
CMS
law·tax·future
European
Class Action
Report 2022

Welcome

Welcome to the 2022 CMS European Class Action Report. Class action risk in Europe continues to develop. A total of 110 class actions seeking damages were filed in 2021. This is slightly higher than the figure for 2020, which was itself a record high. Class actions remain a board level concern. With an increasing number of claimant law firms focussing on these claims, supported by increased capital available from litigation funders, we expect that the risk will continue increasing.

Class action risk in Europe is uneven. Opt-out claims mechanisms are most frequently used in the UK, the Netherlands and Portugal. In other countries, this risk is significantly lower. See our heat map at pages 12 and 13 for an overview of hotspot countries.

Other new features in this report are an overview of developments in litigation funding at pages 32 to 34, and commentary from Steve Shinn, CEO of FinLegal on the role of legal tech in facilitating class actions. As Steve explains at pages 37 and 38, new technologies and automation processes are allowing claimant law firms to bring claims that previously would not have been possible. We also comment on class action risk in the pharma and medtech industries at pages 35 to 36. Those sectors have long faced class action risk primarily for product liability, but the risks are evolving.

As ever, we use a standard definition of "class actions" to encompass the diverse procedural devices across Europe. For our report, the term "class action" means: commercial proceedings brought on a collective basis using any relevant procedural law (opt-in, opt-out, assigned claims, consolidated claims, etc.) where there are five or more economically independent claimants or class members.

Thank you for reading our report. We hope you find it useful. Also, thank you to the many CMS personnel, lawyers, business development personnel, design specialists and data analysts who contributed to this project. Finally, a special thanks to Solomonic for their assistance with data on UK claims.

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Contents

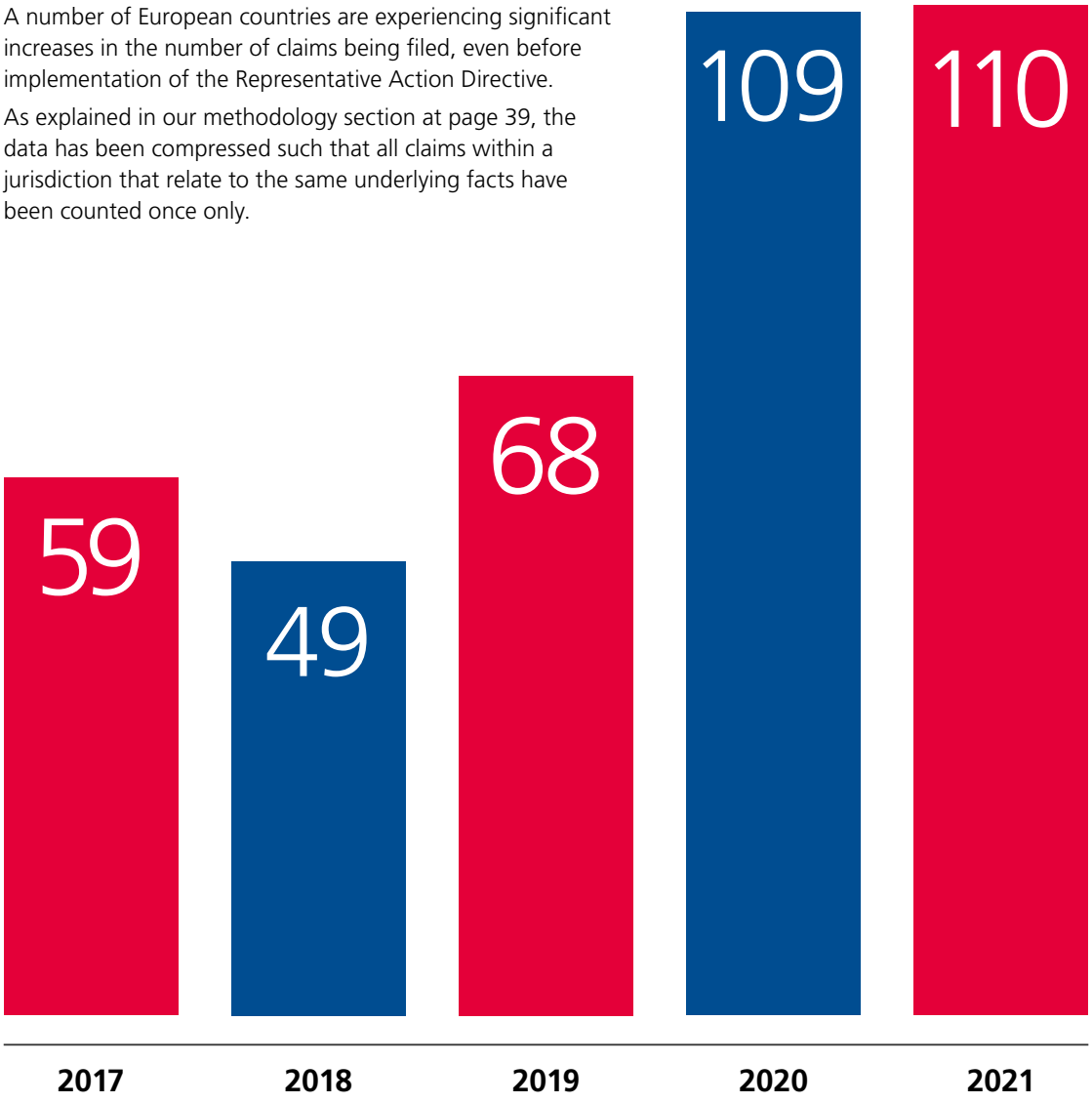
What's trending in class actions?

The following pages show the key trends for 2021 and preceding years. We set out total numbers of claims, where they are being filed, what types of claims are being filed, and against which industries.

The number of class actions filed in Europe in 2021 exceeds 2020, at 110 claims. This equates to growth of over 120% between 2018 and 2021.

A number of European countries are experiencing significant increases in the number of claims being filed, even before implementation of the Representative Action Directive.

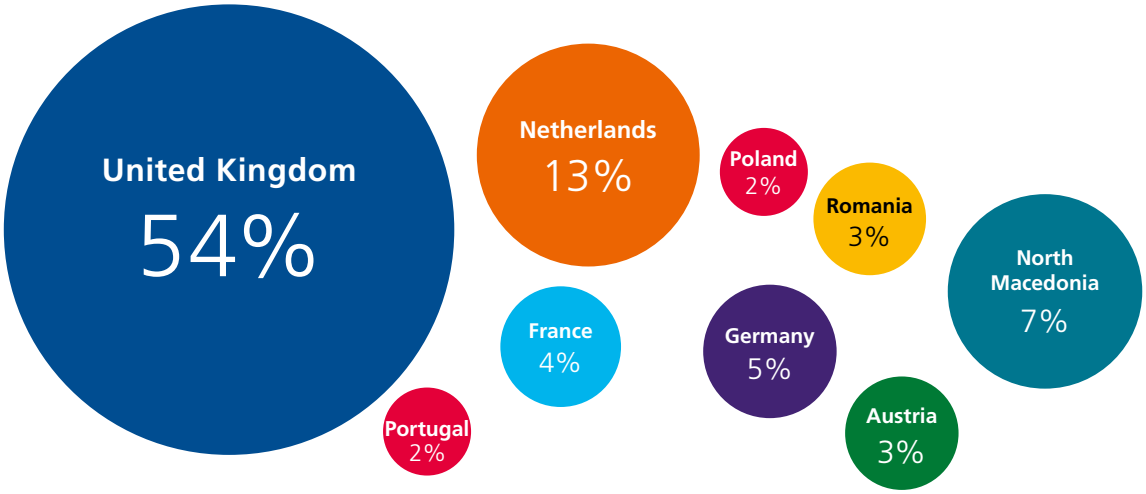
As explained in our methodology section at page 39, the data has been compressed such that all claims within a jurisdiction that relate to the same underlying facts have been counted once only.



Where are claims being filed?

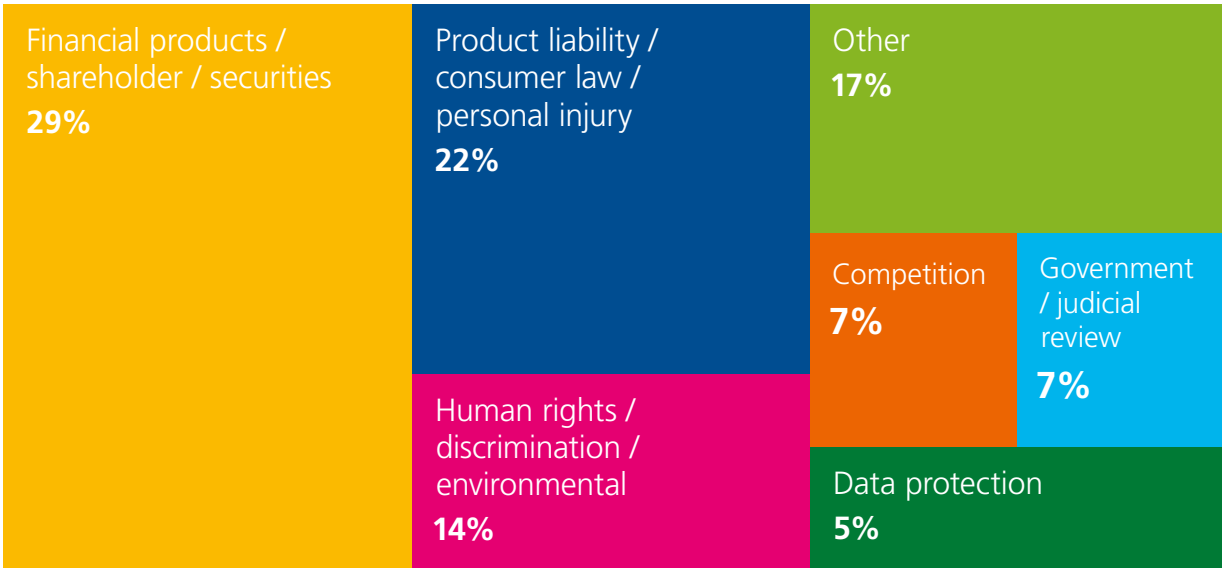
The UK continues to be the most active jurisdiction in Europe for class actions, but claims are being filed across Europe. In particular, an increasing number of claims have been filed in the Netherlands and Portugal. We illustrate below some of the more active jurisdictions for the period 2016 to 2021. This diagram should not be taken as a representation of class action risk, as it merely reflects the number of claims filed. It does not indicate the size of the class actions filed or other factors that make a particular jurisdiction more or less risky. See our heat map on pages 12 and 13 for a holistic assessment of risk by jurisdiction.

Spain, Italy, Bulgaria, Croatia, Montenegro, Slovenia, Belgium and Norway are not illustrated and collectively amount to nearly 6% of class actions filed.



