JONES DAY

THE RISE OF US-STYLE CLASS ACTIONS IN THE UK AND EUROPE

Class actions have been a feature of the litigation landscape in the USA for decades. Claimant-friendly procedures combined with an aggressive and well-funded plaintiffs' bar have created fertile ground for these large, long-running and often high-profile cases.

These trends are no longer confined to the USA. The growth of group litigation in the UK and Europe over recent years has been exponential, and its significance to businesses as a key corporate risk will only continue to increase.

This growth is partly driven by a greater legislative and judicial openness to mass claims, including in particular the broader acceptance of so-called "opt out" mass claims, where claimants can bring a representative action on behalf of a "class" of potential claimants, without seeking the consent of all claimants.

In parallel, the litigation funding market is booming in the UK and Europe. Funders and claimant law firms are working together to pursue novel claims that previously would not have been economically feasible.

UK litigation funder assets have increased from just under £200 million in 2011/2012 to £2.2 billion in 2020/2021.

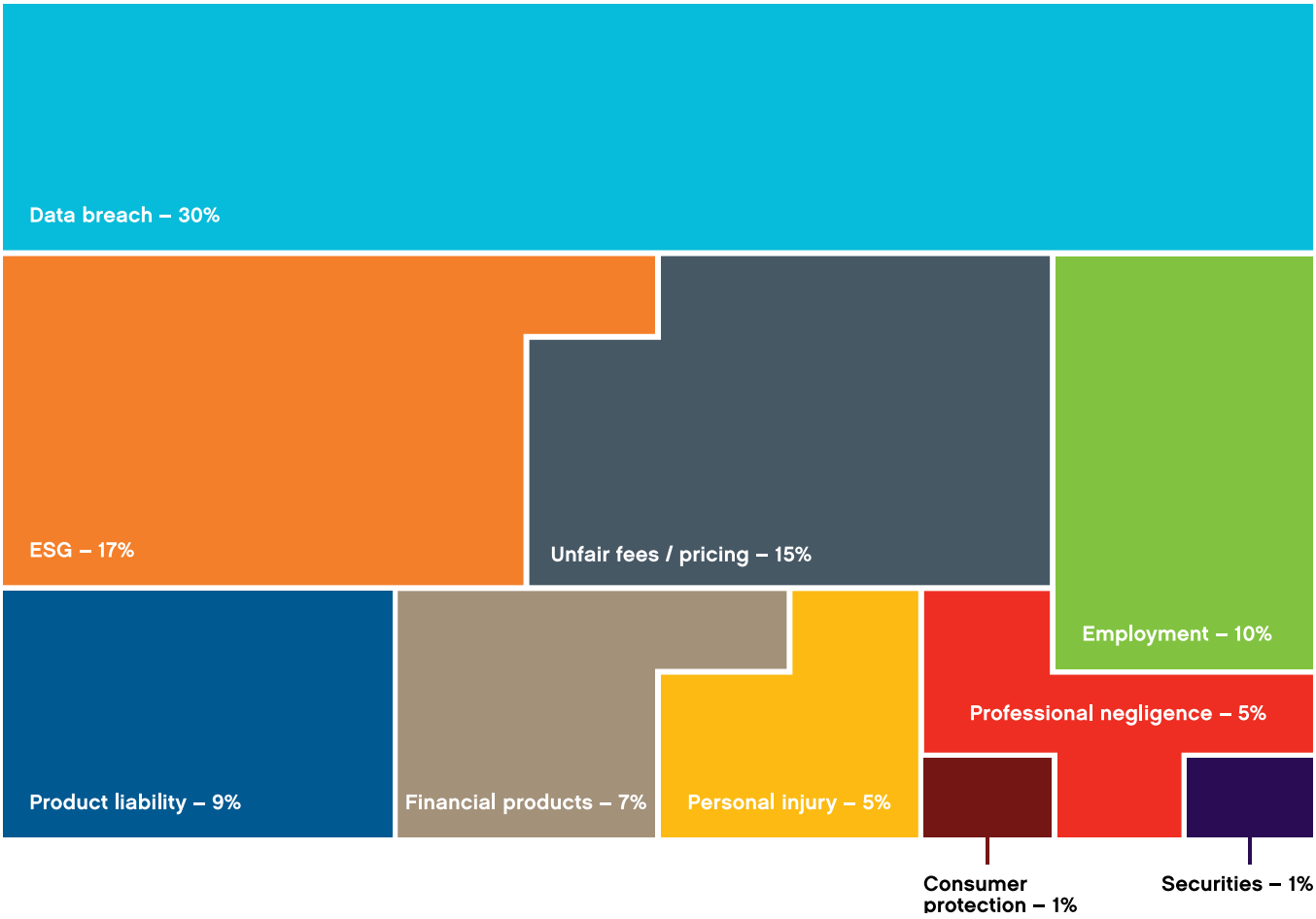
The value of the litigation funding market in the EU was estimated to be €1 billion in 2019, with this projected to reach €1.6 billion in 2025.

