Opt-out class actions can be very profitable for claimant law firms and funders and so their numbers are likely to further increase in the coming years.

Country level opt-out developments

The country focus chapters for UK and the Netherlands at pages 29 and 37 give an overview of the opt-out mechanisms available in those jurisdictions.

A further development in the UK is that in 2018, Scotland introduced primary legislation for opt-in and opt-out group proceedings. The mechanism was implemented in July 2020, but initially only on an opt-in basis. At the time those rules came into force, the Scottish Civil Justice Council stated that it would

The rise of opt-out claims



consider extending the regime to operate on an opt-out basis. Although there are no guarantees, given that the primary legislation is in place for an opt-out regime it seems more a question of "when" such procedure will come into force rather than "if". This would have a significant impact within Scotland, but it could also impose significant pressure for an equivalent procedure to be introduced across the UK, particularly if there is a perception of differing levels of access to justice within a single sovereign state.

If these pressures build, then the UK could be on a track towards an opt-out class action device for all causes of action.

Elsewhere in Europe, Portugal saw its first opt-out antitrust class action being filed in late 2020 with a claim launched against MasterCard seeking upwards of €400 million in damages concerning interchange fees. Slovenia's opt-out class action mechanism law was introduced in 2018 and is available for a range of causes of action including for qualifying consumer protection, competition and employment claims.

EU impetus for more opt-out class actions

Our overview of the RA Directive at page 15 explains that the RA Directive requires Member States to implement an opt-in device, but countries are entitled to go further and implement an opt-out mechanism. Interestingly, the draft of the directive produced by the European Commission would have required Member States to introduce an opt-out mechanism for circumstances including where "consumers concerned by the infringement are identifiable and suffered a comparable harm caused by the same practice or in relation to a period of time or a purchase". This proposal did not survive to the final version of the RA Directive, but

the fact that the Commission even countenanced a mandatory opt-out mechanism across the EU is highly significant in and of itself and shows how far perceptions have shifted in Europe.

A significant impact of the RA Directive is that Member States will be required to examine and make changes to their domestic procedures for collective redress by the end of 2022. This will prompt debate and consultations on whether countries should go beyond the minimum standards required by the RA Directive and – for instance – implement opt-out class action procedures. For example, on 15 March 2021, Ireland launched a public consultation on the implementation of the RA Directive. Amongst the questions asked by the consultation is whether Ireland should introduce an opt-out class action mechanism. Thus, although the RA Directive does not mandate introduction of opt-out procedures, the requirement to implement the RA Directive is prompting debate within Europe that could accelerate introduction of opt-out class action mechanisms.

Impact of opt-out class actions

Availability of opt-out class action procedures can have a number of significant effects, particularly for events where individualised losses are low and where opt-in mechanisms would unlikely be used by claimants. Those effects include as follows:

Higher value claims

Where a mass event causes low individualised losses opt-in mechanisms can be ineffective in coalescing a group. The UK Consumer Association brought an opt-in claim for price fixing of football shirts that settled in 2008, with reported take up of just 0.1%. Opt-in data breach claims can have take up in the single figure percentages. Opt-out claims however start from a position of 100% take up. The *Merricks v Mastercard* claim has been brought on an opt-out basis, facilitating a claim seeking £14 billion.

Claims that otherwise would not have been brought

In addition to leading to higher value claims, opt-out mechanisms lead to claims that simply would not have been brought otherwise. In *Merricks v Mastercard* the consumer class members all had standing prior to introduction of the UK competition class action device but none of them filed proceedings.

Claims can be brought more quickly

By their nature, opt-out class action devices do not require the "book build" exercise necessitated by opt-in mechanisms. It is therefore logistically easier to build a class, and the exercise can be performed more quickly. In some mechanisms, standing for the class representative is restricted to consumer bodies or public sector entities. But where standing extends to class members or even non-class members, opt-out class actions can be driven by claimant law firms and litigation funders.

In those systems there can be an acute "rush to the courthouse" dynamic as claimant law firms compete with one another to file claims early. The consequence of this is that defendants can face damages claims far more quickly than under opt-in mechanisms.

While Europe remains predominantly an opt-in region, there is a clear trend towards increasing availability of opt-out mechanisms which has significant consequences for potential defendants.

The Representative Action Directive:

A European push for consumer class actions

The Representative Action Directive

On 4 December 2020, the European Union approved a new directive to facilitate consumer class actions, with the Directive on Representative Actions ("RA Directive") published in the Official Journal of the European Union here.

The RA Directive sets out minimum standards for procedural rules in member states ("MSs") for collective redress and injunctions for consumers. The claims will be brought by qualified entities ("QEs") on behalf of consumers. The RA Directive distinguishes between claims brought in a MS where the QE is designated (a "domestic representative action") and those brought by a QE in a MS where it is not domiciled (a "cross-border representative action"). QEs must meet additional criteria to bring the latter type of claims. However, as is explained below, the effectiveness of those safeguards is questionable.

Two other important features of the RA Directive are as follows. First, it applies only to claims brought on behalf of consumers; it does not facilitate claims on behalf of legal persons. Secondly, the procedural mechanisms set out in the directive are only available for claims brought for breaches of instruments appended to the directive (i.e., the procedures are not available for all types of claims). The instruments appended to the directive cover a wide range of harmonised areas, including data protection, financial services, travel and tourism, telecommunications and environment.

As the RA Directive sets out minimum standards, it is open to each MS to have collective proceedings and class-action mechanisms, which go beyond those specified in the RA Directive.

We below summarise the key minimum standards set forth in the RA Directive.

Opt-in vs opt-out

The RA Directive grants each MS discretion to introduce an opt-in or an opt-out system, but they must implement an opt-in procedure at the minimum. Where a MS chooses to introduce an opt-out system, only consumers habitually resident in that state can be automatically included in the class. Persons who reside elsewhere must proactively opt-in.[1] The position for injunctive relief is different in that a QE may seek an injunction without the mandate or participation of consumers.[2]

1. RA Directive, article 9, paragraph 3.
2. RA Directive, article 8, paragraph 3.

"[Opt-out mechanisms are] very powerful procedural devices that aggregate the entire exposure which can dramatically increase the overall value of a claim beyond what a defendant would face for the same underlying incident if an opt-in device was used."

Adverse costs rules

The RA Directive preserves the principle of cost shifting as provided for in local law, which is reassuring for prospective defendants.

Adverse costs rules are the norm in Europe, albeit with specific exemptions. In a number of countries, awards of adverse costs are capped at a low level. Claims brought pursuant to the RA Directive may be high value; indeed an objective of the legislation is to facilitate class actions. The purpose of adverse cost rules is to deter unmeritorious claims. But for high value claims, adverse cost rules have limited deterrent effect for unmeritorious claims if the caps are set at a low level. As part of the process of implementing the RA Directive into local law, MSs should consider disapplying caps or adverse costs awards to class actions.

Certification stage

Many collective redress mechanisms have a "certification stage" whereby a court will dismiss claims that fall short of the requisite certification standard.

Unfortunately, the RA Directive has little to say on this topic. The operative provisions simply state that the courts will assess the admissibility requirements of a representative action in accordance with national law and the provisions laid down by the RA Directive.[3] Thus, it is up to the individual MSs to set and apply their own conditions.

While not strictly a certification process, the Directive states that MSs may dismiss "manifestly unfounded" cases at the earliest possible stage.[4] An early opportunity for summary disposal is welcome, although "manifestly unfounded" is a high threshold.

Destination of unclaimed sums

The destination of unclaimed sums is an important issue for defendants, particularly in opt-out mechanisms. In principle, all opt-out systems ultimately become opt-in in that members of the class must engage with the distribution process following trial or settlement in order to receive their share of the damages. Many factors influence the rate of participation. There are reports of low participation rates in consumer claims, sometimes as low as 1%. A 2019 study by the Federal Trade Commission reported that the median claim rate for consumer class actions in the U.S. is 9%.[5]

3. RA Directive, article 7, paragraph 3.

4. RA Directive, article 7, paragraph 7.

5. Reported on here: FTC's comprehensive study finds median consumer class action claims rate is 9% | Reuters

The destination of unclaimed funds is less of an issue for opt-in mechanisms. By their nature, the affected consumers have identified themselves, making meaningful distribution far easier than for an opt-out claim. Once again, the RA Directive gives MSs full discretion on this topic.

Punitive or exemplary damages

The recitals to the RA Directive state that, to prevent the misuse of representative actions, punitive damages should be avoided: "This Directive should not enable punitive damages being imposed on the infringing trader, in accordance with national law."[6] This is a welcome provision and is in keeping with European traditions of awarding damages on a compensatory basis.

Standing

As noted in the introduction, claims are brought by QEs on behalf of consumers.

The requirements for a QE bringing "domestic representative proceedings" are vague. The RA Directive merely requires that MSs ensure that the criteria for QEs "are consistent with the objectives" of the Directive.

To be approved as a qualified entity for cross-border proceedings, organisations must, among other things, prove at least 12 months of actual public activity in the protection of consumer interests, demonstrate their non-profit status and ensure the independence of those persons, other than consumers, who have an economic interest in the class action. Once admitted by a MS, QEs will enjoy mutual recognition, allowing them to operate throughout the EU.

MSs have discretion to extend these stringent qualifying criteria to QEs bringing domestic representative actions, but these criteria should not preclude the "effective and efficient functioning" of claims.

Where MSs do not introduce more specific requirements for QEs bringing domestic representative actions, this arguably creates a lacuna for cross-border domestic representative actions. A special purpose QE can be set up in the MS where the claim will be filed, therefore making the claim a domestic representative action and avoiding the more onerous requirements for QEs bringing cross-border representative actions.

Role of litigation funders

The RA Directive provides that insofar as domestic law permits litigation funding, conflicts of interest should be prevented and that funders should "not divert the action from the protection of the collective interests of consumers."[7] Thus, the Directive imposes restrictions on the degree of control a funder wields over the conduct of a dispute even if there was no equivalent pre-existing restriction in domestic law.