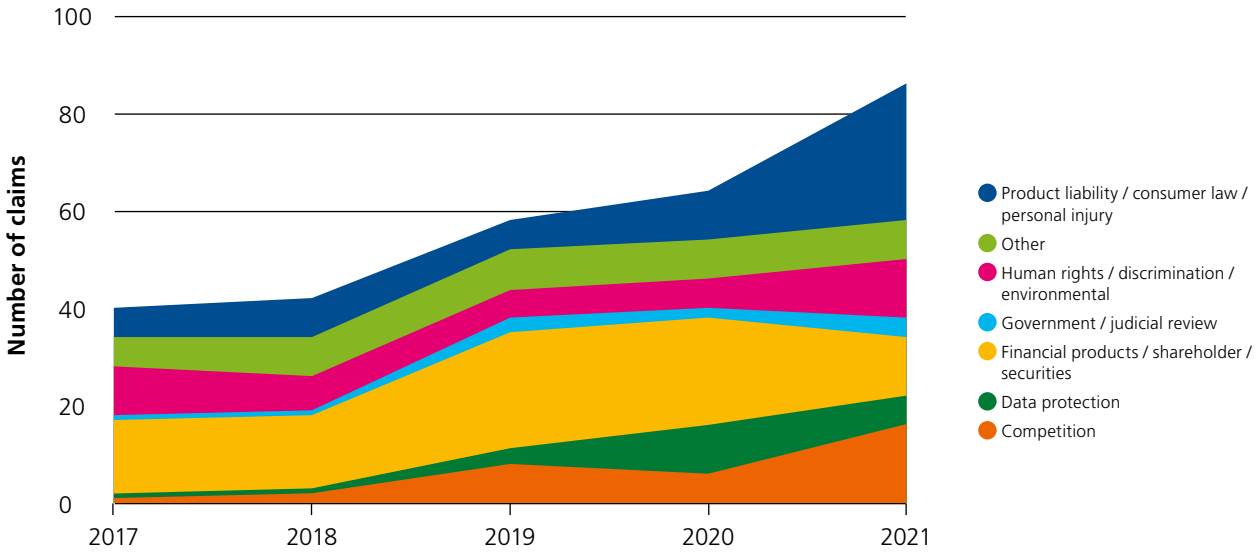
Types of claims across Europe: 5-year snapshot

Claims that have traditionally been the subject of class actions, such as financial products, securities, product liability, consumer, and personal injury claims represent the majority of class actions filed. Although their frequency is growing, competition and data protection claims together represent 12%.



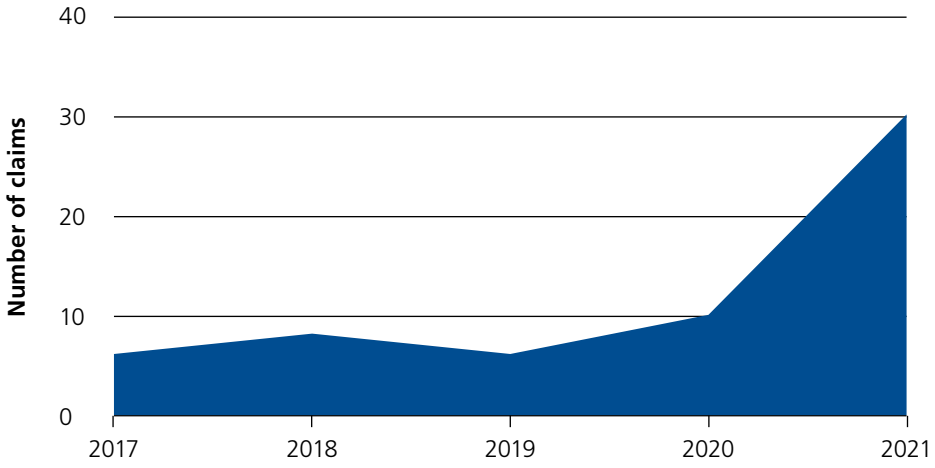
Trends in the types of claims filed in Europe

This graph gives a snapshot of trends by type of claim for 2017 to 2021.



Product liability / consumer law / personal injury claims

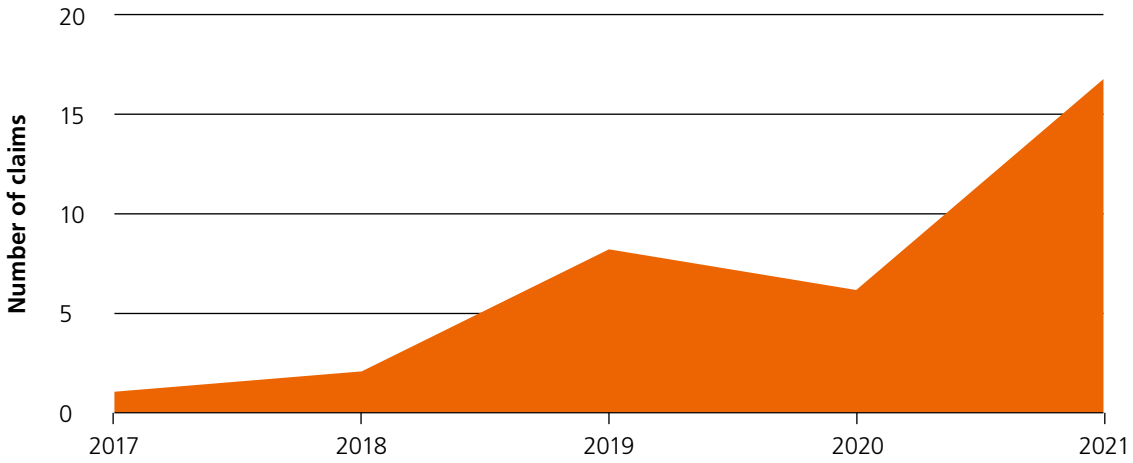
Between 2020 and 2021, there was significant growth in product liability / consumer law / personal injury claims, with triple the number of consumer claims being filed in 2021 as in 2020. This growth is driven by a number of factors, including large numbers of Dieselgate claims in a variety of European jurisdictions.



"2021 saw significant growth (tripling) in product liability / consumer law / personal injury class actions."

There has been significant growth in the number of competition law claims filed in Europe between 2017 and 2021. This is not driven by changes to substantive competition law. Rather it is driven by the availability of new class action mechanisms.

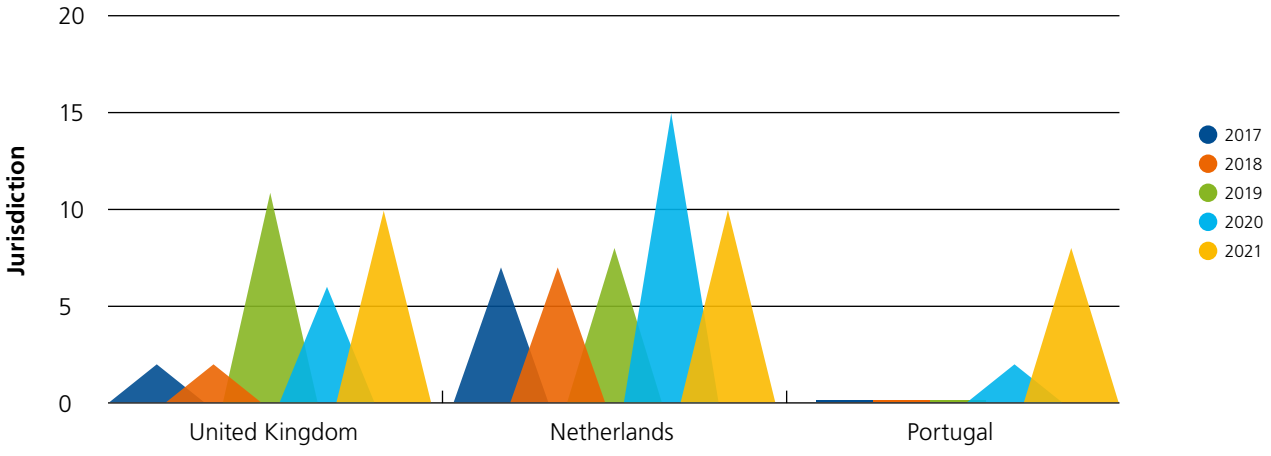
Competition law claims 2017–2021



"A number of European countries are experiencing significant increases in the number of claims being filed, even before implementation of the Representative Action Directive."

Opt-out claims

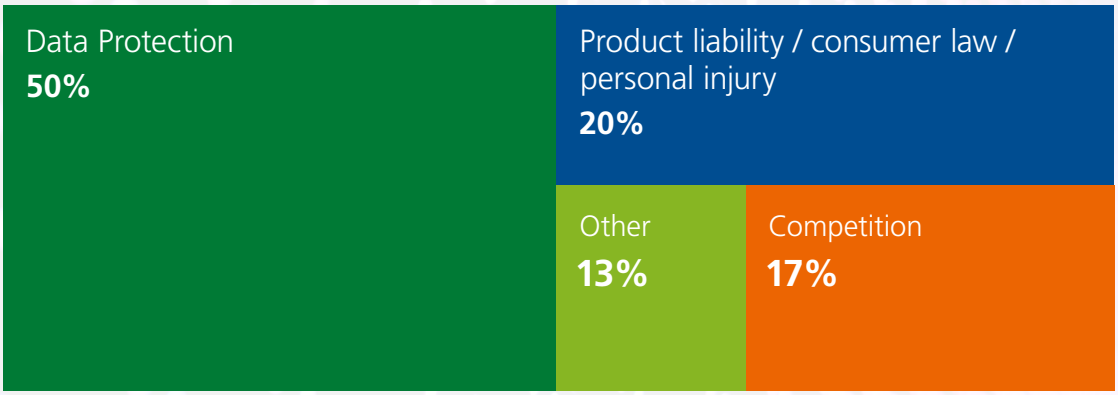
Opt-out mechanisms are very powerful in that they coalesce a class without the need for members to take any active steps to join the claim as a class member, or to "opt in". Thus, they can be used to bring extremely large claims with groups comprising millions of people. The jurisdictions where these mechanisms are most prevalent are the UK, the Netherlands, and Portugal. This graph shows the numbers of opt-out claims seeking damages in those jurisdictions.



