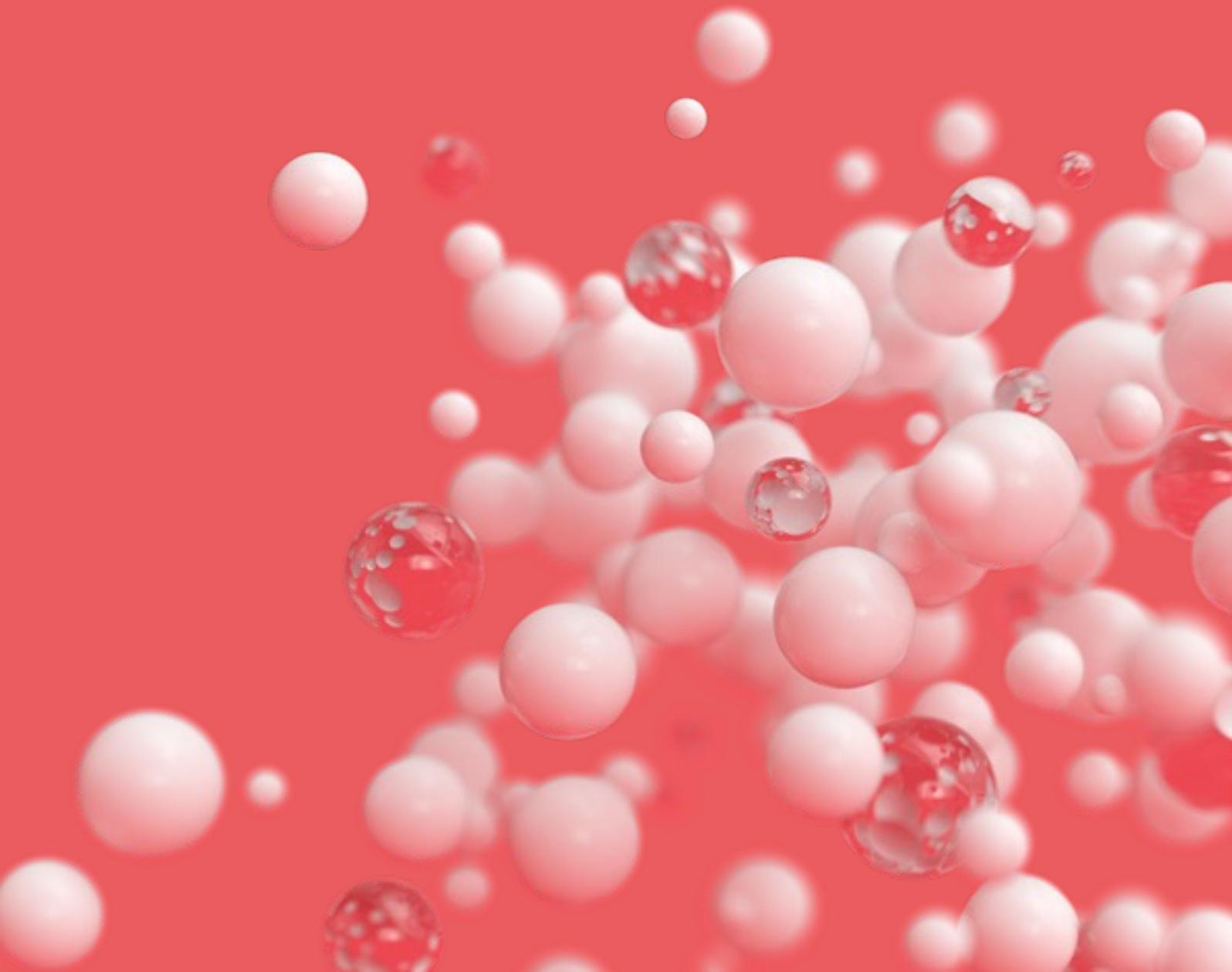


Collective and Class Actions

A guide to UK and Europe



Collective proceedings across Europe and the UK

The risk of collective proceedings, or “class actions”, is growing throughout Europe.

The risk is presently greatest in the Netherlands and the UK, particularly with respect to actions relating to anti-competitive behaviour and breaches of data protection laws.

The **EU’s Representative Actions Directive** will be effective from 25 June 2023. Once implemented, the risk of class actions is expected to rise across many European jurisdictions, with claimant organisations and defendant companies forum-shopping for the most advantageous place for claims to be heard.

This document sets out at a high level the procedural mechanisms by which such claims can be brought in key European jurisdictions and identifies the relevant trends in each jurisdiction.

Further details are outlined on the following pages, with a snapshot below.

	General risk of mass claims	Risk of data class actions	Risk of data anti-trust actions	Opt-out mechanism?
England & Wales	Medium	Medium	High	Yes
Belgium	Low / Medium	Medium	Medium / High	Yes
France	Medium / High	Medium	Medium / High	No
Germany	Low / Medium	Low	Low	No
Ireland	Low	Low	Low	No
Italy	Medium	Medium	Medium / High	No
Netherlands	High	High	High	Yes
Spain	Medium	Medium	Medium	No

Should you have any queries, contact details for our core team are provided at the end of this Guide. We would be happy to discuss any aspect of collective proceedings and class actions in further detail.