As a result, mass claims are now affecting almost every industry sector, and claimant law firms continue to develop innovative case theories to impose liability in new areas.

WHO IS AT RISK?

Claims are being brought against businesses across all sectors, for a wide variety of alleged wrongdoing—no longer is the focus on defective products or catastrophic events.

A survey of the claims being advertised by the most prominent claimant law firms in the UK as of August 2023 shows the types of claims—both actual and anticipated—which are currently being targeted.



Claims relating to **employment**, **product liability**, **financial products**, **antitrust** and **personal injury** continue to be mainstays of group litigation. But in recent years we have seen a significant growth in both **data**-related and **ESG**-related class actions. This trend looks set to continue.

We are seeing a wave of claims based on alleged breaches of obligations relating to the use, processing and storage of personal data. Many companies are "*data controllers*" for GDPR purposes—and therefore subject to stricter processing requirements—without necessarily realising it, which makes the threat of this litigation even more pronounced. Cyberattacks often give rise to compensation claims in the UK, such as the recent group action against British Airways by 16,000 claimants following an incident in 2018 in which personal data belonging to over 420,000 customers and employees was unlawfully accessed[1].

Similar trends are being seen across Europe. In the Netherlands, for instance, claims relating to the alleged misuse of personal data (often in contravention of GDPR obligations) have been, or are being, brought against Meta[2], TikTok[3], Google and Oracle[4].

Environmental incidents are an obvious source of ESG-related group litigation risk. For example, the UK courts are already handling a claim from hundreds of thousands of claimants arising out of the collapse of the Fundao Dam, in one of the largest group claims in English legal history[5]. The "S" in ESG is also giving rise to group litigation, with the Dyson Group facing claims of forced labour and dangerous working conditions brought by a group of Malaysian factory workers[6], and Tesco plc defending a claim brought by a group of workers in its Thai factory[7]. Allegations of greenwashing in market statements, or share price falls following revelations about environmental performance, may also form the basis of claims by groups of investors or shareholders that they relied on untrue or misleading statements.

The same pattern is apparent in Europe. The Dutch courts have also recently dealt with high-profile group actions against Shell[8] (in which six NGOs, alongside 17,000 individuals, successfully obtained a ruling at first instance requiring the oil and gas giant to reduce its worldwide aggregate carbon emissions by net 45% by 2030, relative to 2019 levels) and KLM[9] (for alleged greenwashing).

Claims Pipeline

We believe that group actions will arise across virtually all sectors, for a broad range of issues.

The below table gives examples of the sorts of class action claims that we are currently seeing, or anticipate seeing in the near future, across the UK and Europe.

