EJF Monitoring Report #2 2022

"A Barometer of Collective Redress Regulation in Europe"

Brussels, March 2022

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Content

Introduction

Building on the first monitoring report published in January 2021, this **second EJF Monitoring Report** analyses 14 national jurisdictions in Europe, providing an update on the collective redress mechanisms in those countries and looking at the impact that the transposition of the European Union's Directive on Representative Actions may have. This report aims to help companies and stakeholders interested in collective redress understand the legislative procedures and the core issues related to the necessary transposition of the Directive on Representative Actions in 12 of the Member States, which need to implement it into national law by 1 January 2023. We also look at two jurisdictions outside the EU, namely UK and Switzerland, where there may be strong interrelationships.

In a **first step**, the report takes a closer look at the transposition timelines in each country and the current developments regarding collective redress in two non-EU territories; the United Kingdom and Switzerland. This chapter provides insights on the different national implementation timelines of the Directive and gives an overview of potential influencing factors during the political processes. We found that **none of the 12 EU Member States analysed have proceeded with enacting legislation** to implement the Directive. It appears that **due to numerous political and national factors** (such as Covid-19, inflation, geo-political tensions, or national elections), **the file is not a priority in governments' agendas.** We observed however two waves of transposition. A **first group** includes countries that seem to be a bit more advanced in the transposition process to implement the Directive. Those are Austria, Belgium, Germany, Greece, Ireland, the Netherlands, and Spain with concrete proposals for parliamentary discussions planned before the summer break. A **second group** includes Member States where the process is delayed due to elections and other political priorities in 2022, such as France, Italy, Poland or Portugal. In certain Member States, for example, Denmark, there is currently insufficient information publicly available to assess progress on the transposition.

In a **second step**, the report outlines several key implementation challenges and shows the respective political approaches within each Member State to transpose the Directive. With this overview, potential risks and opportunities can be identified to allow best practices and learnings from each country.

In the **next sections**, the report goes on to highlight the main developments regarding collective redress legislation and case-law in each of the countries. We find that the use of collective redress remains still quite limited, indeed. Since the last Monitoring Report in 2021, there have been no significant developments in court and out of court cases (except for a private partial settlement of the VW case in Germany). The Netherlands and the UK remain the most popular countries for mass claims. At the same time, we have seen some interesting cases in Germany, Belgium and Ireland. With some upcoming changes in the law in Italy and Switzerland, we might see more Court cases emerging in these markets. We have also included a specific analysis on the role of digitalisation, scope of redress areas and private funding.

The **final outlook** gathers all the key learnings and exposes emerging trends, which can then be used by legal experts, risk managers, politicians, and other interested experts to improve their understanding of the civil justice systems in Europe, and propose measures allowing more efficiency, effectiveness and fairness.

Part I: Transposition of the Directive on Representative Actions

Status of Transposition: focus on the progress in each of 12 EU countries

In 2021, Ireland and the Netherlands held already public government consultations[1]. While there are no collective redress measures in **Ireland,** the government conducted a quite detailed consultation in the first half of 2021, and the initial draft of legislation is awaited.

In the **Netherlands** the government is on track with the transposition process. The draft legislative proposal is being finalised, and expected to be sent to the Parliament for discussions before the end of March 2022.

In **Austria** a multi-stakeholder working group (comprising industry, consumer associations, legal experts and government officials) has been discussing the transposition already in 2021. Based on these still-ongoing exchanges, it is expected that the government will release a key issue paper in Q2 2022.

In **Belgium,** an impact study is currently being drafted by the government. Policymakers are anticipated to dive into the political discussions after its publication beginning of Q2 2022.

In **Germany**, it is expected that a draft law will be proposed around mid-April by the Ministry of Justice, under the leadership of the Liberals. A first draft proposal by the German consumer protection organization “vzbv” was presented already in February 2021. 14 business associations jointly put forward their own proposal in September 2021 through a study paper written by Professor Alexander Bruns from the University of Freiburg.

In **Greece** the competent authority is the Directorate of Policy and Consumer Information, which belongs to the General Directorate for Consumer Protection of the Ministry of Development and Investments. An informal working group was set up at the Ministry with the participation of consumer associations, chambers and relevant institutions. At the moment of report writing, exchange of views among the group participants is taking place, but no draft text is yet available. The Ministry’s plan is to have the proposal ready and forwarded to the competent governmental department before the summer.

For **Poland** it seems that only one legislative act will be impacted by the transposition. The Directive has been registered in the Polish Electronic System for Transposing European Law (e-Step). The Office of Competition and Consumer Protection (UOKiK), a central authority of the state administration reporting directly to the Prime Minister, is leading on the transposition.

In **Spain**, the Directive is expected to be discussed in the two chambers of the Spanish Parliament, but the precise timing is yet to be confirmed. Should the timing become tight to meet the deadline of the transposition, this may trigger a short cut via a “Royal Decree-Law". In such a case the Parliament would not be involved as closely as in the regular legislative procedure but would still have the opportunity to amend the Decree-law within a year. This could pose risks for businesses as the legal environment would remain unclear during that period.

In **France**, the transposition of the Directive was not mentioned in the legislative work programmes for 2021/2022. Moreover, three political events will occupy the French government's time: the current EU Council Presidency lasting until the end of June, the presidential election in April/May as well as the parliamentary elections in June. The Ministry of Economy, being in the lead, has just started discussions with first stakeholders. It appears unlikely that there will be any draft law published before summer as a broader internal coordination between several government bodies (incl. Ministry of Health) is planned. A shortening of the regulatory procedure (via “ordonnance”) could be a consequence to meet the deadline.

A similar situation exists in **Denmark**, which has not included the transposition of the Directive in its work programme for 2021/2022. The government is planning to propose the new Danish legislation to Parliament in October 2022, so that rules can enter into force on 25 December 2022 and be applied from 25 June 2023 in accordance with the Directive. It appears likely that the authorities will be preparing legislation (or at least start) in the spring.

[1] EJF contributed and conveyed its messages to both consultations.

Looking at **Italy** the Senate (Upper House of Parliament) just commenced its work on a bill empowering the government to transpose a number of Directives including the Directive on Representative Actions by means of legislative decrees (i.e. acts of government having the same value as a statute). The draft originally submitted by the government to the Lower House (Camera dei Deputati) has already been approved - with a number of modifications - in late December 2021. The Senate is expected to bring further modifications which will imply a further passage in the Lower House. Neither the original draft from government nor the amendments from the Lower House provide any specific guidelines on how to transpose the Directive. Should the final text adopted by the two houses of Parliament retain this approach the Government will be required to follow only the general principles established by the law regulating transposition of EU law in Italy, including the one of faithfully transposing the Directives without providing for extra regulatory burdens. In this case, the government would retain wide discretion on how to transpose the Directive. It seems then also likely that the current Italian collective redress framework is changed as little as possible.

In **Portugal**, policymakers are expected to conduct a detailed analysis of the potential impact of the Directive in the national legal system, but there is no information on whether this process has yet begun. The State Budget for 2022 was rejected on 27 October 2021 which led to the dismissal of the Parliament, and new elections have taken place in early 2022. This means that the future Portuguese government, as well as the newly-elected Members of Parliament, will only assume office around April 2022.

The increasing number of expected legislative drafts for implementation in the first half of 2022 will lead to an accumulating and larger wave of parliamentary procedures during the second half of 2022.

Overview of transposition timelines (current estimates)

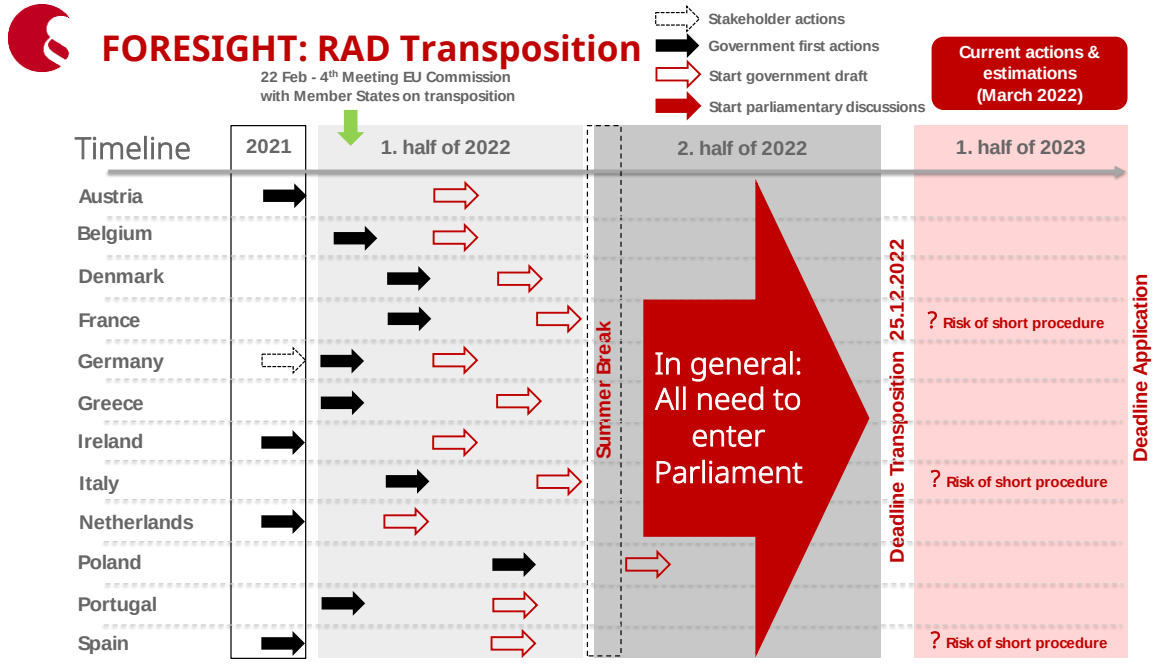

Chart 1

Developments in Switzerland and the UK

On 10 December 2021, the Federal Council of **Switzerland** presented a draft proposal to amend the Code of Civil Procedure in order to strengthen the protection of collective interests. In concrete terms, the existing provision on collective redress in the Swiss Code of Civil Procedure (CCP) is to be adapted and expanded. It is intended to allow enforcement of claims for compensation in so-called mass and dispersed damage cases. This comes as a follow-on to a motion from the Swiss Parliament calling for improvement in the situation of injured parties in case of collective exercise of rights. A consultation was

conducted by the Federal Council in 2018 which led to this proposal, which intends to allow actions for all infringements of private law, and not only for infringements of consumer protection matters. This time the stakeholder debates will concentrate on the parliamentary consultations in the months to come. It appears possible that, also by end of 2022, Switzerland may have further advanced collective redress regulation, with similar elements allowing representative actions as in the European Union.

