

# European Class Action Report 2023

# Welcome

2023 is a significant year, as the Representative Actions Directive (“**RAD**”) requires Member States of the European Union to have minimum procedural rules to facilitate class actions set out in the RAD in force in their domestic law by 25 June. Not all Member States have achieved this deadline, and there has been inconsistent implementation by those that have. Leaving aside these variations between Member States, there is one common theme: the RAD will encourage more class actions in the coming years. See our feature on page 18 for an overview of how the RAD has been implemented. Thanks to our colleagues Anna Cudna-Wagner and Aleksander Wozniak for their work on this topic.

The number of class actions filed in Europe continues to increase, but not all class actions are equal. This year, we have collected data on the claimed quantum in issued claims, focussing on the UK and the Netherlands initially. In the UK alone, we identified issued class actions seeking collectively in excess of €120bn. For the first time we are able to show not only the number of class actions, but also the potential financial exposure. The largest single claim concerns the collapse of the Mariana dam where the claimants are seeking a total of c. €41bn before the English court. That claim is being brought using an opt-in mechanism. Whilst many of the largest claims are brought using opt-out mechanisms, the Mariana dam claim illustrates that opt-in mechanisms can also develop into extremely high value matters. Other features in this year’s report are an updated version of our European risk map at page 14. Case Pilots have kindly included a feature at pages 48 to 51 on how technology is facilitating class actions. Pages 24 and 25 identify the European countries with opt-out class action mechanisms and the key features of those mechanisms.

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: proceedings brought on a collective basis using any relevant procedural law (opt-in, opt-out, assigning claims, consolidated claims, etc) where there are five or more economically independent claimants or class members who are seeking damages.

Thank you for reading our report. We hope you find it useful. Also thank you to the many CMS personnel, including lawyers, business development personnel, design specialists and data analysts who contributed to this project. Particular thanks to Niluka Perera, Francesca Mullen and to our former colleague Jessica Eaton for their dedication. Thank you also to Solomonic for providing data for claims in England and Wales.



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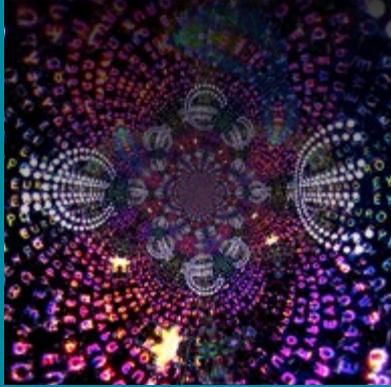


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# Contents



# Quantum





This year, for the first time, we are able to set out information on quantum for class actions issued. Our analysis this year focusses on the UK and the Netherlands, but we will cover other countries in future years.

In assessing quantum, we have taken the figures asserted by the claimant law firm or the claimants. This is used as a proxy for true quantum – there simply are not enough data points for true quantum as few matters proceed to judgment. We have sourced figures from a variety of public sources, including court filings, claimant law firm websites and news reports.

For opt-in matters it is not always clear how many claimants have elected to join the claim, so we have again estimated or inferred figures where the precise figure is unavailable. In some instances we have inferred claimed quantum by multiplying the number of claimants by the asserted per-claimant value. Where further claimants have joined a claim over more than one year we have hypothecated overall quantum to the first year the class action was filed.

For a significant proportion of claims we were not able to identify sufficiently credible data, so those claims are not included in our figures. However, those tended to be the lower value and lower profile claims. Thus, while the true claimed quantum will be higher than our figures, we have captured all claims necessary to give an accurate sense of risk.

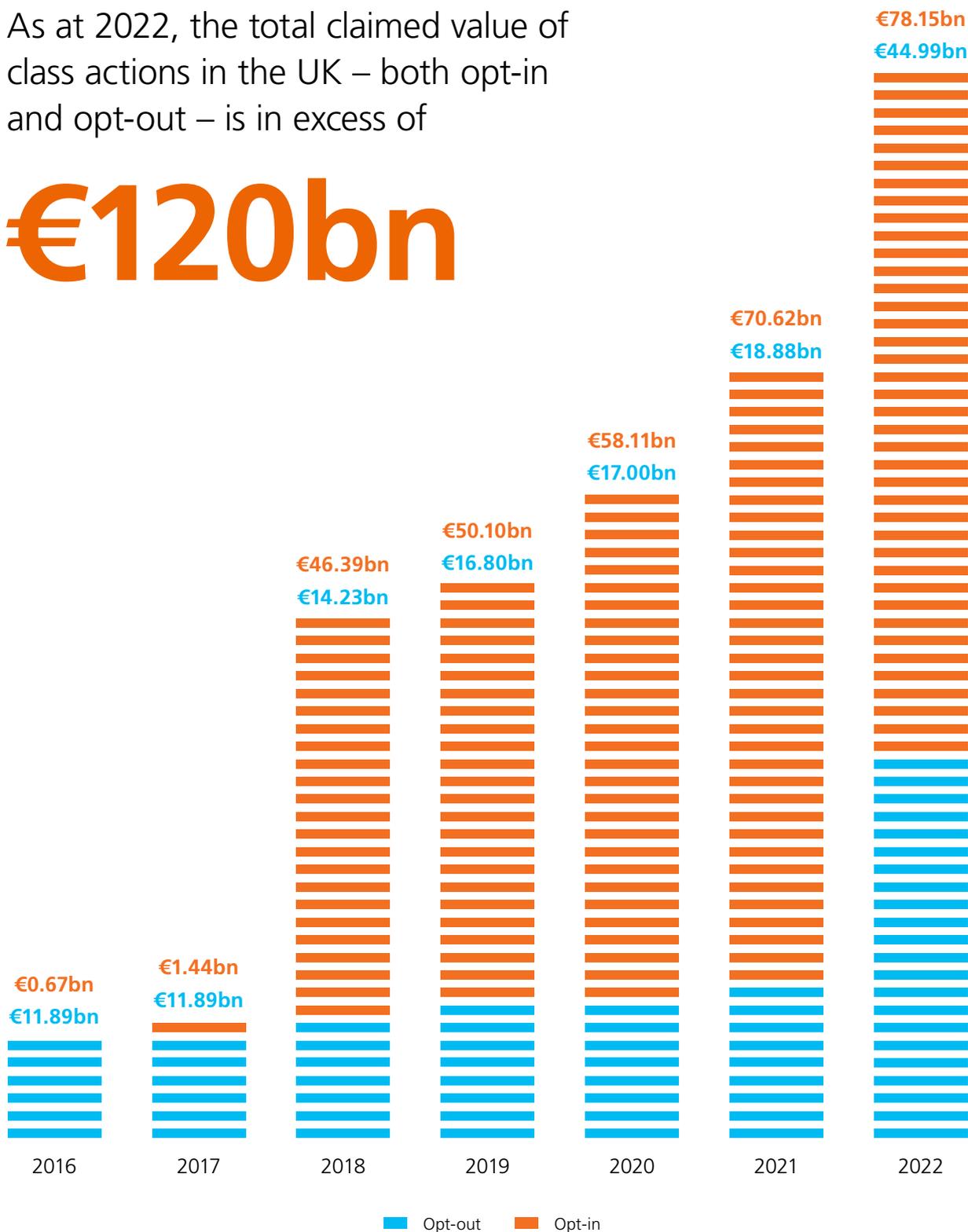
Several very high value data protection representative action claims were withdrawn following a UK Supreme Court's judgment in *Lloyd v Google*. We have not included these claims in our quantum analysis as they could otherwise sway the data.

We will monitor and report on quantum in future reports, as it is an important metric in revealing trends.

## Cumulative UK Quantum 2016-2022

As at 2022, the total claimed value of class actions in the UK – both opt-in and opt-out – is in excess of

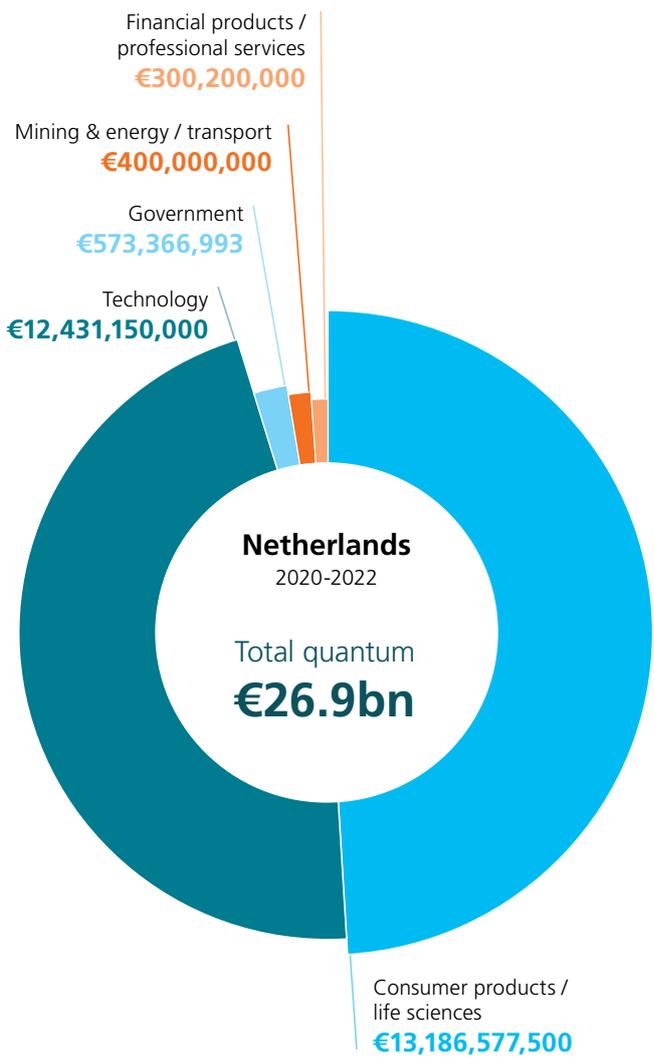
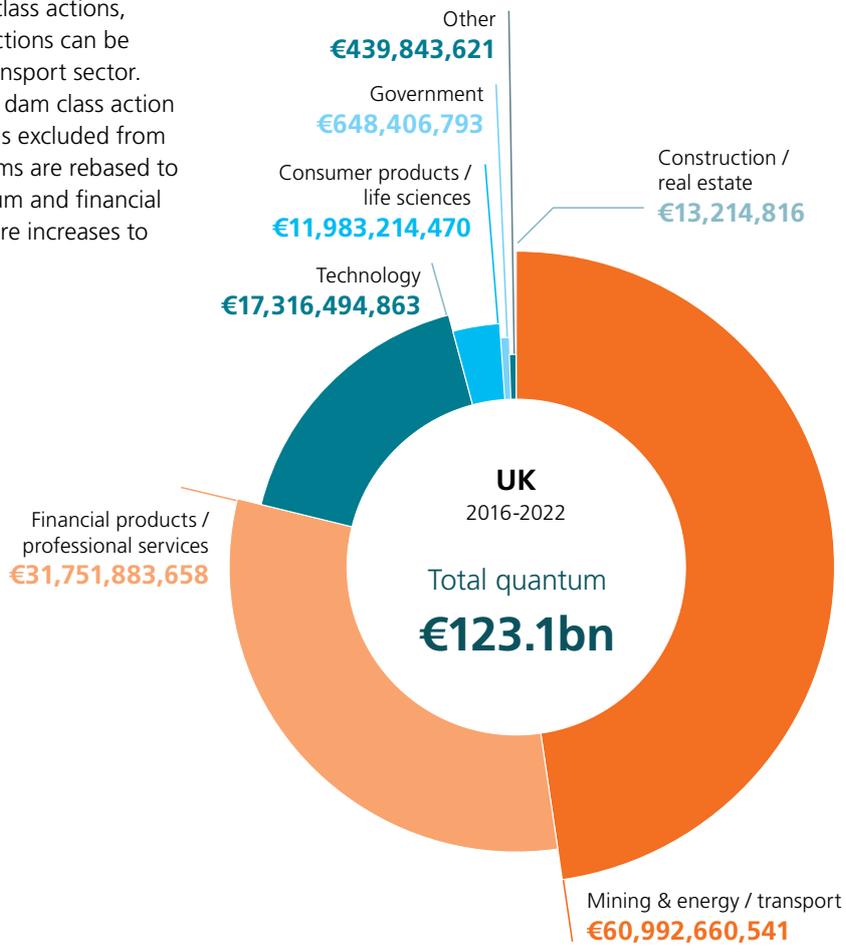
# €120bn



A very significant proportion of that exposure, c. €41bn, concerns the Mariana dam class action, which was issued in 2018. The impact of that case is illustrated in the very steep increase in opt-in exposure in 2018. When that case is stripped out, the trend shows that the overall value of opt-in and opt-out claims has steadily increased every year between 2016 and 2021, followed by a very steep rise in opt-out cases in 2022.

## Quantum by Defendant Industry Sector: UK vs Netherlands

Despite the increase in technology class actions, half of the value of the UK's class actions can be found in the mining, energy and transport sector. This is largely owing to the Mariana dam class action mentioned above. When this claim is excluded from the dataset, mining and energy claims are rebased to representing 23% of the UK quantum and financial products and technology claims share increases to 39% and 21% respectively.