In focus: tech sector

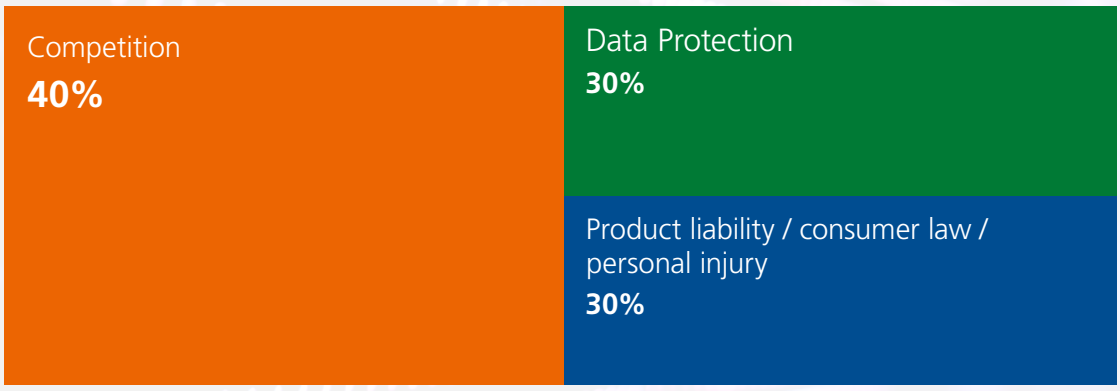
Types of claims against tech sector defendants 2017–2021

While defendants in the tech sector face a variety of class action claims, over the last 5 years the majority of claims filed were data protection claims.



Types of claims against tech sector defendants in 2021

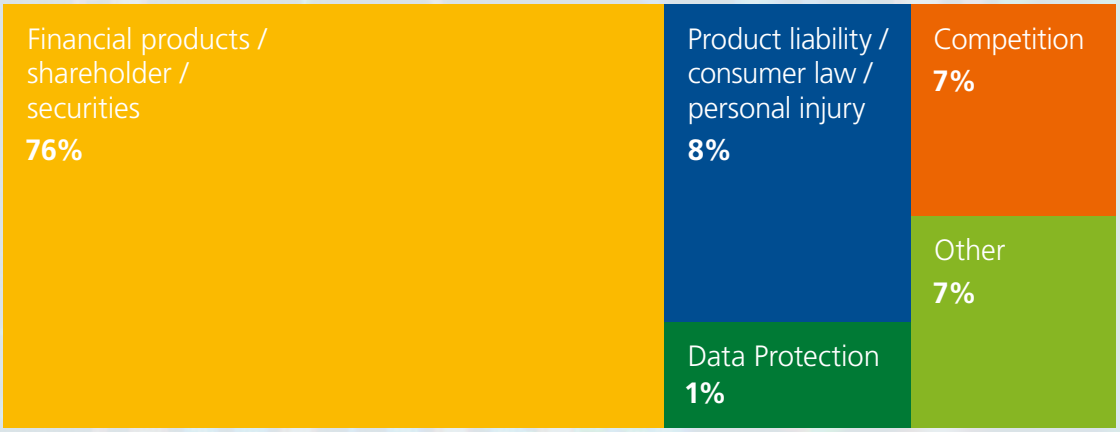
The key trend in tech is the increasing prevalence of competition claims. Over the period 2017 to 2021, competition claims comprised fewer than 1 in 5 new claims. In 2021, competition claims accounted for 40% of new claims in this sector.



In focus: financial products / professional services sector

Types of claims against financial products / professional services defendants 2017–2021

Between 2017 and 2021, defendants in the financial products / professional services sectors have, unsurprisingly, faced class actions relating to financial products / shareholders / securities more than any other type of claim.



Types of claims against financial products / professional services defendants in 2021

In 2021, this sector faced a greater variety of claims. Over the 5-year period above, product liability / consumer law / personal injury claims and competition law claims comprised 15% of claims and financial products / shareholder / securities claims clearly dominated. However, the former types of claims now comprise over a third.

Heat map

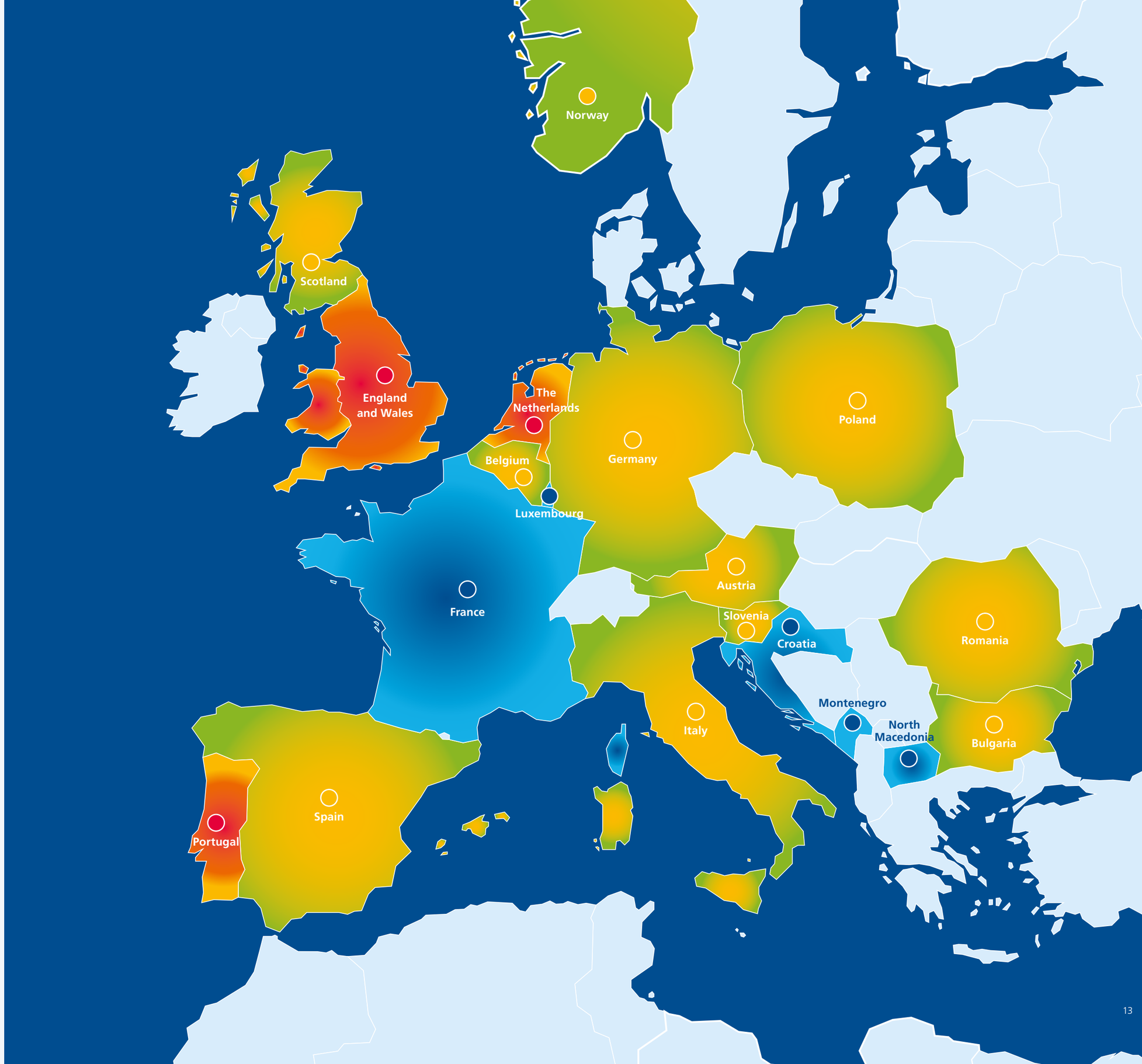
Feel the heat

We allocated a high, medium, and low risk and categorised countries according to domestic legislative and practical class action developments, including factors such as availability of opt-out procedures, ease of bringing and certifying claims and prevalence of litigation funding. We have then allocated each in-scope jurisdiction with a score and 'heat' classification based on our scoring system. This combination of the claims data for 2016 to 2021 with insights from lawyers across Europe as to what they are observing as at the date of this Report, provides a holistic appraisal of class action risk.

"All Member States must pass legislation to comply with the Representative Actions Directive by the end of 2022."

Heat rating

- High
- Medium
- Low



Heat map: Feel the heat

Country spotlights

Individual EU countries are autonomously developing their class action procedures at different rates. This graphic and the subsequent pages identify key issues that impact on class action risk.

All Member States must pass legislation to comply with the Representative Actions Directive by the end of 2022 with such legislation to be in force within six months. To date, very few countries have updated their domestic legislation to ensure compliance with the Directive. We expect that the picture will be very different in our 2023 report.

France

Since the introduction of class actions in France in 2014, fewer than 30 claims have been filed. The 2022 Sonofi judgment may encourage new claims.

Luxembourg

Luxembourg is presently considering legislation (Bill ° 7650) that will change domestic procedure and ensure compliance with the Representative Action Directive.

Poland

Class actions in Poland operate on an opt-in model. These are a popular means of collective redress for consumer claims against financial institutions, especially banks and insurance companies. We predict increasing numbers of claims in the years ahead albeit not a dramatic increase.

Spain

The introduction in the Spanish Civil Procedural Act for class actions initially went unnoticed. However, in recent years, the number of class actions has increased considerably.

Austria

There is no formal class action system in Austria, but individuals can assign their claims to an association. These claims are often financed by third party litigation funders.

Slovenia

Slovenia adopted systematic regulation of class actions in 2017. To date, the number of claims has been low but 2022 saw a large claim against Apple and we expect an increasing number of claims in the coming years.

Portugal

In the past 2 years, Portugal has experienced a wave of class actions, mostly characterised by multi-million Euros claims and by the presence of third-party funders. These class actions have been submitted as follow-on damage claims due to the infringement of competition rules, product liability claims and consumers' rights claims.

Italy

On 19 May 2021, Italy introduced a new class action mechanism. Traditionally, Italy has viewed class actions negatively but perceptions are changing.

France

Since the introduction of class actions in France in 2014, fewer than 30 claims have been filed, and, until recently, there have not been any final judgments.

Rulings to date have concerned procedural issues. The number of claims has been limited in part owing to the fact that claims can only be brought by a licensed association, and not by a class specifically constituted for the procedure.

However, since the mechanism was introduced in 2014 the categories of claims permitted has broadened, from consumer matters to class actions in the health sector, in relation to the protection of personal data, environmental matters, and discrimination.

A major decision was issued on 5 January 2022. This is the first decision to rule on the merits of an action. In this judgment, the Paris Court of First Instance declared the class action admissible and declared that the Sanofi laboratory was liable for breach of its obligations to be vigilant and to provide information, as well as for the defect in the anti-epileptic drugs it had produced and marketed (Depakine), especially in relation to women who took the medicine during their pregnancy. The Court also decided that claimants may opt into the class within 5 years, and ordered publicity of the judgment. By joining the group, the members of the class give the association initiating the class action the mandate to negotiate the appropriate level of compensation. The association will now proceed to negotiate, and after this judgment on liability the judge will have to validate the settlement agreement which may still take a few years. We expect that this Sanofi judgment will encourage use of the class action mechanism.

Portugal

The Portuguese Class Action Law is dated 1995 and for many years class actions were no more than a footnote in law books and in litigation statistics in Portugal.