Pursuant to the terms of the Brexit arrangements between the EU and the **United Kingdom**, the UK is not required to implement the Directive on Representative Actions. Nevertheless, in July 2021 the UK government published a consultation (which closed on 1 October 2021) on competition policy, consumer rights, and consumer law enforcement which included the consideration of broadening current public law measures and inviting views on opening up further routes to collective consumer redress, to help consumers resolve disputes. In 2021, **Scotland** saw a debate around the introduction of new rules to foster collective redress via an 'opt-out' mechanism. The Scottish Civil Justice Council may run a public consultation prior to introducing any further rules to make sure that changes in legislation are properly balanced.

Part II: Implementation Challenges

Analysis of National Approaches to Core Messages

Since the beginning of 2021, the European Justice Forum has been discussing with numerous internal and external experts what crucial messages should be passed on to Member States regarding the transposition process. These messages cover areas in which countries could improve and could help harmonise the national collective redress measures. Additionally, it might also serve as an interim solution to provide the necessary clarifications in the regulatory context of the Representative Actions Directive. The current analysis of the selected Member States may provide an overview of regulatory tasks which remain to be done. When analysing in more details the individual countries in Part III, we will take the opportunity to present ideas for future good practice.

Our overarching message remains that looking merely at redress via courts cuts out the most efficient and effective proven means of practical dispute resolution; namely via regulatory and ombuds redress[2].

Message 1: Member States should adopt stringent rules on certification of a representative action.

Overall, there are currently no stringent rules for certification of representative actions so far existing in the countries monitored. Looking at the process of certification, all countries that so far have legislation in place, have some sort of admissibility criteria as a prior assessment of the case. In the Netherlands, commonality, numerosity and adequacy are taken into account in this first assessment of a case. In Belgium and Denmark, the efficiency of the collective action, compared to an individual action, is also one of the main criteria for the admissibility of a class action. In Germany for example, a Qualified Entity needs to be registered for four years, have a membership of 10 associations or 350 people and receive less than 5% of its financial resources from business companies. Moreover, proceedings are only permissible if they are relevant for at least 10 consumers and if, after two months of court publishing in the registry, at least 50 consumers have registered their claims.

A special case is Portuguese law which has no specific definition of classes and no minimum number of claims. Moreover, any claim can be filed by any individual, resident or foreigner. This means that no preliminary certification as a non-profit organisation is necessary and that there are no prerequisites to be fulfilled to start a popular action.[3] Also, in Spain we do not find a clearly defined procedure at an early stage as to whether a claim is admissible and which criteria need to be fulfilled to pass, although it is

[2] Christopher Hodges and Stefaan Voet, Delivering Collective Redress – New Technologies, Hart 2018, in particular pages 281/282 and 301; this book also covers the legal remedies and cases from the countries covered in this report with the exception of Switzerland as follows on the pages mentioned after the country's respective names: **Austria** 313, 339, 340, 341; **Belgium** 44-48, 145-148, 158-159, 212-233, 313-314, 328, 334-335, 336, 341; **Denmark** 315, 329; **France** 68-76, 233-239, 315-317; **Germany** 76-89, 317-319, 337-338, 340; **Greece** 319, 338; **Ireland** 331; **Italy** 89-121, 168-177, 240-241, 319-320, 328, 330-331, 338, 340, 341; **Netherlands** 125-128, 246-247, 321-323; **Poland** 128-138, 323-324, 338; **Portugal** 324-325, 339, 341; **Spain** 325, 339; and **the UK** 50-66, 149-151, 177-210, 247-260, 327-328, 331-334, 336, 339, 340.

[3] Class Actions Law Review, 5th edition, 2021, p.167-168.

understood that actions in Spain can only be considered as class actions where individual cases have underlying factual issues in common ("commonality"). This lack of regulation is viewed as problematic in practice.

Message 2: Member States should require clear and early Opt-in by all consumers intending to join any representative action for redress measures in their country.

Member States have currently quite different mechanisms for those joining a representative action. For instance, in the Netherlands, Dutch residents can only opt-out, but non-Dutch residents can only opt-in unless the court decides an opt-out mechanism applies also to non-Dutch residents. Similarly, in Belgium, generally the Court decides whether to go for an opt-in or opt-out system (taking certain preconditions into account). The French regime is based on a two-step process with a judgment on liability being handed down, followed by a post-judgment opt-in principle. Such an expanded late opt-in was also introduced in Italy (2021, although not yet in force), allowing members to join a class action even after the court's ruling on the merits. The Portuguese representative action mechanism offers two options: an injunction action or an opt-out procedure.

Germany has so far only an injunction or a model case declaratory action procedure with opt-in via self-registration at the public Federal Office of Justice before the court procedure starts. To participate, consumers must enter their claims or legal relationships in the registry which is open only until the day prior to the first hearing. This is done to prevent free riding on proceedings. To date, it is unclear if the government will enlarge the latter procedure for redress or install a separate procedure. Key stakeholders are divided: the consumer protection association has proposed an opt-in only after court judgment, while business associations have come up with an early opt-in via registration strengthening the case management powers of the court as well as the certification procedure. In Austria, a late opt-in is under discussion, raised by the consumer organisation side, while businesses would prefer an early opt-in with a substantial number of sufficiently similar cases as a requirement.

The opt-out system in Spain has important limitations being only applicable to consumer protection issues. In practice, however, Spanish judges have systematically rejected opt-out collective action suits when those did not attach the documentation to evidence personal communication with each and all relevant consumers. Instead, they have alternatively accepted that individual consumers may append their individual claims onto injunction actions, which ruins the efficiency of injunction actions. As a result, scholars concluded that the Spanish collective action regulation is "an opt-out system on paper (i.e. in the law), but an opt-in system in practice".

In Switzerland the new draft law proposal on representative actions issued by the Federal Council in December 2021 proposes the introduction of an opt-in system with an electronic register.

Looking at the UK, we see a quite diverse picture: on one side representative actions with an opt-out mechanism exist in England, while in Scotland, group procedures are still in their infancy. In March 2020, the Scottish Civil Justice Committee (SCJC) conducted a limited consultation to introduce an opt-in scheme and the introduction of an opt-out scheme was given further consideration. The first formal class action mechanism as "group procedure" was introduced in July 2020. It still remains to be seen if the SCJC will consider in the future the introduction of an opt-out scheme.[4]

Overall, we can see that there are numerous different systems, which we expect to remain, as the transposition of the Directive contains no guiding principle on the topic of opt-in/opt-out (see Chart 2). Our observations are that the opt-in system seems to be the most widely applied. Germany and Austria have seen proposals by consumer organisations or related stakeholders to introduce a late opt-in system. At least in Germany the benefit of a functioning register for early opt-in and better court case management is also on the table. Besides, judicial practice showed in Spain the benefit of a quasi-opt-in. Further, digitalisation may be an important catalyst to integrate processes across various tools of redress beyond court procedures and allow early warning and upfront integration of out-of-court Consumer Dispute Resolution (CDR) or regulatory redress.

[4] Class Actions Law Review, 5th edition, 2021, p. 173.

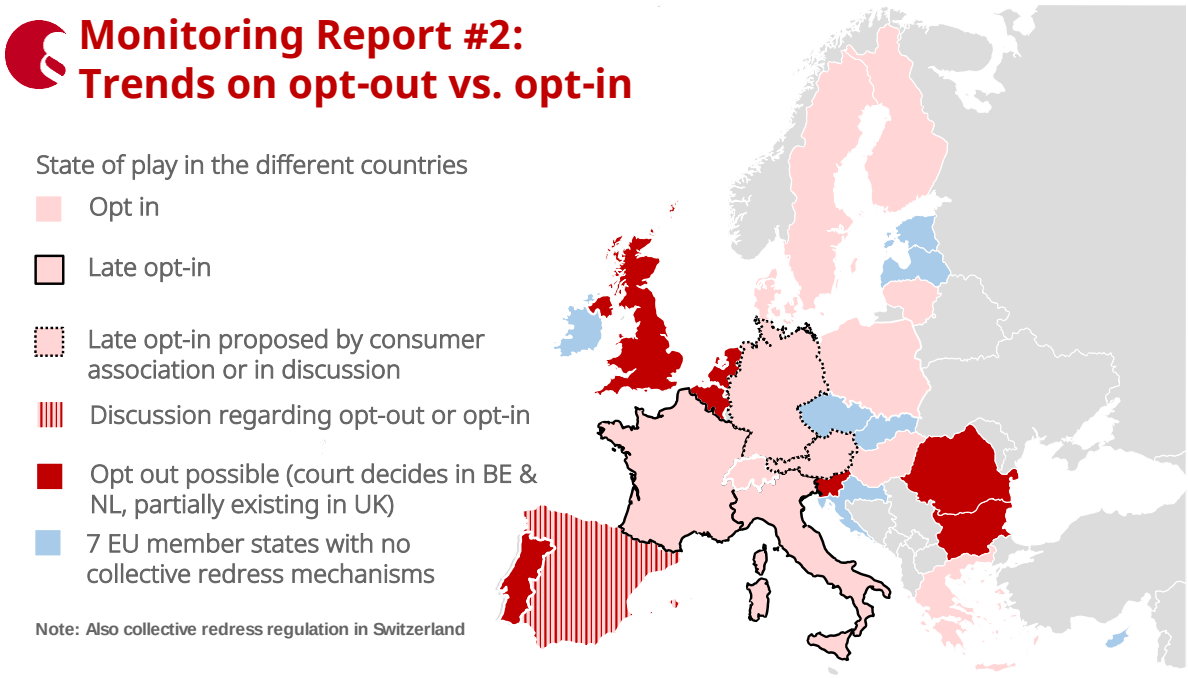

Chart 2

Message 3: Criteria for Qualified Entities for domestic actions should be reinforced to:

a) **be harmonised to at least the level foreseen for cross-border actions by the RA Directive;**
b) **explicitly exclude, and prohibit creation of, ad hoc entities for domestic actions.**

The criteria for Qualified Entities (QEs) to bring domestic actions comply with the Directive on Representative Actions in at least three Member States: Belgium, Denmark, and the Netherlands. In Belgium, some small changes would be required to *fully* comply with the directive though. On the other hand, countries like Germany are already more ambitious than the Directive regarding national Qualified Entities and cross-border entities. For example, in Germany the prerequisites for the Model Case Proceeding Act set out that QEs must have not only a minimum number of members (either 350 individuals or at least 10 associations) but the members need to hold a full membership which allows direct influence on the QE's activities.[5] Here, the risk is rather that national conditions are watered down to the cross-border criteria of the Directive. Both countries' laws (Belgium and Germany) do not allow *ad hoc* entities to introduce class actions. Only in Portugal there are no national criteria and no current proposals to introduce any kind of Qualified Entities.