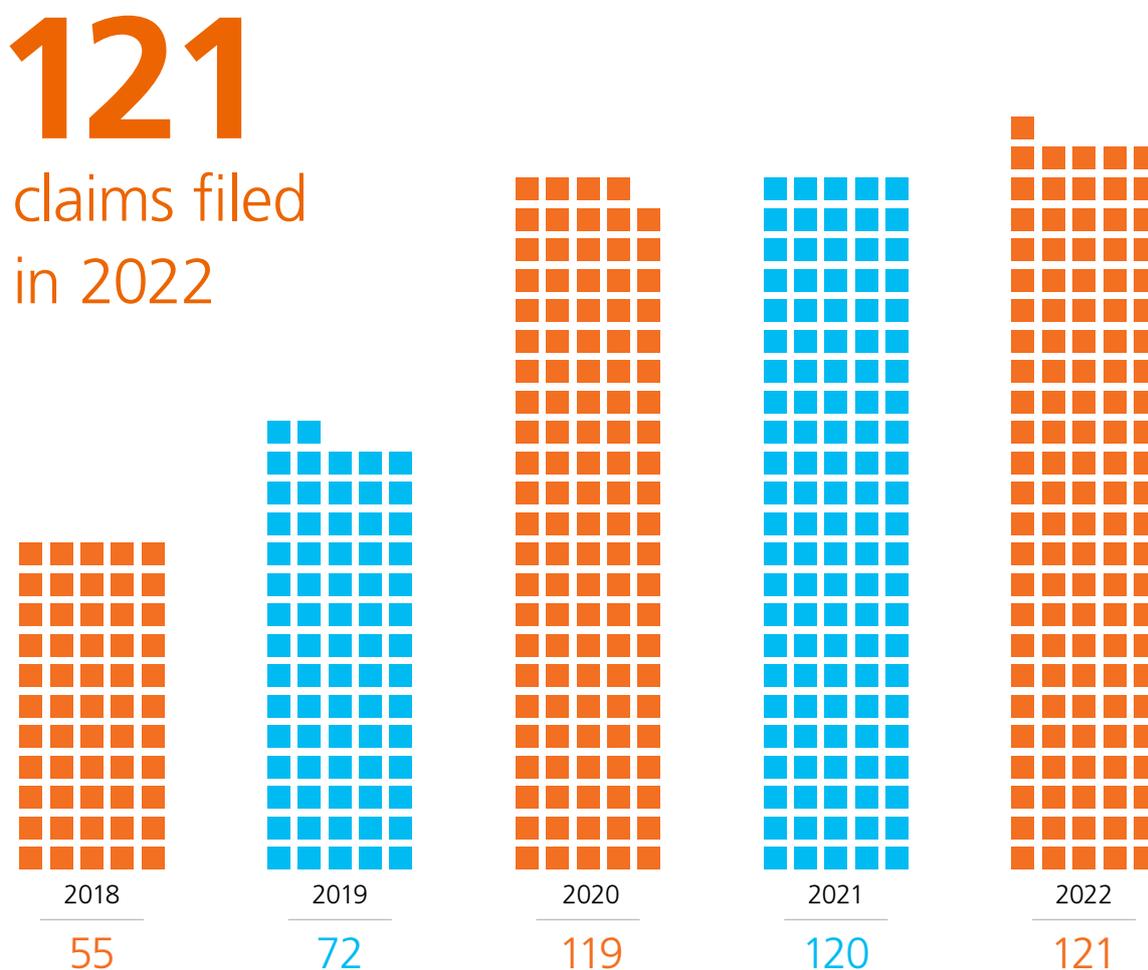
Comparatively and despite only having three years' worth of quantum data for the Netherlands, technology and consumer claims together represent 95% of the total quantum and in contrast to the UK, financial product claims amount to just 1% of Dutch class actions claims value.

# What's trending in class actions?

The following pages show the key trends for 2022 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.

## Overall number of class actions

Europe and the UK continue to see record numbers of class actions being filed. Every year we have analysed has shown a consecutive increase.



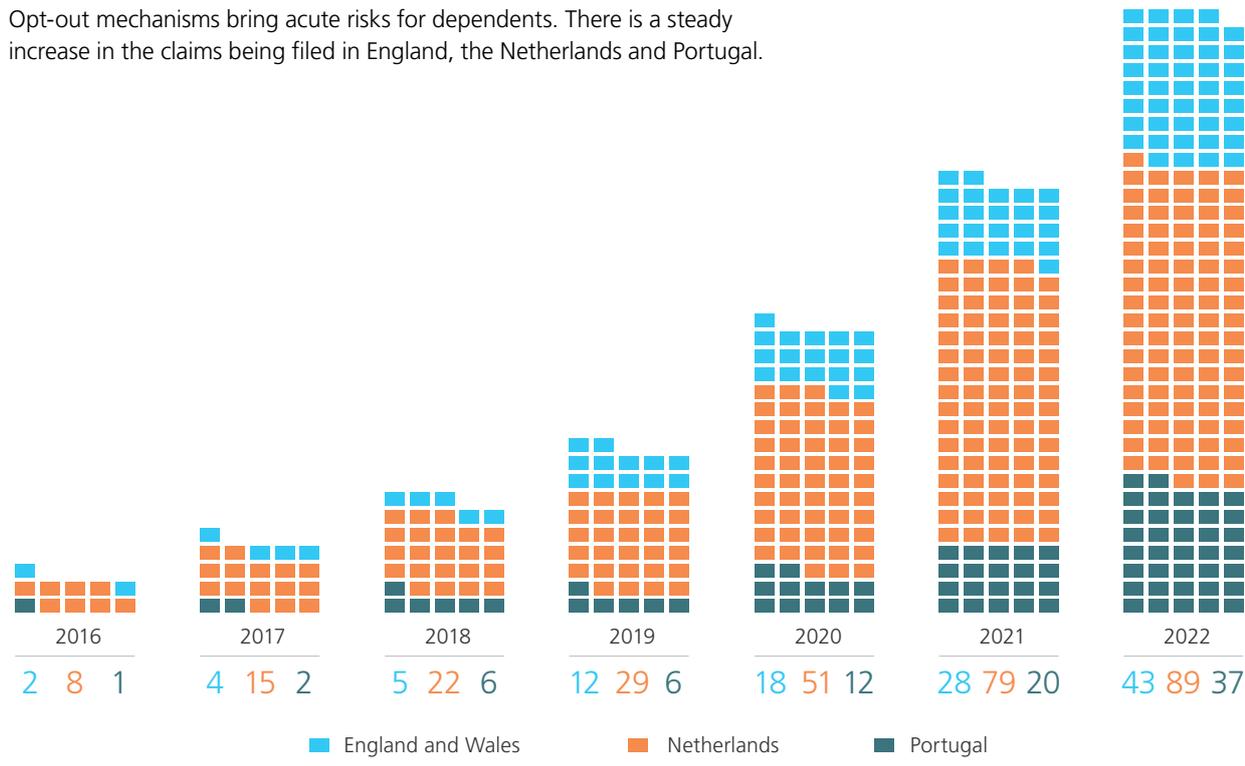
With the Representative Actions Directive now being implemented across the EU, we anticipate yet further increases in the years to come.

As explained in our methodology section at page 57, the data has been compressed such that all claims within a jurisdiction that relate to the same underlying facts have been counted once. The number of claims reported in our consecutive reports can change both based on which jurisdictions are included in the report and as our data set improves.

## Overview of opt-out class actions being filed in key jurisdictions:

### Cumulative total opt-out claims

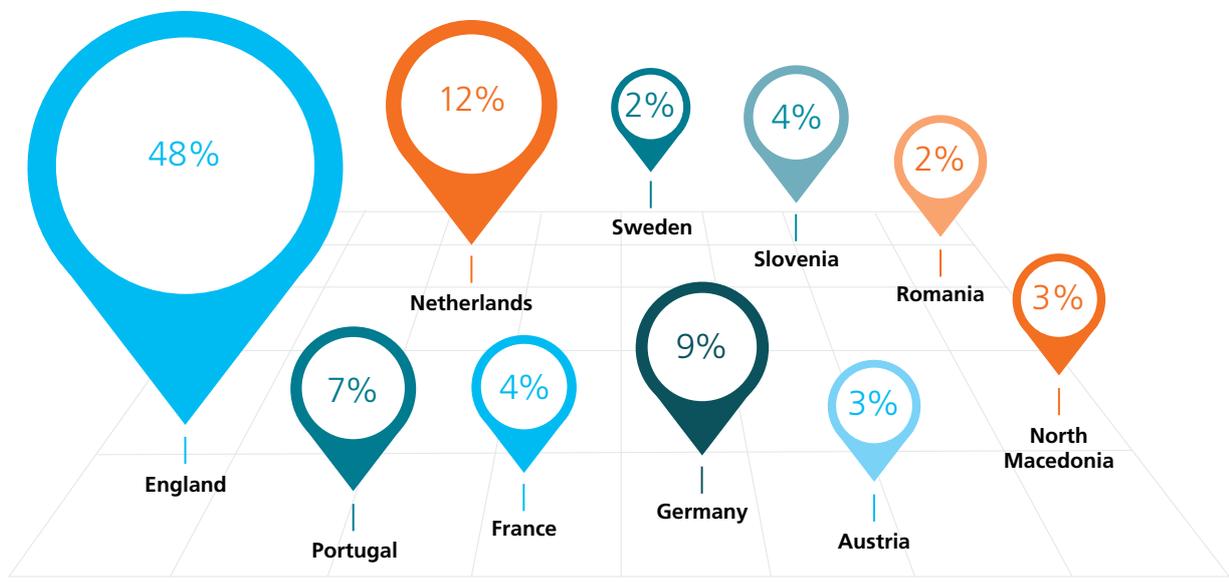
Opt-out mechanisms bring acute risks for dependents. There is a steady increase in the claims being filed in England, the Netherlands and Portugal.



## 5-year snapshot of claims across jurisdictions

Consistent with data from our prior reports, the UK, the Netherlands, Germany and Portugal experience the most class actions comprising 76% of all European class actions between them. However, we are also seeing significant growth in other less traditional jurisdictions which we comment on further below.

The diagram below shows the proportion of claims filed in the past five years. Spain, Italy, Croatia, Scotland, Poland, Norway and Montenegro are not pictured, and account between them for c. 6% of the overall claims numbers.



## Countries with most significant growth

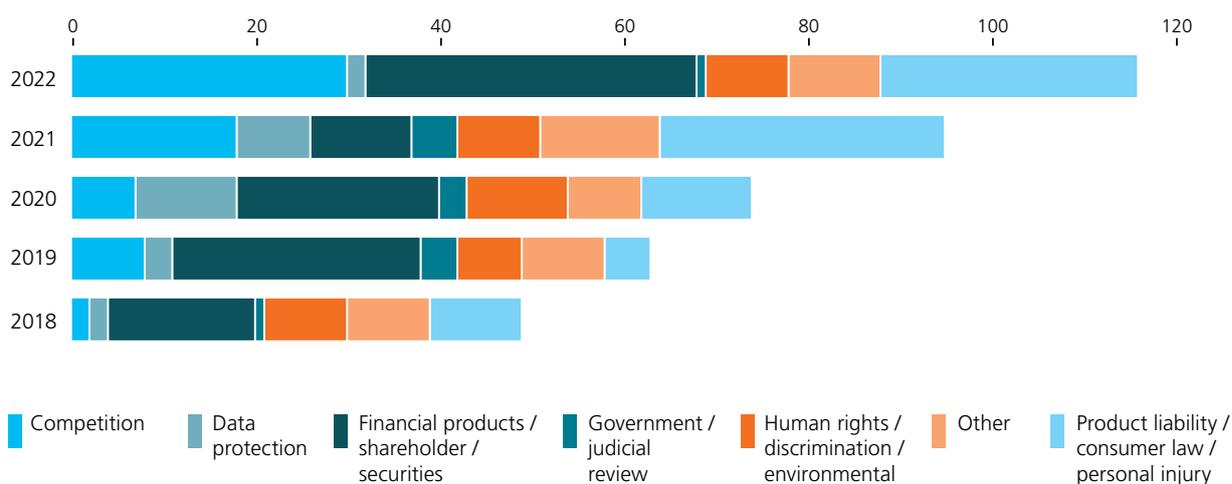
The countries with the steepest growth in the number of class actions are Germany, Slovenia and Portugal.

Growth of claims in Slovenia is driven by a large number of claims against financial institutions related to 'floor clauses' in consumer credit contracts and 'floor practice' in relation to interest calculations.



## Overall trend in types of claims

This snapshot of growth by type of claim filed shows that 3 key types of claims – competition, product liability / consumer and financial products / securities – close to their maximum numbers of claims.

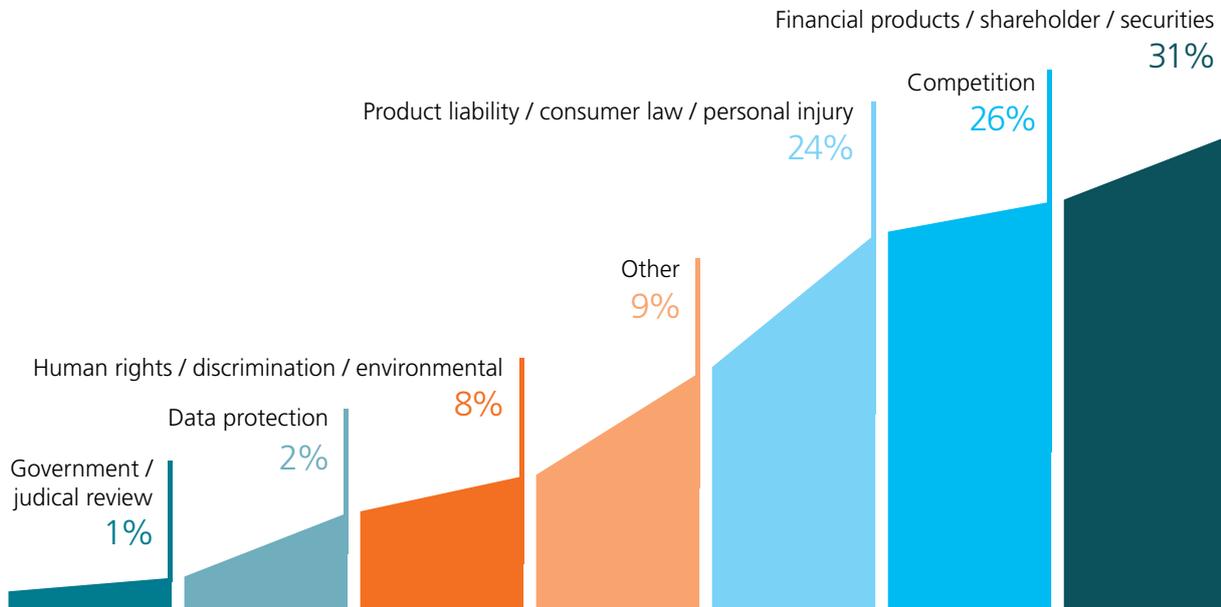


This chart excludes claims where the type of claim could not be readily ascertained.

## Specific data for types of claims issued in 2022

It is unsurprising to see the high levels of financial products / securities claims and competition claims. Perhaps less expected is the low proportion of data protection claims. Data protection, including data breaches, is understandably an area of focus for in-house counsel, but the number of class actions is few.

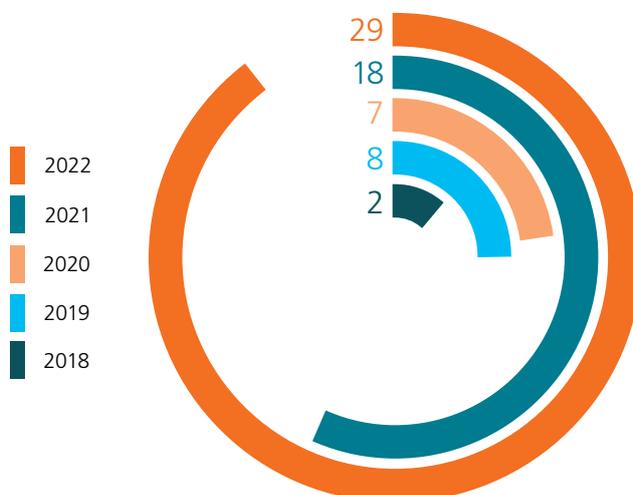
Human rights / discrimination / environmental also sees a relatively low volume of claims. ESG risk is rightly an area of focus, but we are not - yet - seeing that translate into significant numbers of class actions.