The EU Representative Actions Directive (EU 2020/1828)

- Member States must ensure there is at least one procedural mechanism (either opt-in or opt-out) allowing qualified entities to bring representative actions for injunctive and redress measures
- Member States must implement the Directive into their national legal system, applying the measures from 25 June 2023
- As such the risk profile in some member states may increase significantly

England and Wales

Mechanisms that can be used to bring an...

“Opt-in” action

Several similar claims against the same defendant can be dealt with together in the courts (Civil Procedure Rules (“CPR”) 19.1)

Multiple joint claimants

- Multiple parties can issue a joint claim if those claims can be “conveniently” disposed of in the same proceeding (CPR 7.3)
- Consolidation of separate claims also possible (CPR 19.4)
- This is the traditional method

Group Litigation Order (“GLO”)

- Claimants can apply for a GLO where multiple claims give rise to “common or related issues of fact or law”
- Court will consider whether a GLO would (a) save time (b) save costs; and (c) whether each case would be “far advanced” by a determination of the common issues (*Arif & Ors v Berkeley Burke Sipp Administration Limited* [2017])
- Court will set a cut-off date by which claimants must join the GLO
- Each claimant will be liable for (a) its individual costs, (b) severally liable for an equal share of the common costs; and (c) an equal share of adverse costs

NB: A CPO in the CAT can also be brought as an ‘opt-in’ action

Damages

- Only awarded to those who actively participate in the claim
- May be awarded on an aggregate basis (e.g. percentage)
- The court may only give a decision on liability, with quantum to be proved later by individual claimants (*NRAM plc v McAdam*)

“Opt-out” action

Representative Action

- Representative can bring a claim on behalf of others who have the “same interest” (CPR 19.6(1) and 19.7(d))
- Damage needs to be identical for each affected individual (*Lloyd v Google*)
- High threshold to meet

Collective Proceeding

- Can be brought in the Competition Appeal Tribunal (“CAT”) if they:
 - are brought on behalf of an identifiable class of persons
 - raise common issues
 - are suitable to be brought in collective proceedings (CAT Rules 2015, rule 79(1))
 - arise from a breach of competition law
- “Opt-out” only applies to UK residents; non-UK residents must opt-in
- “Opt in” and “opt out” claims can proceed in parallel if it avoids “unnecessary duplication” and achieves “consistent results” (*Trucks Cartel Litigation* (Case Nos. 1282/7/7/18 and 1289/7/7/18))
- Claims require certification before they can proceed

Damages

Representative Action

- Should only compensate for the loss actually suffered (*Lloyd v Google*)
- Bi-furcate process likely. Court will determine common issues which will form a basis for individual claims for redress (*Lloyd v Google*)

CAT

- “Aggregate award of damages” likely. Does not require the CAT to undertake an assessment of the amount of damages recoverable in respect of each person (CAT Rules 2015, rule 73 and rule 92)

No direct equivalent in the UK for US-style class actions except in relation to claims brought under the Consumer Rights Act 2015 (“CRA”) for anti-competitive behaviour

We would characterise the **risk of mass claims** in the UK as **‘Medium’**, except in relation to anti-competitive behaviour where it is **‘High’**

Trends

There is an increasing risk of mass claims against high profile companies due to the availability of increasingly well recognised collective redress mechanisms, an active claimant bar and a very significant increase in the availability of litigation funding.

Data Protection

- The Supreme Court decision in Lloyd stopped the sudden surge in representative actions – most have been discontinued
- Created difficulties for claimants in proving “*same interest*”, calculating measure of damages and established a high de minimus threshold. Data claims are now unlikely to be group actions
- Also led to challenges to data protection actions brought through other collective mechanisms (particularly GLOs, previously used to bring claims against British Airways, Ticketmaster and Marriott)

Anti-trust

- Opt-out collective proceedings are gaining momentum – now present the highest risk of mass claims in the UK
- The risk of opt out class actions has markedly increased post *Merricks v Mastercard* in 2020
- There are currently high profile proceedings before the CAT regarding payment card interchange fees, landline telephone services, train fares, the foreign exchange market, the trucks cartel, App Stores and others

Securities

- Increasing catalogue of mass securities claims by shareholders under s.90 and 90A Financial Services and Markets Act for loss due to misstatements made by a company in its reporting (e.g. RBS, Lloyds, Tesco and Autonomy)

ESG

- Anticipated to drive significant mass claims in the near future
- Particularly in relation to environmental protection and damage abroad being pursued through the English courts (following claims as *Okpabi v Royal Dutch Shell*). Claims brought for misstatements under section 90 or 90A FSMA also likely in respect of ESG issues

Regulatory

- Expected increase in collective action following regulatory investigations (e.g. Lloyds/HBOS, the Berkeley Burke SIPP, *Merricks v Mastercard*, and *Justin Le Patourel v BT Group Plc and British Telecommunications Plc*)
- Provides claimant access to already uncovered underlying factual material required to establish a claim
- Renewed focus on corporate transparency means that instances of corporate wrongdoing are becoming more widely known and at an earlier stage

Belgium

Mechanisms that can be used to bring an...