The Member States with powerful national consumer organisations will be forced to change the current system from a centralised and state-supported consumer protection organisation in the lead, to the application system required by the Directive which may well lead to more competition. This is even more likely where national criteria for Qualified Entities remain below the harmonised criteria of cross-border actions. Examples of such Member States are Austria (VKI), Belgium (Test Achats), Germany (vzbv), Portugal (DECO) and even Denmark with a strong Ombudsman as public authority (Forbrugerombudsmanden).

Message 4: More effective and efficient regulation of litigation funding is needed, both at Member State and EU levels, plus limitation of other harmful incentives at domestic level (for example contingency fees, punitive damages, caps on the claims value which soften the loser pays-rule).

Regarding third party litigation funding (TPLF), in most countries there is no specific regulation in place e.g. France, Belgium, Denmark, or the Netherlands. Furthermore, when it comes to the loser pays principle, it does not have a deterrent effect in Belgium, the Netherlands or France. In the case of France, this is mainly due to the fact that the amount of costs recovered is usually far lower than the actual costs of proceedings. In Belgium, the reason is that the recoverable fees are subject to a cap. The loser pays

[5] See also Class Action Law Review, 5th edition, 2021, p. 94.

principle applies in Portugal for court fees while the court can reduce them for claimants who are only partially successful; the court has large discretion on lawyers' costs and fees. Austrian lawyers are free to agree their fees with the party involved, although "*quota litis*" fee arrangements are prohibited for legal advisers. In this respect the "Austrian Style" (assignment model) class action can involve quite high litigation costs due to economies of scale via the multiplication of individual fees. TPLF is, in principle, permitted under Austrian law.[6] In Germany, the introduction of a new Legal Tech act in 2021, is broadening the possibilities of financing mass litigation cases by debt collectors (see also Part III and the country analysis). Newly-introduced contingency fees in Italy in favour of the common representative of the class and the lead claimant's lawyer may be regarded as implying a punitive effect.

Message 5: Member States should not accept any domestic effects of foreign court procedures in representative actions for redress measures in line with the RA Directive's intention to protect Member States' judicial autonomy.

This message has not been picked up by the different Member States, and we do not see much discussion on this point (Austria and Spain offering some hope, though). It remains to be seen how the European courts, in particular the ECJ will eventually deal with enforcement of collective action awards as between the various Member States, and when the Commission may consider the problem sufficiently urgent to take an initiative to solve it. For example, how will a collective action judgment be enforced in Hungary, when the verdict was obtained in, say, Ireland?

Message 6: Distribution - i.e. pay-out of compensation - to be closely aligned with claims verified and actually acknowledged by identified recipients; to the extent the procedure nevertheless generates undistributed proceeds, channel them towards neutral institutions, rather than to non-impartial consumer organisations. Undistributed proceeds to be returned to the payer in limited circumstances (where acceptable in the context of the wrongdoing).

Overall, there is no transposition or proposal dealing with this situation. Discussions with regards to a public fund – although successful in practice for many years in the province of Quebec in Canada – remain a side issue for now. General interest has been shown by general conciliation bodies in Germany, Austria, Luxemburg, and Belgium. According to Professor Bruns from the University of Freiburg, pay-outs should be organised via a public judicial infrastructure. The respective public redress distribution procedure he proposes follows a model from German maritime legal provisions for the distribution of huge damages as a consequence of sea accidents[7], which is based on an international convention. With the opening of such a procedure, liability and procedural possibilities to hold the debtor responsible are henceforth limited to the compensation fund. The court appoints, similar to an administrator for insolvency proceedings, a trustee to perform collection and distribution of the fund under the supervision of the court.[8]

Role of Digitalisation

Digitalisation is increasingly playing a role in the effectiveness of collective redress procedures. It typically starts with an electronic register to capture the disputes or to gather opt-ins. The identification of disputes is often done by consumer organisations or ombuds entities, law firms or privately-run platforms cooperating with private litigation funders. An example for the latter is the NGO "*iusomnibus*" in **Portugal**, cooperating with the Swiss funder Nivalion. It is less obvious for the consumer organisation "*consumentenbond*" in the **Netherlands** or the specialised association "*Cobin claims*" in **Austria**.

More and more consumer online platforms are popping up, for example, in **France**, with "*Agir ensemble*" or "*V pour Verdict*". The opportunity to opt into a collective action via an electronic register already exists in a number of countries, for instance in **Germany** (via the public judicial infrastructure for the Model Declaratory Action procedure – "Musterfeststellungsklage" – which has an interesting link to the federal German residual Consumer Dispute Resolution body[9]), but more and diverse private offers are also

[6] European Law Institute (ELI), Austrian Hub, Seminar on TPLF, presentation of Brauneis Klauser Prändl Rechtsanwälte GmbH, 10 December.2021.
[7] "Seerechtliches Verteilungsverfahren" based on the Convention of 1976 on Limitation of Liability for Maritime Claims, set out in detail in the "Schiffahrtsrechtliche Verteilungsordnung - SVertO" (link).
[8] Presentation of the legal opinion on 27 October 2021 supported by 14 business associations, see video and report in German (link).
[9] See below section "Outlook" (p. 22).

appearing in Germany[10] and in the **Netherlands**. New draft laws in **Switzerland** are also building the opt-in process via a digital register. This is a crucial starting point, as the electronic register enables further automation of the next steps in the process from the admissibility/certification, through clustering of cases up to distribution. The key question remains if and to what extent this critical infrastructure should be provided by private or public providers. Private providers may raise a discussion about a necessary supervision or needed regulatory frameworks. While it is obvious that such an infrastructure is needed in each and every representative action case, and it should, in our view, be the responsibility of public authorities in charge of civil justice to create this platform as a matter of course.

New digitalisation measures in court procedures are increasingly covering the communication between all types of actors. **Portugal** is quite advanced in using legal tech in processes between all protagonists. **Denmark** established in 2020/2021 a system for virtual communication between courts and lawyers. **Ireland** also introduced the possibility of remote hearings. There is some proven interest in the legal tech sector in **Poland**, where, for instance, the Warsaw Solicitors' Association has established a legal tech committee.

In **Germany**, the coalition agreement of the new government (Dec. 2021) specifically refers to the goal to further digitalise court proceedings. **In an important new development, the new Legal Tech Act in 2021 is strengthening the position of debt collection providers – by including legal assessment and advice associated with it – and hence the assignment model**[11]**.** On 1 October 2021, the "German Act to Promote Consumer-Oriented Offers in the Legal Services Market"[12], entered into force. The focus of the new law is the regulation of legal tech companies that specialise in market mass enforcement of individual consumer claims. In the future debt collection service providers and the license under which these companies operate, will also have to comply with a number of transparency obligations to allow the consumer to clearly see the content, potential costs and other essential conditions of the services offered, as well as potential alternative enforcement options. The new law expands the concept of "legal service" in the Legal Services Act to specifically include “the legal examination and advice related to the recovery". Moreover, debt collection providers can cooperate with litigation financiers as long as their influence is limited to the passive provision of funding and information rights.

The **European Commission** is also planning to roll out a digital cross-border infrastructure tool called “REACT” (“Representative Actions Communication Tool”). The extent of capabilities this IT-system will deliver remains to be seen and by when it will be fully implemented and operational across the EU.

[10] E.g. LegalHero, RightNow, MyRight, MietRight, etc.

[11] Assignment of individual claims to the litigation vehicle which is then claiming on behalf of the mass of beneficiaries.

[12] If the provider cooperates with an external litigation funder to hedge cost risks, the cooperation and the existing agreements must be disclosed to the customer. In addition, the procedure for registration as a debt collection service provider will be expanded and transferred to a uniform supervisory body at the federal level by mid-2022. This is the first time the federal legislature has specifically addressed the issue of litigation funding. The new regulation expressly clarifies that the mere fact that certain reporting obligations exist regarding a participating litigation funder does not necessarily create a conflict of interest prohibiting the offering of these legal services under the law. In addition, lawyers’ fees are cautiously liberalised. When enforcing certain monetary claims up to an amount of EUR 2,000, lawyers are now entitled to agree to contingency fees with their clients. However, this is limited to activities in judicial dunning proceedings (a procedure to obtain an enforceable title if the defendant does not object) and out-of-court debt collection.