## Specific types of claim analysis:

### Competition claims trend

Competition claims are recognised as a high risk area, and this chart illustrates why. 2021 saw a new high, and that figure has again been surpassed in 2022. The UK is the riskiest jurisdiction for competition class actions; as we explore in more detail at pages 30-33.



# Risk map and country updates



# Risk map

We allocate high, medium and low risk, according to domestic procedural mechanisms including the availability of opt-out mechanisms and prevalence of litigation funding.

Based on the increasing numbers of claims being filed there, we have upgraded Slovenia from medium risk (per our 2022 report) to high risk.

Belgium, Bulgaria, Hungary, the Netherlands, Norway, Portugal, Slovenia, Spain and the UK all have opt-out mechanisms. Pages 24 and 25 summarise the key features of the mechanism.

## Risk rating

- High
- Medium
- Low



# Country updates



France

**When class actions were introduced into French law, they were initially limited to consumer and competition disputes. Their availability expanded to healthcare, discrimination, data protection and environment disputes in 2016, and to housing rental matters in 2018.**

Despite these extensions, they have had limited success until now, with relatively few decisions on liability rendered.

However, on 8 March 2023 in the context of the transposition of the Representative Actions Directive, the French National Assembly adopted a bill that aims at increasing the recourse to class actions.

The main changes are: (i) the adoption of a unique regime for all class actions (instead of the sector specific rules that were in place); (ii) the extension of the persons/entities having standing to bring the action; and (iii) the evolution of the scope of class actions, making it possible to introduce class actions in order to obtain either the cessation of a breach or the reparation of a damage. The text will now be examined by the French Senate.



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. In the largest proceedings, consumer groups number over 5,000 people.**

We expect that there will be even more class actions against banks and other financial institutions in the future. This is for three reasons. First, Polish class action law was recently amended to give the Financial Commissioner standing to bring claims. It has since been very active in initiating all categories of proceedings against entrepreneurs in the financial sector. Second, in its jurisprudence, the Court of Justice of the EU presents an extremely pro-consumer approach. This, in turn, encourages consumer organisations to initiate class actions. Third, Poland, like other European countries, is obliged to implement the Representative Actions Directive.



Spain

**We are anticipating the approval of a completely new procedural regulation for the class actions in Spain, prompted by the Representative Actions Directive.**

The expected regulation will create a special procedure that will consolidate all rules concerning collective redress. This legal reform will provide a response to the increasing number of cases in this field that normally refer to extra-contractual civil liability claims, consumer rights in contractual claims, damages claims caused by non-compliance or defective fulfilment of mass contracts and practices contrary to free competition (i.e. price fixing / cartel practices). We expect collective redress proceedings to increase considerably in the coming years in Spain.



Slovenia

**Following the first major class action being filed against Apple Inc in October 2021, the number of class actions in Slovenia has increased significantly.**

In 2022, 15 class actions were filed against different Slovenian banks due to the so-called floor clauses and floor practices. Namely, when EURIBOR had a negative value, it was a common practice that the banks calculated interest rates as if the value of EURIBOR was zero – which, it is alleged, breached the underlying contracts and/or was anti-consumer.

The total value of all the class actions against banks in connection with this practice is approximately EUR 200 million.

Recent developments show that class actions are becoming a widely used mechanism, especially for breaches of consumer protection legislation. There are several different consumer protection entities that launched the claims which means that the market is paying attention to breaches and has adopted an active role in protecting consumers. Therefore, we expect that the number of class actions filed will increase even further in the future.



## Sweden

**When the Swedish Group Proceedings Act entered into force in 2003, it was predicted that there would be approximately 15 to 20 class actions each year. In practice, there have been only a few per year. This may be due to the act being based on an opt-in model, combined with the difficulty of financing a class action.**

Recently, however, a class action was brought against a housing association for breach of contract due to the association raising the fees for newly built condominiums by about 30%. Whether more similar class actions will be brought in the future, not least in light of the high inflation, high interest rates and potential fee increases, remains to be seen.

There is also an ongoing class action against the Swedish state regarding Sweden's responsibility in the climate crisis that has received some attention.



# RAD implementation

# Implementation of the Representative Actions Directive

Member States of the European Union were required to have implemented the provisions of the RAD into force in their domestic law from 25 June 2023.

The RAD requires that each Member State have a class action mechanism that meets the minimum standards set out in the RAD. It is open to Member States to go further than the minimum standard and thereby implement domestic class action mechanisms which pose higher risks to business and public sector defendants. See our short summary of the key features of the RAD here: [CMS | Overview of the Representative Actions Directive](#).

As at 25 June 2023, the following seven Member States implemented the RAD: Croatia, Denmark, Hungary, Italy, Lithuania, the Netherlands and Slovakia<sup>1</sup>. The other 20 EU Member States had not done as of 25 June 2023 however, many were at an advanced stage of implementation, having published draft laws which are working through their legislative processes.

## RAD Analysis Table

This table highlights key procedural features that significantly impact risk, and how those features are addressed in the implemented or draft law for each Member State, as of 25 June 2023. This is based on analysis of data of 13 EU Member States<sup>3</sup>. Please see page 22 for a fuller explanation of these features.

1 Adverse cost rules 		
<p><b>Loser-pays principle applies</b> (or is implied*)</p> <p>Bulgaria Croatia* Germany Hungary Italy Netherlands (courts cap costs orders) Poland Romania Slovenia Spain Sweden*</p>	<p><b>No obvious loser-pays principle)</b></p> <p>Portugal</p>	<p><b>Potential costs incurred by defendant</b></p> <p>France: Judge may order defendant to pay a deposit on some costs (e.g. lawyers fees) incurred by plaintiff in the action.</p> <p>Italy: (i) court fees paid by the Qualified Entity but may be refunded by defendant; (ii) further sums could be granted to the representative of the joining members and to claimants' lawyers who succeed in the proceeding.</p>

2 Litigation funding 	
<p><b>Third-party funding is permitted</b> (with new provisions to domestic law on third party funding*)</p> <p>Bulgaria* Croatia* France* Germany Hungary* Italy Netherlands Portugal* Romania Slovenia Spain Sweden* Poland</p>	<p><b>Sources of funding must be disclosed</b> (and if court deems there is a conflict of interest it can refuse the request for the representative action to proceed**)</p> <p>Croatia (if the court requests) Germany (upon request) Hungary<sup>2**</sup> Italy Poland (if the court requests) Portugal (the funding agreement shall be provided to the court) Romania** Slovenia Spain**</p>

### 3 Destination of unclaimed sums



#### Legislation is silent

Bulgaria  
France  
Hungary  
Italy  
Netherlands  
Romania  
Poland

#### Distributed to other group members

Sweden (If payment can be made at the same time as the payment of the amount that the group member is entitled to according to the judgment. If not, and amount is >100 SEK<sup>4</sup> per group member. Otherwise, it is provided to QE).

#### Provided to QE/ claimant to pay costs incurred by the action

Sweden (in certain circumstances).  
Portugal (and any further remaining sums go to Fund for Promotion of Consumer Rights (60%) and Estate Management of Judicial Services (40%)).

#### Repaid to defendant

Germany  
Slovenia  
Spain

### 4 Standing: criteria for Qualified Entities ("QEs") in domestic vs cross-border action



#### Same criteria must be met to be designated as a QE for both domestic representative actions and cross-border representative actions

Bulgaria  
Hungary  
Romania  
Spain  
Sweden

#### Different criteria must be met to be designated as a QE for domestic representative actions

Croatia (but more complex)  
France  
Portugal  
Slovenia (additional rules apply for filing injunctive consumer class actions)  
Poland  
Italy (private entities meeting specific requirements to be designated as QEs for cross border actions)

#### Ad hoc QEs can be designated (expressly\* or law does not exclude ad-hoc QEs\*\*)

Croatia\*  
Hungary\*  
Netherlands\*  
Romania\*  
Slovenia\*\*  
Sweden\*\*

### 5 Interaction with public enforcement



#### Specific rules provided for interaction with public enforcement

Bulgaria  
Hungary  
Italy  
Netherlands  
Poland  
Spain

#### Decision of public enforcers (consumer protection authority) will be binding in representative action proceedings

Poland  
Netherlands

#### Decision of public enforcers will be evidence in subsequent representative action proceedings

Bulgaria  
Hungary  
Italy  
Netherlands  
Spain

## Explanation of the RAD Analysis Table

Detail on the key risk criteria set out above is as follows:

1. **Adverse costs rules** (or the “loser-pays principle”) means that the losing party bears the costs of the proceedings. This helps to deter unmeritorious claims. Some Member States have remained silent on costs following the outcome of a claim and have focused on the fact that Qualified Entities (“QEs”) bringing claims shall bear the costs of the proceedings. Some Member States link the amount in dispute to the limit on court / lawyers’ fees or adverse costs exposure. There are also exemptions for certain costs in class actions in some jurisdictions.
2. **Litigation funding.** Class actions can be expensive and third-party litigation funding (“TPLF”) can find these investments attractive owing to the potential returns. None of the 13 Member States have chosen to prohibit TPLF in implementing the RAD, but criteria to prevent conflicts of interest between funders and consumers are common. Some Member States require sources of funding or the funding agreements to be disclosed to the court and if the court deems there is a conflict, the action may be prevented from going ahead. This will be welcome news to potential defendants who may be concerned about the influence and lack of safeguards around TPLF.
3. **Unclaimed sums.** Typically, unclaimed sums will arise in opt-out claims. In opt-in claims, the class members have made themselves known which facilitates distribution at the end of a claim whereas in opt-out proceedings there will be many persons who may not be aware they are part of a class that has been awarded a portion of sums by way of damages or settlement compensation. The RAD gives Member States discretion on their procedural law to govern the destination of these sums and the divergence between countries can be seen. Only a small number of Member States have implemented laws that facilitate the return of unpaid sums to the defendant.
4. **Standing.** Generally, claims are brought by QEs on behalf of consumers, although in some Member States they can also be brought by public bodies. To be designated as a QE to bring a cross-border representative action, all countries must ensure compliance with the criteria set out in RAD Art 4. para 3a-f. Some Member States have replicated this criteria for QEs bringing domestic representative actions. In other Member States, the criteria for domestic QEs is less onerous but not dissimilar.

Some Member States have remained silent on it and for other Member States, e.g., in Italy the position is unclear currently. Standing is a complex topic and is an area where there will likely be a lot of procedural litigation and challenges by defendants where a particular Member State’s procedural rules are unclear.

### 5. Interaction with public enforcement.

Some jurisdictions have specific rules for how class actions interact with public enforcement. In Bulgaria, Hungary, Italy, the Netherlands, Poland and Spain representative action proceedings initiated by a QE before a state court may be conducted in parallel to pending administrative proceedings before a consumer protection authority which brings the risk of both exposure in damages and also an administrative penalty. The decision of a consumer protection authority in the Polish draft law is binding in subsequent representative claims. Equivalent decisions of public enforcers will likely be persuasive, if not binding, in subsequent damages claims in other jurisdictions. The Polish draft law requires a QE to inform the consumer protection authority before it files a claim and to obtain the opinion of the authority. The consumer protection authority may initiate its own claim and fine the target up to 10% of its annual turnover. It can also impose fines on managers and make findings which may impact their suitability status.

Finally, the RAD requires Member State domestic law to facilitate claims for breaches of the laws set out in the Annex to the RAD. The instruments listed in the Annex cover a wide range of harmonised areas, including data protection, financial services, travel and tourism, telecommunications and environment. Germany’s implementation of the RAD into its domestic law facilitates claims for all civil disputes, i.e., it is not limited to those matters appended to the RAD. Furthermore, the German procedure facilitates claims on behalf of small businesses as well as consumers, whereas implementation by the majority of Member States only facilitates the latter.



# Opt-out mechanisms in Europe: An overview

Opt-out class action mechanisms are powerful procedures which automatically aggregate potential class members into the class, and bind them to the outcome – at trial or at settlement – unless they elect to “opt-out” of the litigation.

The automatic aggregation facilitates very large and high value class actions. Furthermore, because claimant firms do not need to run a “book-build”, these claims can be brought relatively swiftly in comparison to a large opt-in claim.

The table below lists the European countries that have opt-out mechanisms. Prompted by the Representative Actions Directive, or because they had a pre-existing mechanism. There is considerable variation across these mechanisms, and this table summarises the key features.

COUNTRY	KEY FEATURES OF OPT-OUT MECHANISM
Belgium	Belgium has permitted opt-out class actions since 2014. Under the Belgian opt-out system, only a group of consumers or small and medium sized enterprises (“ <b>SMEs</b> ”) may initiate an action for collective redress. The group of claimants must choose whether they think the action should have an opt-in or opt-out system and after hearing argument, the Court will make the final decision on this. During the parliamentary debate, the legislators stated that an opt-out system is to be preferred where there are a large number of claimants who suffered minimal financial damage.
Bulgaria	Bulgaria had an opt-out system even prior to implementation of the RAD. Under the Bulgarian opt-out system, the court requires: (i) a communication plan with class members; (ii) that persons are given reasonable time to opt-out of the claim. The class must be identifiable and they must be able to demonstrate that they can finance the litigation.
Hungary	The Hungarian Code of Civil Procedure permits opt-out class actions where the public interest has been infringed. Circumstances where these claims are permitted are prescribed by statute and specify the entity with standing (e.g., the public prosecutor). The interests of the class members must be identical.  Hungarian domestic law implementing the RAD does not introduce new certification criteria.
Netherlands	The class representative must make a settlement effort before bringing a claim. If there is no settlement, the court will consider whether the claim is suitable to proceed. At this point, the court will consider whether: <ul style="list-style-type: none"> <li>— the class representative meets the legislative criteria – those include that there must be mechanisms for class members being involved in decision making and the class representative must have sufficient resources;</li> <li>— the collective action must be more efficient than individual actions – where damages are sought the sum must be sufficiently large, the factual and legal questions to be answered must be sufficiently common and the class members must be sufficiently similar; and</li> <li>— on summary examination, the claim cannot be without merit.</li> </ul> A claim must meet the “scope rule”, requiring that: (a) the majority of the class members are Netherlands residents; (b) the defendant has its seat in the Netherlands or is otherwise sufficiently closely connected to the Netherlands; or (c) the allegedly unlawful act must have occurred in the Netherlands.  If the claim meets the above tests and is not settled, it will then proceed to a full hearing on the merits and potentially award of damages.