6. RA Directive, recital 42.
7. RA Directive, article 10, paragraph 1.

Relatedly, the RA Directive requires that the cost of proceedings should not "prevent [QEs] from effectively exercising their right to" bring claims.[8] The RA Directive gives a non-exhaustive list of means for MSs to support QEs, including "structural support for qualified entities, limitation of applicable court or administrative fees or access to legal aid."[9] Although not listed, litigation funding is the obvious private sector means to financially support QEs.

The RA's proscription on cost preventing QEs from bringing claims could have interesting outcomes in certain MSs. For example, litigation funding is presently banned in Ireland, but on one interpretation of the RA Directive European law will require that third-party litigation funding be legalised unless the Irish state chooses to make public money available for QEs or otherwise facilitates their activities.

Impact of final decisions

A final decision on the existence of an infringement can be used as evidence by both parties in the context of any other actions filed to seek redress "against the same trader for the same infringement".[10]

Comment

The introduction of the RA Directive is a significant step in the development of collective proceedings in Europe and is part of the broader trend across Europe.

As explained, the RA Directive provides minimum standards that each MS must meet. As a result, significant impact will likely be felt in MSs that presently do not have workable mechanisms for collective proceedings.

The most important issue is that there is nothing to stop MSs from introducing procedural rules that go beyond the minimum requirements set out in the RA Directive and to make collective proceedings even easier to pursue including, for example, by introducing opt-out mechanisms. Since the majority of MSs will be required to examine their procedural laws over the next 24 months, there will be vigorous debates across the majority of MSs on whether to go beyond the standards provided for in the RA Directive.

Depending on the outcome of those debates, the class action picture in Europe could shift significantly towards facilitating more claims.

8. RA Directive, article 20, paragraph 1.

9. RA Directive, article 20, paragraph 2.

10. RA Directive, article 15.

The internationalisation of class actions: Simultaneous exposure in multiple countries

The internationalisation of class actions

Multinationals are accustomed to facing class action risk in the U.S., Canada, Australia and Israel. Sometimes claims are brought concurrently in these jurisdictions. As noted at page 7 above, with increased class action risk in Europe, fighting claims in different jurisdictions will become more common. Here, we explore this trend and its consequences.

Drivers behind cross border class actions

The increased risk of facing a cross-border class action is being driven by multiple factors, including:

1. The growing prevalence of cross-border events; for example, public health and environmental disasters that affect multiple countries.
2. The globalisation of trade and business operations which exposes corporates to the laws of multiple jurisdictions. This can be the corollary of being active in multiple markets, or driven by regulatory or corporate functions; for example, many businesses are now listed on more than one stock exchange in multiple countries. The class actions brought in respect of pelvic mesh products in Australia, the U.S. and the UK, and the "Dieselgate" claims in the UK and Germany, are illustrations of this trend.
3. The greater availability of class action mechanisms means that such actions are becoming viable in numerous jurisdictions.
4. Increasing co-operation and knowledge-sharing between local regulatory authorities in different countries; for example, we have seen parallel investigations in various jurisdictions by competition authorities into social media platforms, by financial market authorities into foreign exchange market trading, and by independent government bodies into the safety of medical devices and products. Parallel investigations may lead to infringement decisions, which claimant firms monitor for the purpose of assessing whether to build a class action on the basis of decisions.
5. Claimant firms and litigation funders are both expanding into new territories, and also – even where they don't have a physical presence – they will cooperate with domestic litigators who can file the class action and address issues of local procedural law (see pages 9 and 37).

Risks of concurrent class actions

Concurrent class actions raise many of the same issues as a single claim. There will be financial exposure, a drain on management time, interest from shareholders or other investors, publicity and/or customer relations issues. Simultaneous class actions multiply these concerns, but the manner in which a corporate responds can reduce overall exposure.

Where faced with a major incident a corporate should risk-map the jurisdictions of greatest concern. This analysis will then inform a coordinated and consistent defence strategy. Absent such an overview, defence strategy will be piecemeal: a helpful argument in a low risk jurisdiction may be attractive in isolation, but will increase net harm if that position is harmful in a higher risk jurisdiction. Corporates also need to be aware of intersecting regulatory risk. Findings of regulators (or their statements) may be persuasive to courts in other jurisdictions. Relatedly, class actions in foreign jurisdictions may pique the interest of domestic regulators, leading to investigations. A risk mapping exercise should have regard to the impact of regulators, in addition to the litigation environment per say.

Corporates should be aware that in the same way that defence counsel coordinate, claimant counsel will also work together. Claimant firms in jurisdictions where ligation is more advanced (frequently in the U.S.) will look to use their knowledge of a case and expertise to support claims elsewhere. Awareness of these dynamics can help with reducing overall exposure.

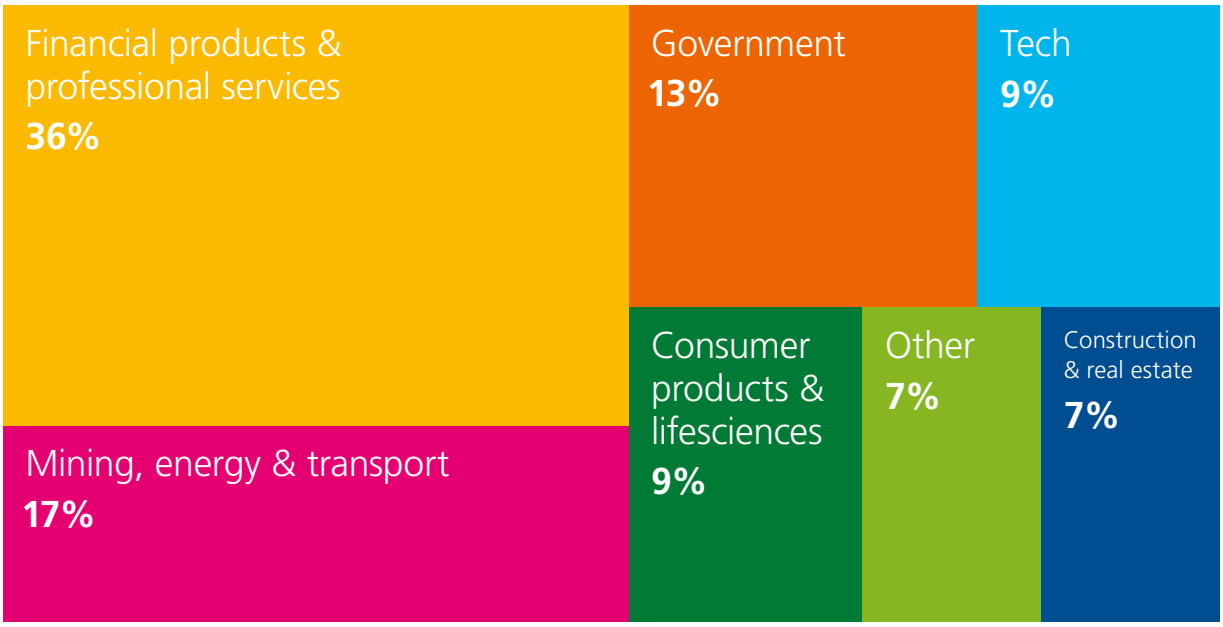
What claims are being filed: Snapshots and trends

What claims are being filed?

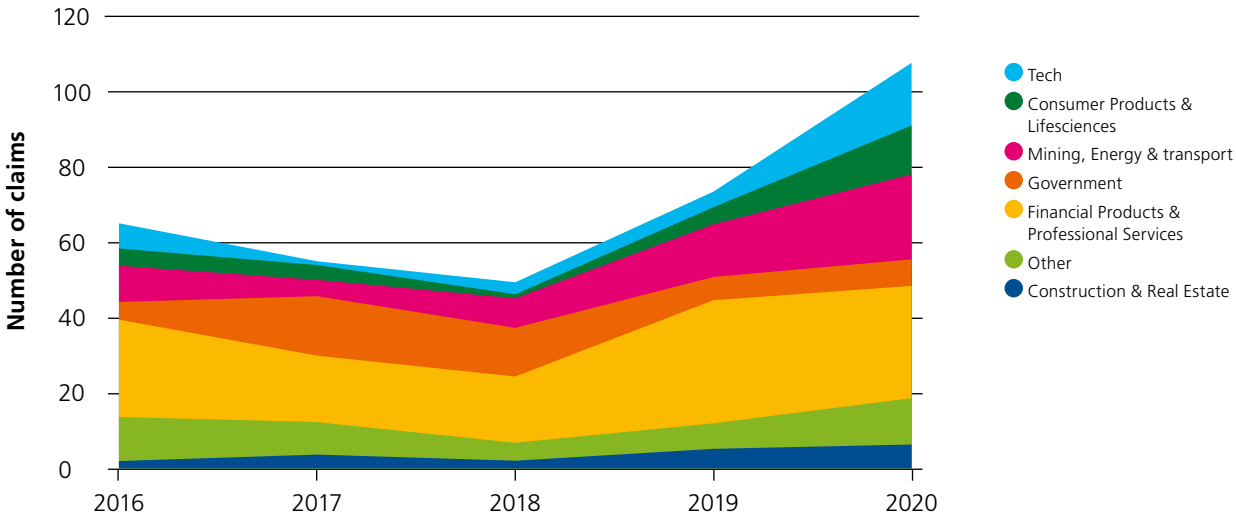
The following graphs illustrate the key areas of risk and trends. In summary, the data shows that no sector is immune from class actions; the sector that has faced the greatest proportion of claims to date is financial products & professional services, and the greatest growth in claims in recent years has been for the tech sector and consumer products & life sciences sector.

The data also shows that many types of claims are being brought using class action mechanisms; while the focus to date has been in financial / shareholder / securities claims, data protection claims and claims under product liability / consumer / personal injury laws are experiencing the greatest growth.