"Opt-in" / "opt-out" action

Representative Action

- Belgian law (since 2014) permits "actions for collective redress" (Book XVII of the Code of Economic Law ("CEL")). Aims to give consumers and SMEs the right to bring opt in or opt out claims. Three conditions apply:
 1. Must relate to an alleged breach by a company of a contract or specific European laws or regulations (as listed in Article XVII.37 CEL), including laws relating to the protection of: competition; consumer and market practices; payment and credit services; intellectual property rights; GDPR; and product liability
 2. The action for collective redress must appear more effective than an individual action of ordinary law
 3. There is a need for consumers and SMEs to be represented by a recognised group representative

Procedure

1. For both opt-in and opt-out claims, an application must be lodged with the Registry of the Brussels Enterprise Court. The application must set out how the conditions (above) are fulfilled
2. Within two months, a judge decides on the admissibility of the action and whether the action should be brought as an opt-in or opt-out action
3. The opt-in system is mandatory for consumers who do not have their habitual residence, or for SMEs who do not have their main establishment in Belgium; or if the action aims at compensating physical or moral (collective) damage
4. Otherwise it is for the Judge to decide - based of the facts and arguments submitted by the parties - the interest of both the consumers or SMEs and the market, the type and the size of the damage suffered, and the number of potential victims
5. Judge will determine the time limit and the modalities for exercising the right to opt in / out, which may not be less than 30 days or more than three months
6. A compulsory negotiation phase follows between the group representative and the defendant for a period set by the judge (3 to 6 months from admission). If an agreement is reached, it must be presented to the judge for approval
7. If no agreement is reached, or if the judge refuses to approve the settlement, the judge will determine the claim

Damages

- Only monetary damages and compensation in kind are available (there is no access to injunctive relief)
- The basic principle is full compensation for the actual damage suffered. There is no cap on damages in Belgian law, however only property damage exceeding €500 caused by a defective product has to be compensated
- The courts may fix either an individual amount to be paid to each member of the group, or a global amount which must then be divided between the members of the group. However, no collective redress action has yet resulted in a judgment on the merits against the defendant because: a settlement has been reached between the parties; the court has found in favour of the defendant; the court has ruled the action inadmissible. Thus, the method that the courts will use to apportion an aggregate amount of damages among the class members remains unclear

No Belgian law (since 2014) provides for both 'opt-in' and 'opt-out' class actions.

We would characterise the risk of mass claims in Belgium as 'Low' to 'Medium'.

Trends

There is a risk of class actions but it is relatively limited: only ten collective redress actions have been filed since the law came into force in 2014. Of those ten cases, only three led to a court decision. However, the risk has increased in recent years - particular relating to data protection.

Consumer Protection

- Test-Achat is the most active organisation in actions for collective redress (9 of the 10 actions since 2014 have been launched by Test-Achat)
- Action filed in 2020 concerned the allegedly planned obsolescence of Apple devices through software updates

Data protection

- In 2018, Test-Achat brought an action for collective redress against Facebook following the "Cambridge Analytica" scandal. In 2020, the parties finally agreed to terminate the action in order to enter into a collaborative relationship to improve the security and privacy of Facebook consumers
- In September 2020, NOYB (a non-profit organisation committed to the protection of personal data) was granted class representative status
- NOYB has in the past filed several complaints with data protection authorities for data protection breaches. As such, the risk of action for collective redress in this area is likely to increase

ESG

- Test-Achats has filed a collective redress action against the VW group for damage suffered by consumers who bought VW, Skoda, Seat, Audi and Porsche cars on and after 1 September 2014 equipped with an EA 189 engine and software that allegedly distorted the results of the emission tests during the tests, and did not comply with the emission standards for harmful gases
- This action was declared admissible by the Dutch-speaking court of 1st instance in Brussels on 18 December 2017. This action is still ongoing and the pleadings before the Dutch-speaking court of first instance in Brussels are scheduled for 15 and 22 May 2023
- In parallel, a conciliation procedure is in progress between the parties and Test-Achats

Implementation of Directive 2020/1828

- The Directive envisages a system of collective action very similar to the existing Belgian regime, but some adaptations will be needed. The Directive requires, for example, that Member States provide for sanctions (such as fines, periodic payments or periodic penalty payments) in the event of a company's failure to comply with: a cease-and-desist order; a decision to provide information on final decisions to the consumers concerned; or in the event of failure or refusal to produce evidence. Nothing has yet been published regarding the update of the Belgian system to meet the requirements of the Directive

France

Mechanisms that can be used to bring an...

"Opt-in" action

Procedure

- Can only be initiated by a duly authorised organisation (such as a consumer association) specifically mandated to bring liability claims
- Proceedings are divided into two distinct phases:
 - a. "Collective phase": Judge rules on the conditions of liability and the individuals who can be considered as victim
 - b. "Individual phase": Judge rules on the individual claims for compensation
- Judge will specify in their decision the category of persons to be compensated, including: (i) the criteria an individual must meet; (ii) the publication measures the defendant must implement to inform individuals of their right to compensation (letters to individuals or global media announcement); and (iii) the time limit for the collective action and the deadline for opting in (2-6 months for consumer and competition claims)
- To opt-in the consumer must give notice to the association bringing the claim, to the defendant directly, or to any person designated by the Judge in their decision
- Claimants must demonstrate that they have suffered a similar type of damage
- A consumer who chooses not to opt-in to the class action loses the right to seek compensation for any harm suffered that could have been compensated by the class action
- Specific procedural points apply to different types of class action, for instance:
 - Anti-trust: Opt-in class actions must be a follow-on action (ie there must be a decision handed down by a European or French Competition Authority on a matter that is non-appealable). Can be brought by individuals or companies that have suffered from the anticompetitive practices. However, no decision handed down to date
 - Data protection: Opt-in class actions permitted. Claimants can: (i) request that a defendant is ordered to cease breaching GDPR or French Data Protection Act; and / or (ii) request compensation for damages resulting from this breach