COUNTRY	KEY FEATURES OF OPT-OUT MECHANISM
Norway	<p>Norway has permitted both opt-in and opt-out class action since 2008. However, a class action requires court approval. It can permit an opt-out class action if the following criteria are met:</p> <ul style="list-style-type: none"> <li>— the individual claims involve amounts or interests that are so small that it must be assumed that a considerable majority of them would not be brought as individual actions; and</li> <li>— the claims are not deemed to raise issues that need to be heard individually.</li> </ul> <p>Persons who do not wish to participate in the class action may withdraw.</p> <p>Class actions may be brought by any person who fulfils the conditions for class membership. In addition, class actions may be brought by organisations, associations, and public bodies charged with promoting a specific interest, provided that the action falls within its purpose and normal scope. However, it is a prerequisite that the (natural or legal) person or organisation could have brought or joined an ordinary action before the Norwegian courts.</p>
Portugal	<p>Individuals or suitable associations can seek to bring opt-out class actions for specified breaches of substantive law, including consumer protection law and competition law.</p> <p>There is no formal certification stage, but the court can order early dismissal of the action where the granting of the claim is manifestly unlikely.</p>
Slovenia	<p>The court will not approve class actions on an opt-out basis if: (i) any claim relates to payment for non-pecuniary damages; or (ii) at least 10% of the group members are seeking payments in excess of €2,000 each. Claims must be brought on behalf of an identifiable class of individuals, concerning the same, similar or related questions of fact or law. Common questions of fact or law must predominate over individual questions. The class must be sufficient size such that individual claims would be less efficient. The claim must not be manifestly unfounded and any success fee agreement with the lawyer must be reasonable.</p>
Spain	<p>The court can permit opt-out class actions where the claims are sufficiently homogeneous and the action is not clearly unfounded. The court may decide to only assess liability on an opt-out basis. Where damages claimed for individual class members exceeds €5,000 the court may decide to certify the claim on an opt-in basis.</p>
UK	<p>Collective Proceedings Orders (UK-wide) can be sought from the Competition Appeal Tribunal (the “<b>CAT</b>”) for alleged competition law breaches on an opt-out basis. The CAT will consider factors including whether: it is just and reasonable to authorise the proposed class representative; whether the claims raise common issues; and whether the claims are suitable to be brought as collective proceedings. If the CAT is minded to permit the claim it will consider whether it should be authorised as an opt-in or opt-out claim. The CAT and higher courts have applied a low threshold to the certification process and some defendants have not resisted certification.</p> <p>Representative proceedings (not available in Scotland) can be brought for any cause of action. The class representative and the class members must have the “same interest”. To date, the courts have not awarded damages on an opt-out basis, noting the challenges of awarding damages on a compensatory basis in circumstances where the class members do not participate in the claim.</p>

# Country spotlights: UK, Germany, Netherlands and Portugal

FOCUS ON:

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## UK

Change  
Consolidation  
Data

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## Germany

Implementation  
Opt-in  
Consumer

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## Netherlands

ESG  
Privacy  
Health

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## Portugal

Surge  
Opt-out  
Fundors

# Spotlight on: **the UK**



The UK remains the highest risk jurisdiction in Europe for class actions. This year we have seen significant developments in Competition Class Actions, Representative Actions and Group Litigation Orders.



## Competition class actions

Competition class actions have been very active throughout 2022 and 2023. The UK Supreme Court implemented a low threshold for certification in *Merricks v Mastercard*.<sup>5</sup> That approach has created significant problems for defendants, and as a consequence some have not resisted certification.

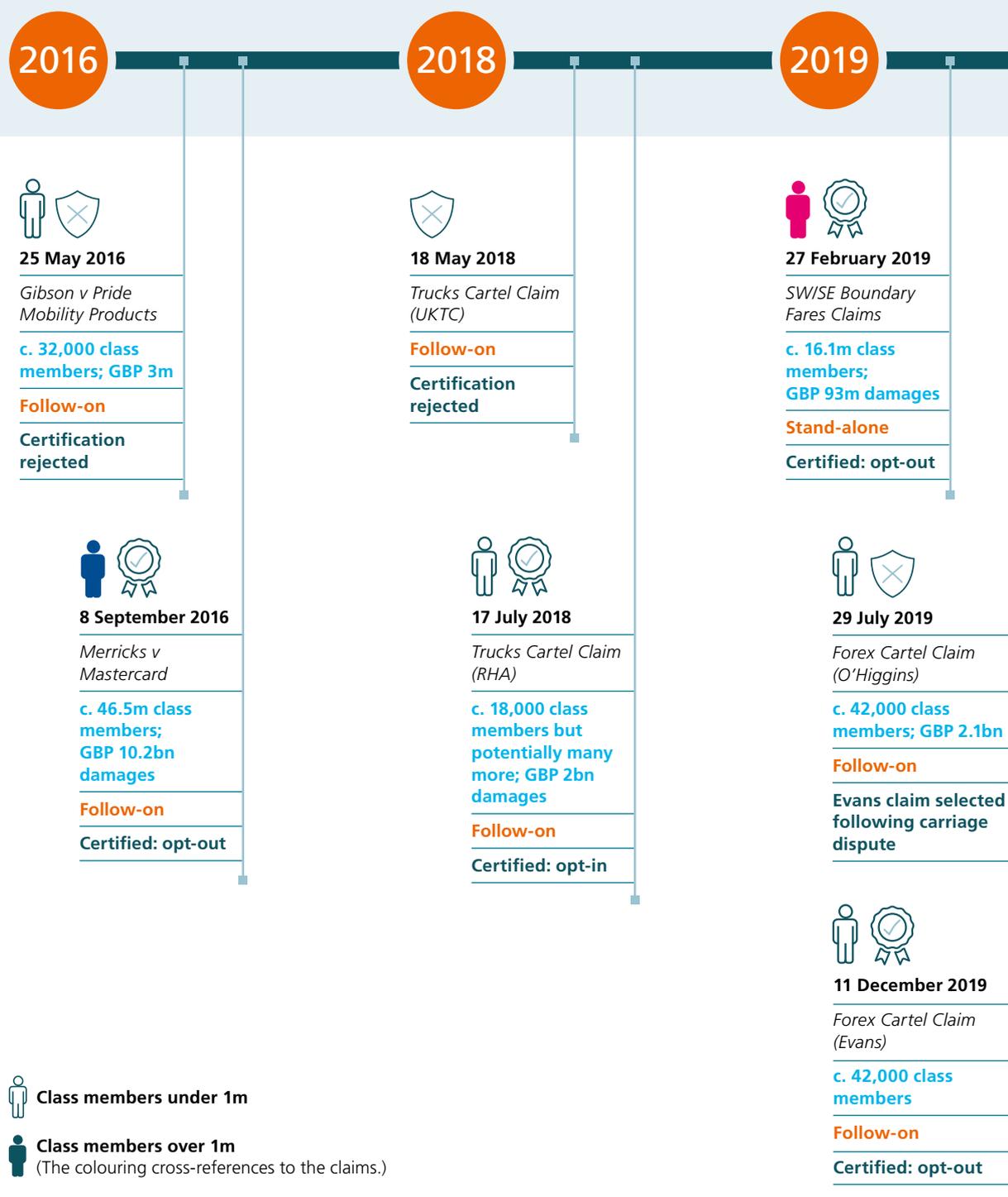
In the Forex litigation, which entails competing class representatives Mr Higgins and Mr Evans, the Competition Appeal Tribunal was prepared to certify the Evans claim but only on an opt-in basis and in the face of evidence that the class representative would not continue the case if it was certified as an opt-in claim rather than an opt-out claim.<sup>6</sup> On appeal, the Court of Appeal reversed this aspect of the CAT's judgment, noting that where an opt-in case is impracticable that would militate in favour of a claim being certified on an opt-out basis. The Court of Appeal chose not to interfere with the CAT's assessment of the carriage dispute and therefore permitted the Evans case to proceed on an opt-out basis.<sup>7</sup>

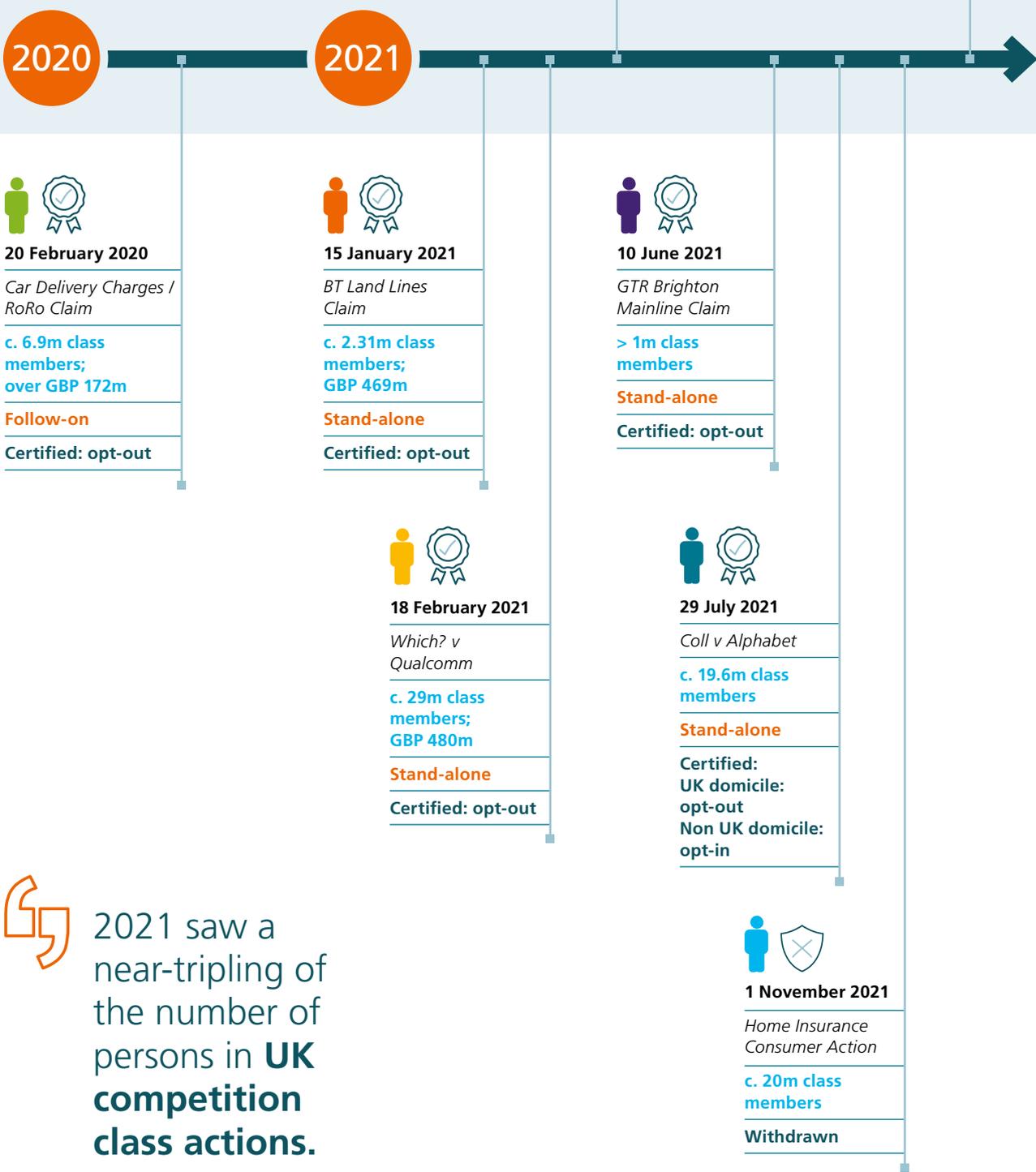
In the trucks litigation, the Court of Appeal handed down an important judgment on conflicts within the class. The Road Haulage Association ("**RHA**") claim included both group members who had bought new trucks and those who had bought second hand trucks. The Court of Appeal held that there was a conflict between these different class cohorts on the extent to which any overcharge was passed-on between first-hand and second-hand purchasers. It ruled that this did not preclude the RHA from being the class conflict representative, but that an ethical barrier was needed and that the RHA would need to have separate legal and expert teams for the two sub-classes and that it was "safest" for the sub-classes to also have separate funders.<sup>8</sup>

The Supreme Court's July 2023 judgment in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others*<sup>9</sup> could potentially significantly impact funding of competition class actions because many existing Litigation Funding Agreements will now be Damages Based Agreements ("**DBA**"), and DBAs are prohibited for opt-out competition class actions. See page 53 for more information on the PACCAR judgment.

## CPO applications in the CAT

2022 saw a new record in the number of CPO applications filed, with 15 new claims being registered. The timeline below sets out the status of claims as at 1 August 2023.





2021 saw a near-tripling of the number of persons in **UK competition class actions**.



14 February 2022

*Gormsen v Meta Platforms, Inc.*

c. 44m class members;  
GBP 2.2bn damages

Stand-alone

Certification rejected



6 June 2022

*Visa I*

c. 1m class members;  
GBP 1.87bn

Stand-alone

Certification rejected



15 June 2022

*Gutmann v Apple Inc.*

c. 25 m class members;  
GBP 750m damages

Stand-alone

Certification hearing: TBC



26 August 2022

*Korg Claim*

c. 80,000 class members

Both

Certification hearing: TBC



21 March 2022

*Fender Claim*

c. 1.95m class members

Both

Certification hearing: TBC



6 June 2022

*Visa II*

c. 1m class members;  
GBP 1.87bn

Stand-alone

Certification rejected



29 July 2022

*BSV v Bittylicious*

c. 242,000 class members; GBP 5bn

Standalone

Certification hearing: TBC



26 August 2022

*Roland Claim*

c. 40,000 class members

Both

Certification hearing: TBC



10 May 2022

*Power Cable Cartel Claim*

c. 30m class members;  
GBP 300m

Follow-on

Certification hearing: TBC



6 June 2022

*Mastercard I*

c. 1m class members;  
GBP 1.87bn

Stand-alone

Certification rejected



22 August 2022

*Sony Interactive Entertainment Claim*

c. 8.9m class members; GBP 500m

Standalone

Certification judgment: TBC



16 September 2022

*Yamaha Claim*

c. 200,000 class members

Both

Certification hearing: TBC



6 June 2022

*Mastercard II*

c. 1m class members;  
GBP 1.87bn

Stand-alone

Certification rejected



2022 saw 15 new competition class actions filed on behalf of **169m** people in aggregate.



## Estimated Class Size

This chart shows the cumulative estimated class sizes, based on publicly available information, for all UK competition class actions that have been filed in the CAT. It includes figures for claims that have been certified, withdrawn or where certification has been rejected.