Sectors under attack: a 5-year snapshot



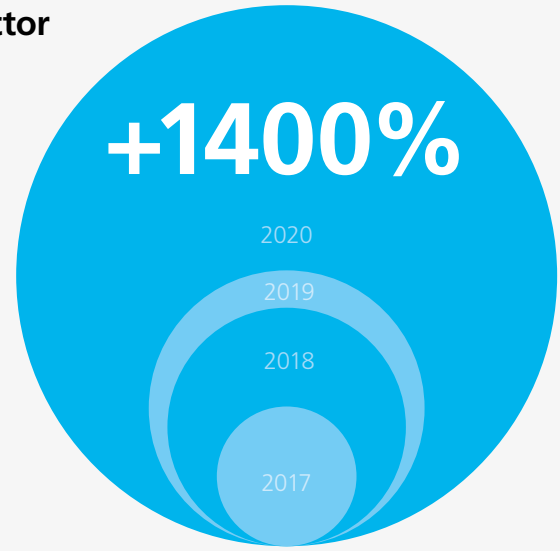
Defendant sector trends



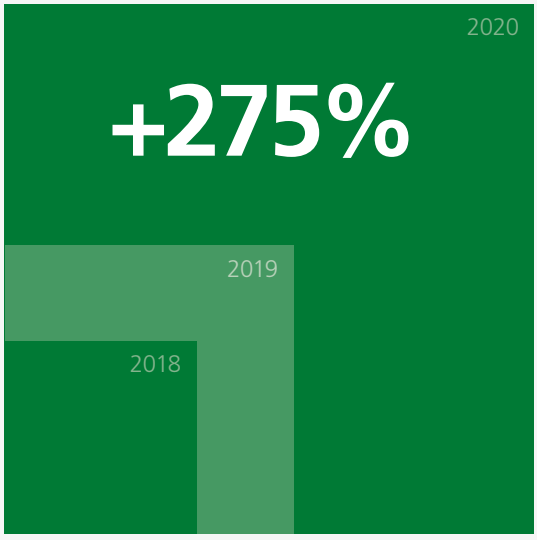
Growth against tech, consumer products and life sciences has been particularly dramatic:

Growth of claims in the tech sector

Class actions against the tech sector are increasing dramatically, with 15 times the number of claims filed in 2020 as in 2017 (i.e. growth of 1400%). This is fuelled by the rise in data protection class actions, but this sector also faces consumer and competition class actions.

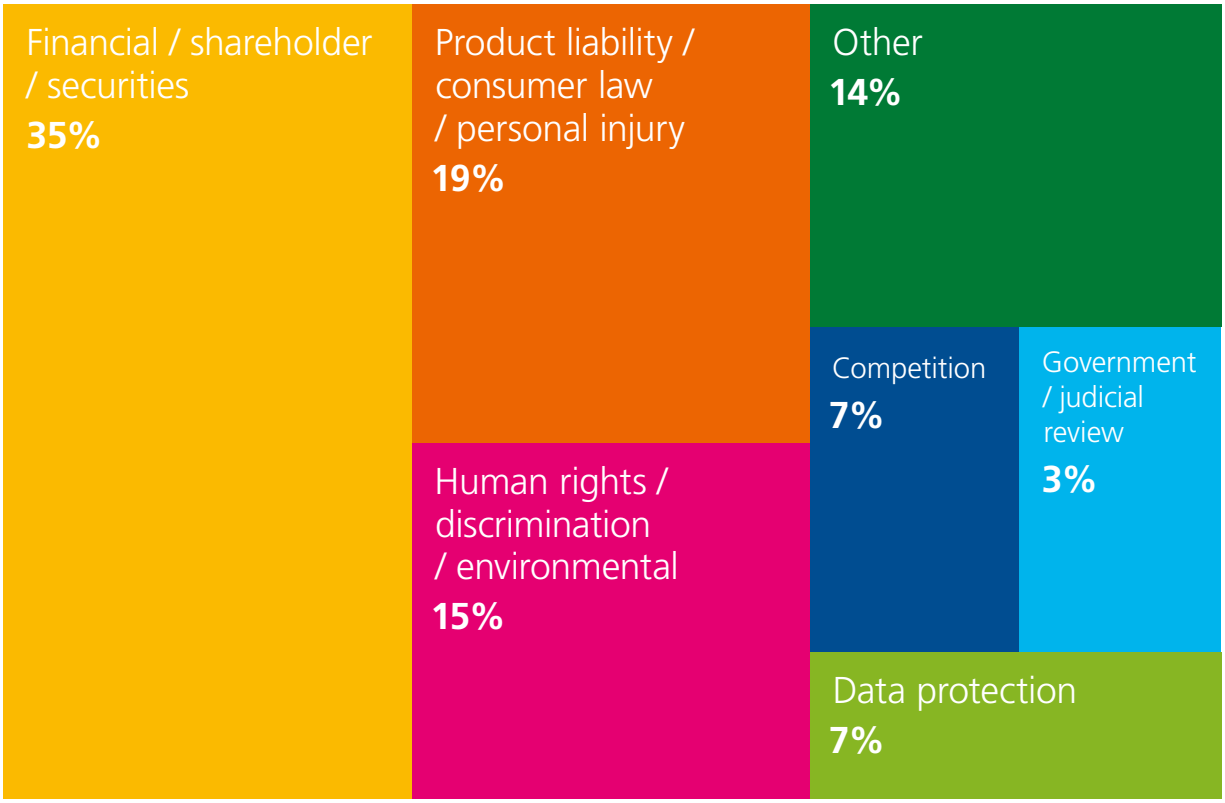


Growth of claims in the consumer products & lifesciences sector



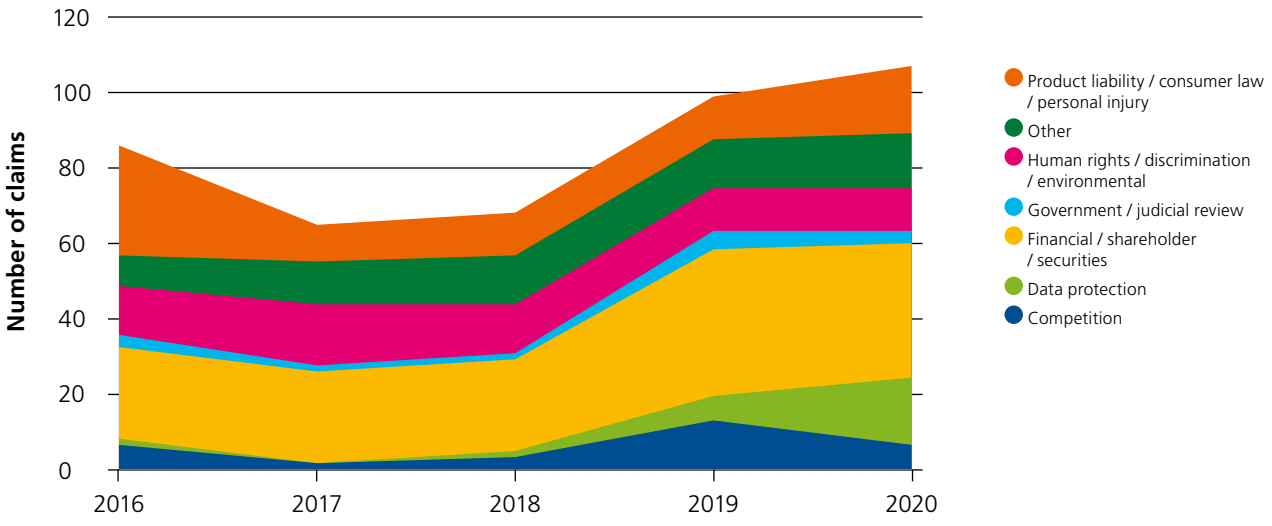
The consumer products and life sciences sectors have long been targets of class actions, particularly for product liability claims, but for these businesses we see that the risk is starkly increasing with 275% growth in the number of claims filed from 2018 to 2020, comprising product liability claims but also developing threats from data protection and competition class actions.

Types of claims across Europe: 5-year snapshot



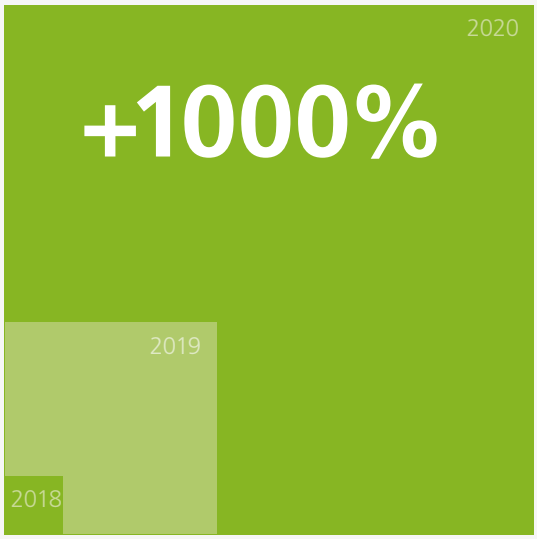
The chart above that illustrates types of claims filed over 2016 to 2020 understates the number of claims filed. This is because, for claims filed in 2020 and sometimes 2019, there is limited information in the public domain on the type of breach alleged. The chart only includes class actions where the beach alleged has been identified, leading to underreporting. The data shows, unsurprisingly, that financial products/shareholder/ securities claims are the most prevalent.

Trends in the type of claims being seen across Europe



Growth in data protection class actions is dramatic, but there is also significant growth in product liability, consumer law and personal injury class actions.

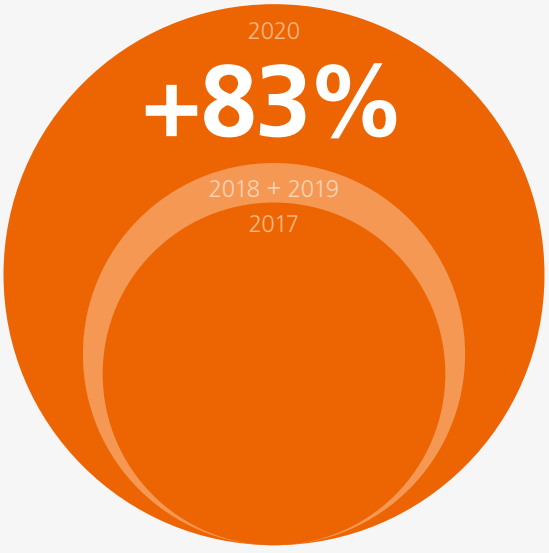
Growth of data protection class actions



Data protection claims grew 11 times (i.e. by 1000%) between 2016 and 2020. This growth in data protection class actions is unsurprising given the introduction of the GDPR and the potential for data protection issues (including data breaches) to impact large numbers of data subjects.