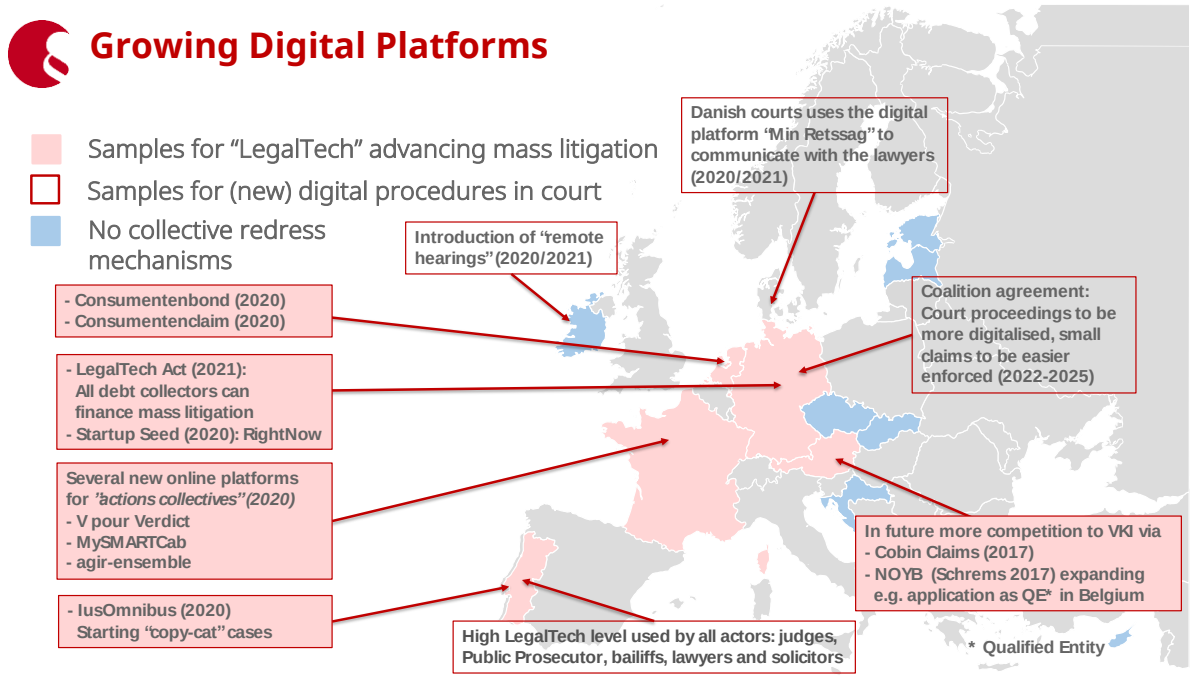

Chart 3

Scope of Application

When looking at various countries in Europe, we see a tendency toward enlarging the scope of mass litigation. Some countries already allow the opportunity to bring mass claims which is beyond the EU Directive on Representative Actions or have indicated that they intend to do so. This can occur either by expanding the types of claims that can be brought as mass claims beyond those set out in the Directive's Annex, or, also frequently by enlarging eligible beneficiaries to small and medium sized enterprises (SMEs). Some examples of this include:

Austria: Political stakeholders are contemplating enlarging the types of mass claims that may be brought to be as broad as possible and go beyond the Directive's Annex. This would include for example environmental issues. It is rather unclear yet whether SMEs will be included as claimants. The idea is not generally supported by the business community.

Denmark: According to national legislation, cases concerning human or environmental rights can be brought before the courts as a class action. The same applies both to cases related to individuals and to SMEs as claimants.

Belgium: The current Belgian law on collective redress does not cover human or environmental rights. A group of SMEs may initiate collective actions. SMEs are defined by reference to the Commission's recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises[13].

France: Since the introduction of the law on group actions in 2014, there have been a series of steps to continuously expand the scope, which now includes - besides consumer and competition law - health issues, data protection, employment discrimination (which is slightly more limited than human rights), environmental matters and personal data. Consumer group actions are only open to consumers which are restrictively defined as natural persons. A legal entity cannot, therefore, be part of a group action as per the French Consumer Code. Legal entities are excluded from health group actions as well as from employment discrimination group actions. However, legal entities (and hence businesses and SMEs) may be part of a group in an environment group action. This action must be brought by a certified association acting for the defence of the environment or consumers' rights.

[13] Commission recommendation (link)

Germany: The current Model Declaratory Action determines legal issues or contested facts in all consumer matters. This applies also for the Capital Market Model Declaratory Action, for claims on behalf of a group of claimants in capital market mass disputes. The latter collective redress mechanism is equally available to all companies.

Italy: The new class action rules that came into force in May 2021 include a widened scope of application. Both consumers and SMEs can claim compensation for a violation of "homogeneous individual rights" regardless of the area of law. Under the previous system, class actions could only be filed by consumers for claims related to alleged unlawful conduct falling in identified areas of law — i.e. antitrust infringements, unfair commercial practices, violations of contractual rights, and product liability. Under the new system, it will be possible to start a class action in areas of law which were previously precluded, such as for violations of environmental, employment or health care rights.

Netherlands: The country allows a broad scope of claims to be brought, as has been shown by the successful class and representative action of an NGO (Vereniging Milieudefensie et al.) against Royal Dutch Shell Plc in May 2021 (district court Den Haag). The Shell group has accordingly been obliged to reduce the CO2 emissions of its activities by net 45% by the end of 2030 - the reduction targets include emissions from its suppliers and buyers.

Portugal: Popular actions are covering a wide range of claims like consumer rights, environmental and health issues, misuse of users' personal data and anticompetitive practices.

Switzerland: The new draft law on Representative Actions published in December 2021 foresees a significantly broader scope. So far, only privacy violations had been covered, but the new draft provides the possibility to claim compensation for all kinds of legal violations.

United Kingdom: The UK has a mature set of collective redress mechanisms. Group actions involving human rights and environmental issues have been brought in the UK typically against large corporations. As an opt-in mechanism, many individual claims managed together are often tried through several lead cases applying the outcome to the defined group. The cause of action can be, for instance, negligence, breach of human rights' legislation, or nuisance (for an environmental spillage for example) as well as the breach of other relevant statutory rights of individuals. In Scotland the group procedure is not restricted to consumer claims and could therefore also be used on behalf of SMEs.[14]

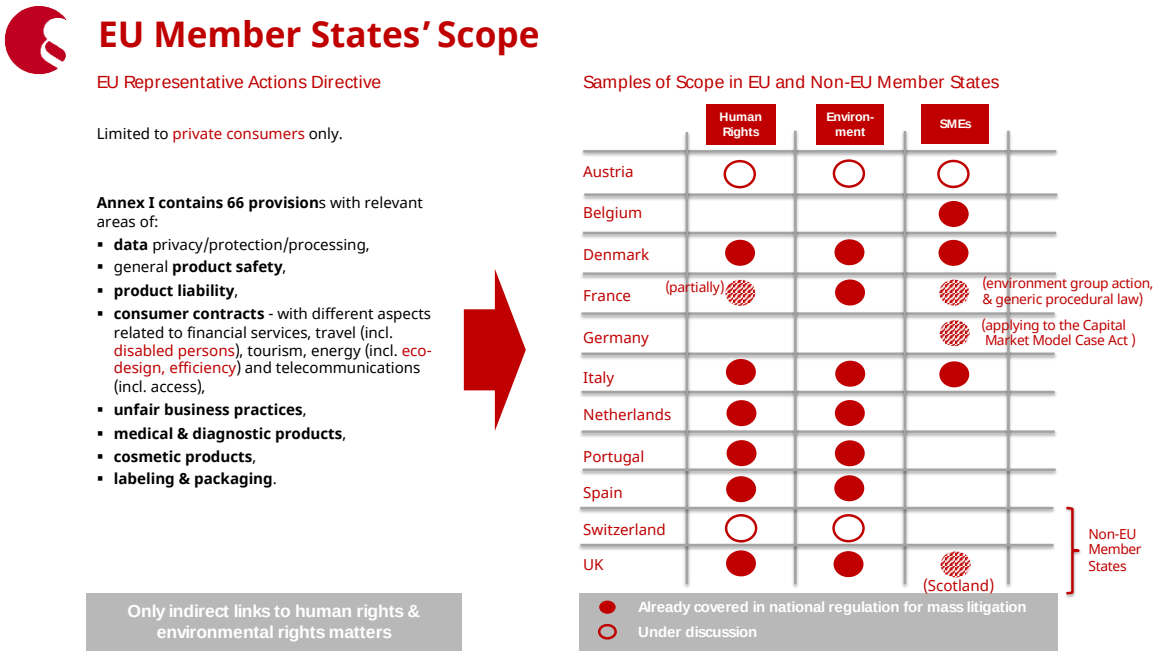

Chart 4

[14] Class Actions Law Review, 5th edition, 2021 p. 175.

Part III: Individual Country Developments: Main Court and Out-of-court Cases

This chapter provides a snapshot on the main court and out-of-court cases and key developments on collective redress and actions in 14 countries. What we find is that the use of collective redress remains still very limited. Indeed, since the last Monitoring Report in 2021, there have been few significant developments in court and out-of-court cases. The Netherlands and the UK remain the most popular countries for mass-claims. At the same time, we have seen some interesting cases in Germany, Belgium and Ireland. With some changes in the law in Italy and Switzerland, we may well see more court cases emerging in these markets.

Austria

The Consumer Protection Law had limited representative actions to a number of associations able to sue on behalf of consumers. In Austria, the consumer protection association VKI (Verein für Konsumenteninformation) has a historically strong position: the sponsor of the VKI is the Federal Chamber of Labour, and the Republic of Austria, represented by the Federal Ministry of Social Affairs, Health, Care and Consumer Protection is an extraordinary member of the VKI. The Consumer association NOYB – European Centre for Digital Rights, co-founded by Max Schrems, an Austrian activist - has been focusing on data protection and data privacy issues. Moreover, the specialised association "*Cobin Claims*" is currently seeking to be legally recognised as an association and bring class actions to court. They are mainly focusing on "Austrian-style" class actions, not only for consumers but also for entrepreneurs (e.g. based on cartel violations).

The debates in the working group for the transposition of the Directive between the government and important stakeholders - namely business, professionals, consumer protection organisations – came to an end in December 2021. Discussions covered damage classifications, cost reimbursement rules and caps. The focus is on an opt-in system. Currently only VKI is appointed by law as a Qualified Entity. A widening of active QEs can be expected, because the Directive requests a shift from naming QEs by law to an application procedure guaranteeing admission of all applicants fulfilling the defined criteria. It is not clear yet how the law will deal with the recognition of foreign procedures, particularly in cross-border cases. The government's coalition agreement had aimed not to recognise foreign court rulings in collective procedures[15]. Other important issues currently under discussion with stakeholders are the potential enlargement of the group of suitable claimants from private consumers to SMEs as well as late-opt-in. Both topics are generally opposed by business. It remains to be seen how the financing of "Austrian-style" class actions, based on the assignment model, and the consumer protection organisation "VKI" will be influenced through decisions with regard to litigation funding. While the former mechanism is privately financed, the latter QE uses currently public funding.