2016 | 46,232,000



2017 | 46,232,000



2018 | 46,250,000



2019 | 62,493,819



2020 | 69,393,819



2021 | 171,003,819



2022 | 340,013,333



As can be seen, 2022 saw a **significant increase** in the volume of persons in UK competition class actions.



Class members under 1m



Class members over 1m

(The colouring cross-references to the claims.)

## Representative actions

The representative action mechanism is a potentially very powerful opt-out class action mechanism available for all causes of action, i.e., not just for competition class actions. It has existed as a feature of English procedural law for hundreds of years, but historically its scope has been applied narrowly such that it has been ineffective for damages claims.

A step change took place in *Lloyd v Google*, where – although it rejected the instant class action against Google – the Supreme Court broadened the all important “same interest” test for representative actions.

2023 has seen two important judgments concerning representative actions. In *Commission Recovery Ltd v Marks & Clerk LLP & Anor*<sup>10</sup> the court identified some significant problems with the claimant’s case and its use of the representative action, but in a permissive approach the High Court allowed the claim to proceed to give an opportunity for those problems to be overcome. In the final section of the judgment the judge summarised his permissive view, “we are still perhaps in the foothills of the modern, flexible use of [the representative action mechanism, i.e., the post *Lloyd v Google* use of this mechanism], alongside the costs, costs risk and funding rules and practice of today and still to come. In a complex world, the demand for legal systems to offer means of collective redress will increase not reduce.” Our short analysis of this judgment is available [here](#).

In *Andrew Prismall v Google UK Limited and Deepmind Technologies Limited and LCM Funding UK Limited*,<sup>11</sup> the High Court rejected use of the representative action mechanism. In this case the representative sought to recover damages for the tort of misuse of personal information. To avoid the need for individualised evidence from class members who were non-participants in the proceedings, the representative framed the claim as seeking damages for an “irreducible minimum” of common facts. The High Court ruled both that the irreducible common facts did not meet the criteria for the test of misuse of personal information and also that any such damages would have been trivial. Our short analysis of this judgment is available [here](#).

We predict that claimant law firms and funders will continue to explore the use of the representative action mechanism owing to its very significant potential as an opt-out mechanism for all causes of action.

## Group Litigation Orders

Group Litigation Orders are mechanisms for determining common issues of fact or law in opt-in claims.

In *Bennett & others v Equifax Ltd* [2022] EWHC 1487 (QB), the claimants applied for a GLO early but the High Court was unpersuaded that a GLO was appropriate at that stage, and deferred a decision on the point to later in the litigation. This case demonstrates that GLOs will not simply be “waved through” and the courts will have regard to the most appropriate means of case managing complex litigation.

Endorsement of GLOs came again in July 2023, when in *David Hamon & Others v University College London* [2023] EWHC 1812 (KB). The application for a GLO was adjourned for the purpose of settlement discussions. Again, the Court recognised not only the benefits of a GLO but the benefits of potentially more flexible management: “But however these claims, and other similar claims are managed, it would clearly not be proportionate for them to proceed separately as single actions.”

Several GLO hearings in dieselgate consumer emissions claims are pending and the Court will need to manage its resources carefully as single claims of this type are complex, so several simultaneous claims could tax Court resources.





## Data protection class actions

In our 2020 Spotlight, we noted that data protection class actions were developing as a key risk in the UK. That year went on to be record-busting with hundreds of data protection claims issued in the High Court. This was fuelled by a growing awareness and assertiveness of data subjects with respect to their rights, supported by litigation funders and claimant law firms offering various ‘no win no fee’ arrangements.

While the majority of those claims were filed on behalf of individuals, the natural consequence was a raft of judgments developing the case law and guidance on key data protection issues and concepts. That is important – data protection litigation involves complex and novel questions of law, which require interpretation and application of the UK’s data protection framework.

Many businesses have faced claims brought by a single individual claimant (and so not a class action) in respect of data breaches on the mistaken assumption that just because there has been a data breach this means: first, that data controllers and/or processors involved are automatically liable; and second, that data subjects whose data were impacted are automatically entitled to compensation. Both of these points are inaccurate.

Despite this, when faced with what could be described as low level data breach claims, given the costs involved of defending such claims, many businesses have opted to settle them, irrespective of how unmeritorious the claims may be.

A recent line of cases has however given businesses a significant new weapon in their armoury to fight back against such claims. Claimant firms have often sought to argue that as a result of data protection claims involving complex issues and novel questions of law that they are not suitable to be allocated to the County Court small claims track and instead should be allocated to the fast track. The significance of this is that costs are recoverable in the fast track, whereas only very limited costs (which do not include solicitors’ fees) are recoverable on the small claims track.

The recent line of cases has seen a string of decisions where it was held that there is no reason why straight forward data breach claims cannot be dealt with on the County Court small claims track and claims that have been commenced in the High Court have been transferred to this Court and track.

This line of cases poses a significant hurdle to the claimant law firm model of funding a claim by way of a no win, no fee conditional fee agreement, backed by an after-the-event insurance policy, as if it can be demonstrated that the claim is relatively straight forward and has a value of less than £10,000, then good arguments can be put forward at the pre-action stage to say that this is a small claims matter and solicitors’ fees and any ATE premium therefore cannot be recovered from the defendant business.

This development will not assist with large scale and complex litigation (including class actions) but it is useful in disposing of low value claims that businesses previously may have felt it necessary to settle, if only from a commercial view point.

## The Commercial Court's 'Test and grouped cases' scheme

Owing to events during the Covid-19 lockdown, the Commercial Court faced a very large number of claims seeking coverage under business interruption insurance policies. The court took a flexible approach to case management for this very large number of claims in an effort to drive efficiencies.

The Commercial Court has expanded and formalised this approach to encompass Russian aircraft leasing claims, Italian swaps cases and certain other Covid-19 claims. These are all categories where the court expects to see large numbers of claims. The new regime permits the court to identify similar claims at a very early stage and actively manage those common cases.

Whilst the regime only applies to the identified categories of claims, it is indicative of the judiciary's increased awareness that facing large numbers of claims imposes burdens on the court and on the parties, and their willingness to amend and develop procedural rules in response.

## A developing class action landscape in Scotland

Scotland's first formal class action mechanism, was introduced on 31 July 2020. Although the primary legislation facilitating the new procedure envisages both opt-out and opt-in claims, it has – for now – only been introduced as an opt-in procedure.

A small number of claims have been filed in Scotland under this new mechanism, including by owners of diesel vehicles concerning emissions and also a transnational tort claim. Although we are very early in the life of the new Scottish opt-in mechanisms, the early response from the Scottish judiciary is taking a permissive approach of allowing these cases to proceed.

The Scottish Civil Justice Council is currently carrying out research considering new rules for introducing the opt-out procedure, as is envisaged by primary legislation. If Scotland was to introduce an opt-out mechanism for all causes of action and that mechanism was workable, it would put pressure on England and Wales to follow suit.



# Spotlight on: Germany

A nighttime photograph of the Berlin skyline. The central focus is the Fernsehturm (TV Tower), a tall, white, cylindrical tower with a red and white antenna at the top, illuminated against a dark blue sky. In the foreground, there are several multi-story buildings with red-tiled roofs and lit-up windows. A multi-lane highway with light trails from cars is visible in the lower part of the image. The overall scene is a vibrant cityscape at dusk or night.

In 2018, Germany introduced the model declaratory action (*Musterfeststellungsklage*), a first of its kind mechanism, providing for general collective proceedings that are to be brought by so-called qualified entities e.g., consumer associations, and that may be joined by consumers via an opt-in mechanism. Prior to the model declaratory action, collective mechanisms were limited to specific areas of law e.g., in capital markets.

By its nature, the model declaratory action only provides for the determination of certain factual or legal aspects of the case at hand. Subsequently, consumers are required to file an individual claim against the defendant in order to have their individual claims and potential damages determined. In these (subsequent) proceedings the judgment from the model declaratory action has a binding effect. Thus, under the model declaratory action regime, it is not possible to directly claim for damages or other specific remedies.



## Fundamental changes to the German litigation landscape

However, due to the forthcoming implementation of the Representative Actions Directive, this status is about to change. Under the Directive, EU member states are required to provide at least one procedural mechanism that allows qualified entities to bring representative actions for the purpose of both injunctive measures and redress measures (*Abhilfeentscheidungen*). The option to assert claims for payment within a collective redress mechanism is going to be a novelty under German Law.

Initially, the Directive was to be implemented by 25 December 2022 with its provisions entering into force by 25 June 2023. Whereas the coalition agreement of Germany's 2021 elected government has picked up the thread and referred to an implementation of the Directive as an "advancement of the model declaratory action", the draft law for the implementation was published only recently in March 2023, far later than expected.

Once passed in the legislative process, the proposed law, with the rather bulky title *Verbandsklagenrichtlinienumsetzungsgesetz* (or abbreviated VRUG), will provide for fundamental changes in the German litigation landscape. Since the Directive only sets a minimum standard, there was eager anticipation on how the German legislators would utilise its leeway.

## Specific features of the German implementation approach

Whereas, according to the Directive, the representative action procedure should be available in cases of alleged violation of certain consumer protection provisions of EU law (including national implementation standards), the draft law does not adopt this limitation. Rather, the subject of the new representative action may be all claims made by consumers against traders. For instance, claims for compensation due to antitrust damages, whose inclusion was not mandated by the Directive, as well as general tort claims, could potentially be a subject of the representative action.

Going beyond the minimum requirements of the Directive, the German draft law allows small companies to join the representative action as well. 'Small companies' are defined as those employing fewer than 50 employees and whose annual sales or annual balance do not exceed an amount of EUR 10 million. This extension could particularly become relevant in antitrust actions for damages, which may affect consumers and small businesses alike.



## Opt-in mechanism

The draft law provides for an opt-in model under which consumers may register their claims with a newly introduced register for representative actions (*Verbandsklageregister*) within months from the first hearing in the representative action proceedings. This provision is the subject of an ongoing debate. It remains to be seen whether it will become law.

The main prerequisite for claims being a subject of a representative action is that the alleged claims of the consumers are of a similar nature (*Gleichartigkeit*). Claims are considered similar if: (i) they are based on the same factual situation or a series of comparable factual situations; or (ii) they involve the same material facts and legal issues that are relevant to the decision. The interpretation of this criteria by the courts will be crucial in determining the extent to which the representative action will apply in the future, in particular whether it will have a narrow or broad scope.

## Three step procedure

The general procedure before the competent Higher Regional Court (*Oberlandesgericht*) consists of three levels. First, if the court determines the representative action to be justified in principle, the court issues an interlocutory judgment as to the merits of a claim. Second, the court invites the parties to submit a settlement proposal. Third, if the parties fail to reach a settlement, the court issues a final judgement in which a total collective amount is determined.

The payment of the amounts to the individuals who have joined the proceedings is subsequently handled within a so-called implementation procedure (*Umsetzungsverfahren*). For this procedure, the court appoints an administrator (*Sachverwalter*) who is responsible for examining the eligibility for payment to consumers in accordance with the judgment. The costs of these proceedings are generally to be borne by the defendant.

## Relationship to other types of group litigation

If the draft law is adopted in its current form, it will create a model of litigation that will be more attractive for aggrieved consumers than the collective mechanisms available so far. In particular, the possibility to directly and collectively claim compensation is likely to lead to more of these proceedings. Whereas the model declaratory action will remain a part of German Law, given the structural advantages of the representative action mechanism, its future remains uncertain.

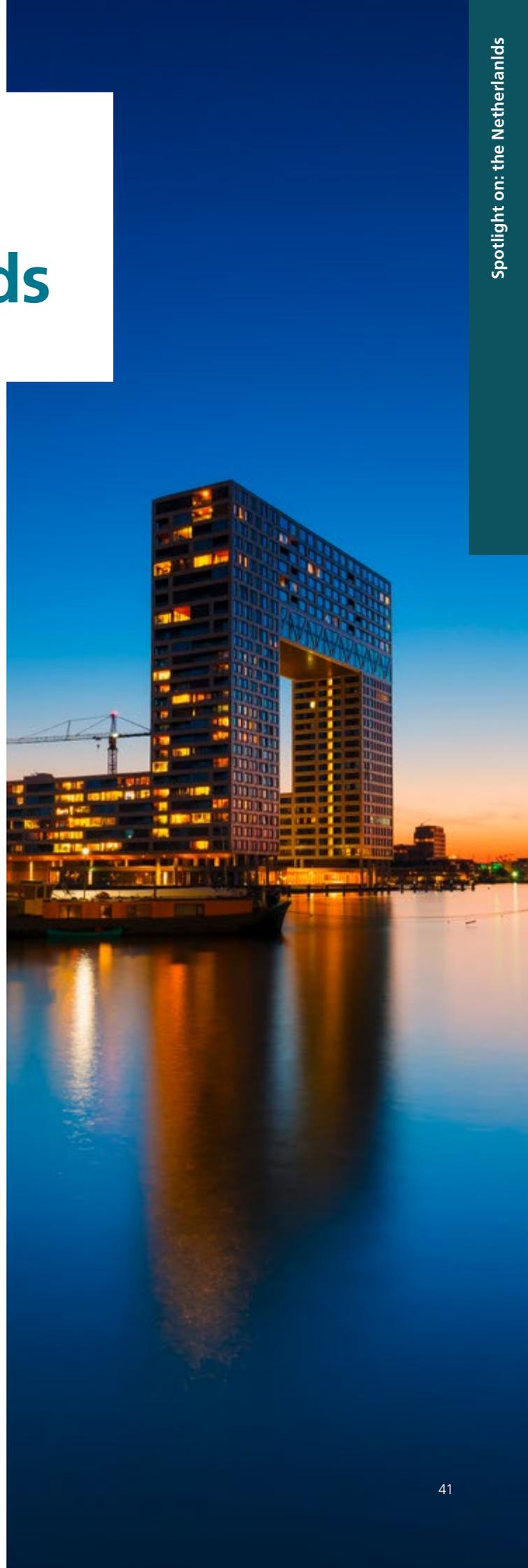
Finally, collective actions under the assignment model as well as mass individual actions can generally continue to be brought as they are not excluded by the new mechanism. Only if an individual has registered its claims via the opt-in mechanism, the individual is barred from filing an individual claim concerning the same facts and/or claims.

# Spotlight on: the Netherlands

Since January 2020, the Class Action Mass Claims Settlement Act (WAMCA) has been in place in the Netherlands. Under this regime, claimants can also claim damages in a class action. The WAMCA has an opt-out mechanism for Dutch class action members and an opt-in mechanism for foreign class action members. Besides the possibility of opt-out or opt-in, the court also sets a deadline for trying to reach a settlement between the parties. If the parties reach a settlement and it is recorded in a settlement agreement, the settlement agreement is submitted to the court for approval.