Other forms of collective actions

It is possible for multiple individuals placed in a *similar* situation to bring a joint claim for loss they have all suffered. Each claimant is a separate party and does not benefit from the collective representation of any organisation. No specific requirements for data protection and / or competition claims

Damages

Violations of data protection regulations:

- Claims brought to date tend to be c. €1,000 per individual, and the relevant classes are constituted of 100 to 200 claimants. Therefore, the potential amount that could be ordered if actions were declared admissible would be €100,000 to €200,000. It is difficult to be specific as no public decision on the level of compensation awarded to claimants to date

Violations of competition law:

- Class actions: Damages can only be awarded for pecuniary losses resulting from property damage. No case law yet
- Collective actions / private enforcement follow-on actions: Evaluation of each head of damages carried out in accordance with the principle of full reparation by comparing the actual situation in which the anti-competitive practice occurred with the "counterfactual" situation that would have occurred in the absence of the anticompetitive practice

French law includes a formal mechanism for 'opt-in' class actions but does not permit 'opt out' proceedings.

We would characterise the **risk of mass claims** in France as **'Medium'** to **'High'** for anti-trust claims, **'Medium'** for GDPR injunctive relief and **'Medium'** for all other compensatory action.

Trends

Although class actions have been permitted in France for almost a decade, a limited number of decisions have been issued by French Courts due to the length and complexity of civil procedure. Class actions were originally only authorised for breaches of consumer law and competition law but the scope of class actions has now broadened to: health law; discrimination at the workplace; environmental damage; and data protection. The introduction of GDPR triggered a wave of actions by privacy associations but the majority of these claims remain pending.

Compensatory claims

- There is a medium risk of class actions which claim compensation and we do not expect this trend to change
- Claimants must demonstrate that they have suffered a similar type of damage, which remains difficult to demonstrate. For example, on 11 May 2022 the Paris Court of First Instance declared inadmissible a class action filed by the patient association RESIST on the grounds that the claimants did not demonstrate having suffered similar damages despite having used the same medical device
- Likely to take years for the class action to be heard, which may deter potential claimants from taking this route to obtain compensation (perhaps more likely to file individual claims)

Data protection

- Limited actions to date but class actions which seek to stop a certain type of GDPR breach are on the rise. Given the position of the French Data Protection Authority on topics such as transfer of data outside the EEA, claimants may take this opportunity to organise a class action against major companies (especially in the tech sector which generally involves more transfer of data than in other sectors) in an attempt to force them to comply with GDPR regarding data transfers
- Privacy associations (eg Quadrature du Net / Internet Society France) and consumer associations (eg UFC Que Choisir) were very active at the time GDPR entered into force, organising class actions and collective actions against major companies in the tech sector. There have been two class actions on the grounds of violation of data protection rules: *UFC Que Choisir vs. Google*; and *Internet Society France vs. Facebook*
- Privacy associations also began collective actions to encourage supervising authorities to fine companies (eg 5 collective actions introduced by Quadrature du Net against Google, Apple, Facebook, Amazon and Microsoft)
- In May 2022, the Quadrature du Net initiated a collective action against the French state on the grounds of the illegality of mass surveillance measures

Anti-trust

- Expected increase in private enforcement actions. For instance, 4,000 professionals have joined a collective action for compensation against the issuers of luncheon vouchers, which were sanctioned by the FCA in December 2019 with a fine of €415m for anti-competitive practices

Implementation of Directive 2020/1828

- A bill has been drafted and should be discussed before Parliament in the coming weeks. Current French law is already partially compliant with the Regulation

Germany

Mechanisms that can be used to bring an...

"Opt-in" action

Joinder of Actions (Prozessverbindung)

- Court may order the joinder of several actions (brought by the same or different parties) if the claims are legally related or could have been asserted in one action (s. 147 of the German Code of Civil Procedure ("ZPO"))
- Claims are no longer independent but are combined into a single proceeding with a uniform hearing, taking of evidence and one binding judgment

Joint Plaintiffs (Subjektive Klagehäufung / Streitgenossenschaft)

- Several individuals may also sue as joint litigants if they share a legal interest in the subject matter of the dispute; factual and legal cause is the same (s. 59 ZPO); or their claims or obligations are of the same kind and based on an *essentially similar* factual and legal ground (s. 60 ZPO)
- Each party is still pursuing its individual claim without any effect on the other plaintiffs or defendant (s. 61 ZPO)
- It may be mandatory to treat the claims of the plaintiffs uniformly (eg when the legal relationship may not be determined otherwise (s. 62 ZPO))

Representative Action (Verbandsklage)

- An authorised association represents interests of each class member. However, the association does not represent specific consumers (i.e. does not act on behalf of an identifiable group of claimants, but becomes active on its own initiative)
- A special form of Representative Action was introduced in 2018 following the VW scandal: a Model Declaratory Action (Musterfeststellungsklage)
 - An authorised association may bring such an action where at least 50 affected consumers register within two months of the publication of the complaint
 - The model proceeding ends with either a settlement or a declaratory decision. Each consumer entered in the register of actions must then individually enforce his or her claims for damages. The declaratory decision is binding on the questions of fact and law or the purposes of their individual follow-on litigation
 - There is no financial expense or risk of legal costs to the consumers

Kapitalanleger-Musterverfahrensgesetz (Capital Market Disputes)

- Claims for damages for false, misleading or omitted public capital market information can be combined (Act on Exemplary Proceedings in Capital Market Disputes 2005)
- If ten or more claims of the same nature are filed within six months, the court of the first instance will issue an order for referral by summarising the common issues affecting all proceedings and presenting the common factual circumstances to the next higher court
- The latter will choose and publicly announce one claim where it will decide the case as a model; after announcement, new plaintiffs can join the action
- The findings of the model decision are then legally binding for the original claims, but not for later joined plaintiffs specific consumers

German law includes many different procedures for bringing 'opt-in' claims but no mechanism for an 'opt out' class action.