In 2021, there have been no major developments related to court cases. Some smaller proceedings are being built, but they will likely have no impact on the development of class actions in Austria. There is a case about the violation of the Data protection act (DSGVO) that is currently in the process of gathering plaintiffs, after the publication of the personal data of 24,000 people who have tested positive for Covid-19 in the Tyrol region. The regional authorities and the responsible testing laboratory are the defendants. Another case is being considered against a public transport company which differentiated between students from Vienna and other regions when selling tickets.

Belgium

There have been some developments in court cases brought by Test-Achats, the main consumer protection organisation in Belgium:

- The case *Test-Achats vs Facebook* was amicably settled in May 2021 (a case against three Facebook entities pertaining to the Cambridge Analytica data scandal).
- In the case concerning Test-Achats against Ryanair (in relation to flight delays and cancellations resulting from strikes during summer 2018) the action was found admissible by the Brussels Court of First Instance. The Court decided to apply the opt-in system. Ryanair lodged an appeal against that decision in January 2021 and hearings on admissibility were expected to take place in 2021.
- Test-Achats also filed an action against Apple in December 2020 regarding the planned obsolescence of Apple devices through software updates. Furthermore, the Belgian Ombuds-Service for Energy filed a case against six energy suppliers regarding the fixed fees energy

[15] Aus Verantwortung für Österreich. Regierungsprogramm 2020-2024, p. 39 Link.

suppliers continue to charge in case of an early termination of energy contracts. While the case was found admissible in the first instance, it was overturned by the Brussels Court of Appeal in April 2021, which held that the Belgian Ombuds-Entity may not act as group representative.[16]

Denmark
In Denmark, while there have been no significant developments regarding collective redress nor third party litigation funding in the past year, a case has been filed against Tesla by a group of consumers which could influence the development of collective actions in the future. The case is in the opt-in stage.

There is willingness to strengthen and modernise consumer protection, indeed, a strong majority in the Danish Parliament is asking for more protection of consumers rights (especially amongst centre-left parties), and a strong tradition for supporting legislation that arrives from EU directives (especially amongst centre-right parties). Depending on how the transposition of the EU Directive on Representative Actions progresses, we may see an uptick in court cases in the next years.

France
Since 2014, only 22 group actions have been brought to courts in France, and only three have led to any compensation being received by the claimants in a settlement. One group action has been filed in 2020 against BMW pertaining to a product recall case. Most collective redress procedures have, however, been lodged before the National Commission for Data Protection and Liberty (CNIL) instead of going through the path of group action. This followed on from Google being fined EUR 50 million in 2019 by CNIL for having failed to comply with the EU General Data Protection Regulation (GDPR).

Additionally, we can see some movement regarding the General Product Safety Regulation, as France (which is currently holding the European Union's Council Presidency) proposed to include standalone software as a product to be regulated by consumer law, which brings the spectre of software manufacturers facing new obligations to consumers.

Germany
In Germany, there are a number of references to collective redress in the new government's coalition programme[17]. The transposition of the Representative Actions Directive is planned to be integrated into the existing Model Declaratory Action (Musterfeststellungsklage), with the Ministry of Justice leading on the file. Notable mentions of collective redress in the coalition programme include:

- Upgrading collective redress mechanisms: existing instruments like the "KapMuG" (mass claims for shareholders) will be modernised and are being checked for necessary additions.
- The EU Directive on Representative Actions will be transposed in alignment with the Model Declaratory Action ("Musterfestellungsklage") while opening up also claim options for small-sized companies. The government plans to keep the well-proven requirements of the admission criteria regarding Qualified Entities.
- Court proceedings should become faster and more efficient: it should be possible to conduct hearings online, evidence should be documented audio-visually, and more specialised courts should be created. Small claims are to be more easily enforced in court via citizen-friendly digital procedures.

In terms of case-law, the most prominent model declaratory action, to date, has been the Dieselgate case against Volkswagen. It was terminated by withdrawal of the representative action by vzbv in order to facilitate a private out-of-court settlement without judicial approval in February 2020, by which a total amount of approximatively EUR 830 million was to be paid to about 230,000 consumers. Nevertheless, due to exclusion of registrants via a bilateral settlement between "vzbv" lawyers and Volkswagen's lawyers, all consumers from other Member States who had registered have been excluded, and those who obtained compensation only got a fraction of that to which they would have been entitled had the procedure been decided by the court. Beyond this, there still are numerous cases pending based on assignment model claims. A new model declaratory action has recently been filed also against Daimler in the context of the Dieselgate scandal.

[16] According to the Code of Economic Law, collective redress actions may only by brought forward by an association for the protection of consumer interest or the Consumer Ombuds-Entity, although only with a view to negotiating a collective settlement agreement. If no collective settlement agreement is found, the Consumer Ombuds-Entity must be replaced by another representative. This right of action for the Consumer Ombuds-Entity is controversial and subject to a pending test case. See Hodges/Voet, op. cit, p.45 and Link.
[17] German government coalition programme Link.

Since December 2021, Bayer AG has been facing a class action lawsuit in Germany from institutional investors claiming that it concealed risks associated with the takeover of Monsanto, and a court in Cologne has allowed the suit to go forward. (This is in addition to cases against Bayer in the US based on the same Monsanto takeover.) In another case, Google is under strict observation of the competition authority, being accused of abuse of data exploitation. The German competition authority (Bundeskartellamt) stated: "A newly introduced provision under the German Competition Act[18], which entered into force in January 2021, enables the Bundeskartellamt to intervene earlier and more effectively, in particular against the practices of large digital companies. In a two-step approach the Bundeskartellamt can prohibit companies which are of paramount significance for competition across markets from engaging in anti-competitive practices."[19]

One of the newest collective redress cases is related to massive consumer contract terminations by energy providing discounters due to the increase of energy prices. In this case, a new legal tech company from Berlin, Veneko[20], has already gathered more than 4,400 claimants. The claim calculation is being prepared via an algorithm, and the dispute is expected to be submitted to court in March 2022.[21]

Greece
The use of collective redress in Greece remains very limited and it is rather difficult to find any cases as no official case law database exists, and any private databases include their own selection and evaluation criteria.

One area which is developing in Greece is mediation. Since the pandemic, there has been a slight shift towards the culture of mediation, which will become increasingly necessary and provides practical solutions when litigation is costly, lengthy and its outcome is uncertain. It is still to be confirmed if and how it will be used regarding collective redress.

Ireland
In Ireland, there is currently no legislative framework nor legal procedure allowing class actions. Some analogous procedures are nevertheless available, such as representative actions and test cases. The major development for Ireland regarding class actions will be the implementation of the Directive on Representative Actions.

In February 2021, an interesting decision was handed down by the High Court regarding Covid-19 related business interruption complaints test cases, brought by publicans who had to close their premises following the Irish government's order to close all public houses. Whilst the judgment is confined to the specificities and wording of the insurers' policy (here, FBD Insurance), its findings and some of the judge's comments are of relevance to other business interruption wordings in Ireland. As such, the judgment has been utilised by claimants in mediation and other ADR settings seeking to apply the interpretations of the policy in these cases to other similarly worded policies issued by other insurers. The judgment, however, did leave certain issues unaddressed such as what evidence is required to demonstrate that an outbreak occurred at a premise or within its vicinity, a condition precedent to many business interruption policies. As a result of the judgment, FBD Insurance has been required to make insurance payments to a large number of publicans across the State. This is remarkable given that this judgment was only binding among the parties but seems to have prompted FBD to not defend other similar cases – different e.g. from what we have seen from VW in Germany.

Italy
The collective action landscape in Italy was stemming mainly from the Italian Consumer Code which allowed injunction proceedings, redress proceedings (possible in areas such as product liability, environmental law, competition law, social security disputes, or financial services) and assignment models. However, in 2019 a new law (31/2019) introduced a wide-reaching collective action in the Code of Civil Procedure and is available to consumers against traders, repealing the previous collective action model provided in the Consumer Code which was available only to consumers against traders. The new law entered into force in May 2021 and has had very limited application so far also because of delays

[18] Section 19a of the German Competition Act (GWB).
[19] Press release in English Link.
[20] Veneko Link.
[21] Handelsblatt, "Stromio, Gas.de, Grünwelt: LegalTech Firma plant Sammelklage gegen Energiediscounter" 1.2.2022.

in the setting up of the web-based infrastructure required for the proper functioning of the procedures. Italian rules will need to be adapted as they do not meet the Directive's requirements on transparency of financing of actions and associations. There is also the issue of premium fees in favour of plaintiffs under the Law 31/2019, which appear to operate like punitive damages contrary to the Directive. Italian rules on discovery will need to be adapted, as well (discovery also in favour of the defendant).

Netherlands
The Netherlands is already a popular country for mass claims, due to the lack of regulation regarding third party litigation, which incentivises collective actions.

In the first three quarters of 2021, there has been one verdict from the Supreme Court regarding collective redress cases, 13 judgments on the merits from the Dutch Appellate Courts and 34 judgments in First Instance Courts in areas such as employment, civil liability, collective settlement procedures, consumer law, environment, competition, and insurance law.

An interesting case was the judgment of 26 May 2021 against Shell, which was a public interest class action on climate. The claimants stated they represent the interests of current and future generations of the world's population, but the court found these interests not suitable for bundling. The court ordered Shell to reduce the CO2 emissions of the group by 45% by 2030, through the Shell group's corporate policy – an appeal has been lodged against this judgment.

In 2021, we also saw the publication of the 'Stichting Volkswagen Car Claim' – the Dieselgate emissions case against Volkswagen, Audi, Skoda, Seat and their dealers. In the declaratory judgment, the court declared that VW acted unlawfully by misleading on purpose the supervisory authority and the buyers of their cars with the original software. The court also declared that the consumers that bought a new car had the right to claim EUR 3,000 from the dealers as a reduction of the purchase price because the cars did not have the quality they could expect. Furthermore, they can claim EUR 1,500 if they bought a second-hand car from a dealer. The court calls on the parties to settle the damages and requests the Amsterdam Court of Appeal to declare the settlement binding on the class (WCAM-settlement).