Growth of product liability/consumer law/personal injury claims

The number of product liability / consumer law / personal injury claims almost doubled between 2017 to 2020. The growth in claims is striking, as it reflects increased exposure to class actions involving claims that are traditional staples of group litigation and for which there have been no substantive legal changes.



Country spotlights: Focus on the UK, Germany and the Netherlands

Spotlight on: **The UK**

The UK is one of the most active jurisdictions in Europe for commercial litigation, and it has seen particular growth in class actions in recent years. This trend is set to continue, Brexit notwithstanding. Areas of particular risk are: competition class actions; data protection class actions; product liability and foreign torts/environmental claims.

Competition class actions

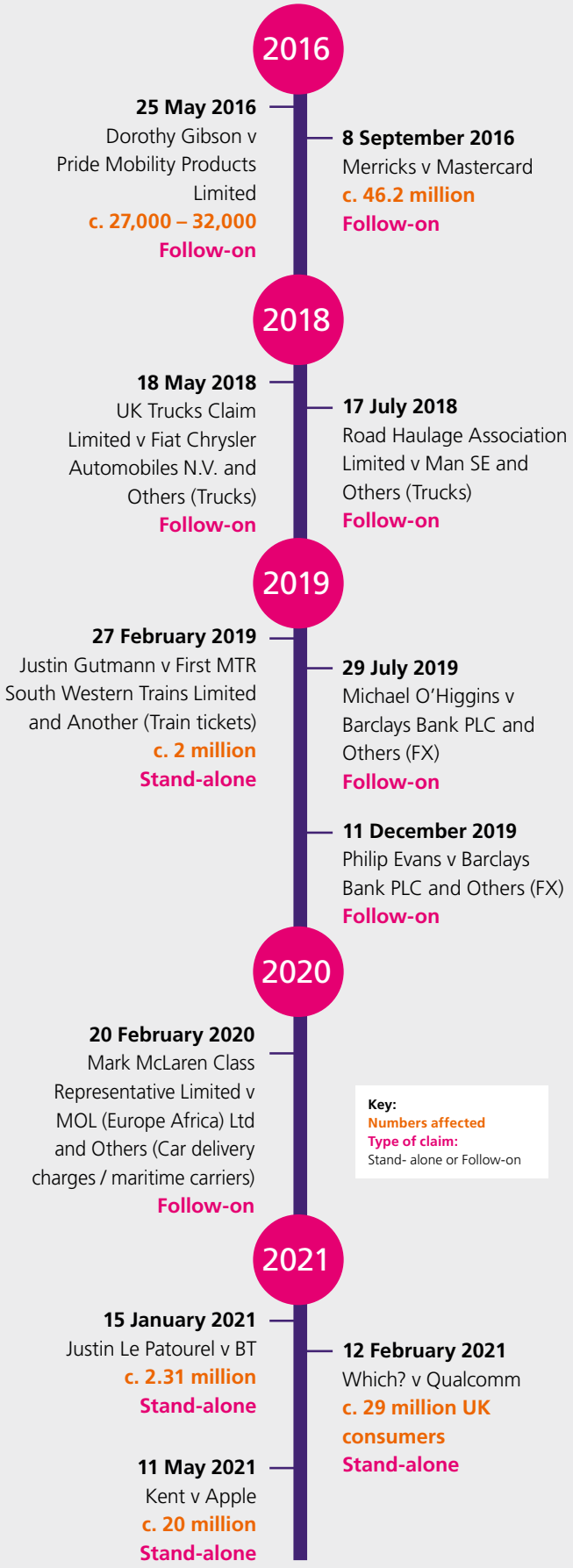
In 2015, the UK introduced a class action regime for competition damages claims. Most significantly, these claims can be brought on an opt-out basis. A modest number of cases (11) have been commenced since the regime was introduced, although no claim has yet proceeded beyond the class "certification" stage.

The number of claims filed is likely to increase in the coming years. This is in part due to the Supreme Court's decision in *Merricks v Mastercard* of December 2020, which confirmed a low threshold for certifying class actions brought under this regime.[1] Claimant law firms and litigation funders have welcomed this decision and will be emboldened to file further claims.

A further trend will be the increase in "stand alone" competition class actions. Since the competition class action regime was introduced the majority of claims filed have been "follow on" claims, being those that rely on a competition regulator's finding of infringement. In "follow on" competition claims, the regulator's infringement finding is binding on the national court where damages claims are filed such that the claimant law firm does not need to prove liability, and the focus in these claims tends to be on procedural arguments and quantum. Naturally this makes "follow on" claims attractive for claimant law firms. That said, the decisions of regulators are publicly available, and so there is significant competition between claimant law firms to file "follow on" claims. Relatedly, there are a limited number of regulatory decisions and pending regulatory decisions, which limits the size of the market for claimant law firms. For these reasons, and also given the low certification threshold confirmed by Merricks, claimant law firms are increasing exploring case theories for "stand alone" claims and we expect that increasing numbers of these claims will be filed in the next few years notwithstanding that liability must be proven.

1. *Walter Merricks CBE v Mastercard Incorporated* [2020] UKSC 51; for a summary of the judgment, see here.

UK competition class actions to date



Data protection class actions

Data protection class actions are developing as a key risk in the UK. Traditionally, these claims have been brought on an opt-in basis following significant data breaches, but in recent months several very large opt-out data protection class actions have been filed both for data breaches and also for other alleged breaches of data protection law. This trend represents a new and significant threat to businesses that control or process significant volumes of personal data irrespective of their sector.

Opt-in data protection class actions

Claimant law firms have been very active in bringing UK opt-in data breach claims for a number of years.

Following public news of a major data breach, the claimant law firm will begin a "book build" on a no-win/no-fee basis, offering potential damages/settlement recoveries to data subjects. Large breaches can affect hundreds of thousands or even millions of people. Although the proportion of data subjects who participate in these claims can be low, often in the single figure percentage of persons affected, large scale breaches can nevertheless lead to high value (multi-millions of pounds) claims. Companies that have been targeted by these actions include Morrisons, British Airways and easyJet. In addition to dealing with these damages claims, companies in this situation will also face regulatory scrutiny and possibly also fines for breaches of the GDPR.

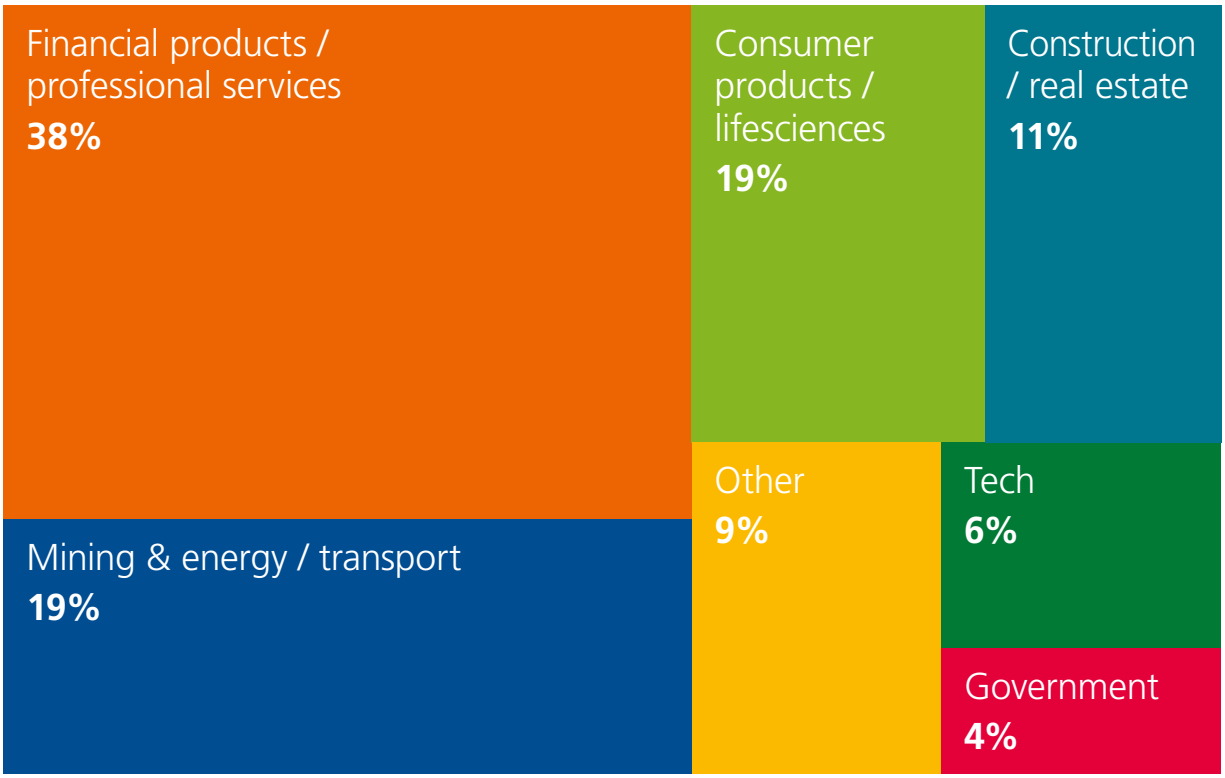
Claimant law firms have generally sought to recover damages for the "distress" to data subjects and/or for financial losses if, for example, credit card data was lost leading to financial losses.

"[Opt-out data protection class actions] represents a new and significant threat to businesses that control or process significant volumes of personal data."