In the past 2 years, Portugal has experienced a wave of class actions, mostly characterised by multi-million Euros claims and by the presence of third-party funders.

These class actions have been submitted as follow-on damage claims due to the infringement of competition rules, product liability claims and consumers' rights claims.

The relative lack of claims until recent years means there are important unanswered questions. In principle, litigation funders can receive the sums attributed to affected consumers, but which are not claimed. But there are other open questions on how litigation funding will operate, owing to the lack of regulation in Portugal. Also, there are questions in particular over how more traditional aspects of consumer rights protection will operate under class action mechanisms. These are interesting and challenging times for all agents involved in class actions.

Poland

Class actions (or more precisely "group actions", since the Polish collective action is based on an opt-in model) were introduced into the Polish legal system in 2010 (the "Group Action Law").

There were concerns that adoption of the Group Action Law would lead to a wave of group actions. This did not happen, although there was and continues to be a steady inflow of group actions. The group action mechanism brings challenges for claimants owing to the complexity of the proceedings consisting of several stages, including admissibility, certification of the group, and the merits phase. As a result, group action proceedings are burdensome for the parties and slow moving. As with all opt-in models, defendants can be cautious in settling as that may encourage other claimants.

The Group Action Law has proven relatively popular of collective redress for consumer claims against financial institutions, especially banks and insurance companies. We predict increasing numbers of claims in the coming years albeit not a dramatic increase.

Luxembourg

There is currently no specific framework allowing for class actions under Luxembourg law.

However, Bill no. 7650 concerning the introduction of consumer class action lawsuits was introduced on 14 August 2020 with the objective of introducing a collective action in Luxembourg law. The Bill was significantly revamped in January 2022 to ensure compliance with the Representative Action Directive. While the Bill is still subject to amendment during the legislative process, its current key features are:

1. The introduction of an entirely new and ad-hoc representative action procedure which will become available from 25 June 2023, irrespective of when the facts underlying the action took place.
2. A significant recast of the regime for injunctions for the protection of consumers' interests, in order to align certain of its features (scope of application, competent jurisdiction, potential claimants, etc.) with the representative action procedure.

Austria

There is no formal class action system in Austria, but certain civil procedural rules are used for collective redress purposes.

Individuals may assign their claims to an association which then asserts these claims in court in its own name. There must be an essentially similar legal basis for the claims and the same relevant legal or factual question must have to be assessed.

Over the last couple of years, a number of such cases were brought before courts in Austria, including claims by hundreds of consumers against several Austrian banks seeking repayment of overpaid loan interest or claims of approximately 10,000 Austrian car buyers against a prominent German car manufacturer. Another case involved claims of clients against an institutional financial advisor for not having sufficiently informed the clients about the risks of the recommended investment.

The Association for Consumer Information or the Chamber of Labor will often act as claimant in such cases. It is also possible to establish an ad-hoc association to bring claims. All assigning individuals form the "class" for which the association asserts the claim. Other individuals are in no way affected by these proceedings or any settlement even though they may have similar or identical claims against the same defendant.

This type of collective redress is very often financed by third party litigation funders. If the claims are successful, the funder would usually receive a success rate of 30% in return.

Spain

The introduction in the Spanish Civil Procedural Act of the possibility of submitting class actions before the Spanish Courts initially went unnoticed.

However, in recent years, the number of class actions has increased considerably. This increase occurred mainly in the field of consumer law contract claims, such as:

1. claims for damages due to non-compliance or defective fulfilment of mass contracts;
2. in the field of competition law, claims of damage caused to consumers as a result of practices contrary to free competition (for example, price fixing practices); and
3. in the field of extra-contractual civil liability.

The tendency is that these sorts of proceedings will increase in the following years. Notwithstanding the above, the lack of complete regulation on the matter, together with the slow adaption of procedural and consumer regulations to the specific particularities of class actions, means that class actions are yet to move forward significantly in Spain. The coming years will bring relevant legal changes.

Slovenia

Slovenia adopted systematic regulation of class actions in 2017.

Prior to 2017, there were limited options for group actions as set out in consumer protection regulation, but they were never utilised in practice. Even though the regulation has now been in place for more than 5 years, the procedure is still not used commonly. By 2021, only three class actions had been filed in Slovenia.

In 2021, the institute Zavod KOLEKTIV 99 filed a class action against Apple Inc. The lawsuit claims damages incurred by consumers due to diminished value of their phones resulting from update iOS 10.2.1. The said update allegedly slowed down the performance of certain older iPhone models and degraded their battery performance. Apple publicly admitted on 28 December 2017 that the update had this effect.

The class action against Apple represents the first class action for damages that covers a wide group of consumers. According to publicly available information, it is also the first case financed by a third-party. It has attracted a lot of media attention and contributed to a promotion of the institute bringing the claim among legal experts and the general public.

We expect to see an increase in class actions over the coming years. Following the action against Apple, the number of class action proceedings initiated in 2022 has increased significantly: by the end of May, 6 new class actions had been filed.

Italy

On 19 May 2021, Italy introduced a new class action mechanism.

The new rules provide both compensatory and injunctive remedies against any serial misconduct of private companies and entities operating public services or public utilities.

The new law was meant to drastically change the class action scene in Italy. However, relatively few claims have been brought since the law came into force. This is due to the following factors:

— The new law is not retrospective and applies only to infringements committed after 19 May 2021. This means we may see more claims in the coming years.

— Class actions have been viewed negatively in Italy from a cultural point of view. This perception may change as the early claims progress, which would encourage further claims.

— There is a lack of "claimant firms" in Italy and the litigation funding market is underdeveloped. Consumer protection has typically been the purview of consumer associations, rather than being addressed in litigation.

The above factors will all be addressed if the early claims are considered "successful", which will lead to an uptick in class actions.

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

Spotlight on: **The United Kingdom**

The UK continues to see significant development in class actions across a range of fields: competition class actions; representative actions and Group Litigation Orders.

Competition class actions

The UK introduced a class action regime for competition damages claims in 2015, whereby claims can be brought either on an opt-out or an opt-in basis using a collective proceedings order (CPO). These claims must be brought in the Competition Appeal Tribunal (CAT). Claims can either be follow-on, in that they rely on a regulator's finding of infringement such that the claimant need not prove liability, or they can be stand-alone such that the claimant must prove liability.

As reported in our 2021 Annual Report, the UK Supreme Court judgment in *Merricks v Mastercard* confirmed a low threshold for certifying class actions brought under the CPO regime.[1] A number of claims were stayed pending the ruling from the Supreme Court, but six claims have now been certified on an opt-out basis and one has been certified on an opt-in basis. 2021 saw a new high in the number of applications for CPOs filed in the CAT, with seven new claims being registered.

Whether a claim is certified on an opt-in or an opt-out basis is likely to be a hotly contested topic. In 2021, the CAT certified *Le Patourel v BT* on an opt-out basis. BT appealed to the Court of Appeal, which in May 2022 gave a unanimous judgment confirming the CAT's decision. In doing so, the Court of Appeal clarified that there is no presumption or preference for opt-in or opt-out, *"the starting point is one of neutrality"*. The CAT will decide whether opt-in or opt-out is appropriate based on a *"balancing exercise"* involving the relevant factors in each case.[2] The Court of Appeal observed that *"convertibility"* (the ability of a claimant to identify potential class members and get them to opt-in to the proceedings) is *"an important factor"*.[3] Moreover, the Court of Appeal held that *"relevant factors such as size of class, the scale of a possible award and the impact of these on funding... might be sufficient, by themselves, to justify an opt-out decision"* but the CAT was also correct to consider *"more subjective characteristics of the class including age profile, social class and technical ability"* which *"can serve to reinforce an opt-out decision"*.[4] The Court of Appeal also held that it was appropriate to consider the availability of third party litigation funding when making a decision on whether an opt-out or opt-in CPO is appropriate, *"If, in a given case, a claim is only viable if third party funding is secured then this is relevant to access to justice and is a*

[1] *Walter Merricks CBE v Mastercard Incorporated* [2020] UKSC 51; for a summary of the judgment, see here.
[2] [2022] EWCA Civ 593 at [61]-[63], [68].
[3] [2022] EWCA Civ 593 at [74].
[4] [2022] EWCA Civ 593 at [73].

CPO applications in the CAT

2021 saw a new record in the number of CPO applications filed, with 7 new claims being registered. Claims are also now progressing to the certification stage following the UK Supreme Court's decision in *Merricks v Mastercard*.

2016

25 May 2016
Gibson v Pride Mobility Products
c. 32,000 class members
Follow-on
Certification rejected

8 September 2016
Merricks v Mastercard
c. 46.5m class members; GBP 14bn damages
Follow-on
Certified: opt-out

2018

18 May 2018
Trucks Cartel Claim (UKTC)
Follow-on
Certification rejected

17 July 2018
Trucks Cartel Claim (RHA)
c. 18,000 class members but potentially many more; GBP 2bn damages
Follow-on
Certified: opt-in

2019

27 February 2019
SWISE Boundary Fares Claims
c. 16.1m class members; GBP 93m damages
Stand-alone
Certified: opt-out

29 July 2019
Forex Cartel Claim (O'Higgins)
c. 42,000 class members
Follow-on
2nd certification hearing: TBC

11 December 2019
Forex Cartel Claim (Evans)
c. 42,000 class members
Follow-on
2nd certification hearing: TBC

2020

20 February 2020
Car Delivery Charges / RoRo Claim
c. 6.9m class members; over GBP 150m
Follow-on
Certified: opt-out

Found suitable for opt-in; pending revised CPO application

2021

15 January 2021
BT Land Lines Claim
c. 2.31m class members
Stand-alone
Certified: opt-out

18 February 2021
Which? v Qualcomm
c. 29m class members
Stand-alone
Certified: opt-out

11 May 2021
Kent v Apple Inc.
c. 19.6 million class members
Stand-alone
Certified: opt-out

10 June 2021
GTR Brighton Mainline Claim
> 1m class members
Stand-alone
Certification hearing: July 2022

29 July 2021
Coll v Alphabet
c. 19.6m class members
Stand-alone
Certification hearing: July 2022

1 November 2021
Home Insurance Consumer Action
c. 20m class members
Follow-on
Certification hearing: TBC

24 November 2021
TSGN Boundary Fares Claim
c. 10.1m class members; GBP 73.33m damages
Stand-alone
Certification hearing: TBC