The Directive includes several requirements that differ from the Dutch class action law requirements. The key differences are[22]:

- The Directive's limited scope for representative actions in the interest of consumers;
- Representative actions can only be brought by Qualified Entities designated as such by a Member State;
- The distinction in standing criteria between Qualified Entities that bring 'cross-border' and 'domestic' representative actions; and
- The absence of numerosity and commonality requirements since these are left to the discretion of the individual Member State.

Poland
The legal situation in Poland is based on a Group Actions law from 2009, which has been amended several times over the past years. The system is based on opt-in, and there is a requirement of at least 10 members which must be legally represented. It is likely that the legislation will change due to the transposition of the Directive on Representative Actions. Poland established an administrative procedure which is initiated and conducted by the head of the Office for Protection of Competition and Consumers (OPCC). As there are no other collective ADR procedures, the OPCC has a quite unique and strong position. It remains currently unclear how other QEs will be integrated in the proceedings.

Regarding the cases brought before court, most consumer representative actions were filed in 2014 and 2016. As those were rather unsuccessful and encountered delays due to the lack of managerial skills in courts to handle the matters, they lost some of their attractiveness. Some group actions are however ongoing against financial institutions, with heavy involvement of the consumer ombuds-entity and the competition regulator.

There were no new court/out-of-court cases to report in Poland in 2021.

[22] 'News Update: Class Actions – EU Directive on Representative Actions' Houthoff Link.

Portugal
The Portuguese legislation is not expected to change in the near future and there have been no new developments either in the legislative or policy field.

Although no further court cases had been brought up by the consumer organisation DECO, the newly created NGO *"iusomnibus"*[23] has filed numerous copycat mass claim cases. It remains to be seen whether this NGO fulfills the upcoming national requirements for QEs. In December 2020, the Municipality of Vila Velha de Ródáo filed a popular action against a bioenergy plant[24] based on claims relating to the protection of public health, environment and quality of life of all residents.

Spain
In Spain, the collective action regulation is based on six articles within the Civil Procedure Act and sets out the obligation of the consumer association to communicate personally the beginning of the collective action to the represented consumers in those cases in which those represented consumers are identified or can be easily identified. This has led to collective redress actions in Spanish courts being systematically rejected on the ground that they did not attach all the communication with all concerned consumers. They have accepted individual claims to be grafted on the injunction action brought by consumer associations. However, this has shown to be rather inefficient because this substantially delays the injunction action.

In practice, Spanish judges have rejected opt-out collective actions by requesting personal communication take place and have alternatively accepted that individual consumers graft their individual cases onto injunction actions. As a result, scholars conclude that the Spanish collective action regulation is "an opt-out system on paper (i.e. in the law), but an opt-in system in practice".

Switzerland
There is no tradition of class actions in Switzerland, and those are viewed as dangerous and not fitting the country's rules. While for the longest time, Switzerland did not consider developing a representative action model, this point of view has changed with the European Union's legislative developments on the subject.

On 10 December 2021 the Federal Council of Switzerland presented a draft proposal to amend the Code of Civil Procedure to strengthen the protection of collective interests. It will serve the enforcement of claims for compensation in mass and dispersed damage cases. This proposal comes after a consultation was conducted by the Federal Council in 2018 and intends to allow actions for all unlawful infringements, and not only for privacy–infringements. In order for an association to be able to sue, additional requirements must be met in the future, namely, the association must not be profit-oriented and it must have existed for at least 12 months. Associations should also be able to sue for compensation for affected persons. This would require their prior authorisation or a subsequent declaration of membership. The prerequisite for such an action by an association is that at least ten affected persons have authorised the association or organisation to take legal action as a pre-condition to initiating the action. With the introduction of reparatory class actions and the possibility of a collective settlement Switzerland is orienting itself at the current practice in the Netherlands. The proposal is now with the Swiss Federal Parliament for deliberation.

United Kingdom
Pursuant to the terms of the Brexit arrangements between the EU and the UK, the UK is not required to implement the Directive on Representative Actions.

However, the following examples of legislative developments - here with a focus on data protection matters - might also have impact on collective actions in Europe:

- In December 2020, the Supreme Court handed down the judgment in *Merricks v Mastercard*, and ruled that a low threshold should be applied in certifying competition class actions, thus encouraging further claims to be filed.
- In November 2021, the Supreme Court handed down the judgment in Lloyd v Google. Overturning the Court of Appeal decision, it ruled that a right to compensation under the Data Protection Act 1998 ('DPA') following the unlawful processing of personal data is not automatic

[23] *Iusomnibus* Link.
[24] Class Action Law Review, 5th edition, 2021, p.166.

but required proof of damage or distress on an individual basis, Accordingly, the matter could not be advanced as a “one stage” representative action. The Supreme Court made it clear the ruling was made on the basis of DPA, which applied to the claim, not the more-recent UK GDPR regime (Article 82 of which provides that a person who has suffered material or non-material damage as a result of an infringement of its provisions shall have a right to compensation).

- In 2021, the British government decided to not introduce a statutory mechanism for bringing opt-out data protection claims, in part because *Lloyd v Google* (as decided in the Court of Appeal) demonstrated that such claims could be brought and so there was no need for a new mechanism, for now. However, there is some appetite to do so from the government, as it ran a public consultation on the topic. The Supreme Court’s reversal of the Court of Appeal ruling may prompt further reflection.
- A new class action mechanism was introduced in Scotland on 31 July 2020, pursuant to the Civil Litigation Act 2018. Claims have already been issued against Volkswagen (Dieselgate), Celtic Football Club (allegations of child sexual abuse) and James Finlay (transnational tort/working conditions of Kenyan workers) under this new regime, and more are expected.
- Regarding new court claims, in January 2022 a case was introduced against Meta (formerly Facebook) over allegations of abusive market dominance through the exploitation of the personal data of 44 million users.

The EU Directive will undoubtedly figure in the debate around whether to create a mechanism where Qualified Entities can bring claims, as it will surely be re-visited following the *Lloyd v Google* case.

In July 2021 the UK government published a consultation (which closed on 1 October 2021) on competition policy, consumer rights, and consumer law enforcement which includes consideration of broadening current public law measures and invites views on opening further routes to collective consumer redress, to help consumers resolve disputes. Up to now, no date for the publication of the outcome of the consultation has been disclosed.

Overall, the use of opt-out mechanisms increases the possibility of scaling up individual damages with high return for funders. Although there are already mature collective redress mechanisms in place, the government’s public consultation is widening the view through a section dedicated to improving alternative dispute resolution.

Part IV: Deep Dive into Third Party Litigation Funding (TPLF)

Third-party litigation funding (TPLF) – an arrangement whereby a third party, who has no other connection to the litigation, finances some or all of a party's legal costs in return for a share of any proceeds of the litigation – is a growing practice. In a study published at the beginning of 2021, the European Parliamentary Research Service (EPRS) estimated that EUR 39 billion have been invested in this sector world-wide in 2019, having seen an annual average growth rate of 3.5% since 2008. Assuming a continuation of this past trend, the sector could increase by an additional EUR 9 billion to reach more than EUR 48 billion by 2025. In terms of litigation market size, the top five countries in the EU are Germany, France, Italy, Spain and the Netherlands.[25] Swiss Re - the world-wide second largest re-insurer found that litigation funding "contributes to higher awards, longer cases and greater legal expenses" [26]. Swiss Re reported in their study paper that TPLF diverts a greater share of legal awards to the funder rather than the plaintiff. The research estimates that up to 57% of legal costs and compensation in the United States' TPLF cases go to lawyers, funders and others. This compares with an average of 45% in typical tort liability cases.

In Europe, litigation funding is so far used for a broad range of claims. The common uses are for arbitration claims, claims pursued by insolvency practitioners, intellectual protection claims, investment recovery claims, anti-trust claims and collective consumer claims (e.g. on product defects, data privacy or contractual breaches).

At the EU Member State level, Greece and Ireland generally prohibit TPLF. While Germany last year opened up the option of funding to a limited use of contingency fees in its Legal Tech Act, in numerous Member States, funding is used for mass claims, often based on the assignment model. For instance, in Portugal the quite young NGO *"iusomnibus"* has also received private litigation funding by third parties (namely from Nivalion in Switzerland) for copycat cases.

The UK, due perhaps to London's leading position on arbitration and finance, together with the Netherlands, have the largest numbers of litigation funders. At present, numbers of litigation funders in London vary between 40 and over 60, operating also across Europe. The Netherlands appears to have around 24 litigation funders, followed by Germany with 13 funders, followed closely by France. Funders are also located in Austria, Spain, Portugal and Ireland.[27]

Looking at funding in the UK, government funded legal aid is generally not available in civil collective redress claims. On the other side, the UK has a strong TPLF market, since it is now no longer viewed as champertous - as long as the funding arrangement does not disclose any element of impropriety such as disproportionate control by the funder for example. Due to the loser pays rule, TPLF is often used alongside an indemnity for (the other side's) legal expenses in the form of after the event (ATE) insurance.

In June 2021, MEP Axel Voss presented a first draft of his own-initiative report on Responsible private funding of litigation. This report is currently sitting with the Committee on Legal Affairs (JURI), which is discussing the report to find a compromise on the amendments of the different political parties, and we expect a vote from the JURI Committee earliest in March 2022. In January 2022, EJF issued a position paper analysing the funding process, proposing further safeguards for private funding and outlining the importance of installing public infrastructure controls.

During a seminar of the European Legal Institute (ELI) on TPLF in December 2021, Professor Astrid Stadler (University of Konstanz), pointed out that third party funding by commercial funders is only the second-best option for representative actions. She stressed that Member States should establish publicly controlled "access-to-justice" funds that allow funding of collective redress mechanisms. Sources of money could be for instance residues of settlement funds or administrative fines for violation of consumer law.

The following overview presents ideas for areas of regulation.

[25] European Parliamentary Research Service (EPRS) study on "Responsible private funding of litigation – European value added assessment", (2021) Link inter alia p. 4-5.
[26] The Insurer "Swiss Re calls for action on third-party litigation funding" (2021) Link.
[27] European Parliamentary Research Service (EPRS) study on "Responsible private funding of litigation – European value added assessment", (2021), inter alia p. 8.