We would characterise the **risk of mass claims** in Germany as 'Low' to 'Medium'.

Damages

- "Opt-in" procedures used to establish the facts and the existence / non-existence of a claim but damages claims then brought by each individual
- Damages are calculated on a compensatory basis, so that the claimant is granted a situation that is neither advantageous nor disadvantageous compared to the situation before the harm was done
- There are currently no court decisions on the public record specifically relating to damages claims for data protection breaches

Trends

Mass scale collective actions are rare in Germany, though there are growing numbers of opt-in consumer protection and data protection claims. It is likely that the risk attached to collective proceedings in Germany will increase in the future.

Consumer Protection

- Consumer protection actions are quite regularly undertaken by consumer protection associations. Recently, a consumer association filed a lawsuit against Telefónica Germany, Telekom Deutschland and Vodafone because, in the opinion of the consumer association, the companies transmitted personal data of their customers to credit agencies without obtaining the consent of the consumers concerned
- Major claims have been brought, for instance against Volkswagen and Ernst & Young, but currently there are only a few ongoing Musterfeststellungsklagen. These are mostly directed against savings banks because of the termination of savings contracts. There is no discernible trend here

Data Protection

- Increasing number of data protection lawsuits for damages
- So far, only individual actions have been brought but there is potential for actions to be brought by consumer protection associations in the future, which could lead to more claimant involvement and therefore higher damages claims

Implementation of Directive 2020/1828

- The EU Regulation has not yet been implemented into national law. There is currently no (publicly available) draft law. However, it is not unusual that implementation of such regulations takes place in Germany on short notice
- It is noted that, even notwithstanding the Regulation, collective redress measures may become more prominent in the future. The German government's coalition agreement between the SPD, Greens and Free Democrats committed both to implementing the Regulation and to expanding and modernising these mechanisms

Ireland

Mechanisms that can be used to bring an...

“Opt-in” action

There is no formal opt-out procedure under Irish law. However, in practice, if a party does not authorise a party to represent it / him / her in a representative action then that party can in essence “opt-out” of that representative action. In a test case scenario, following the conclusion of the test case if a party opts not to bring their case on the back of the test case then strictly speaking they could be said to have opted out.

Representative Action

- One (or more) can sue / be sued on behalf of / or for the benefit of all persons interested in the given case
- To commence a representative action, the court must be satisfied that each individual has authorised the main party to represent them in proceedings
- Parties must have the same interests in the same proceedings, not just similar or ‘common’ interests; this is a very strict requirement
- A barrier to representative action is the Irish prohibition on third party litigation funding. It is expected that this prohibition will keep the number of claims low even with the introduction of the EU Directive
- Representative actions are typically used in financial services litigation (e.g. mis-selling of a financial product to a large number of consumers) or in relation to product defects

Test Case

- In terms of a test case, the party whose case is not a test case is not bound by the outcome of the test case but is likely to have a significant bearing on that party’s case (should they opt to bring one following judgement in the test case) due to the test case’s precedential value
- The identification of the cases to be treated as test cases is subject to the Court and, accordingly, a party may not have much sway in whether his / her / its case is treated as a test case depending on the relevant circumstances
- Examples of test cases can be seen in the business interruption cases following Covid 19 against FBD insurance (*High Court Hyper Trust Limited Trading as the Leopardstown Inn -and- FBD Insurance plc* [2020/3656 P.] and *Aberken Limited Trading as Sinnots -and- FBD Insurance plc* [2020/3658 P.]

Damages

- Test cases give an indication and set a precedent for that particular type of case. It is then up to the individual, who falls under the test umbrella to bring their own action to recover damages
- Any order or judgment in the a representative action binds all persons represented at the direction of the Court
- In a data privacy context, the type of damage (whether material or non-material) determines the quantity of damages which may arise. However, there have been no reported decisions on the damages awarded for material or non-material breaches
- Likely to mirror UK approach and require a “*de minimis threshold of triviality*” for a claim of damages to succeed
- Data breaches normally dealt with by a regulator imposing fines (e.g. Data Protection Commission imposed EUR 17m fine on Meta Platforms Ireland Limited)

There is currently no legislative framework in Ireland to facilitate compensatory collective or class actions for consumer redress. However, multiparty or multi-plaintiff litigation does frequently occur by way of 'representative actions' and 'test cases'.

We would characterise the **risk of mass claims** in Ireland as '**Low**' given that there is currently no procedural mechanism to bring such claims and third party litigation funding is prohibited.

Trends

Despite there being no legislative framework for class actions, Ireland has seen its share of multiparty proceedings. In the near future, Irish legislation implementing the EU Regulation will introduce true collective. Given Ireland hosts the European HQs of many large tech companies - and the increasing activity of the Irish data protection regulator - the risk of data protection actions is expected to increase.