2022

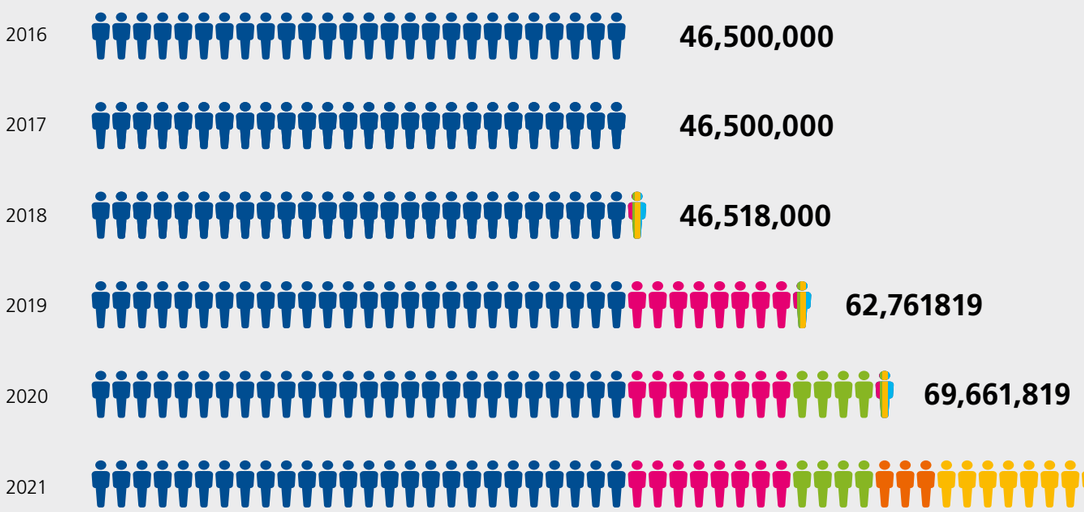
14 February 2022
Gormsen v Meta Platforms, Inc.
c. 44m class members; GBP 2.3bn damages
Stand-alone
Certification hearing: TBC

10 May 2022
Power Cable Cartel Claim
c. 30m class members
Follow-on
Certification hearing: TBC

15 June 2022
Gutmann v Apple Inc.
c. 25 m class members; GBP 768m damages
Stand-alone
Certification hearing: TBC

Estimated Class Size

This chart shows the cumulative estimated class sizes, based on publicly available information, for all UK competition class actions that have either been filed or certified in the CAT. It does not include figures for claims that have been withdrawn or where certification has been rejected. The colouring cross-references to the claims on the timeline above. As can be seen, 2021 saw a significant increase in the volume of persons in UK competition class actions with claims filed on behalf of 100 million people. Many UK citizens will now be class members in multiple claims.



UK population 2022

Estimated total UK members of competition class actions in the CAT as at June 2022

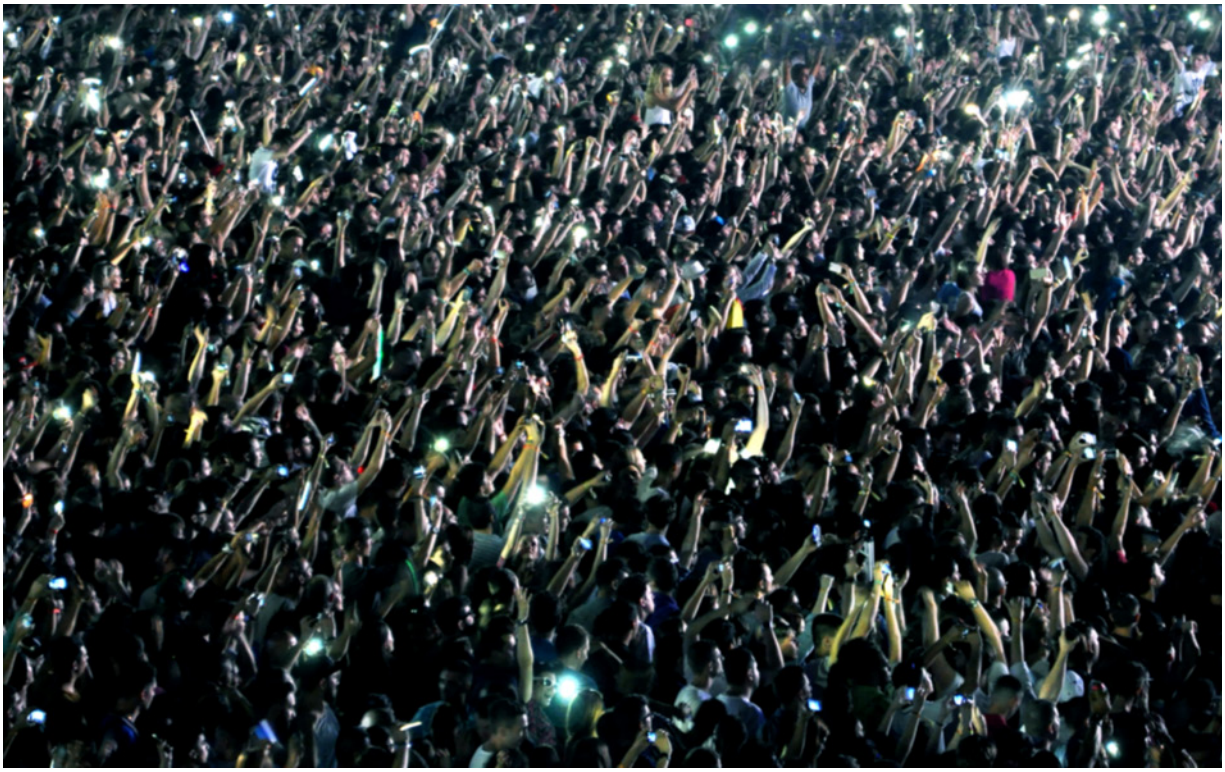
"2021 saw 7 new competition class actions filed on behalf of **100 million** people in aggregate."

Class members under 1m

Class members over 1m

Country spotlights

"6 of the 7 claims filed in 2021 were stand-alone claims."



factor the CAT should necessarily take into account. It is self-evident that in many large-scale consumer based collective actions the availability or non-availability of third party funding might be dispositive of whether the claim ever gets off the ground." [5]

The majority of competition class actions filed in 2016 to 2020 were follow-on claims, but six of the seven claims filed in 2021 were stand-alone claims. Stand-alone claims can be attractive for claimant law firms and funders in that regulatory scrutiny attracts attention from various potential claimants; where a claimant law firm derives a theory of harm independent of regulatory action they may face less competition from other claimant law firms.

2022 saw the first determination of a "carriage dispute" – where two applications were made for substantially overlapping CPOs, seeking damages arising from the the *trucks cartel*. That carriage dispute was decided at the same time as the substantive hearing of the application for a CPO. The CAT ruled that *"it would be wholly inappropriate to approve both"* CPO applications because doing so would *"very substantially increase the cost and complexity of the proceedings generally and the trial in particular"*.[6] Carriage disputes carry high stakes for claimant law firms and litigation funders.

There are also competing CPO applications seeking damages arising from the *Forex cartel*. In March 2021 the CAT declined to determine the carriage dispute as a preliminary issue, but rather to decide it at the certification stage.[7] Both claimants prepared for the substantive certification hearing, which took place in July 2021. In March 2022, the CAT gave a 255-page judgment dealing with whether the claim should be certified, whether it should go ahead on an opt-in or opt-out basis and the carriage dispute.[8] The majority of the CAT found that neither of the competing FX claims was suitable to proceed as a CPO on an opt-out basis. The CAT decided against striking out the claims and gave the claimants in each claim permission to file new applications for a CPO on the opt-in basis. Subject to any appeal of the CAT's decision, if the competing applications both reformulate their claims on an opt-in basis then the CAT will have to decide the carriage issue.

[5] [2022] EWCA Civ 593 at [77]-[78].
[6] [2022] CAT 25 at [194].
[7] [2020] CAT 9.
[8] [2022] CAT 16.

Representative actions

England has a rarely used but potentially powerful class action mechanism known as the "representative action". The key case in 2021 concerning this mechanism was the UK Supreme Court's judgment in *Lloyd v Google*.

The representative action mechanism requires class members and the representative to have the "same interest". Until *Lloyd v Google* the Courts had policed the "same interest" test strictly, rejecting multiple attempts to use this mechanism to bring U.S.-style opt-out class actions. In *Lloyd v Google*, the Supreme Court relaxed the "same interest" test, finding that it can be met where there is no conflict of interest between class members and the representative claimant. The Court also held that "divergent interests" amongst class members – for example, where certain issues are relevant to some class members but not others – may be dealt with by bringing multiple representative actions and joining them together.[10]

The UK Supreme Court rejected Lloyd's claim against Google. But its relaxation of the "same interest" test confirms that the representative action can be used for claiming damages on an opt-out basis in suitable claims, being those where *"the elements [of the claim] can be calculated on a basis that is common to all members of the class"*. Claimant law firms are likely to continue to attempt large class actions using this device, although there are challenges. For more detail on the Supreme Court's judgment in *Lloyd v Google*, see here: link.

Group litigation orders (GLOs)

A GLO is an opt-in device which can be used for claims that *"give rise to common or related issues of fact or law."* At a GLO trial, the court will rule on these common issues with the ruling binding claimants that have elected to join the group.

As with all class actions, the financial underpinning of GLOs is critical to their viability. There have been three significant rulings in recent months that impact the costs of bringing claims using a GLO.

— First, the High Court refused a Cost Capping Order (CCO) in *Thomas & Others v PGI Group Limited*. This is a transnational tort claim brought by 31 Malawian women who worked in tea or macadamia nut plantations and who claim damages alleging various types of mistreatment including sexual harassment, assaults and rapes. The defendant applied for a CCO. A CCO limits the amount of costs that a party will pay in adverse costs and can put claimants under pressure where the damages to be recovered may not exceed the costs of pursuing the claim. In refusing to grant a CCO, the Court at first instance and the Court of Appeal emphasised the vindicatory purpose of the proceedings and that this had to be taken into account when assessing whether the costs were proportionate. The Court of Appeal explained: *"The claims are about much more than money... the claimants want to show that they were telling the truth; they want to restore their reputations; and they want to bring these and similar abuses to an end"*.[11] Claimant firms and litigation funders will welcome this ruling, particularly given the increasing number of transnational torts being pursued in UK courts using GLOs.

— Second, the High Court confirmed that sums that a claimant law firm spends in advertising are not recoverable from the defendant, but rather they are costs of *"getting the business in."*[12] In that case the claimant law firm had spent GBP 443,000 on advertising and intended to spend a total of GBP 1m. This demonstrates the significant sums that claimant law firms are willing to invest to persuade putative claimants to join a claim; their inability to recover those costs from defendants makes financing these claims slightly more difficult.

— Third, in *Rawet & Ors v Daimler AG and Ors* [2022] EWHC 235 (QB) the High Court confirmed that a claimant law firm can add further claimants to an issued but unserved Claim Form at its own election and without needing agreement from the defendant(s) or permission from the court.[13] This gives claimant law firms more flexibility in being able to add additional claimants iteratively. This can also save the claimant law firms money in reducing the need to issue multiple further Claim Forms which have a court fee of up to GBP 10,000 each.