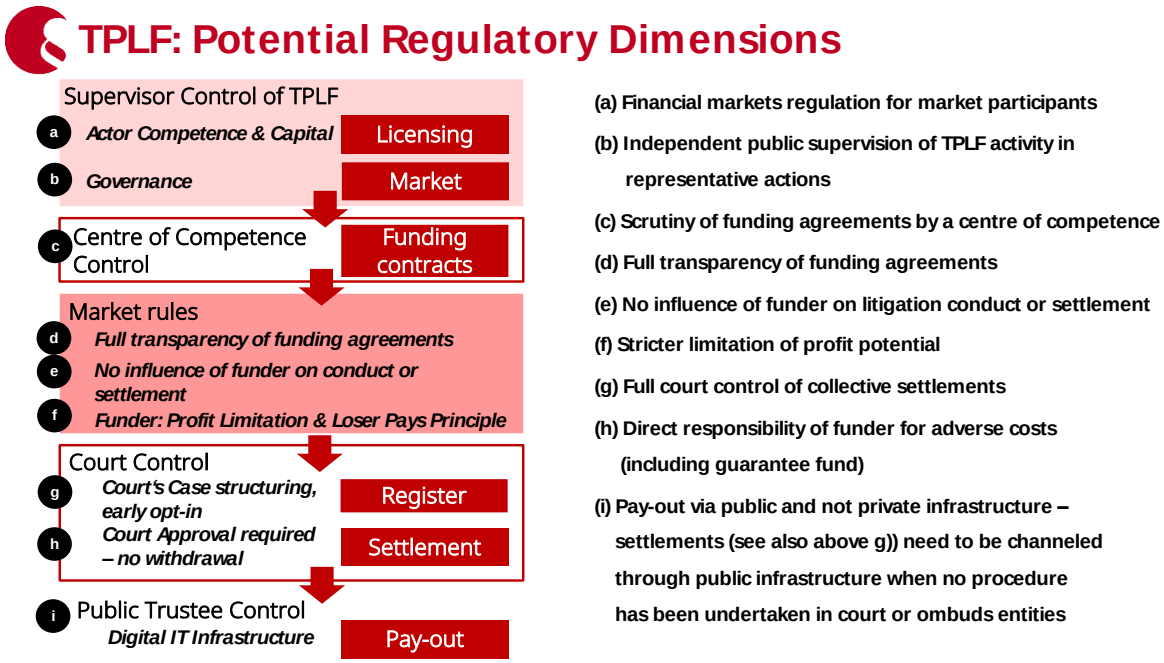
TPLF: Potential Regulatory Dimensions
Supervisor Control of TPLF
a Actor Competence & Capital
Licensing
b Governance
Market
c Centre of Competence Control
Funding contracts
Market rules
d Full transparency of funding agreements
e No influence of funder on conduct or settlement
f Funder: Profit Limitation & Loser Pays Principle
Court Control
g Court's Case structuring, early opt-in
Register
h Court Approval required – no withdrawal
Settlement
i Public Trustee Control
Digital IT Infrastructure
Pay-out
(a) Financial markets regulation for market participants
(b) Independent public supervision of TPLF activity in representative actions
(c) Scrutiny of funding agreements by a centre of competence
(d) Full transparency of funding agreements
(e) No influence of funder on litigation conduct or settlement
(f) Stricter limitation of profit potential
(g) Full court control of collective settlements
(h) Direct responsibility of funder for adverse costs (including guarantee fund)
(i) Pay-out via public and not private infrastructure – settlements (see also above g)) need to be channeled through public infrastructure when no procedure has been undertaken in court or ombuds entities

Chart 5

Part V: Learnings and outlook

Learnings

The findings from this second Monitoring Report reveal that regarding the transposition of the EU Directive on Representative Actions, **none of the 12 EU Member States analysed have completed enacting legislation** to implement the Directive. It appears that **due to numerous political and national factors** (e.g. Covid-19, inflation, geo-political tensions, elections), **the file is not a priority in governments' agendas.** We observed, however, that some countries seem to be a bit more advanced in the transposition process, including Austria, Belgium, Germany, Greece, Ireland, the Netherlands, and Spain with concrete proposals for parliamentary discussions planned before the summer break. More discussions with Member States regarding the transposition are necessary bearing in mind that most of EJF's suggestions to improve collective redress mechanisms (articulated in the six "Key Messages") during the transposition phase **still remain unsolved or are not sufficiently addressed.**

When analysing the 14 countries across Europe, we notice that the wider the scope of areas of application for mass claims, the higher the risk of substantial increase of class actions. We perceive a shift from pure consumer or competition law and investor-related claims towards societal claims with the intention of influencing behavioural change. That would not only impact B2C business but also B2B business, e.g. when living conditions are negatively affected. Likewise, the inclusion of SMEs into mass claims would also impact B2B relations. Private funding, the use of electronic platforms and specialised lawyers are the "ingredients" for further acceleration of mass litigation. In addition, more and more copycat cases are seen (for example in Portugal).

The front runners of collective redress actions in court remain the **Netherlands** and the **UK.** Taking into consideration running cases, judgments, as well as appeals, we can see a substantial difference compared to the other European countries. Not surprisingly, in the Netherlands, one year after the introduction of the WAMCA (Dutch Act on collective damages claims) legislation in January 2020, the number of "ideologically" motivated class actions has turned out to be double the number of damages class actions. Moreover, several WAMCA provisions still lack clarity which has led to differing court decisions on how to handle WAMCA proceedings.

Portugal is following this trend with an increasing number of cases being filed by one very active legal tech platform. In some countries, like **France and Poland**, previous judgments influenced the lack of new cases. In France cases are brought in front of the National Commission for Data Protection and Liberty as the Commission is eager to impose very high fines on companies breaching GDPR. In Poland the lack of new cases is explained by the delays encountered in such cases in the past. We can expect further developments in **Italy and Switzerland**: in Italy, a new law on class actions was implemented in 2021, and in Switzerland a law introducing class actions is being discussed in the Swiss Parliament.

Collective Redress in Court

Analysis from 2020 to approx. Q3 2021

★ EU Opt-out Mechanisms

* Model Case Proceedings, see website 'Bundesamt für Justiz"

** Purely for shareholders'/investors' mass claims

Countries	★			★		
# cases Different court levels	>70 (incl. Judgments)	> 20 (incl. Judgments)	>11 MFK* & few KapMuG**	ca. 10 (most by IusOmnibus)	2 (BMW & State)	2 (Tesla & State)
Key Areas						
- Consumer & Anti-competition	yes	yes	yes	yes	yes	yes
- Investors	yes	yes	yes	--	--	--
- Environment & Health	yes	yes	--	yes	--	--
- Data Privacy	yes	yes	--	--	--	--
- Human Rights	yes	yes	--	--	yes	--
Main Claimants						
- Consumer Ass./NGOS	yes	--	yes	yes	yes	--
- Platforms, Lawyers, Adhoc Vehicles	yes	yes	Platforms (assignment models)	Platform (assignment model)	Platforms (assignment models)	Yes (Lawyers & LegalTech)
Private Funders (#)	yes (~24)	yes (>44)	yes (~13)	yes (few)	yes (~10)	(?)

Chart 6

Some best practices can be found, however: a coalition of 14 major German business associations tasked Professor Alexander Bruns (University of Freiburg) to come up with a proposal on how to effectively and efficiently integrate the RA Directive into the German civil justice law. He criticized the "vzbv"-model for having no binding effect but instead a late opt-in, therefore no limitation of liability, no procedural bar, trustees without trust assets and controversial assessment proceedings and the need for individual enforcement by each consumer. In total, the effects may well have been even less desirable than in the US class action model. Instead, **Prof. Bruns has developed a model with important elements for the transposition:**

- High case management competence of the court;
- Registration of a minimum number to allow adequate certification and then an opt-in process for other consumers leading to a tolerable uncertainty about legitimation (the practical example of Spain argues rather for an early opt-in than a late opt-in or opt-out);
- After judgment against the defendant, payment needs to be made to a "distribution-court" with no risk of insolvency;
- Further positive effects are: better systemic compatibility of the standing of the QE to sue with general German civil procedural law, a procedural stalling, binding effects on other court procedures with a connected objective, limitation of liability and exposure of the defendant to the amount judged adequate for all beneficiaries having opted in.

EJF incorporated the above-mentioned elements into a graphical conceptual approach (see Chart 7 below) which EJF views as a solid basis for further discussions about optimal pursuit of the regulatory objectives. A choice needs to be made between private or public infrastructure. The latter may fulfill also supervisory functions.[28]

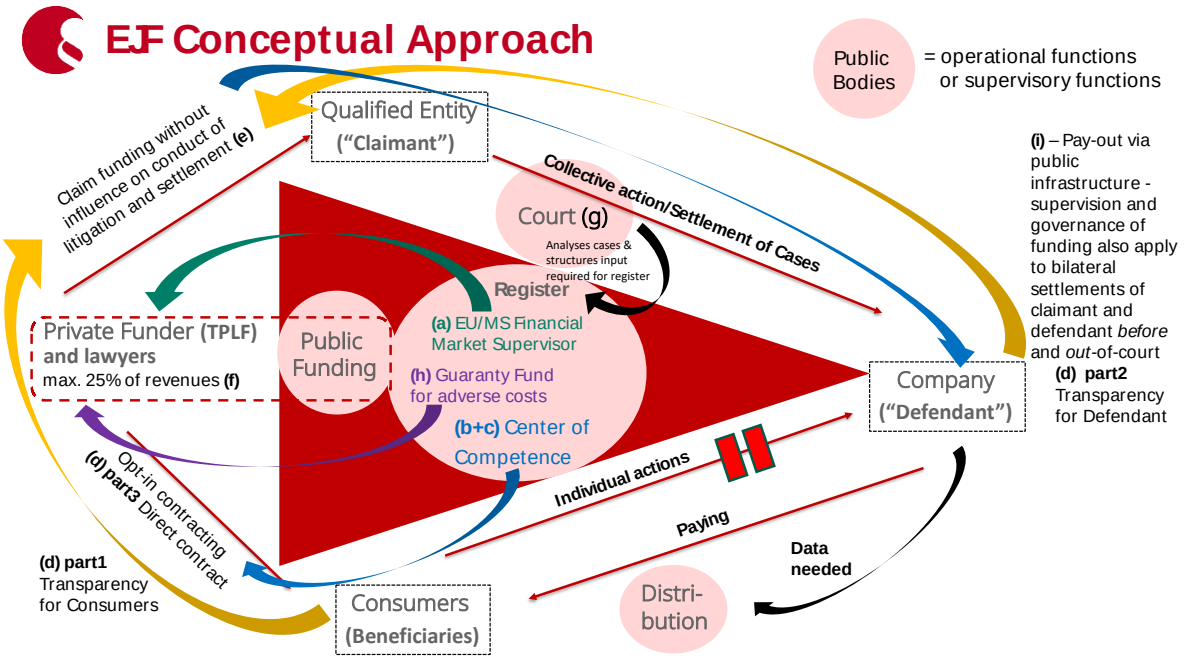

Chart 7

[28] Catherine Piché, Public Financiers as Overseers of Class Proceedings, in New York University Journal of Law & Business 2016, Special Issue, Volume 12 Number 3, p. 777 (787). (link)

Outlook

The main triggers for mass litigation appear to come from the scope of collective actions laws, opt-out mechanisms, digital platforms/legal tech, together with private financing as well as potential cross-border claims, potentially leveraging the most favourable litigation conditions within Europe.