Since the WAMCA came into force, more than 70 class actions have been filed in the class action register (<https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen>), with a total of 16 actions in 2022 (including actions for non-monetary awards), and 8 new claims filed in 2023 already.

Most notable developments last year are in the area of ESG-claims, privacy-claims and non-material damages.





## ESG

In recent years, there has been an increase in class actions on environmental, social and governance (“**ESG**”) issues, such as climate change claims. In the Netherlands, there were two notable ESG class actions under the old class action law. In the Urgenda case the Dutch court ruled that the Dutch State is obliged under the European Convention on Human Rights to take preventive measures to protect, among other things, the right to (family) life. The Supreme Court confirmed in 2019 that not limiting emissions further would lead to a breach of the State’s duty of care towards its citizens, which constitutes a tort under Dutch law. In the class action of foundation Environment Protection (Milieudefensie) against Royal Dutch Shell (RDS) in 2021, the Court of The Hague ruled that RDS has an obligation through the Shell group’s group policy to reduce CO2 emissions from its operations by a net 45% by the end of 2030 compared to 2019. The introduction of the WAMCA can lead to a second wave of climate litigation in which interest groups seek compensation.

In 2022, the Foundation Fossil-Free Netherlands (Stichting Fossilvrij Nederland) started a class action under the WAMCA against The Royal Aviation Company (KLM) for ‘greenwashing’. The foundation argues that KLM makes misleading representations in its advertisements and other communications to the public regarding the extent to which they and their products contribute to harmful climate change. The foundation demands that KLM immediately stops its ‘Fly Responsibly’ campaign and similar sustainable marketing.

Furthermore, KLM should stop claiming that climate damage can be nullified, reduced or compensated for through ‘carbon offsets’. The court announced in June 2023 that the Fossil-Free Netherlands claim is admissible under the WAMCA against KLM.

This class action is one of the first worldwide to seek to have ‘misleading sustainability claims’ ceased. The case could potentially set a precedent for the growing number of lawsuits against so-called ‘greenwashing’.

## Privacy

The Netherlands is a frontrunner in class actions for privacy violations. Before the introduction of the WAMCA, breaches of the General Data Protection Regulation (GDPR) could be addressed through individual claims and action by the Personal Data Authority (Autoriteit Persoonsgegevens). Since the WAMCA, there is another tool to address privacy infringement and claim damages. Other European countries have not yet found ways to bring mass claims against privacy law violations.

In March 2023, the court of Amsterdam ruled that Facebook Ireland broke the law when processing personal data of Dutch Facebook users in the period from 1 April 2010 to 1 January 2020. These proceedings, however, concern a class action brought under the old class action law, before the WAMCA, under which affected parties could not yet collectively claim damages.

It is not yet clear whether the WAMCA is actually suitable to address privacy infringement under the GDPR. A complex question is how the WAMCA relates to Article 80 GDPR, which regulates the representation of the subjects. This article stipulates that a data subject can mandate a party to exercise its rights. It can be argued that the concept of 'mandate' presupposes a certain level of awareness and therefore the question can be raised whether this is the case with the opt-out mechanism of the WAMCA, where the subject is bound by the judgement unless it actively opts-out. No answer can be found in the parliamentary history of the WAMCA to the question whether article 80 GDPR precludes a class action for breach of the GDPR. The court will therefore have to answer this question.

In the Netherlands, there are multiple privacy class actions currently pending under the WAMCA. In March 2022, The Privacy Collective (TPC) foundation filed a lawsuit on behalf of Dutch internet users against Oracle and Salesforce. They claim EUR 11 billion for the privacy violations of 10 million Dutch internet users. In August 2021, the Take Back Your Privacy foundation (TBYP) launched a class action against TikTok on behalf of all underage TikTok users in the Netherlands. They demand that TikTok pay Dutch underage TikTok users damages of at least EUR 2 billion for unlawfully collecting and trading their data. In March 2023, the Foundation Initiatives Collective Actions Mass Damage (Initiatieven Collectieve Acties Massaschade) filed a class action on behalf of 6.5 million Dutch citizens to claim damages from the Municipal or community health service (GGD), because of the data leak in which privacy-sensitive data of hundreds of people was leaked. The foundation is now claiming EUR 500 per person in damages, which could total over EUR 3 billion. The courts in these cases have not yet ruled on the applicability of the WAMCA to privacy infringement.

## Non-material damage

Recently, class actions have been filed to claim not just material damage, but also damage to health and the fear thereof. In December 2022, the Clara Wichmann Foundation (Stichting Bureau Clara Wichman) filed a class action against Allergan to claim damages for defective breast implants. The foundation is demanding damages of tens of thousands of euros per woman with defective breast implants that could exceed EUR 900 million for women in the Netherlands. In addition to the cost of treatment to have the implants removed and for the cost of (safe) reconstruction of the women's breasts, these damages also consist of the distress and harm the implants may have caused.

And more recently in March 2023, the Foundation Essure Claims (Stichting Essure Claims) has filed a class action against Bayer for bodily harm caused by the Essure sterilising agent (a device for female sterilisation). The foundation also seeks high non-material damages for physical injuries in these proceedings.

To serve different individual interests, both the Clara Wichmann Foundation and the Foundation Essure Claims have created subgroups in the subpoena, for which separate demands apply concerning the amount of damages.



# Spotlight on: Portugal

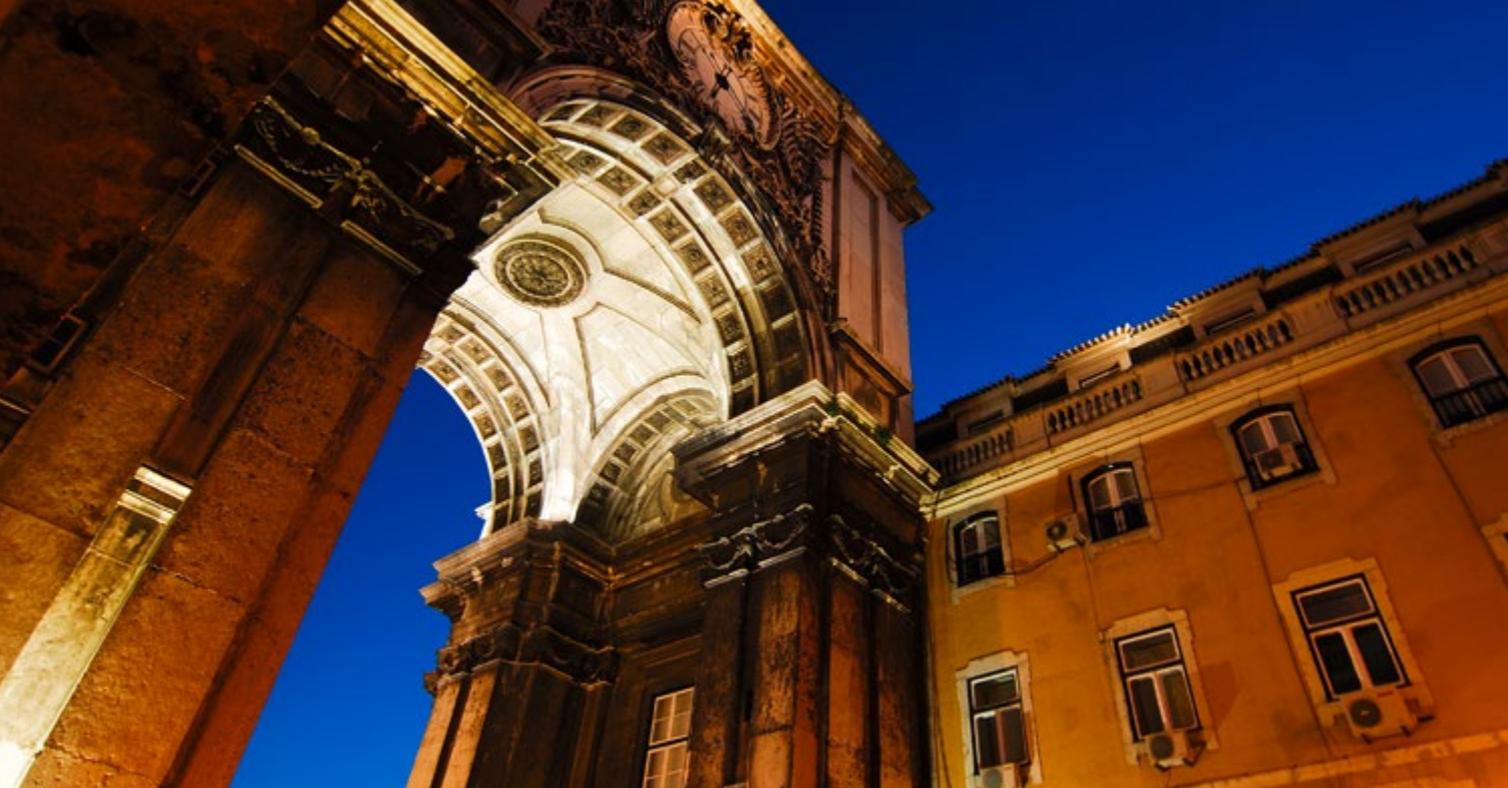
Although Portugal has had a class action legal framework since 1995, the actual experience in applying such law was quite limited for many years. This has recently changed as a wave of class actions has reached Portugal, with multi-million euro compensation claims, third-party litigation funders and specialised law firms discovering and exploring Portugal as a forum for such claims.

## Opt-out system

Class actions are regulated in Portugal by Law no. 83/95 of August 31, 1995, which provides the framework for the use of class actions in civil, commercial and administrative litigation in what concerns the protection of public, diffuse, collective and/or homogenous individual interests in areas such as public health, consumer rights, quality of life, and the preservation of the environment and cultural heritage.

The Portuguese legislators chose to adopt an opt-out system, whereby the claimant (any citizen and any legally constituted association or foundation created to defend the above-mentioned relevant interests) represents the entire class by default, without the need for express mandate or authorisation from each individual of the class.

Immediately after its submission, the statement of claim is subject to a preliminary assessment where the claim shall be dismissed if the judge (after hearing the Public Prosecutor) considers its success to be manifestly unlikely. If the claim is to proceed, the judge will then fix a deadline for individuals to declare their wish to opt-out from collective representation or to singularly act in the proceedings alongside the representative claimant. Only those who decided to exercise their right to opt-out shall not be bound by the court's award (with two exceptions: if the action was not successful due to insufficient evidence and if the court should decide in a different way based on specific aspects of the case).



## The recent surge of class actions

Although Law no. 83/95 dates from 1995, for many years no special attention was given to class actions in Portugal neither by the courts, nor by scholars and by the economic agents. Except for limited situations, the class actions regime was regarded as a legal instrument rarely put into practice. This scenario has completely changed in the last few years.

Indeed, in recent years there has been an increase in class actions in a great variety of areas, with a special focus on consumer rights and competition law. These class actions have been primarily filed as follow-on damage claims arising from various legal violations, such as breaches of competition law provisions, product liability, and consumer rights. Stand-alone claims are also gradually becoming a trend in Portugal.

### To give some examples:

In 2016, in the aftermath of the “Dieselgate” scandal, the Portuguese consumers’ association DECO filed a class action against Volkswagen claiming for compensations for all consumers owning or using Volkswagen vehicles that used allegedly illegal defeat devices. DECO is claiming a compensation between USD 5,100 and USD 10,000 or alternatively 15% of the vehicle’s purchase price.

In 2018, following Cambridge Analytica’s leak, DECO filed a class action against Meta (Facebook), alleging that Meta infringed data protection rules by failing to adequately inform and obtain consent from users to share their personal data with certain entities. The lawsuit sought EUR 200/year compensation for each affected user (it was initially estimated that 63,000

Portuguese users were affected by the breach and more than the 63,000 users joined the association). The lawsuit was withdrawn in 2021, with Meta and DECO reaching a settlement agreement to co-operate in a 3-year programme to improve Portuguese users’ digital life.

In 2020, the Portuguese consumers’ association Ius Omnibus filed two follow-on class actions asking in both cases an overall compensation of EUR 400,000,000 (corresponding to an average compensation of EUR 40 to each affected consumer). Under the first follow-on class action, Ius Omnibus is seeking compensation against Super Bock (brewery) for all Portuguese consumers harmed by alleged Super Bock’s anti-competitive practices (resale price maintenance on distributors). Under the second follow-on class action, Ius Omnibus is aiming to obtain a compensation for all Portuguese consumers who were allegedly injured by Mastercard’s anticompetitive practices (excessively high prices for transactions and adopting rules that made it more expensive to accept Mastercard and Maestro card transactions).

In 2021, Ius Omnibus followed DECO’s example against Volkswagen and filed class actions against Mercedes (demanding a compensation estimated at a minimum of EUR 4,200 per vehicle); and Stellantis/ FIAT (claiming a compensation estimated at a minimum EUR 2,702 per vehicle), alleging the use of illegal defeat devices by these companies.

More recently (April 2023), the same association Ius Omnibus filed two class actions against TikTok, accusing this platform of adopting allegedly misleading commercial practices, which violates privacy and mishandles personal data of Portuguese users.

TikTok was ordered to pay compensation to all represented consumers, which can reach EUR 1.12 billion according to said consumers association.

Another very recent active consumers' association called "Citizen's Voice" has filed a number of class actions in the recent years: against Ryanair (for allegedly unfair commercial practices), FNAC (for allegedly non-compliance with the warranty of goods), Vodafone (for allegedly unsolicited additional services), PRIO (for allegedly charging higher prices for lower quality of fuel for motor vehicles), among others.

## The change in the class actions' profile

Class actions submitted in Portugal by more traditional and low-profile associations have been replaced by high-profile associations, which coordinate with other European claimants and are supported by third-party funders and specialised claimant law firms.

The first class action was submitted in Portugal by DECO (a very traditional consumers' association, which has been active for many years in defending consumers' rights), while the subsequent class actions against Mercedes and Stellantis/FIAT were initiated by Lus Omnibus, a consumers' association incorporated in 2020, less than a year prior to the submission of the above referred class actions, with a website that identifies the third-party funders that finance this type of class actions.

The Portuguese opt-out mechanism, the court-costs friendly Portuguese environment and some of the Portuguese procedural rules provide an attractive gateway for class actions against multinational companies operating in Europe.

Despite the fact that the Portuguese Class Actions Law dates from 1995, there are many areas where there is uncertainty about how the courts will apply it as for many years it was rarely used or it did not raise the issues that the new wave of class actions is bringing.