Although GLOs are an opt-in device and require significant "bookbuilding" efforts by claimant law firms to persuade sufficient putative claimants to join a claim, they will remain popular for sufficiently large mass-harm events and where there is no opt-out mechanism available.

[10] *Lloyd v Google* [2021] UKSC 50 at [72], [74].
[11] [2022] EWCA Civ 233 at [12.2].
[12] *Weaver v British Airways Plc* [2021] EWHC 2017 (QB).
[13] Contradicting the earlier decision in *Various Claimants v G4S plc* [2021] EWHC 524.

Spotlight on: **Germany**

Whereas "US-style" opt-out class actions still do not exist under German law, the approach towards collective redress mechanisms in Germany has shifted significantly in recent years to encourage these claims to be brought. That trend is likely to continue.

Until the implementation of the model declaratory action *(Musterfeststellungsklage)* which was brought in in 2018, there was a limited number of collective redress mechanisms available. Moreover, these mechanisms were limited to specific areas of law, such as the capital markets model action. For the first time, the model declaratory action provided for a collective redress mechanism which was not limited to specific areas of law.

However, the model declaratory action is not a class action in the formal sense. Rather, it is filed by so-called qualified entities *(qualifizierte Einrichtungen)*, e.g., consumer protection associations, and may be subsequently joined by consumers by an opt-in mechanism. In order to opt-in, consumers must sign up with a claim register *(Klageregister)* administered by the Federal Office of Justice.

Model declaratory action did not meet expectations

To date 27 model declaratory actions have been filed, the most prominent being the model declaratory action of the *Verbraucherzentrale Bundesverband* against *Volkswagen AG* before the Higher Regional Court Braunschweig. 450,000 consumers joined this claim. The VW model declaratory action was finally settled in 2020, granting consumers an overall amount of EUR 750m in damages. The amount paid to the individual consumer ranged between EUR 1,350 and EUR 6,257, depending on the type and age of the vehicle. The settlement was approved by approximately 240,000 of the consumers, who had opted-in.

The consumers who did not approve of the settlement retained the right to bring an individual lawsuit against Volkswagen.

Despite the very large VW claim, model declaratory actions are far from being a widespread phenomenon in Germany. The German legislator initially expected a multitude of about 450 model declaratory actions to be filed each year, but 2021 saw a total of 5 model declaratory actions filed of which two related to *Dieselgate* litigation. 2022 has seen 9 model declaratory actions so far. Most of the model declaratory actions filed relate to municipal savings banks and the validity of their general terms and conditions. Other defendants in model declaratory actions include an energy supplier, a real estate company, a debt collection service provider and – against the background of the COVID-19 induced lockdowns – a gym provider.

The reason for the model declaratory action's underperformance partly lies in its two-step procedure:

By its nature, the model declaratory action only provides for the determination of factual or legal aspects of the case at hand. Subsequently, consumers must file an individual claim against the defendant of the model declaratory action with the competent court in order to have their individual claims and potential damages determined. Thus, under the model declaratory action regime it is not possible to file directly for damages or other specific remedies.

The future of model declaratory actions

In light of the model declaratory action's underperformance and the upcoming implementation of the EU's Representative Actions Directive, its future is uncertain. The Representative Actions Directive must be implemented into national law by mid-2023 which will considerably expand the scope of collective redress mechanisms under German law.

It remains to be seen whether Germany will opt for a single harmonised mechanism for consumer collective redress or introduce a new and additional procedure that will sit alongside the model declaratory action.

The coalition agreement of Germany's government, elected in 2021, posited an "expansion and modernization" of collective redress mechanisms. The government plans to implement the Representative Actions Directive in an "advancement of the model declaratory action", which hints at replacing the model declaratory action with the new collective redress mechanism. The government is expected to propose a draft bill before the upcoming parliamentary summer break.

Rise in other mass proceedings

The limited options of collective redress mechanisms available under German law have resulted in a rise of claimants filing bundled claims against a single defendant, thereby attempting to mimic a class action procedure. Under this model, multiple original claim holders assign their individual claims by means of a fiduciary assignment to a single claimant, which then brings a consolidated action against the defendant.

In cases where the claimant acts commercially, i.e., for profit, there have been questions over the legality of this model. In a 2021 landmark case, the Federal Court of Justice (*Bundesgerichtshof*) decided (in contrast to various lower court decisions) that the assignment model is generally permissible under the German law.

However, as recent decisions of other courts in similar cases show, there is still a significant level of uncertainty as to the permissibility of bundling claims in mass litigation procedures. It is very likely that the Federal Court of Justice will have to deal with the assignment model again. The final assessment of the Federal Court of Justice will be of fundamental importance particularly for many legal tech and litigation finance business models.

Spotlight on: **The Netherlands**

Over the last decade, the Netherlands has become a leading forum for international class actions against multinationals in Europe. There is developed infrastructure for class actions and many international claimant class actions firms and case funders are active in the Dutch market. Speed to trial in the Netherlands is amongst the fastest in Europe with an average of 130 days from a notice to appear to a final judgment (EU Justice Scoreboard).

The Dutch system operates an opt-out mechanism for Dutch class members and an opt-in mechanism for foreign class members. A significant number of international companies have their European principal place of business in the Netherlands owing to favourable business and tax conditions. Accordingly, there are many companies available for claimant law firms to target.

The Dutch class action climate has recently been bolstered by the Dutch Class Action Act (The Act), which came into force on 1 January 2020. The most important change in the Act is the ability to claim damages in a collective action. The award of damages not only binds the defendant company, but also the parties who suffered damage and whose interests were represented by the representative entity, but did not opt out. The Act also provides certain safeguards for companies and officials against trivial claims and the proliferation of claims foundations / interest groups. Since the Act came into force two years ago, more than 40 cases have been filed in the class action register. There is no restriction on the type of claims that can be brought under the Act; it is available for all causes of action.

Class actions in interlocutory proceedings

Interlocutory proceedings are also a popular route for class action groups. In 2020 and 2021, at least 15 summary judgments, of which COVID-19 was a common subject, were rendered in class actions. Example interlocutory proceedings include those commenced by:

— 'Stichting Vijfde Macht' (Fifth Power Foundation), who demanded a complete Covid lockdown; and

— 'Viruswaarheid' (Virus Truth Foundation), who started three preliminary relief proceedings claiming that the preliminary relief judge should order the State to revoke coronavirus measures (and emergency ordinances) in one proceeding.

Both claims were unsuccessful, but they demonstrate that the relief requested in such claims can have broad and significant practical impacts.

Under the new class action system, the Dutch courts require sufficient connection between the claim and Dutch territory. A collective claim against US Companies Oracle and Salesforce based on alleged misuse failed to meet this requirement. The foundation has appealed this judgment.

Diesel emissions claims

Multiple large claims have been filed in the Netherlands against car producers concerning diesel emissions. In 2020 claims were filed against Volkswagen, Daimler and Fiat. In 2021, three foundations ('Foundation Car Claim', 'Foundation Emission Claim' and 'Foundation Diesel Emission Justice') initiated class actions against Renault and Stellantis (i.e., Peugeot and Citroën). These proceedings are still pending.

Data protection claims

In 2021 several class actions were filed against international tech companies alleging data privacy infringements. On 30 June 2021, the District Court of Amsterdam rendered an important judgment allowing the collective action of 'Data Privacy Stichting' (DPS) against Facebook Netherlands, Facebook Ireland and Facebook Inc. (jointly: Facebook) to proceed. Facebook objected to these proceedings on several grounds, but the Amsterdam District Court dismissed those objections. Also, class action proceedings were initiated by several foundations against TikTok Technology alleging violation of the privacy and consumer rights of 1 million users of the social video service. These proceedings are still pending.

Frontrunner in climate change litigation

In recent years, we have seen an increase in class actions on human rights (ESG) issues, such as climate change claims. In the landmark case of Urgenda in 2019, the Dutch Supreme Court upheld an earlier judgment finding that reducing emissions was necessary in order for the Dutch government 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 Urgenda case has inspired other further international climate change litigation.

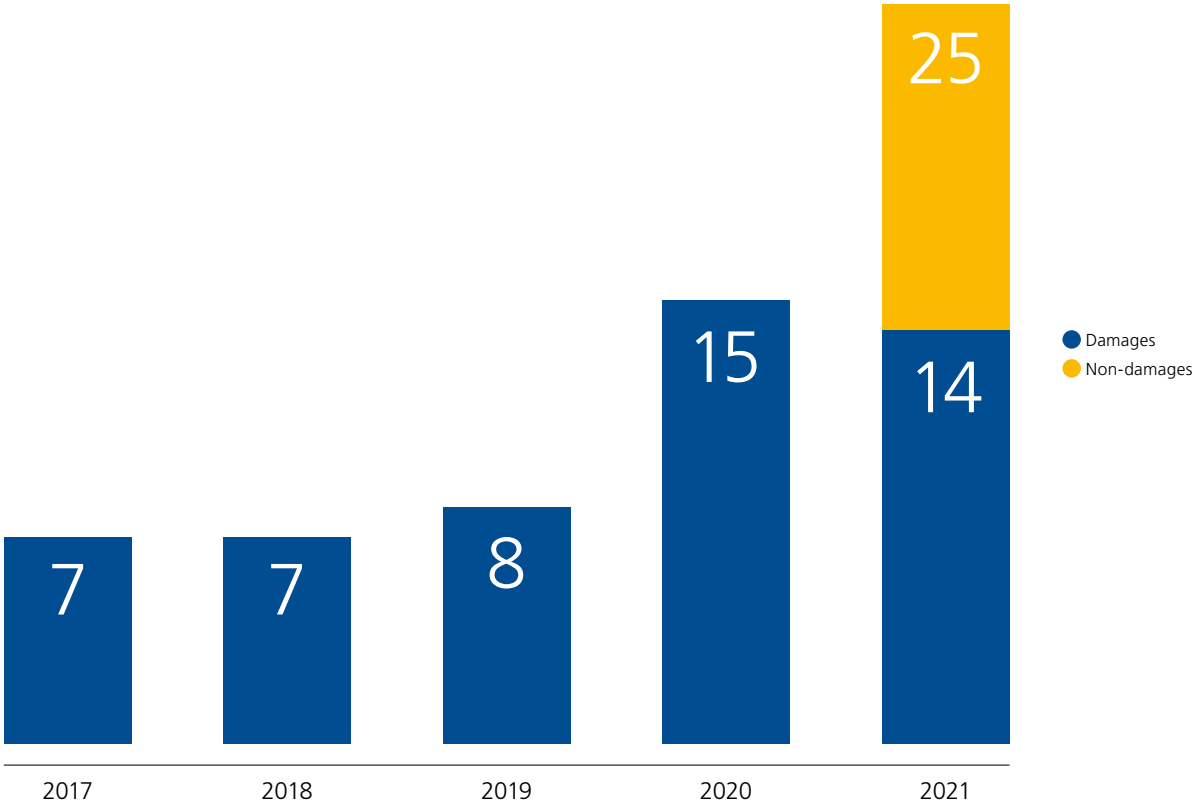
May 2021 saw a further important climate change judgment, this time against Royal Dutch Shell (RDS). In this judgment the court held RDS directly responsible for climate change based on its duty of care and having regard to international treaties such as the UN Guiding Principles and Paris Climate Agreement. The court ordered RDS to reduce its CO2 emissions by 45%. Notwithstanding any possible appeal, this judgment will encourage claimant law firms and climate change activists to target other multinational companies in the Netherlands and also in other jurisdictions. The claim foundation that brought the RDS claim, Milieudefensie, has already announced actions against Dutch companies in other sectors, such as steel producers, dairy companies and the beef industry.