Regarding the creation of comprehensive **legal tech platforms**, an interesting connection already established in German law has so far not yet received due attention: The General Conciliation Body ("Universalschlichtungsstelle" which is the residual ADR-body required by Art. 5 para 3 of the ADR-Directive[29]) in Kehl[30] has, based on section 30 para 1 no. 2 VSBG[31], the task to resolve "Disputes in respect of which **binding findings have been made in a final judgment on a model declaratory action** under section 613(1) first sentence of the Code of Civil Procedure or **a settlement** under section 611(1) of the Code of Civil Procedure and **in respect of which the consumer's claims or legal relationships in dispute were validly registered for the register of actions** under section 608(1) of the Code of Civil Procedure."

Thus, a **link between two of the three ways of resolving disputes** (**courts** and **CDR-bodies**[32]) already exists here and could be used as a basis to develop a suitable infrastructure that would enable "dual" or better "triple" use (i.e. use also for **regulatory redress**) of the very same infrastructure **to achieve results for consumers in the most effective and quickest of avenues possible**.[33]
While the German consumer association vzbv had called for establishing such a link, they have not embraced the idea of opening the ODR platform[34] in Germany for domestic online dispute resolution as it appears in order to protect their own "business" and financial resources[35].

A **better solution for the future** would be to admit, based on one integrated IT infrastructure for capturing the relevant cases, **that an escalation becomes possible from an ODR procedure to the court procedure if there is not enough progress in the ODR procedures.** The aforementioned vzbv statement made a suitable proposal in that respect: to not reject a CDR-procedure, but to stay it as soon as a collective court procedure starts[36]. Such a bridge would lead to the integration of the various avenues to redress which EJF has been advocating for many years.

From **a market perspective**, it seems that the Netherlands will further foster their position as a class action hub in the EU. The UK may remain the country with the largest number of third-party litigation funders playing an important role but will, due to Brexit, have less impact on the continent, and certainly UK judgments will not be automatically recognised in the EU.

In terms of **claim areas**, it very much depends on what type of representative actions can be initiated. **Areas of disputes are increasing in sectors such as data privacy, distortion of competition** (for example via oligopoles) or any other grey areas around innovation. Especially with a **new wave of regulations on environmental protection and ambitious goals of governments or supra-national organisations in terms of climate change, both governments and businesses may face litigation pressure in areas like pollution, health impact, biodiversity etc**.

New regulations on the horizon may bridge links between liability matters and mass litigation potentials. This could include the review of the Product Liability Directive, currently under debate in relation to how to deal with digitalisation and the other new regulatory initiatives around sustainable

[29] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).
[30] Link
[31] Law on alternative dispute resolution in consumer matters (link).
[32] Consumer Dispute Resolution bodies.
[33] See again Hodges/Voet, op. cit. p. 6, footnote 2.
[34] Online Dispute Resolution platform – see Regulation (EU) 524/2013 on online dispute resolution for consumer disputes (link).
[35] See page 4-5 in Link – Their claim was that a different approach would deprive the consumers of "full consumer advice" which needed to be "partial advice" rather than impartial advice incl. conflict resolution which the ODR platform would deliver because vzbv would include other means than ODR resolution in their advice.
[36] Ibid., p. 6, section 3.1 third bullet.

corporate governance and the legislative initiative of the European Parliament on "Corporate due diligence and Corporate Accountability"[37]:

On 23 February 2022, the European Commission adopted a proposal for a Directive on Corporate Sustainability Due Diligence[38] aimed at advancing the green transition through sustainable corporate behaviour. The Directive will primarily apply to companies of substantial size and economic power with 500+ employees and a minimum EUR 150 million turnover. Additionally, concerning due diligence duties, companies will have, for instance, to ensure their business strategy is compatible with limiting global warming to 1.5°C (to be in line with the Paris agreement).

This proposal is quite significant in light of the far-reaching and potentially costly obligations it would impose on companies. There are the potential penalties (including for company directors) and civil liability could follow. The proposed Directive would introduce a civil liability regime to allow victims to sue companies for damages for harm which could have been avoided by proper due diligence measures. To that end, consumers would be able to bring collective claims to court, demanding injunctive measures and/or compensation for the presumed harm a company causes to human rights or the environment at any level of the supply chain. These enhanced legal requirements could lead to abusive lawsuits and a challenging position for undertakings that will face significantly higher standards at every level of their supply chain once they have come into force.

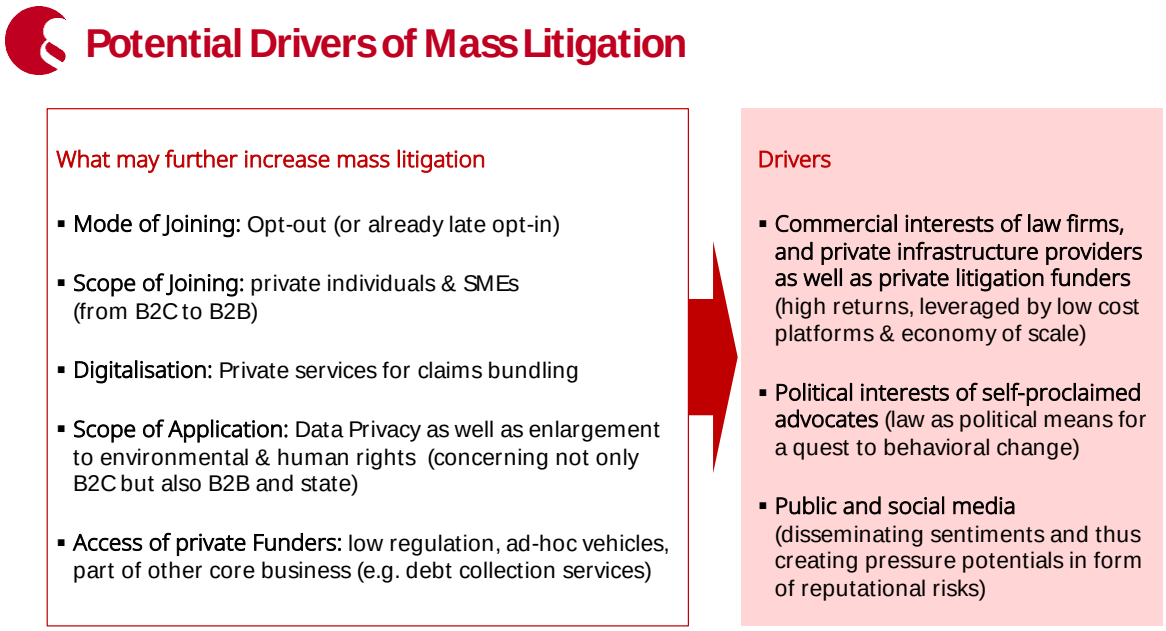

Chart 8

EJF Recommendations

Involving decision makers and regulators in the debate for a more holistic view. Having in mind that mass claims are of public interest, it is worth reminding policymakers and regulators of the important role public infrastructure can play in solving such conflicts also by means other than court.

Digitalisation is key for effectiveness, efficiency and speed for prevention/intervention. Based on these developments, a conversation needs to start from capturing disputes electronically via register. Therefore, an **EU-wide electronic communication tool** is needed. The European Commission is already working on the "REACT" (Representative Actions Communication Tool) project, similar to the IMI (Internal Market Information) System and more encompassing in terms of stakeholders than

[37] European Parliament initiative covering supply chains (link).
[38] EU Commission's proposal on Corporate sustainability due diligence (link).

eCodex, which only connects courts. **Particular attention** should be given to the link already existing in Germany between collective action in court and resolution of disputes after such a judgment in the distribution phase via the federal German residual dispute resolution body in Kehl which closely cooperates with its French counterpart and the respective ODR platforms instituted by the EU ODR Regulation.

Capturing disputes early provides an excellent opportunity for Consumer Dispute Resolution bodies, ombuds entities or public authorities to clarify issues and propose settlements out of court ideally as a first mandatory step before escalation of the case to court.

Legal clarity for cross-border actions is needed. In that respect, Brussels I (Recast) needs to be revised. Otherwise, there is the risk that respective mass claim cases end up at the European Court of Justice and the population in the EU's Member States may lose trust in policy makers in Brussels as this topic has been repeatedly on the agenda.

More safeguards for private funding of litigation across different dimensions is needed. Especially contractual transparency and control mechanisms throughout the whole process.

Better court management competences and a strict certification process at the beginning is needed. These are crucial elements to correctly channel the claims. More thought should be given to bundle competences, i.e. in specialised courts.

EJF will further engage in an open dialogue with the aim of building fair and effective civil justice systems in Europe. In the course of this year we should be able to draw further conclusions from the regulatory changes made in the Member States as well as from the ongoing collective redress developments in-court and out-of-court.

- End -

Our supporters

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