Financial services litigation

- Mis-selling of a financial product to a large number of consumers (e.g. tracker mortgage cases against Financial Institutions such as AIB, Bank of Ireland etc)

Data protection

- Fastway Couriers confirmed that names, email accounts and phone numbers of 446,143 customers were hacked. However, the type of data which was compromised effectively categorised this breach as a "non-material breach" and, as a result, would attract minimal damages - meaning the breach did not result in an avalanche of similar claims
- The Data Protection Commission ("DPC") announced its decision in Meta (Facebook) inquiry, imposing a fine of €17m on Meta Platforms Ireland Limited (formerly Facebook Ireland Limited) ("Meta Platforms"). The decision arose following an inquiry by the DPC into a series of twelve data breach notifications it received in a six month period between 7 June 2018 and 4 December 2018. The DPC found that Meta Platforms infringed Articles 5(2) and 24(1) GDPR. Albeit no "class action" arose against the Meta Platforms within the jurisdiction in this instance - and accordingly no "damages" were awarded to any applicants / plaintiffs - it clearly shows how a regulator is willing to investigate and take action against companies who are in breach of Data Protection laws, with or without court proceedings being initiated by affected individuals/data subjects

Consumer Protection and Anti-trust

- A rise in multiparty insurance claims (following test cases) relating to business interruption claims where the insurance provider failed to pay out (eg FBD insurance and the business interruption claims following Covid-19)

ESG

- Limited reported ESG decisions by the Irish courts, and the fact that Ireland does not have a class action mechanism in place could be a factor for this. However, that is not to say that ESG actions are unheard of
- The Irish Supreme Court's decision in 2020, in *Friends of the Irish Environment CLG v The Government of Ireland & Ors*, where the Irish Government's National Mitigation Plan for tackling climate change was challenged and ultimately quashed due to a lack of specificity required under the Low Carbon Development Act 2015

Implementation of Directive 2021/1828

- The legislation implementing the EU Representative Actions Directive (EU 2020/1828) was due to take effect in June 2023 but this deadline will not be met and it is now expected that the Directive may be implemented into Irish law by the end of 2023. This legislation will specifically provide for collective actions in Ireland for the first time, allowing qualified entities to seek both injunctive relief and redress

Italy

Mechanisms that can be used to bring an...

Class Action

- Class actions are regulated by Italian law 31/2019, which entered into force on 19 May 2019 (“New Regime”). The New Regime repealed the pre-existing rules set forth in Article 140-bis of the Italian Consumer Code (“Old Regime”) and introduced articles 840bis and following in the Italian Civil Procedure Code
- The New Regime broadens the scope of application for class actions in Italy and applies to unlawful conduct occurring after 19 May 2021. Unlawful conduct that occurred before 19 May 2021 remains subject to the Old Regime (see next page)
- Both (Old and New) Regimes provide for an opt-in mechanism
- Scope of application: claims relating to any area of law
- Legal Standing: anyone seeking protection of their, or another’s, “homogeneous individual rights” can start a class action irrespective of his / her quality as consumer / user (including professionals, companies, investors, shareholders or non-profit organisations or association, which are statutorily entitled to protect individual rights)
- Key features of the New Regime:
 - must be presented to a chambers specialising in corporate matters (*Sezione Specializzata in materia di imprese*) within the ordinary Civil Court
 - instituted by means of a complaint (*ricorso*) filed with the competent Court; complaint published on the telematic platform of the Ministry of Justice
 - within 30 days from the first hearing, the Court will issue an order stating whether the claim is admissible or not
 - claimants can opt-in either: (a) immediately after the Court declares the class action admissible; or (b) after a positive judgment on the merits is issued
 - if the class action is upheld, the Court will issue a decree that: (i) admits or rejects each request for joinder; (ii) quantifies the sums due to each class member; and (iii) orders the defendant(s) to pay the quantified sums

Representative Action

- Italy has implemented the EU Collective Redress Directive (EU Directive 2020/1828), by enacting Legislative Decree no. 28 of 10 March 2023
- Such legislation (incorporated in art. 140ter et seq. of the Italian Consumer Code) aims to strengthen consumers’ protection against domestic / cross-border infringements of EU laws committed by any individual / legal entity in relation to their trade, business, craft, or profession
- The new representative action will be available for infringements committed from 25 June 2023 onwards
- Scope of application: claims against domestic and cross-border infringements of the laws referred to in Annex II-septies to art. 140ter of the Italian Consumer Code that harm, or may harm, the consumers’ collective interests. Such infringements relate to a broad range of areas including, but not limited to, those relating to product liability, consumer goods warranty, unfair trade practices, misleading advertising, e-commerce, and digital services. Competition law infringements are not included
- Legal Standing: representative actions can only be brought by qualified entities: (i) consumers’ and users’ associations included in the list referred to in Article 137 of the Italian Consumer Code; (ii) bodies designated in another member state and included in the list drawn up and published by the European Commission; and (iii) national independent public bodies referred to in Article 3(6) of Regulation (EU) 2017/2394 (including, amongst all, the Italian Antitrust Authority, the Italian Privacy Authority). Consumers are not entitled to bring representative actions on their own
- Action must be presented to a chambers specializing in corporate matters (*Sezione Specializzata in materia di imprese*) within the ordinary Civil Court
- Instituted by means of a complaint (*ricorso*) filed with the competent Court. Complaint published on a telematic platform of the Ministry of Justice
- Proceedings governed by the simplified procedure as provided by the Italian Civil Procedure Code
- Interim measures may be granted, if justified reasons of urgency are met
- Special regime on limitation period: filing of representative action by qualified entities tolls the applicable limitation periods for consumers having rights homogenous to those for which the representative action was brought