Opt-out data protection class actions

A recent trend has been the filing of extremely large opt-out data protection claims. These claims have been brought using the Civil Procedure Rules, rule 19.6 "Representative Action" opt-out mechanism. The 19.6 mechanism requires that the representative and the persons being represented (i.e., the class) have the "same interest". Historically, the English courts have policed this "same interest" test strictly and have rejected multiple efforts to use the Representative Action device to bring class actions.

UK–Defendant sector trends: 2016–2020



However, this changed with the October 2019 Court of Appeal decision in *Lloyd v Google*.[2] In that ruling, the Court of Appeal held that the 4.4 million persons that Mr Lloyd was seeking to represent were entitled to damages for the "loss of control" of their personal data, when the defendant, Google, had without their knowledge or consent gathered data on their browsing behaviour. This created a new head of damages for data protection claims, beyond financial losses and distress. Furthermore, and significantly, the Court of Appeal held that Mr Lloyd and the represented persons each had the "same interest" in the loss of control of their data, and so approved the use of the Representative Action mechanism.[3]

In reliance on this decision, a number of very large opt-out data protection class actions have been filed using the Representative Action mechanism, including against: SalesForce; Oracle; Marriott; Facebook; YouTube; TikTok and Experian. Of these claims, only Marriott concerns a data breach, the others allege that the defendant's conduct otherwise breaches data protection law. For example, the claims against SalesForce and Oracle concern the use of AdTech and third-party cookies. The claims against YouTube and TikTok are on behalf of large classes of children, where it is alleged that consent for processing data was invalid.

An appeal from the Court of Appeal's decision in *Lloyd v Google* to the Supreme Court was heard in late April 2021. The judgment will be very important in confirming the viability or non-viability of these very large data protection class actions.

Relatedly, in late 2020 the UK Government consulted on introducing a statutory mechanism that would permit authorised entities to bring opt-out class actions for breaches of GDPR. In February 2021, the Government decided against introducing such a mechanism. However, the Government said it would "continue to monitor developments in this area closely" so it is possible it will decide to introduce a mechanism in the medium term.

Data protection has traditionally been viewed as a regulatory issue, but the increase in large claims filed demonstrates that GDPR is evolving into both a regulatory and a class action issue.

2. *Lloyd v Google LLC* [2019] EWCA Civ 1599.

3. See here for a summary of the Court of Appeal judgment.

Product liability

For many years, product liability has been a key area of class action risk in the UK. Many claims have been brought in the pharmaceutical and medical device sectors in particular, and large claims have been filed or threatened against car manufacturers in relation to emissions devices. UK product liability claims are generally brought on an opt-in basis, using the Group Litigation Order ("GLO") device. GLOs can allow for efficient case management: a group register is established onto which individual claims are entered and applications for entry onto the register may be refused by the court if it is not satisfied that the case can conveniently be managed as part of the GLO. Although GLOs are often preferred by Claimants, they may also sometimes benefit defendants giving tactical advantages by identifying the common issues of law or facts to be litigated.

There is an observable caimant-led trend to encourage courts to adopt a looser approach to the certification of common issues of fact or law. We see requests by claimants for certification of claims involving different products (and consequently different designs, regulatory history, marketing history, composition, etc.) and different producers raising the question as to the practicality and fairness of such a broad approach.

Product claims inevitably include highly individual features whereas claimants frequently assert a wide range of injury across the group.

A GLO, looking at generic issues, may therefore be a blunt tool from a defendant's standpoint and in practice may create significant problems for addressing individual features and defendants must therefore weigh this against its potential usefulness in managing large numbers of claims.

The long-running Seroxat litigation (a pharmaceutical product liability group action) is an interesting example of the impact of narrowing pleadings applicable to an entire group and the importance of: considering whether a GLO is tactically beneficial; careful pleading, and taking steps to define and uphold the issues for trial. Judgment was handed down on 3 July 2020 in the High Court in GSK's favour.[4] Throughout the group case management process interim rulings confirmed the tightly defined scope of the issues to be considered at trial, consistent with the Claimants' own pleadings. The interim rulings held that the Claimants limited their allegations of defect to Seroxat being "worst in class", as regards discontinuation symptoms, and an associated failure to warn of it being "worst in class." The Claimants' later attempts to expand their pleaded case and argue a broader scope of trial issues, to include the relative risks and benefits of the product, were rejected by the Court. The Claimants appealed the Court's ruling on the Claimants' scope of the pleadings, and the trial adjourned in the interim. The Claimants' appeal was unanimously dismissed with costs; the Court of Appeal confirming that, in accordance with the interim rulings, the Claimants' case could only proceed on the basis of their narrow pleading. The Claimants eventually agreed GSK's application for the trial issues to be determined in its favour. After 13 years of litigation, the court awarded GSK indemnity costs (under an earlier costs regime). The Seroxat litigation also endorsed the approach taken in both *Gee* and *Wilkes*[5] with regard to determining "defect" continuing the trend of judgments based on a holistic approach to defect despite Claimants' pleadings to the contrary.

Procedurally, the recent judgment in *Various Claimants v G4S plc*[6] has introduced significant risk for group claim forms issued by claimants where these are amended to add new parties before service without consent being filed with the court where there is a potential defence of limitation. The Court held that the procedural rules did not permit the addition of new claimants to an issued claim form prior to service. Furthermore, the rules required consent in the form of a separate document to be filed at court before new claimants could be added. This case highlights the importance of claimants' solicitors correctly identifying the parties at the outset and before limitation expires or else risk later amendments being struck out.

Legislative developments post-Brexit may also affect product liability litigation in the UK in the medium term. Changes to the UK's Consumer Protection Act 1987 and the definition of "producer" has narrowed the scope of the "first importer" to an "importer" into the UK market, rather than a first importer into the EEA market. Over time this may reduce the number of ex-UK Defendants involved in product liability litigation in the UK although the producer categories of manufacturer and "own brander" still remain.

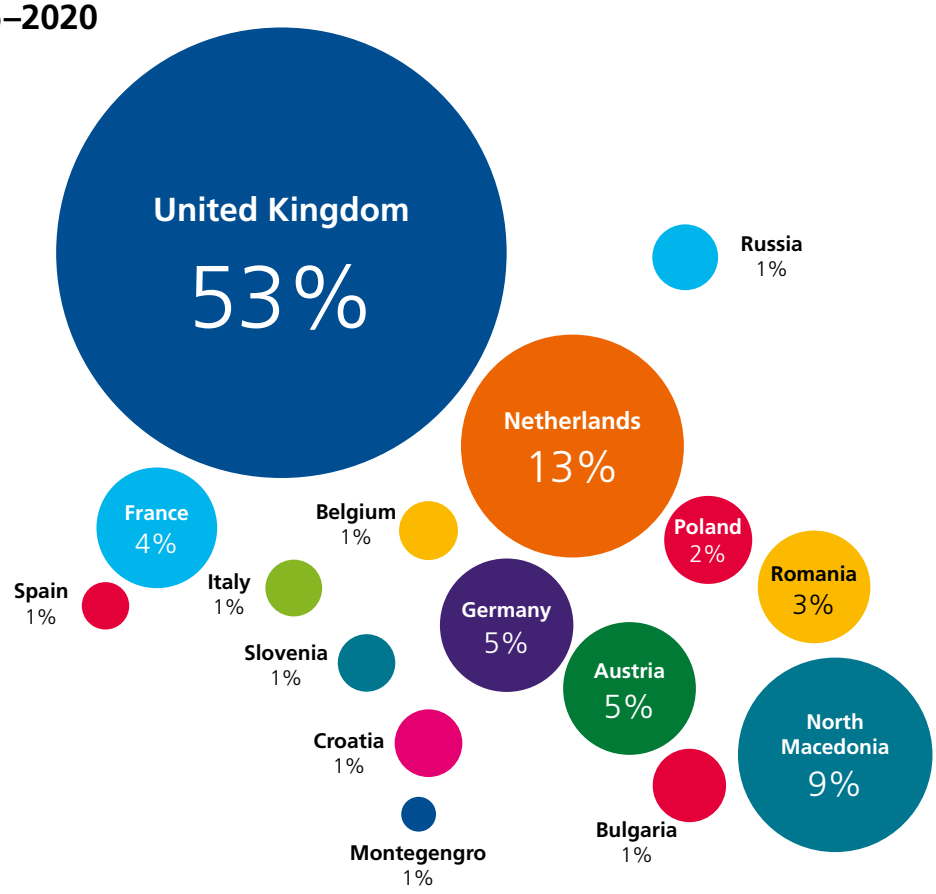
Product regulatory changes may also be on the horizon in light of the UK's product safety review announced on 11 March 2021 to ensure product safety laws are fit for

4. *Bailey and others v GlaxoSmithKline* [2020] EWHC 1766 (QB).

5. *Gee v DePuy International Limited* [2018] EWHC 1208; *Wilkes v DePuy International Limited* [2016] EWHC 3096 (QB).

6. *Various Claimants v G4S plc* [2021] EWHC 524 (Ch).

Class actions by jurisdiction 2016–2020



the 21st century. This review will consider the adequacy of the UK's current product safety frameworks as well as whether the Consumer Protection Act 1987 is fit to address new types of products, such as internet-enabled devices, AI and 3D-printing. This is unsurprising in light of the European Commission's ongoing review of the Product Liability Directive.[7]

Transnational torts

England has seen a number of high profile and high value class actions seeking damages for the overseas operations of multinationals. Those claims typically concern working or environmental conditions in non-European countries, often for employees or employees of suppliers.

Accordingly, they raise issues of supply chains, environmental, social and governance ("ESG") and human rights standards.