Collective settlement

The Dutch Act on the Collective Settlement of Mass Damage offers a 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). Last year, no collective settlements were published.

The Netherlands has seen a steady increase in the number of class actions filed. In the Netherlands, a further 11 class actions that were filed in 2021 were not claims for damages. These 11 claims have not been included in our data elsewhere in this Report because they do not strictly meet our definition of a "class action" as they do not seek damages; however, they clearly carry significant risks for defendants. Of these, 10 were opt-out actions.

Class actions filed in the Netherlands



Hot topics

- Developments in litigation funding
- Claims against Pharma and MedTech
- The role of LegalTech

Litigation funding

Litigation funding is expanding in Europe. A joint study by The Lawyer and AlixPartners reported that in the UK alone, funders' new investment into UK litigation are approaching GBP 1bn per annum.[1]

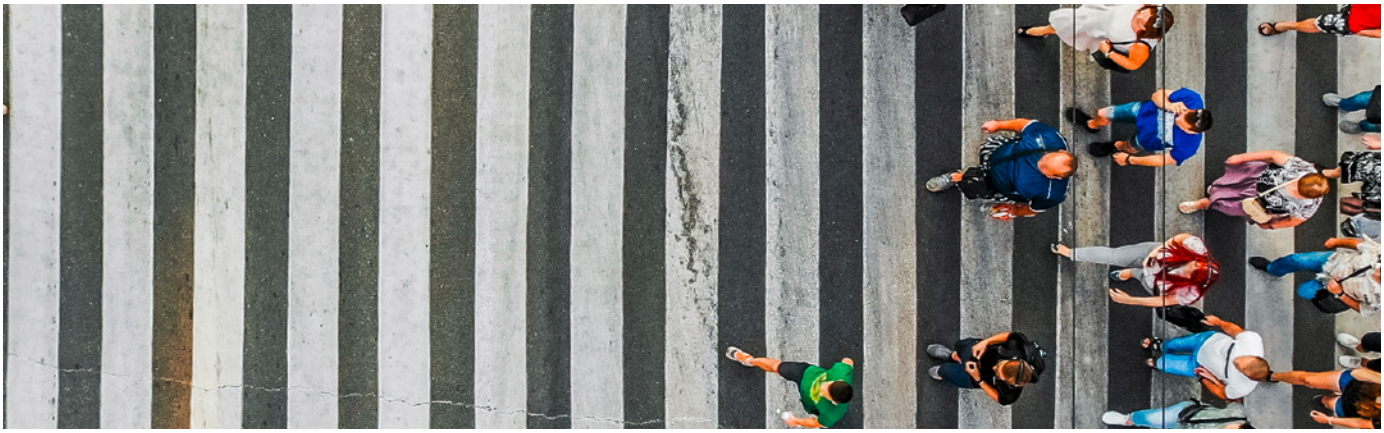
Continental Europe has a less developed market for litigation funding than the UK. The size of the third-party litigation funding market in the EU 27 was estimated to be in the region of EUR 1bn in 2019 and has been projected to grow to EUR 1.6bn by 2025 in terms of revenue.[2] Litigation funders see potential growth in the UK and across Europe. The nascent European Association of Litigation Funders has established a web page[3] and is likely to seek to advance the interests of the litigation funding industry as the UK's Association of Litigation Funders (ALF) which was established in 2011, and the Washington DC headquartered International Legal Finance Association, which was established in 2020.

Growth drivers

The growth in litigation funding and class actions are connected, including for the following reasons.

1. Class actions are expensive. They involve detailed factual evidence and extensive expert evidence is frequently needed. It is logistically complex and costly to coordinate and communicate with the class. The costs of class actions are often met by a third party litigation funder, but – equally – introduction of new class action mechanisms increases the number of potential class actions, which attracts funding capital. In jurisdictions with highly functioning adverse costs rules, such as the UK, adverse costs insurance is usually purchased or a deed of indemnity is provided. There is a two-way supply/demand relationship.
2. The regulatory and Court attitudes to third party litigation funding are, in general, softening in Europe. In the UK, the historic rules on champerty and maintenance have been whittled away. In fact, the judiciary occasionally acknowledge and welcome the role of litigation funders.[4] Similarly a 2021 report of the European Parliament stated that third-party litigation funding *"might…facilitate access to justice as it proposes tools to transfer the risk of the uncertain outcome of the dispute to the litigation funder"*.[5] There are significant barriers to litigation funding in certain jurisdictions. A 2017 Irish Supreme Court decision applied domestic rules on maintenance and champerty, such that commercial litigation funding

[1] "The Future of Third-Party Litigation Funding", AlixPartners and The Lawyer, June 2021; p. 2.
[2] "Responsible Private Funding of Litigation – European Added Value Assessment", European Parliamentary Research Service, March 2021; p. 5.
[3] europeanlitigationfunders.com
[4] *Association Limited and UK Trucks Claim Limited v Paccar Inc and others* [2021] EWCA Civ 299, [5].
[5] Supra fn 2, p. 1.



remains very difficult in Ireland. But in March 2022 the Chief Justice of Ireland called for the rules on litigation funding to be examined. Other domestic litigation markets are relaxing their approach. A recent judgment in Cyprus confirmed that third party litigation funding is not against Cypriot public policy.[6]

3. Current socio-economic conditions will increase litigation volumes, with growth opportunities for litigation funding. Each of COVID-19 and lockdowns, rising inflation, commodities shortages and the war in Ukraine will lead to disputes.

4. Litigation funding can be very lucrative *"with TPLF returns [being] higher than those observed in private equity, real estate, traditional credit and hedge funds."*[7]

Lack of regulation

In countries where it is permitted, litigation funding remains largely unregulated across Europe even where it is being used to fund consumer class actions, including in the UK. The language of section 28 of the Access to Justice Act 1999 permits the UK government to impose conditions and requirements for valid litigation funding agreements. However, this section of the Act is not in force. Rather, the UK operates self-regulation through the ALF's Code of Conduct. The Code provides certain safeguards including on funders' capital adequacy, ability to terminate their funding arrangements and funders' ability to control litigation. The ALF has 13 funder members and 8 associate members as at the date of this Report. Litigation funders that are not members of the ALF are not bound by its code. Furthermore, the maximum fine for breach of the Code is GBP 500. Members can be expelled from the ALF, but that would not prevent them from funding.

The present approach, whereby industry self-regulates, reflects the then recommendation of the Rt Hon Jackson in 2009. However, his pro self-regulation view was expressly on the basis that the UK litigation funding industry was then in its early stages of development.[8]

As litigation funding expands, and in particular into class actions where the class members are often private individuals without independent legal advice, we are likely to see calls for formal statutory regulation of the industry.

[6] *Kazakhstan Kagazy PLC and others v Arip and others* (Appl No. 1 / 2020, 31 January 2022).
[7] Supra fn 2, p.6.
[8] "Review of Civil Litigation Costs: Final Report", Rt Hon Jackson LJ, December 2009, Ch.11 (2.3 – 2.4).

Proposal for European regulation

At present there is very limited regulation of litigation funding at EU level. The Representative Actions Directive prohibits conflicts of interest and also requires that a funder must not *"divert the representative action away from the protection of the collective interests of consumers."* More specifically, funders are not permitted to unduly influence the decisions of the "qualified entity" (i.e., the class representative) *"in a manner that would be detrimental to the collective interests of the consumers concerned by the representative action."*[9]

However, potentially significant regulation is now being proposed. On 17 June 2021 Axel Voss MEP published a report with draft recommendations for regulating third-party litigation[10] funding. Key proposals are as follows:

— Litigation funders would need to be authorised in order to conduct business, have a registered office in a Member State and their activities would be monitored by a domestic regulator.

— There are significant proposals for capital adequacy, whereby funders would be required to have capacity to fund all stages of litigation for all their investments including through to any appeals. The domestic regulator would have the power to verify compliance with the capital adequacy rules.

— The funder would owe a fiduciary duty to class members, including to members of an opt-out class (at least some of whom will inevitably not know they are in a class action). This would introduce an interesting dynamic whereby the funder would be required to promote the interests of the class including to maximise distribution of any settlement or damages award.

— The proposal includes rules on transparency and clarity. Litigation funding agreements would need to be written in an official language of the Member State in which the claimant(s) or class members are resident. Thus, multiple language documents may be needed where the class extends across borders. The agreement must also be *"presented in clear and easily understood terms"*. It must explain the share of any fees that will be paid to the litigation funder and third parties (e.g., the claimant law firm) and also model *"a range of realistic outcomes."* Furthermore, it must clearly explain the risks to the class members including of escalating costs and the risk of being ordered to pay the defendant's costs. Finally, funders must avoid conflicts of interests and disclose arrangements that potentially could give rise to a conflict of interests.

— Litigation funding agreements that breach certain rules would be invalid and have no effect. This would include agreements with non-authorised funders. Any clause in a funding agreement that permits the funder to influence the decisions of the group would be invalid. There are also restrictions on financial payments to the funder. Any provision that guarantees that the funder will receive a minimum return before a group member will have no impact. This is significant as funding agreements often have "waterfall" clauses, whereby the funder receives its investment prior to payments to group members or other parties. Relatedly, the group members must receive a minimum of 60% gross of any settlement sum or damages aware (i.e., the sum before deduction of the funder's return, claimant law firm costs, etc.). Any provision that limits the funder's liability to an adverse costs award would be ineffective.

— The litigation funder would not be able to terminate litigation funding at will. It would require either the consent of the claimants or approval of the court, which would consider whether the *"interests of the [group] would be adequately protected."* This proposal will likely concern funders, who prefer to have the ability to withdraw from a funding agreement if the merits of the claim substantially deteriorate and/or if the investment deteriorates for some other reason.