Damages

- Remedy: compensatory damages. Collective action for injunction is also available
- Damages awarded on an individual basis to all class members who opted in; Court orders sum of damages to be paid; Decree is immediately enforceable

Damages

- Remedy: compensatory measures (including through payment of money, repair, replacement, price reduction, contract termination or reimbursement of the price paid)
- Remedy: injunctive measures (aimed at ceasing or forbidding any conduct in breach of EU Laws)

After the implementation of Directive 202/1828, the Italian legal system provides now for three parallel regimes for collective proceedings: two class action regimes and the new representative action regime.

We would characterise the **risk of mass claims** in Italy as **'Medium'** and in relation to consumer protection and competition as **'Medium'** to **'High'**

Trends

Class actions have always been permitted for alleged violations of competition laws, unfair commercial practices, violations of contractual rights of a plurality of consumers and users, and product liability, but their scope has now expanded to include any subject matter. Class actions were uncommon in Italy, under the Old Regime.

Despite an expected increase of interest and attention in class actions with the New Regime, only a few cases (as publicly available on the Ministry of Justice dedicated website) have been brought so far

The Representative Action regime will enter soon into force.

Interestingly, the class action and the representative action regimes will apply in parallel and it remains to be seen how they will co-exist in practice. An initial period of confusion and uncertainty in the application of these new regimes is foreseen.

Consumer Protection and Anti-trust

- Consumer associations are active in monitoring the market, typically launching follow-on actions against companies sanctioned / fined by the Italian Competition Authority
- Altroconsumo launched a class action against Facebook following a decision against them for consumer law breaches (as did others)

Data Protection

- Action by Garante Privacy (responsible for imposing administrative fines for infringements of data protection law) is increasing - this may lead to follow-on class actions
- Garante Privacy have imposed varying fines: EUR 27m on TIM for unsolicited marketing calls (January 2020); and EUR 20m on Clearview for unlawful biometrical data processing

The Old Regime: Procedure relating to unlawful conduct before 19 May 2021 (art. 140-bis Italian Consumer Code)

Can be brought only by “consumers” and “users” against businesses. Limited to claims relating to: (i) “contracts with a number of consumers or users that are in a homogeneous situation vis-à-vis the same enterprise” (including general terms and conditions and contracts concluded through templates or forms); (ii) torts in the context of the circulation of consumer goods; and (iii) unfair commercial practices or anti-competitive behaviour

Procedure in a nutshell: (i) must be presented before the ordinary Civil Court of the capital of the Region where the defendant is based; (ii) instituted by means of a writ of summons (*atto di citazione*) to be served on the defendant and the Public Prosecutor; (iii) at the end of the first hearing, the Court decides on the admissibility of the class action; (iv) with the admissibility order, the Court shall fix the terms and manner of the public notice; (v) individual can join a class action by filing a request for joinder within a defined term (not higher than 120 days) from the date on which the Court declares the class action admissible; (vi) the ordinary procedure ends with a judgment upholding or dismissing the class action

Regarding damages, the Court either orders sum of damages to be paid or specifies the criteria for determining the quantum (either by agreement between the parties within 90 days or by order of the Court). Judgment enforceable 180 days after date of issue.

Netherlands

Mechanisms that can be used to bring an...

"Opt-in" / "Opt-out" action

Representative Action

- Class actions can be initiated by an association (vereniging) or a foundation with full legal capacity (stichting) (the "Representative Organisation") to protect the similar interests of a group (Article 3:305a of the Dutch Civil Code ("DCC"))
- Pre-2020, representative actions were aimed at obtaining a declaratory judgment of liability
- The introduction of the Act on Collective Damages Claims (the "Act"), has now made it possible for claimants to claim monetary damages in class actions in all areas of law. The Act applies to events that took place on / after 15 November 2016 and claims that are commenced after 1 January 2020

Procedure for Representative Action

1. Commences through the submission of a writ of summons
2. Within two days the representative organisation needs to enter the claim in a public registry of class actions
3. A three-month waiting period then commences during which other representative organisations can file claims that seek to address the same facts and events. If the claims address the same facts and events, the claims will be consolidated
4. The court will appoint a lead representative organisation. The other representative organisations, if any, may remain party to the proceedings
5. An announcement is then made in one or more newspapers, including:
 - a. that Dutch class members can opt-out
 - b. that non-Dutch class members can opt-in
6. The court will set a period during which class members can opt-in or opt-out. This is the first point at which members can opt-in/opt-out
7. Parties must try and reach a settlement agreement. If the parties reach a settlement, the class action ends in a settlement under the Dutch Act on the Collective Settlement of Mass Claims (the "WCAM"). The class members can opt out (within a specified period) if they do not wish to be bound by the settlement. If no class settlement is reached, the proceedings continue. This is the second opportunity to opt-out
8. Judgment is, in principle, binding on all parties if they opted-in or did not opt-out (Article 1018k of the Dutch Code of Civil Procedure ("DCCP"))

Damages

- The court will set the damages of the class members in categories
- The court will ensure that the damages awarded are reasonable and the interests of all class members are taken into account. The court can also base its decision on proposals that may be submitted by the claimant and defendant
- There is a high threshold to prove that damage has been suffered. Claims have been denied because damage could not be proven

One of the only EU jurisdictions with a formal ‘opt-out’ class action procedure; increasingly popular forum for international class actions against multinationals.