These types of claims are typically brought on an opt-in basis, and large claimant law firms are experienced and effective in working locally in affected regions to publicise their services to potential claimants. These firms frequently work with local agents and sometimes also with not for profit groups that have campaigned on the corporate activity that will be the basis for the claim. In 2015, a class of 218 Kenyan nationals, who were employees and/or residents of a tea plantation owned by Unilever, brought a claim against the company for its alleged failure to protect the claimants from ethnic violence following the 2007 Presidential election. The Claimants in that claim were ultimately unsuccessful in seeking to use UK-domiciled parent company, Unilever Plc, as an anchor defendant.[8]

In a recent claim against Royal Dutch Shell Plc, the Claimants were unsuccessful in establishing jurisdiction. The class, composed of 40,000 Nigerian fishermen, sought damages as a result of pollution and environmental damage caused by oil leaks in and around the Niger Delta. They contended that the Defendants, UK company Royal Dutch Shell Plc ("RDS") and its Nigerian

7. Proposals for amendments to the Product Liability Directive are expected later this year.

8. *AAA and others v Unilever PLC* [2018] EWCA Civ 1532.

subsidiary the Shell Petroleum Development Company of Nigeria Ltd ("SPDC"), were responsible for damage to their lands based on the tort of negligence. The Court of Appeal upheld the High Court's decision that there was no arguable case that RDS owed the claimants a duty of care, finding there to be an insufficient degree of control of SPDC's operations in Nigeria by RDS.

However, in a significant recent decision welcomed by claimant law firms, the Supreme Court ruled that the English Courts can take jurisdiction over disputes concerning foreign conduct where the English parent company exercises management or supervision over a foreign subsidiary's operations and/or where there are issues as to whether the claimants will be able to obtain justice in the relevant overseas courts.[9]

In *Jalla v Shell International Trading and Shipping Company Ltd*,[10] the High Court rejected an effort by the claimant law firm to use the CPR 19.6 "Representative Action" procedure to bring a claim on an opt-out basis on behalf of 27,500 individuals and 450 communities. The High Court rejected this approach because it found that the purported members of the class did not have the "same interest" in the claims.

Although the effort failed, this attempt to use the "Representative Action" procedure demonstrates the continued efforts by claimant law firms to push the boundaries of class action procedural law.

We expect that transnational tort claims will remain an important area of risk for companies operating directly and indirectly outside of the UK and Europe. Given the nature of the behaviour alleged, these claims bring media and social media scrutiny in addition to financial risk.

Shareholder actions

Shareholder claims are typically brought under sections 90/90A of the Financial Services and Markets Act 2000.[11] Section 90A provides a mechanism to hold issuers accountable for public statements (such as those made in annual reports and accounts) which are untrue/misleading, whilst section 90 applies to statements made in prospectuses and listing particulars. Omissions as well as positive statements can also trigger liability.

Under section 90A, the person bringing the claim must show reliance on the untrue/misleading statement and that it was reasonable for that person to rely on the statement being complained of at the time. For section 90 claims, a defence is available if there was a reasonable belief that the statement complained of was true and not misleading or that the omission was justifiable. For section 90A claims, the party responsible must have known the information was inaccurate or have been reckless to the accuracy.

2019 saw the failure of a high profile shareholder class action brought outside of the section 90/90A regime, relating to the 2008 takeover of HBOS by Lloyds.[12] In this case, a group of 5,800 retail and institutional shareholders sought damages from Lloyds and from certain of its directors owing to the recommendation to acquire HBOS.

Recent years have seen some high profile and high value securities claims such as those against the Royal Bank of Scotland and Tesco. The specific elements of the section 90/90A causes of action can give listed companies some cause for comfort, but it is important to note that institutional investors are serviced by claims monitoring providers and claimant law firms who analyse opportunities for claims and who are prepared to move quickly and to organise opt-in groups where there is an opportunity to bring a claim.

The potential adverse costs consequences for class members in group litigation are also likely to act as a deterrent to claimants. Following failure of the Lloyds/HBOS claim, the court ordered that the claimants, and their third party funder, were jointly and severally liable for the defendants' costs, which totalled in excess of £30 million, as well as pre-judgment interest. Although funded claims are often presented as "no win, no fee" recovery opportunities, with no downside risks, this decision highlights the costs risk that potential claimants need to carefully consider. As this ruling commented, "It may well be that many of the 5800 Claimants… thought that they were litigating risk-free. But most unfortunately that is not the case."

9. *Vedanta Resources PLC v Lungowe* [2019] UKSC 20; in this case, the Supreme Court confirmed that a lawsuit brought by approximately 1,800 Zambian villagers against mining company Vedanta and its English parent could be heard in England.

10. [2020] EWHC 2211 (TCC).

11. For an explanation of the types of claims typically available to shareholders and their legal issues, see our Law-Now, "Securities litigation: Shareholder claims post Covid-19", available here.

12. *Sharp v Blank* [2019] EWHC 3078 (Ch).

Spotlight on: **Germany**

Class actions do not have a long-standing tradition in Germany. Until the implementation of the model declaratory action ("Musterfeststellungsklage") in 2018, there was limited scope for class actions to be brought. While class actions were limited to special areas of law, such as the capital markets model action, the German legislator expected a multitude of about 450 model declaratory actions every year.

However, there have – to date – been a total of 15 model declaratory actions, most of them taking place in the banking sector where regional banks allegedly miscalculated interests, consequently paying consumers too little in interest rates. Against this background it can be challenging to identify clear trends, but

Germany is becoming an increasingly important jurisdiction for class actions as is demonstrated by the value and profile of the Dieselgate litigation.

Emissions Consumer Litigation ("Dieselgate Scandal")

Certainly, the best-known class action litigation in Germany to date has been the model declaratory action brought against the Volkswagen company in 2018 in relation to the emissions scandal before the Higher Regional Court ("Oberlandesgericht") Braunschweig. About 445,000 consumers joined the action, initiated by the "Verbraucherzentale Bundesverband e.V.", which aimed at answering the question of whether consumers who purchased vehicles from the VW, Audi, Skoda and Seat brands, all belonging to the Volkswagen company and using the EA 189 motor, had the right to claim damages for Volkswagen's alleged manipulation of exhaust emission tests by installing a shut-off mechanism. The Claimant, a so-called "qualified entity", claimed that Volkswagen was in breach of Art. 19 REGULATION (EU) No 168/2013, in turn leading to the right to claim damages under German tort law, particularly para. 826 German civil code ("Bürgerliches Gesetzbuch").

Separately, the German Federal Motor Transport Authority ("Kraftfahrtbundesamt") found that Volkswagen had installed a shut-off installation which indeed infringed EU law. However, the court did not have to decide on other issues such as quantum as the parties involved reached a settlement in 2020, granting the 240,000 settling consumers a sum of over €830 million in total. The amount paid to an individual consumer ranged between €1,350 and €6,257, depending on the type and age of the vehicle. Consumers, who had earlier opted-in to the declaratory class action but who did not approve of the settlement, retain the right to bring an individual lawsuit against Volkswagen.

Regional banks' invalid terms and conditions on interest rates

Nine out of the total of 15 model declaratory actions are claims brought by different consumer advice centres ("Verbraucherzentralen") against regional banks ("Sparkassen") in connection with the miscalculation of interest. The cases, the latest of them brought in March 2021, all rely on similar facts, with the consumer advice centres claiming that consumers were paid too low interest rates after the banks had wrongfully calculated the interests. Therefore, the claimants sought the declaration that the savings contracts contained a loophole in regard to interest rate adjustments and based their actions on alleged breaches of the German Civil Code concerning general standard terms and conditions.

The number of consumers opting-in (as far as publicly known) ranges between 282 and 757 with the exemplary claim value of the action brought against the "Stadt- und Kreissparkasse Leipzig" being €160,000 (with 552 consumers who opted-in).

In those five cases in which the competent courts have so far reached a decision, it was ruled that the banks did not effectively incorporate provisions regulating the adjustment of interest rates in the savings contracts and that they are under the obligation to adjust the interest rates to an adequate reference interest rate. To the current date, both the claimant and defendant parties in three cases appealed on points of law to the Federal Court of Justice, where the cases are now pending (the judgments in the fourth and fifth case date to the 31 March 2021 so that there is still the possibility to appeal).

Class Actions and the Covid-19 Pandemic

Very recently, in light of the global Covid-19 pandemic, there were market rumours that more than 300 retailers were planning to file a class action challenging public measures to limit the spread of the Covid-19 virus, pointing to loss of income caused by the mandatory closing of businesses. However, the model declaratory action, being the only non-sector specific tool for general class actions under German law, is designed to protect consumers' rights and interests against corporations and is not available for retailers seeking relief against state measures. The situation has now been cleared up by the claimants, explaining that the actions are being brought together as a widely used simple joinder of parties under para. 50.

The Future of Model Declaratory Actions

Although the model declaratory action is still a relatively new mechanism under German procedural law, its future is uncertain. The adoption of the model declaratory action aimed to effectively protect consumers' rights against powerful corporations but has led to fewer claims being brought than was originally anticipated likely due to, amongst other reasons, the length and cost of proceedings as well as strict conditions for the admissibility of claims which create high barriers to bringing an action.

However, further change is coming which could lead to more claims and increased risk to corporates. With the adoption of the Representative Actions Directive at the end of 2020, the German legislator is currently obliged to implement the directive into national law, considerably expanding the scope for class actions. It remains to be seen whether Germany will opt for a single harmonized mechanism for consumer class actions (i.e., to incorporate changes mandated by the Representative Action Directive into the existing German procedures) or whether Germany will introduce a new and additional class action procedure that will sit alongside the model declaratory action.

Spotlight on: **The Netherlands**

Over the last decade, the Netherlands has become a popular forum for international class actions against multinationals in Europe. This popularity is reflected by U.S. claimant firms (Hausfeld and Scott + Scott) opening Dutch offices in recent years. Many litigation funders are active in the Dutch market and it is telling that European Association of Litigation Funders established itself in Amsterdam.

The Dutch system has an opt-out mechanism for Dutch class members and an opt-in mechanism for foreign class members. A significant number of international companies have operations or headquarters in the Netherlands due to its well-established business, tax and legal conditions for international organisations. This gives claimant law firms many companies to target.

The key recent development is the Dutch Class Action Act, which came into force on 1 January 2020. The most important change in the Act is the new possibility to claim damages in a collective action.