Conclusion

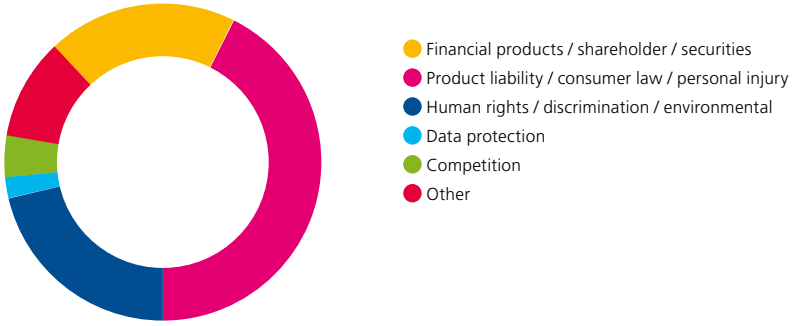
Litigation funding in Europe is growing rapidly and is closely connected to the growth of class actions. The key areas to observe in the coming few years will be: rate of growth of this industry; the categories of claim particularly attractive to funders; and the coming debates over proposed regulation.

[9] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, Article 10.
[10] Draft Report with Recommendations to the Commission on Responsible Private Funding of Litigation

Focus on Pharma and MedTech

Owing to the nature of the sectors they operate in, Pharma and Medtech companies are familiar with facing class actions, with a range of medical devices and drugs being the subject of mass litigation. However, the risk for these companies is evolving, and we summarise some of the key themes below.

Types of claims against consumer products / life sciences defendants 2017–2021



New EU regulations: proposed civil liability for AI

In April 2021 the EU published its proposed Artificial Intelligence (AI) Act ("the Act"), an ambitious attempt to regulate AI technologies across the EU in order to provide legal certainty, encourage investment and innovation in AI, and build public trust in the way AI systems are used. However, the Act is proving a cause of concern for the MedTech sector, because aside from increased regulatory compliance and risk management obligations the Act is also expected to increase litigation and class action risk.

The Act provides a broad definition of 'AI' and a four-tiered classification of risk: the fact that the definition of 'AI' is particularly broad (and is widely predicted to catch software that would not usually be considered 'AI') is softened for many sectors by the fact that the majority of applicable AI systems are expected to fall into the lowest risk category, in which AI systems are permitted with no restrictions; however, all AI medical devices that require to undergo a conformity assessment procedure by a Notified Body are to be classified as 'high-risk' AI systems, and as such will be subject to additional compliance and risk management processes. There is some concern that in the MedTech sector, these new processes may duplicate or conflict with existing obligations such as those under Medical Device Regulations ("MDR") and the In Vitro Device Regulations ("IVDR"). As with any increase in regulatory compliance and risk management obligations, the Act would also result in a consequent increase in the risk of class action litigation where an AI medical device was alleged to have caused injury or loss as a result of falling short of regulatory obligations.

Finally, it is worth noting that whilst the Act is an EU proposal, its impact is expected to be of significance to a much wider audience: similar to the GDPR, as well as applying to providers and/or users of an AI system in the EU, the Act will also apply to providers of an AI system in third countries who place services with AI systems in the EU's single market, and to providers whose AI systems produce outputs used in the EU; additionally, it is anticipated that other extra-EU AI frameworks may in due course try to align themselves with the Act in order to standardise regimes. For MedTech organisations around the world, this is a significant piece of regulation which poses a new source of class action risk, and should be appropriately monitored.

A new EU product liability directive?

The publication of a new draft EU product liability directive is expected later in 2022. The new directive will modernize and replace the current EU product liability directive (Directive 85/374/EEC), and a number of the proposed changes could significantly increase class action risk for product liability claims. For context, the existing directive has a no-fault liability regime whereby producers are liable to consumers who suffer injury (including psychological injury, and death) or damage to personal property caused by a defect in a product. The proposed changes, which may be included in the new directive and which would increase mass litigation risk include as follows:

— expanding key definitions: for example, extending "product" to include software, and possibly even data and digital assets; and expanding "damage" beyond injuries to a person or physical property, to include damage to intangible property, such as loss of and damage to data; and

— shifting the burden of proof from consumers to producers in certain instances: some commentators have argued that the complexities of products involving AI and other emerging technologies causes an asymmetry in the ability to prove defect and causation, and that in some situations it may be appropriate for the burden of proof to be on the producer rather than the consumer, or for the producer to be under an obligation to provide specific necessary information to assist the consumer's claim.

Such changes would expand the scope of the current regime and significantly change the risk profile for producers. Many in the MedTech sector consider that the current directive remains fit for purpose including for emerging technologies (such as AI-powered and connected medical devices) when account is also taken of the EU's recently revised MedTech sectoral legislation. It is possible, but presently unclear, whether the EU will carve out specific sectors (such as MedTech) from all or parts of the new directive.

New cause of action under the UK's Medicines and Medical Devices Act 2021

The Medicines and Medical Devices Act 2021 ("MMDA") was passed into UK law in 2021. It creates a new cause of action where a person claims to have 'been affected by' a manufacturer's or other obligation holder's failure to comply with a broad range of obligations. However, the new cause of action may pose a potentially significant litigation risk owing to the breadth of obligations which might be founded upon in litigation. In particular, the MMDA provides that an obligation imposed by 'a medical devices provision' is to be treated as a duty owed to any person who may be 'affected' by a breach of that obligation, and a breach of such an obligation gives rise to a right of action for breach of statutory duty (section 38). A 'medical devices provision' is defined as a provision made by the Secretary of State for Health in relation to (1) the manufacture, marketing and supply of medical devices, (2) fees, information and offences relative to medical devices, or (3) the disapplication of medical device provisions in the event of certain emergencies (sections 16-18). It remains to be seen whether the new cause of action results in an increased number and variety of civil claims alleging that a person has 'been affected by' a manufacturer's or other obligation holder's failure to comply with applicable obligations. We will be watching this space carefully.

Readiness for cybersecurity and data breach class actions?

A recent global survey carried out by CMS[1] on a cross-sector group of 500 organisations, suggests the Life Science sector (including digital health, healthcare services, pharma/biotech, and social care services) is not sufficiently prepared for data breach class actions. However, the Technology Transformation: Managing Risks in a Changing Landscape report found that in terms of class action risk more generally, the Life Sciences sector compared favourably to other sectors with over half of Life Science organisations surveyed having adopted a class action risk management plan. This is likely attributable to the Life Science industry being a frequent target of product liability class actions. However, other findings in the report suggest that these plans remain orientated towards product liability class action risk and do not sufficiently cater for newer and developing risks such as data breach class actions and competition class actions. It might be assumed that most companies planning to manage class action risk would also have taken steps to put in place a cyber incident response plan ("CIRP") to efficiently manage a cyber incident and mitigate associated risks (including litigation and class action risk). However, the survey found that 45% of Life Science companies had adopted a cyber incident response plan (compared to a cross-sector average of 54%), and only 55% of Life Science organisations had conducted a cyber breach simulation exercise (against a cross-sector average of 70%).

[1] The results of this study can be found at Technology Transformation: Managing Risks in a Changing Landscape (cms.law)

Focus on technology: the role of legal tech in facilitating class actions

Class actions involve complex logistics, but many processes are capable of commoditisation and automation. LegalTech is assisting claimant law firms in maximising efficiencies, allowing them to bring larger claims and to bring claims more quickly than previously. Steve Shinn, CEO of FinLegal, explains more.

Introduction of new class action mechanisms and the growth in the litigation funding market undoubtably play a role in the growth of class actions. However, the emergence of new technology that allows claims to be managed at a fraction of their previous cost is, in my opinion, the most important reason why class action lawsuits are becoming established and normal across the world.

Recent innovations in super-fast networks, digital ledgers, and automation are coming together to revolutionise how business is conducted and the management of huge amounts of data. It's absolutely logical that LegalTech is transforming mass litigation too.

Twenty years ago, it would have been prohibitively expensive for a law firm to distribute an award to 200,000 Volkswagen owners. Most lawyers would not consider taking on the Dieselgate case, and those that did would struggle to get backing from a funder. LegalTech has changed that.

Barriers to engagement

One of the challenges of group actions is engaging – and maintaining engagement – with claimants. This is true for both book-building an opt-in claim and at the distribution stage of an opt-out claim.

Newspaper, radio and TV adverts and social media promotions are expensive. When potential claimants do engage, the sheer number of individuals concerned brings logistical challenges.

Well-designed digital forms allow claimants to sign up in an instant. FinLegal's tool allows a claim to be signed up in two minutes, and a payment collection form can be completed in just over a minute. Our tech tools help in engaging and communicating with the group cost effectively, keeping them informed and interested. The rapid sign-on process is key to maximising claim participation and helps to build the class size.

Cost of administration

Technology has transformed the economics of class actions. We no longer need call centres full of claims managers. Claimants now self-serve via the internet. Using management-by-exception a single person can effectively manage a book for 50,000 claimants or more. This would have been unimaginable even five years ago in the absence of the technology that is now available.

Finally, modern litigation is becoming increasingly data centric. Class actions aren't an exception. LegalTech makes data analysis much more effective and affordable.

By significantly reducing costs, tech is making thousands of claims viable for lawyers and funders. Tech alone is turning a specialist area of litigation into a much larger market that aids regulation and provides access to justice and redress for millions of people.

Sign-up time is critical

Engagement is key. There is no point investing in finding claimants if they lose interest when asked to fill out a complicated form. A standard FinLegal payment collection form can be completed in under a minute on a mobile phone.

Opt-in or opt-out

From the perspective of the LegalTech industry, it makes no difference if a case is opt-in, opt-out or even a company's voluntary compensation scheme. In all those situations, at some point an individual needs to actively engage in the process. Without specialist technology, that engagement can be very expensive and unless the process is as streamlined as possible, the engagement rates tend to be low.

Collection rates: a key stat

In the US collection rates are historically low with figures reported between 1%–10%. That means that, even in the world's most mature class action market, lawyers find it difficult to reach claimants using the traditional methods.

Collection rates are a critical statistic. They are a key indicator of legitimacy because, if you can't get money to claimants, what was the process for? Low collections rates will lead to jurisdictions withdrawing their support for class actions. Claimant lawyers need to maximise the collection rates.

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 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 2016–2021 inclusive. The overall number of class actions filed between 2016 and 2020 has changed compared to that set out in our 2020 report. This is because our 2021 report includes claims filed in Norway and Portugal but excludes claims filed in Russia. 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; Norway, Poland; Portugal; Romania; Scotland; Slovenia; and Spain. Certain major events, such as the Dieselgate claims, 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. Any charts in this report that relate specifically to defendant sector or type of claim are based on claims filed where this information was publicly available. Where the type of claim or defendant sector is "unknown", it has been filtered out of the related chart, leading to underreporting.

We would like to acknowledge the assistance of Solomonic Litigation Intelligence in providing certain of the data in relation to claims filed in the UK.

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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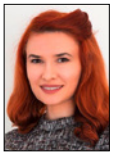

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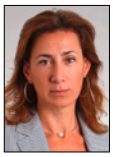

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