This is the case, for example, in respect of the activity of litigation funders, which is not regulated in Portugal. There are many questions surrounding their role and intervention in class actions, in particular the legal standing of consumers' associations funded by third-party funders; or even the possibility of a third-party funder being able to receive consumers' non-reclaimed amounts to cover claimants' costs and the possibility of third-party funders receiving consumers' non-reclaimed amounts to cover claimants' costs, among other questions.

The transposition of the Representative Actions Directive may change the current legal framework, but no draft law has been published yet.

These are exciting and challenging times for those who operate and deal with class actions in Portugal.



# Future risks

## FOCUS ON:

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Class claimants

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Litigation funding

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Digital Services Act:  
key takeaways

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# Class Claimants: A force to be reckoned with

Case Pilots have supplied the below feature which discusses the procedural factors that are increasing class action risk. Pages 50 and 51 explain how new technologies can be used to increase class member participation. These developments in particular are increasing risk in opt-in claims as the proportion of persons joining these claims is increasing.

Claimants in European and UK class actions are better resourced, better organised and better supported than ever before. So, what exactly has changed? There are several factors converging:

## 1. Harnessing the Power of Litigation funding

An increasing number of litigation funders are entering the marketplace, with deep pockets and an appetite for cross-jurisdictional class actions. These cases appeal to funders. They are typically large, enabling a funder to deploy significant capital into one case, and the potential rewards are considerable.

Recent analysis of the balance sheets of the top 15 largest UK litigation funders, using data from Companies House and annual reports, reveals that UK litigation funder assets hit a record £2.2 billion in 2021, an 11% increase on the previous year. Much of that money is fuelling class actions.

## 2. Cultivating a Culture

Consumers and businesses alike, in the UK and across Europe, are demonstrating a greater level of understanding and engagement in class actions. A recent report revealed 60% of UK respondents said that they would be willing to join a class action against a company if they were directly impacted by their alleged illegal activities – which is similar to the litigation appetite of the US consumers.

**How many people would join a class action against a company, organisation or institution if they were directly impacted by their activities that broke the law?**





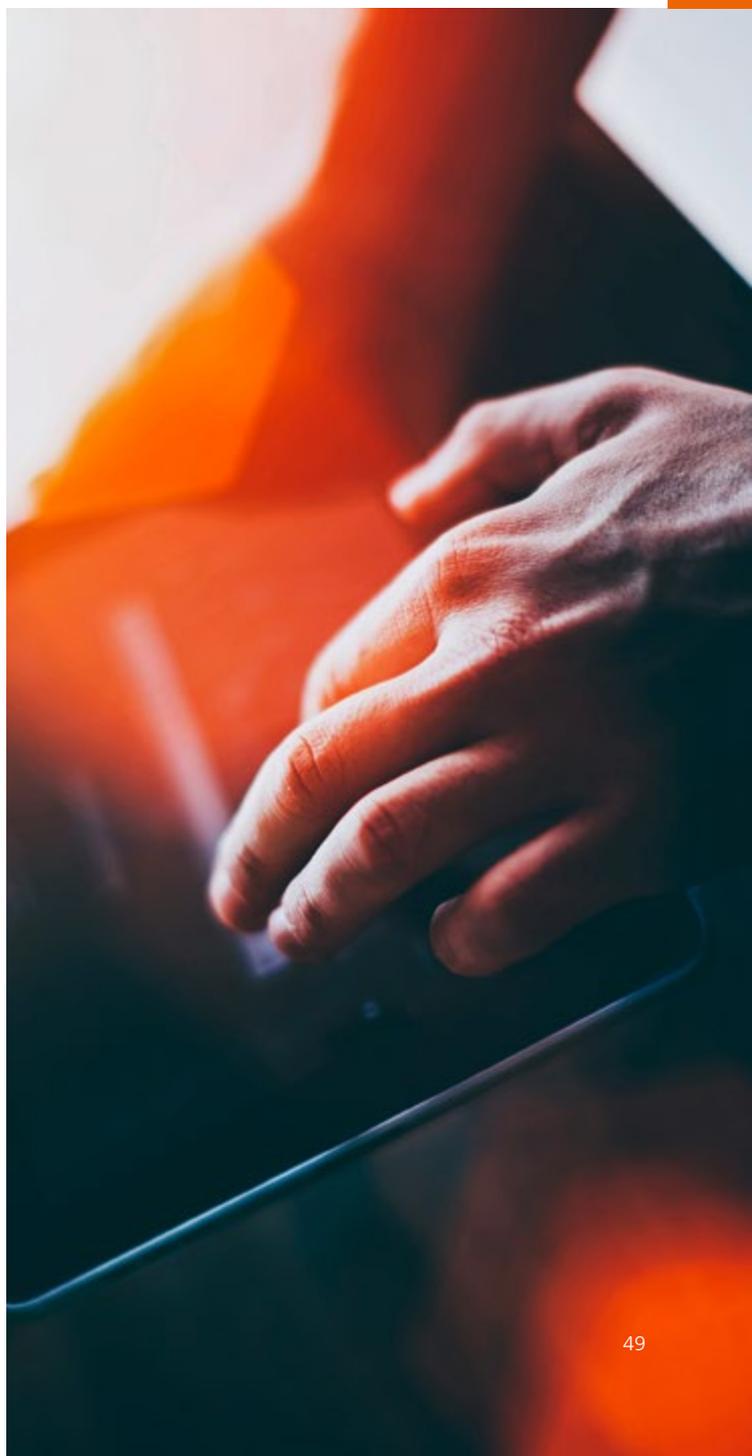
### 3. Strengthening Cooperation Between Claimant Legal Teams

Claimant firms are working cooperatively to enhance the collective position of affected parties. The motto “stronger together” rings true, with self-appointed ‘steering committees’ proactively focussing on process improvements – such as deduplication. The creation of CORLA (The Collective Redress Lawyers Association) demonstrates a concerted effort by claimant-side legal practitioners to collaborate and share expertise.

Cooperation also emerged at a UK parliamentary level this year with the publication of the APPG Fair Business Banking report “*Building a Framework for Compensation and Redress*”<sup>12</sup> setting out key recommendations and building blocks of a fair compensation scheme.

### 4. Leveraging legal tech and outsourced services

The landscape of European class action litigation has become characterised by the daunting task of managing intricate cases at volume. The diverse nature of claimant groups, the barriers to identifying these groups, cross-jurisdictional elements and the ability to effectively communicate complex legal concepts to these groups, all call for a sophisticated approach. This is where composability – the ability of different components of a system to be combined or arranged together in various ways to create new and larger systems – plays a significant role.

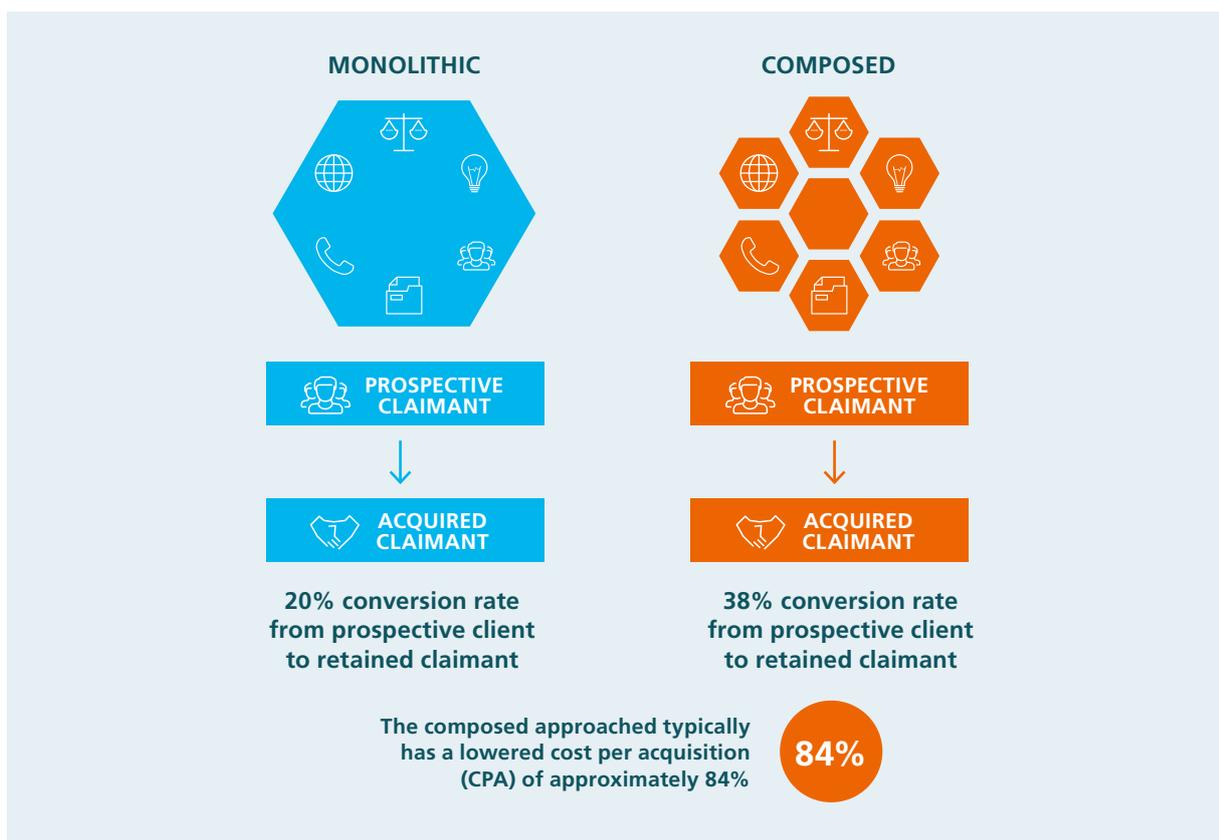


## Composability: Empowering Class Actions

The power of composability lies in its capacity to facilitate seamless coordination between disparate parts of complex processes. By adopting a composable model, it is possible to quickly and easily tailor and reconfigure one’s approach based on the unique demands of each case. This use of technology is instrumental in harnessing the collective power of claimant groups, a crucial feature of class action claims.

These composability principles – which derive from composable software systems – play a valuable role in legal case management services at volume. Consider each element of a class action case – from claimant communication and data collection to legal research and court filings – as a ‘component’. Each of these components plays a critical role and requires specific expertise. When managed separately, they can be

optimised, improved, or replaced as needed without disrupting the entire case. For instance, the claimant communication component could be further subdivided into different channels (email, social media etc.) or tailored to different claimant sub-groups. When these components come together in a coordinated, seamless manner, they create a more efficient, adaptable, and successful case management process.



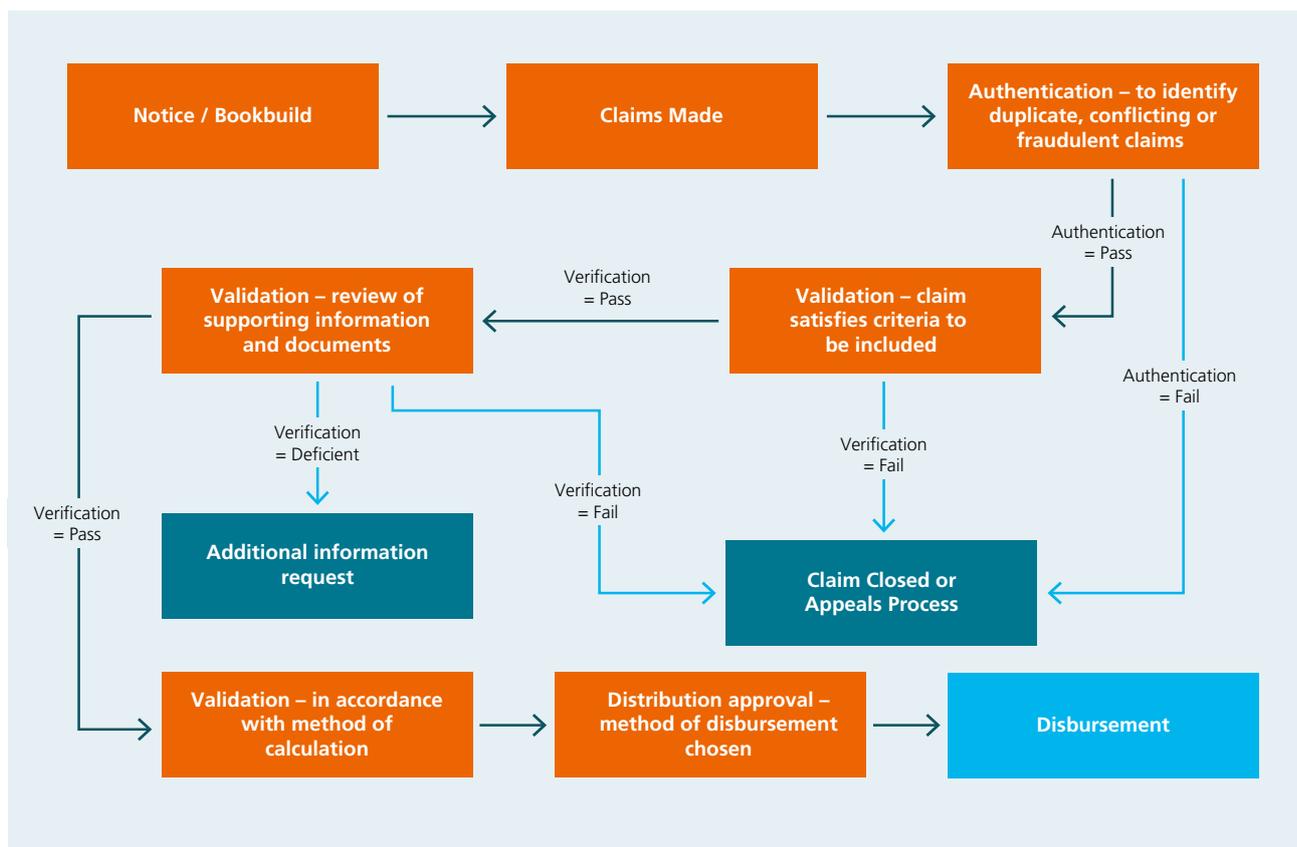
A “composed” approach increases the conversion rate from leads to acquired claimants by 90%, and lowers the cost per acquisition (CPA) by 84%.

## Technology and Collaboration as Game Changers

Leveraging technology, collaborating with other providers, adopting digital tools, use of third-party data and cementing all of that with a well-trained, professional outsourced litigation support team, is a game changer.

It is not by chance that an improvement in uptake rates of class actions in the UK and Europe has coincided with the ability of law firms to leverage technology that helps manage legal processes. Emerging technologies, such as AI (Artificial Intelligence), stand to continue to significantly transform the legal landscape and will play a revolutionary role in the development of class actions across the UK and Europe. These jurisdictions are in the unique position of being able to learn from class action experiences in other countries and combine that with modern, cutting-edge technologies.