The award of damages binds both the defendant company and also the parties represented by the representative entity who did not opt out. The threat of large damages awards is likely to create pressure for the settlement of class actions and the Act should lead to greater empowerment of the consumer and consumer organisations. The Act provides certain safeguards for companies and officials against trivial claims and the proliferation of claims foundations / interest groups.

The first year of the Act has seen 15-20 cases being filed in the class action register. That is a significant number, both taking into account the fact that out-of-court settlements will often be reached before claimants reach the registration stage and given that the COVID-19 has slowed down some court processes.

The Dutch class actions regime is available for all types of claim; it is not restricted to, for example, data protection or antitrust claims. The types of class actions registered this year underline the variety of the Dutch class action climate:

- Common interest/human rights claims against the Dutch State (discrimination): four cases
- IP infringements: four cases
- Enforcing consumer rights (diesel emission claims with refund): three cases
- Privacy/GDPR infringements on behalf of consumers: two cases
- Collective labour claim: one case

There were no financial and securities (prospectus and misrepresentation) class actions filed in 2020. We anticipate that these types of class actions will increase in 2021 prompted by the impact of COVID-19.

However, in the first year of the Act, we have seen several international class actions against multinationals with significant claims for damages, such as the privacy class action against Oracle and the Dieselgate class actions against several international, mainly European, car producers.

Recent years have seen an increase in class actions on human rights (common interest) issues, and those related to climate change. In the well-known landmark case of Urgenda in 2019, the Dutch Supreme Court upheld an earlier judgment finding that the Dutch government should reduce emissions to protect human rights. This is the first such tort case to be brought against a government in relation to climate change on a human rights basis, and is the first successful climate justice case. This demonstrates the liberal attitude of the Dutch courts in new concepts of class actions.

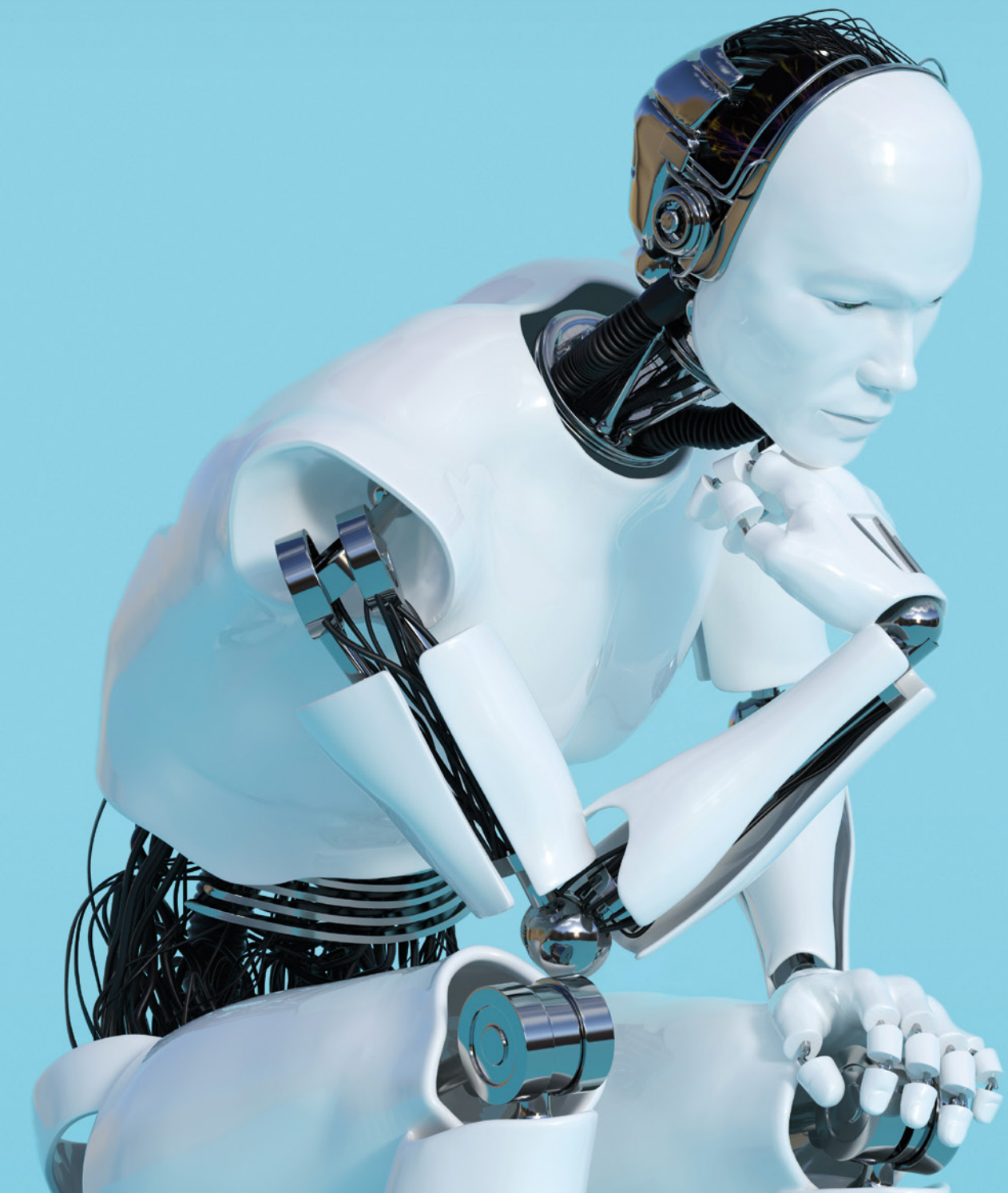
With the argumentation of this Urgenda-judgment, Greenpeace summoned the Government before the court with requests to require more climate safeguards in government funding of Dutch Airline KLM in November 2020. The most recent case is in this respect is the case of Dutch Environment Defense against Shell.

By comparison with other EU countries, the Netherlands is a relatively liberal jurisdiction for allowing international collective claims in Dutch courts with regard to Dutch (holding) companies as co-defendant, like in Steinhoff and Petrobas.

Additionally, the Netherlands offers, via the Dutch Act on the Collective Settlement of Mass Damage, an unusual mechanism for settling collective cases on a global scale. A settlement in the Netherlands can be declared universally binding for every interested party that a claims foundation purports to represent, unless a party has opted out. Such collective settlements have been used for securities/misrepresentation cases involving international investors, and well-known examples include: Shell (2009), Converium (2012) and recently Fortis/Aegeas (2018).

The Dutch class action framework is built on a solid foundation. The reputation of the Dutch judiciary, which is ranked among the most efficient, reliable and transparent worldwide (top 3). The Dutch courts are in the top 5 of the fastest courts in the European Union with an average of 130 days from a notice to appear to a final judgment (EU Justice Scoreboard). The Netherlands are also an ideal forum for litigation in which the defendant or its assets are not located in the Netherlands. The Dutch court judgments are amongst the most widely enforceable judgments worldwide. Put simply, the growth of class actions in the Netherlands is likely to continue.

Future risks: Developing areas of class action exposure



Future risks

Class action risk crystalises where there is both a substantive cause of action and also a procedural device that enables a large number of claimants to prosecute their claims collectively. Much of the content of this Report has considered procedural devices, but there are two areas of developing risk where changes to the substantive law could lead to very significant exposure and feature heavily in litigation in the medium to long term. Those areas are product liability/artificial intelligence and climate change litigation.

Product liability and artificial intelligence

Product liability has long been a mainstay of class action litigation, both within Europe using opt-in mechanisms or outside of Europe, including the U.S. and Australia in particular. Large scale manufacturing of goods leads to many sales, but where there is a fault there can be mass harm and common issues that lend themselves to collective proceedings.

The current product liability regime across most of Europe derives predominantly from the European Product Liability Directive of 1985 (Council Directive 85/374/EEC) (the "Directive"). Much has changed since 1985, and the European Commission is considering potentially far reaching changes to the Directive. Those changes are intended to address issues arising from emerging digital technologies ("EDT") such as artificial intelligence ("AI"). These changes are transforming our economy, including in the HealthTech, AgriTech, FinTech, RetailTech and GreenTech sectors. But they also raise important issues of liability. For example, where a product or a service is augmented by AI should the human supervisor of a partially automated system be absolved of liability? The Directive was drafted with specific tangible goods and products in mind.

Software is outside the scope of the Directive, but there are increasing calls for software to be considered a "good" and subject to a similar regulatory regime as physical products. These proposed changes could significantly impact on exposure to class actions.

Proposals for change

Following its 2018 report on the application of the Directive, the Commission established an Expert Group on Liability and New Technologies (the "Expert Group"). In December 2019, the New Technologies formation of the Expert Group (the "NTF") report proposed a number of changes of particular concern to would-be defendants:

— **"Product"** – the concept of "product" should be extended to include intangibles (digital goods and components). Damage to data should also sound in damages in certain circumstances. This change could expose developers of software and intangible components to potential claims and class actions.

— **Strict liability for operators** – in addition to strict liability for producers, strict liability should now be introduced for operators (i.e., those in control of the risk connected with the operation of the EDT and those who benefit from their operation) where they are operating EDT in public places.

— **Disapplication of existing defences in certain situations** – the "development risk defence", a longstanding element of product liability theory which operates to prevent the producer being liable for defects which arise after the product was put into circulation, should be disapplied if the defect appears after the product was put into circulation, as long as the producer was still in control of updates to the technology.

— **Further duties of care for operators and producers** – operators of EDT should owe a duty of care to choose the right system for the right task and skills and to monitor and maintain the system. Producers, whether or not they are also the operator, should owe a duty of care to design, describe and market products in a way that enables operators to comply with their duties of care, and to monitor the product after putting it into circulation (such duties already exist in some jurisdictions).

— **Changes to burden of proof** - the burden of proof, which would usually rest with the claimant, should be reversed or made less onerous where the defendant has failed to comply with certain obligations or where there are "disproportionate difficulties or costs" involved in establishing defectiveness, causation and/or fault in a particular claim.