We would characterise the **risk of mass claims** in the Netherlands as **‘High’**.

Trends

The Netherlands is increasingly the jurisdiction of choice in Europe for claimants bringing class actions. In the first two and a half years alone, 57 class actions were brought before the court under the Act. Most of these class actions are concerned with the protection of human rights, the public

Data protection

- An increase in the number of class actions is expected. Proceedings before the Dutch district courts are relatively cheap and efficient. There is little downside to initiating class actions because full adverse costs are in principle not awarded
- Many claims have been issued against “Big Tech” in particular, including claims against TikTok, Oracle and Salesforce (amongst others)

Anti-trust

- There are an increasing number of anti-trust follow on claims before the Dutch courts including in relation to the paraffin waxes cartel, the airfreight cartel, the sodium chlorate cartel and the elevator cartel (amongst others)
- Although it appears that interest-groups in relation to “Big Tech” have been (relatively) more eager to initiate class actions when privacy rules have been violated there are also increasingly anti-trust claims being issued against tech companies, including Apple and Google

ESG

- The Supreme Court decision in Urgenda (ECLI:NL:HR:2019:2007) shows that the Dutch courts can impose obligations on corporations and restrict their rights
- For example, the District Court of The Hague ordered Royal Dutch Shell to reduce the CO2 emissions of the Shell group by net 45% in 2030, compared to 2019 levels, through the Shell group’s corporate policy (ECLI:NL:RBDHA:2021:5339)

Consumer protection

- There is an increase in (procedural) protection of consumers

Spain

Mechanisms that can be used to bring an...

"Opt-in" action

Representative Action

- Can be brought by both consumer organisations and groups of consumers (provided the group of consumers includes the majority of those affected)
- Announcements in the media are made to call the injured parties to assert their individual rights / interests

Where the injured parties are determined or easily ascertainable:

- claimant(s) must have previously notified all interested parties of their intention to file suit
- after being summoned, the consumer may only intervene in proceedings to perform certain procedural acts which have not been precluded

Where there are a number of undetermined or difficult to determine parties:

- Proceedings suspended for up to 2 months whilst an appeal is made to the interested parties
- Proceedings resume with the intervention of all consumers who have responded to the summons
- The individual appearance of consumers or users shall not be admitted at a later time
- In consumer protection cases, the burden of proof falls on the defendant
- The judgment will be a bar against any subsequent proceedings in which the matters in issue are identical to those in the proceedings from which that judgment arose

Collective Intervention in Anti-trust and Data Protection Proceedings

- Spanish Organic Law 3/2018, on the Protection of Personal Data and the guarantee of digital rights, introduced into the Spanish Civil Procedure Act (the "SCPA") a new form of collective intervention in anti-trust and data protection proceedings
- Art 80 GDPR allows persons concerned to give a mandate to a non-profit-making body / organisation / association (whose statutory objectives are in the public interest and which is active in the field of the protection of data protection) to lodge a complaint on their behalf.

Damages

- The SCPA does not set out any particular mechanisms for the assessment of damages or the distribution of settlement / judgment sums. No case law yet
- Awarded if there is a common interest between the claimants
- Awarded on an individual basis to all class members
- Can be divided according to a percentage

Spanish law only provides for 'opt-in' class actions and does not permit 'opt out' proceedings.

We would characterise the **risk of mass claims** in Spain as '**Medium**'.

Trends

In Spain, there has been only partial regulation references to the litigation of collective interests, in favour of mass litigation.

A Draft Bill for the protection of consumers was published in January 2023 for transposing Directive 2020/1828 and it is in the process of being amended and approved before submitting for approval by the Spanish government, which should be completed by 25 June 2023.

A special and specific procedure will apply to representative actions for damages. The general rule is that these actions will affect all consumers, unless they express their wish to opt-out of the collective procedure – this will change current “Mechanisms that can be used to bring an “opt-in” action”.

Consumer Protection: Banking sector

- Unless the Directive is transposed, an increase in class actions is not expected
- The Spanish consumer organisation - Asociación de Usuarios Financieros - brought a collective action, seeking injunctive relief in relation to revolving credit cards. This followed judgment in the Spanish Supreme Court, declaring revolving cards contracts with interest rates of above 20% as usurious (Ruling of the Supreme Court, No. 149/2020, 4 March 2020); the claim was dismissed

Consumer Protection and Competition

- Action brought by a consumer association against Volkswagen alleging environmentally misleading advertising; the action was upheld by the Spanish courts

There are others sectors in which consumers are “eagerly awaiting” the approval of the Draft Bill, such as:

Insurance: Both the insured parties in contractual disputes - as well as injured third parties exercising direct actions against the insurer - will be able to bring collective actions, regardless of whether they are consumers or not. In anticipation of an increase in representative action cases, insurance companies are reviewing their coverage in this respect

Data Protection and ESG: Keenly anticipating the new Spanish legislation, to consider pursuing compensation for data breaches and environmental damages

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