We now have the power to engage with class members in a digestible format and deliver class action legal services via avenues that resonate with their everyday lives. Combine that with a respectful and considerate use of AI, and we are looking at a future where class action workflows can be achieved instantaneously without even a click of a button:



Our current ecosystem is primed for this shift towards a technology-driven, composable approach. By addressing traditional challenges in class action litigation and empowering legal teams with advanced, composable systems, we're paving the way towards a more efficient future. In turn, freeing up those legal teams to focus more on litigating class action cases.

In conclusion, as we face this new and revolutionary era in class action litigation, one that embraces dynamic and efficient case management, those class claimants do indeed become a force to be reckoned with.



## Litigation funding: Big Picture

Litigation funding is a fast-growing industry and is expected to further expand in Europe in the next 5 to 10 years. According to research<sup>13</sup> published in the Litigation Finance Journal in autumn 2022, litigation funding in Europe is set to reach EUR 1.6 billion<sup>14</sup> annually, representing nearly 16% of the total market and EUR 3.4 billion<sup>15</sup> by 2025.

With returns from litigation funding being higher than those observed in private equity, real estate, traditional credit and hedge funds,<sup>16</sup> and as EU MSs transpose the RAD into domestic legislation, we are likely to see litigation funding expand across Europe. Potential defendants should consider the scope of their potential exposure, and keep abreast of market and policy changes.

### The Representative Actions Directive (the “RAD”)

The RAD, implemented in the EU in December 2020, is intended to ensure that consumers in EU Member States (“MSs”) are to pursue collective actions i.e., legal actions brought on their behalf by Qualified Entities (“QEs”). The RAD permits, so far as MSs’ domestic law does, funding of such actions by commercial third-party litigation funders (“TPLFs”) and provides a framework to support and protect funded claimants and intended beneficiaries, including those whose interests are represented by QEs, in proceedings financed either in part or whole by TPLFs. See our piece at page 18 for an overview of implementation of the RAD in Europe.

### Recent developments by the European Parliament and the Voss Report

On 13 September 2022, the European Parliament adopted a recommendation of the Voss Report ‘Recommendations to the Commission on Responsible Private Funding of Litigation’<sup>17</sup> (led since June 2021 by Axel Voss MEP, rapporteur of the European Parliament’s Committee on Legal Affairs) that the Commission aims to harmonise EU member states’ rules on private third-party funding in commercial and civil litigation. This was to achieve “a more comprehensive and restrictive regulation of third-party funding, including authorisation procedures for TPLFs and a requirement to respect fiduciary duties to claimants”<sup>18</sup>.



Practically speaking, the recommendations of the Voss Report centred around transparency of the existence of a TPLF and ensuring that in the event of a successful damages award, claimants receive their share of the reward as priority over TPLFs. The International Legal Finance Association has challenged the Voss proposals, including suggested caps on fees payable to TPLFs<sup>19</sup>.

Absent the Voss proposals litigation funding is relatively unregulated in Europe. The RAD provides that conflicts of interest between TPLFs and consumers should be prevented and imposes certain restrictions on the degree of control which a TPLF has over the conduct of a dispute, even if there was no pre-existing restriction in domestic law. But that aside, there is no existing European-wide regulation of litigation funding.

## What is happening at the national level in the EU?

Adoption of the RAD has seen some EU member states “extend” domestic legislation and permit litigation funding where it was previously (technically permitted but) not used in the context of class actions. For example, the draft laws of **Bulgaria**, **Croatia**, **Hungary** and **Sweden** envisage a completely new set of rules on permissibility of third-party litigation funding.

**Historically**, many EU member states have either viewed class actions negatively (**Italy**), had no formal class action system (**Austria**) or if the legal mechanism for bringing a class action did exist, it was rarely used (**France**). The two exceptions were the **Netherlands** and **Portugal**, which have been hotspots for class actions in recent years, assisted by local use of litigation funding.

Whilst litigation funding remains prohibited in **Ireland**, the Minister of Justice recently confirmed that its use is being considered in arbitration<sup>20</sup>. If TPLFs are eventually permitted to fund arbitration in Ireland, then that will increase pressure for funding to also be permitted in general commercial litigation and class actions.

In the UK, the Supreme Court’s July 2023 judgment in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* has caused serious complications for litigation funders. In short, this ruling means that many litigation funding agreements which calculate a return by reference to the claimant’s recovery, e.g., as a percentage of any recovery at trial or on settlement, are in fact Damages Based Agreements (“**DBAs**”). DBAs are prohibited in opt-out competition class actions in the UK, so PACCAR’s impact is likely to be most acute for these types of class actions. A litigation funding agreement that is a DBA, and which is not prohibited by virtue of being used in an opt-out competition class action, must comply with the DBA Regulations which will bring regulatory restrictions to those funding agreements. Our short summary of the PACCAR judgment is available here: [The Supreme Court deals blow to litigation funding and collective proceedings \(cms-lawnow.com\)](https://www.cms-lawnow.com).




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## Class action risk in light of the EU Digital Services Act: key takeaways for online services providers

After a few years of negotiations between EU policymakers, and eventual approval on 5 July 2022, the Digital Services Act (“**DSA**”) will be coming into full force in just a few months. One of the DSA’s key intended outcomes is to encourage the development of competitive practices between digital services providers by raising the standards in content moderation, transparent advertising and combatting disinformation.

Article 2 of the DSA provides that the DSA is applicable to all intermediary service providers offering services to recipients based in the Union, regardless of whether that provider is based in the Union (see section below for examples of intermediary services). This includes providers of all sizes, spanning from micro companies to conglomerates. Simply put, obligations imposed by the DSA are often proportionate to the size of the provider – less onerous obligations on smaller companies and more onerous for larger companies. Most affected digital services providers will have until 1 January 2024 to comply with the provisions of the DSA, except for those facing the greatest regulatory scrutiny – dubbed “Very Large Online Platforms / Search Engines” (“**VLOPs**” or “**VLOSEs**”) – which are subject to the DSA as from 25 August 2023.

The DSA brings significant regulatory obligations, but this article specifically focusses on how the DSA increases litigation risk for those within its scope companies.

Unusually for European legislation, the DSA confers a specific cause of action in damages to persons suffering losses flowing from a breach. Article 54 provides: *“Recipients of the service shall have the right to seek, in accordance with Union and national law, compensation from providers of intermediary services, in respect of any damage or loss suffered due to an infringement by those providers of their obligations under this Regulation.”*



## Scope of Article 54

Article 54 allows recipients of the service to seek compensation from the providers of “intermediary services” for loss suffered from an infringement of the DSA. Article 3(g) of the DSA defines intermediary services as one of the following categories: a “mere conduit” service, a “caching service” and a “hosting” service. Each service involves, in varying degrees, the transmission and storage of information for recipients.

Examples of services falling into these categories include: internet service providers; direct messaging services; virtual private networks; domain name systems; voice over IP; top level domain name registries; content delivery networks; content adaptation proxies or reverse proxies; cloud service providers; online marketplaces; social media and app stores. Few digital platforms, if any, would fall outside the scope of “intermediary services”. Because the DSA applies to intermediary services only, all providers falling within the scope of the DSA are also potentially within the scope of Article 54.

The potential class of litigants encompassed by Article 54 is also broad. Article 54 grants all recipients of intermediary services the right to seek, in accordance with the EU and national law, compensation from providers. There is no prerequisite for said recipients to have entered into agreements with providers or exchanged any money for those services. Given the multitude of providers offering services on a free or freemium basis, and the essentially uncapped user bases spanning countries, digital services present a potentially fertile breeding ground for class action litigation.

The other two requirements for bringing a claim under Article 54 are that: (a) the claimant must have “suffered damage or loss”; and (b) that such damage or loss must have been caused by “an infringement by [the provider of intermediary services breaching its] obligations under this Regulation”. Some potential specific areas of risk are discussed below.

## Content Moderation

Pursuant to Article 15 of the DSA, all providers of intermediary services must make available “clear, easily comprehensible reports on any content moderation that they engaged in”. VLOPs and VLOSEs face more specific regulation with regard to risk mitigation. Specifically, under Article 35 of the DSA, VLOPs and VLOSEs are required to adopt content moderation processes focussed on the removal of illegal content, illegal hate speech or cyber violence. In addition to filtering and removing content, VLOPs must make available, as necessary, age verification blocks and parental control tools.

In light of the increasing number of young people online, content moderation is an area where breaches could impact numerous individuals, and therefore – in principle – presents risk of group litigation. Should minor recipients become exposed to illicit content, they may become susceptible to different types of harm. Causation issues may arise depending on the nature of the alleged breach and the group affected, but claimant firms could argue that dissemination of false or misleading information could lead minors to needlessly spend money or otherwise behave irresponsibly.

Other problems tied to content moderation include the increasing phenomenon of people acting en masse in reaction to false reporting on politics and global affairs. A more dramatic claim would be one alleging that failures to properly moderate caused psychological harm to users of the online service. The extent of harm could differ across a potential group, but that is not necessarily a bar to group litigation.

VLOPs and VLOSEs in particular will need responsive protocols to mitigate against the potential class action risk tied to failures of content moderation.

Despite challenges in causation and potential heterogeneity of impact across a group, the sheer scale of online interactions and its profile puts the relevant companies at heightened litigation risk under the DSA.

## Right to Contest Decisions

Article 23 of the DSA requires providers of online platforms to issue a warning prior to the suspension of recipients that frequently provide illegal content. Some recipients of intermediary services use these services to make a living, whether that is by generating views or clicks and earning advertising fees, or by engaging with other users in subscription packages. For this category of recipient there are clearly defined financial repercussions for when an intermediary service provider removes their content or suspends their rights.

Such a recipient of services could have grounds to allege that the moderation protocol was applied too loosely, or insufficient warning was provided, directly causing a loss of income when the recipient's content was prematurely removed. A change in internal policy on how to address these issues, or incorrect application of the provisions under Article 23 for a period of time, could result in a group of persons having a claim. Their degree of homogeneity, and the similarity of the facts, would impact their suitability to be brought in a single class action.

## Advertising transparency and right to information

The DSA imposes strict requirements on intermediary service providers to present transparent and comprehensive information in relation to items or services advertised on their platforms. Where an online platform that allows consumers to conclude distance contracts becomes aware that the product or service is illegal it must inform consumers who purchased the product or services via its services of 1) the legality of a product; 2) the identity of the trader; and 3) any relevant means of redress. It is possible to envisage circumstances where a group of consumers argue that failure to provide this information impeded their ability to recover sums from the trader acting illegally and thereby seek redress from the online platform.

Article 39 of the DSA requires that VLOPs and VLOSEs make publicly available details concerning advertising that they are carrying, including the person who provided the advert and, to the extent different, the person who paid for the advert. Consumers are increasingly interested in the provenance of goods and services, including owing to ESG concerns. If failure to provide clear information on adverts resulted in a category of purchasers making buying decisions that they otherwise would not have made, they may seek to bring legal action. Similarly, many recipients may make purchases based on celebrity advertisements and from influencers. If it is not clear that such advertisement has in fact been paid for by a separate legal person, and is not a free endorsement, some recipients, particularly younger ones, may make purchases they otherwise would not.



# Methodology

As noted in the introduction, our study on European Class Actions seeks 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).

Although not formally an avenue to claim damages, we also included mechanisms that clearly facilitate subsequent mass claims such as the German model declaratory action. 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 2016–2022 inclusive. The overall number of class actions filed between 2016 and 2021 has changed compared to that set out in the previous year's report, due to inclusion of new jurisdictions in the survey and improvements in our data set.

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 at the local and central editorial level to ensure it reflects the picture in the local market and to reduce the risk of inaccuracies.

Jurisdictions included in our report are: Albania, Austria, Belgium, Bosnia Herzegovina, Bulgaria, Croatia, Czech Republic, England and Wales, France, Germany, Hungary, Italy, Luxembourg, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine.

Certain major events, such as the Dieselgate claims, have resulted in many thousands 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 or against different defendants we included them as a single data point per country and a single data point per defendant.

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 Solomonik Litigation Intelligence in providing certain data in relation to claims filed in the UK.

See page 5 for an explanation of our methodology for UK and Netherlands quantum data. We used a GBP to Euro conversion ratio of 1:1.17 as at 31 August 2023.

# Contacts

With more than 70 offices in more than 40 countries and 5,800+ 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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# Endnotes

Endnotes are interactive; click the endnote number to return to the main text.

- 1 Representative Actions Directive – dealing with deadlines | Robert Li | [CDR Article \(cdr-news.com\)](#) plus checks with CMS colleagues in those countries
- 2 In the case of Hungary, it is not the Court but the Minister for Consumer Protection who can revoke an entity's standing to proceed with the representative action.
- 3 Bulgaria, Croatia, France, Germany, Hungary, Poland, Italy, Netherlands, Portugal, Romania, Slovenia, Spain and Sweden.
- 4 Equivalent to EUR 8.80.
- 5 [2020] UKSC. For a summary of the judgment, see <https://cms-lawnow.com/en/ealerts/2020/12/uk-supreme-court-gives-landmark-judgment-in-mastercard-v-merricks>.
- 6 [20220331\\_1329\\_1336\\_Final\\_CPO\\_Carriage\\_Judgment \[2022\] CAT 16](#)
- 7 <https://www.baillii.org/ew/cases/EWCA/Civ/2023/876.html>
- 8 <https://www.baillii.org/ew/cases/EWCA/Civ/2023/875.html>
- 9 <https://www.supremecourt.uk/cases/docs/uksc-2021-0078-judgment.pdf>
- 10 [2023] EWHC 398
- 11 [2023] EWHC 1169 (KB)
- 12 [Redress-Report-2023-230217-Web.pdf \(appgbanking.org.uk\)](#)
- 13 [Litigation Funding from a European Perspective by Erik Bomans.pdf \(hubspotusercontent-na1.net\)](#)
- 14 Converted from USD 1.8 billion
- 15 Converted from USD 3.7 billion
- 16 [Litigation funding “explosion” driving class actions across Europe - Legal Futures](#)
- 17 [REPORT](#) with recommendations to the Commission on Responsible private funding of litigation | A9-0218/2022 | European Parliament (europa.eu)
- 18 [Litigation Funding Prepares for Growth in Europe | Law.com International](#)
- 19 [6498d39ac7b645dcdc5b9a4d\\_Resourcing the Rule of Law in Europe\\_Full report.pdf \(webflow.com\)](#)
- 20 [Proposed Legislation – Tuesday, 20 Sep 2022 – Parliamentary Questions \(33rd Dáil\) – Houses of the Oireachtas](#)



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