In October 2020, the European Parliament passed a resolution with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)) and expressed the view that the Directive should be "revised to adapt it to the digital world". The resolution "[urged] the Commission" to:

— clarify the definition of "products" by determining whether digital content and digital services fall under its scope and to consider adapting concepts such as "damage", "defect" and "producer";

— ensure that the concept of "producer" incorporates manufacturers, developers, programmers, service providers and backend operators;

— consider reversing the rules governing the burden of proof for harm caused by EDT in clearly defined cases.

In summary, all indicators point towards a radical upgrade of product liability law and concepts in the near future, in order to ensure the substantive law is fit for purpose in the interconnected, digital, and automated age.

The proposed upgrade would expose new industries to product liability claims - and consequently to the risk of mass product liability claims. For example, the extension of the strict liability of "producers" to developers, programmers, service providers and backend operators of products (including digital content and services) would extend liability for defects – and the risk of class actions - to those developing, supplying and maintaining the software integral to the safe operation of automated systems (including automated vehicles, smart home ecosystems, and industrial robots), and those responsible for providing and processing the data essential to automated and interconnected devices (for example those providing GPS mapping or weather data for drones).

The proposed changes are also likely to alter the way in which product liability claims are defended: reversing the burden of proof will certainly change the dynamic of litigation and may (depending on national procedures and costs regimes) result in defendants incurring higher costs at an earlier stage. In summary, assuming that the Commission's proposals for the Directive outlined above come to fruition in the near future, there is likely to be an even bigger take-up in consumer and product liability class actions.

Climate change class actions

Litigation stemming from climate change is an increasing concern for corporates. As at May 2020, climate change claims had been filed in over 40 countries.[1] In this section, we explore how this developing area could mature into a major class action risk.

Climate change litigation to date

Climate change litigation is a broad concept, covering different categories of claims. Many of the claims brought to date have been instigated by environmental or other groups seeking injunctive or declaratory relief, rather than damages. These claims may be brought to enforce treaty obligations and human rights law, often against nation states or public sector defendants, and are therefore distinct from class actions seeking damages. A high-profile example is the Urgenda Foundation litigation in the Netherlands. There, an NGO and group of Dutch citizens successfully brought a human rights claim against the Dutch Government to compel it to reduce greenhouse gas emissions. In a high profile ruling in May 2021, the Hague District court ordered Shell to cut its 2019 carbon emissions by 45% by 2050.

Claimants may also use the courts to try and block projects on grounds they are environmentally harmful. For instance, ClientEarth's judicial review of the UK Government's approval of Europe's largest gas fired generation plant. The corollary is where corporates seek judicial review where planning permission has been refused or withdrawn on the basis of climate-related concerns. For example, West Cumbria Mining has sought judicial review of Cumbria County Council's decision to withdraw planning permission for the first development in several decades of a coal field in England.

Climate change class actions

Climate change class actions seeking damages present a different type of risk, albeit one which is not yet established in Europe. That said, the legal framework is developing such that these claims could become mainstream. If the risk crystallises then the consequences would be significant, potentially enabling claims for personal injury, financial loss or damage to property caused by the consequences of climate change, such as intense floods, wildfires, rising sea levels, impacts on agriculture and fisheries and air pollution. Claimants may also seek damages for loss for breaches of company law, such as the laws on disclosure to investors or shareholders.

Australia is ahead of Europe in that it has already seen claims of this type. For example, the Kilmore East-Kinglake Black Saturday bushfires of 2009, which occurred when a section of a power line broke and struck the ground

1. Sabin Center for Climate Change Law, at 22 May 2021.

during extreme weather conditions, resulted in 119 deaths, the destruction of 1,242 homes, damage to a further 1,084 homes, and almost 400,000 acres of land being burned. A class action in Victoria, Australia brought against corporate and government defendants in relation to the loss caused by the fires settled in December 2014 for over A$494 million (about £330 million at the time).

How could climate change class action risk increase?

Like all class action risk, climate change class actions require both a substantive cause of action that entitles a claimant to damages and also a workable procedural mechanism for grouping claims. As to the latter, and as is explained elsewhere in this report, European class action procedures are increasingly viable.

The former is also developing rapidly, and, as noted above, climate change and environmental groups have been successful in developing the substantive law that could be used as the basis for damages claims. Claimant law firms are also investing capacity in this area, attracted by the financial upside of bringing claims on behalf of very large classes.

Pre-existing causes of action, such as the tort of nuisance, can be suitable for certain types of environmental claims against an alleged polluter. Claimant law firms will also point to regulatory limits on volumes of emissions and argue that breach of those regulations enable claims in damages. A further potential avenue for bringing claims is to contend that polluters owe a duty of care and that they have breached this duty. An example of how the substantive law is developing is the 2020 ruling of a UK coroner, who found that the 2013 death of Ella Adoo-Kissi-Debrah, a nine year old child who lived in London, was in part caused by air pollution.

> This is the first UK legal ruling that personal injury, in this case death, was caused by pollution.

The finding does not in of itself enable damages claims to be brought against corporates or public authorities, but it shows the evolution of the law and will assist future claimants to contend that polluters owe a duty of care.

Proving causation

Even where both a substantive cause of action and a suitable procedural mechanism are available, the claimant must show causation between the defendant's conduct and the event that caused the harm. In the context of climate change litigation-causation is likely to a challenge for claimants as multiple sources of emissions may have contributed to a specific incident.

The growth and advances in attribution science i.e., the science of determining the causes of unusual climate trends and climate-related events, offers one possible solution for demonstrating causal links in climate change claims. In *Lliuya v RWE*, German Watch is seeking to use attribution science to link RWE's emissions to its proportionate responsibility for melting of glaciers and the consequent need to build flood protections.

The courts may also choose to adopt a more flexible approach to causation. There is precedent in the UK, where the English courts developed the Fairchild principles in mesothelioma personal injury claims where scientific techniques were unable to determine, on the balance of probabilities, whether a defendant's conduct caused the claimant's cancer. Instead, the Fairchild principle – which the courts developed of their own volition – considers whether the defendant's conduct "materially increased the risk" of the injury.[2] This more relaxed approach to causation has not been applied in climate change litigation to date, but it is a precedent which shows that the courts can develop creative solutions to difficulties with causation. Taking a similar approach in climate change claims could have significant consequences for defendants.

Corporate conduct, investors and climate risk

Boards have faced climate change claims for alleged failure to adequately factor climate change risk into investment decisions. Claims have also been filed for companies allegedly misleading investors as to the climate risks to investments. For example, in 2018 an individual in Australia sued a major superannuation (pension) fund, Retail Employees Superannuation Trust ("REST"), in the Federal Court of Australia for breach of fiduciary duties. Amongst the allegations made was of failure to act in the individual's best interests and to exercise care, skill and diligence to protect his savings from climate-change related financial risks. REST settled the claim in November 2020, publishing a statement on its website that "climate change is a material, direct and current financial risk to the superannuation fund across many risk categories, including investment, market, reputational, strategic, governance and third-party risks."[3]

In the Netherlands, there are cases seeking to extend the principles in the Urgenda litigation, in respect of government policy, to private companies. For example, in May 2021 the Hague District court ruling extended the Urgenda litigation principles to a claim against a private company, in this case Shell. Having regard both to the Paris Climate agreement, domestic Dutch law and the ECHR, Shell was ordered to reduce its carbon emissions by 45% by 2050 as from 2019 levels. The claim was brought by a combination of NGOs and 12,000 Dutch citizens. Following the ruling a lawyer for Friends of the Earth encouraged other organisations to "pick up the gauntlet" and it is inevitable that similar claims will follow.

Concluding remarks

Climate change class actions are not yet proceeding apace in Europe, but suitable procedural mechanisms are in place and further developments to the substantive law could facilitate a broad range of claims. The most obvious targets will be companies with a significant carbon footprint or that contribute to other emissions or pollutants. Banks and financial institutions that arguably facilitated these activities are one step removed, but they also need to be aware of the developing legal risks.

2. *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 [7] (Lord Bingham).

3. https://rest.com.au/why-rest/about-rest/news/rest-reaches-settlement-with-mark-mcveigh.

Methodology

As noted in the introduction, our survey of European Class Actions sought to capture all types of group litigation filed on behalf of five or more economically independent persons[1] seeking damages or other monetary payment (although other remedies may also have been sought). Qualifying claims were captured irrespective of procedural device used and irrespective of whether the mechanism operated on an opt-in or an opt-out basis.

Data on applicable cases were gathered by lawyers based in each applicable jurisdiction for claims filed in the years, 2016 – 2020 inclusive. While some countries have central repositories of claims filed, others do not and so lawyers used a variety of manual techniques including searching publicly available information, subscription services and local knowledge regarding issued class actions in order to identify relevant claims. Data was then sense-checked to ensure it reflects the picture in the local market and to reduce the risk of inaccuracies.

Jurisdictions included in our survey are: Austria; Belgium; Bulgaria; Croatia; England and Wales; France; Germany; Italy; Montenegro; the Netherlands; North Macedonia; Poland; Romania; Russia; Scotland; Slovenia; and Spain.

Certain major events, such as the trucks cartel and interchange fees, have resulted in dozens of class actions being filed and counting each of these claims as an individual data point would skew the trends. Accordingly, once we had gathered instances of qualifying group claims involving five or more claimants we "compressed" claims arising from a single underlying or series of related or similar events to avoid "overcounting". Where a single or series of related events resulted in class actions being filed using different procedures or in different countries we included them as a single data point per procedure and country.

1. So, for example, claims filed on behalf of five or more members of the same corporate group would be excluded.

Contacts

With more than 70 offices in more than 40 countries and 4,800+ lawyers worldwide, CMS combines deep local market understanding with a global overview, giving us the ability to see what's coming, and to shape it.

We have the most extensive European footprint of any law firm in the world, which makes us ideally placed to seamlessly support clients facing cross-border European class actions.

Contact any member of our expert team in your jurisdiction for further information and support.

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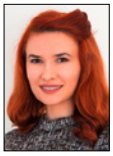

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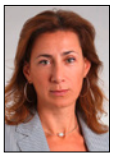

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