ANTITRUST / COMPETITION

- Claims for damages arising from anti-competitive practices (e.g. cartels, price fixing etc.)
- Consumer protection, data mishandling or environmental claims, framed as an abuse of dominant market position

DATA BREACH

- Individuals arguing that they have been put at risk by their data being leaked, e.g. following a cyberattack
- Customers and/or employees arguing that their data has been misused, e.g. provided to a third party or otherwise monetised without appropriate consent

ESG

- Claims for greenwashing in a variety of different consumer contexts
- Activist shareholders arguing that natural resource companies have failed to devise strategies compliant with the Paris Agreement surrounding emissions targets
- Claims against large retailers relating to the working conditions in the offshore factories that produce their products
- Claims against car manufacturers following the "dieselgate" scandal
- Claims against water companies relating to the discharge of sewage/wastewater into waterways
- Claims against landlords by tenants/licensees relating to misleading representations about the environmental credentials of buildings

FINANCIAL SERVICES

- Claims against credit/debit scheme providers relating to alleged overpricing
- Claims against banks alleging the fixing or manipulation of foreign exchange rates
- Traders alleging unlawful trading practices relating to crypto currencies
- Claims against banks for insufficient information in financial product contracts

LABOUR / EMPLOYMENT

- Employees arguing that they have been underpaid on the basis of their gender
- Workers arguing that they should be treated as employees rather than self-employed contractors
- Workers—even if outsourced—bringing complaints about working conditions

PHARMA AND CONSUMER

- Consumers arguing that everyday products cause serious health conditions
- Claims against pharmaceutical companies in relation to over-inflating drug prices or restricting the market

PRODUCT LIABILITY

- Consumers arguing that they suffered personal injury due to a faulty or defective product
- Claims relating to losses caused by malfunctioning software or AI systems

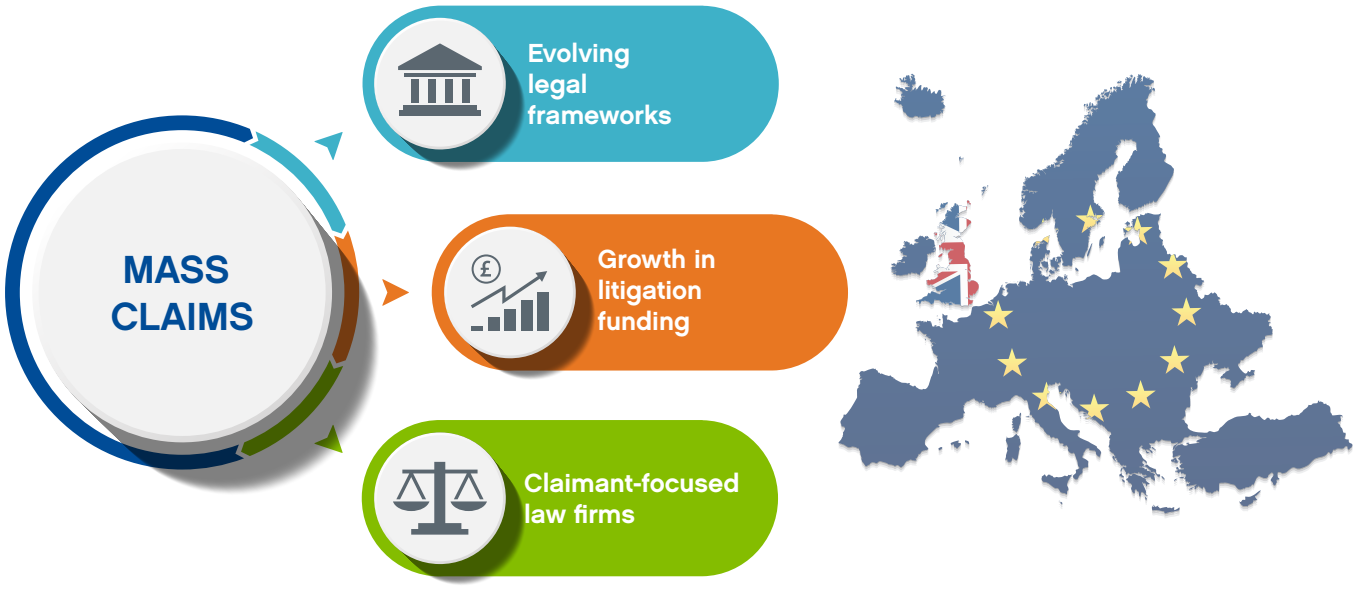
TECHNOLOGY

- Claims against smartphone chipmakers or phone battery makers in relation to chipset pricing
- Consumers alleging unlawful practices in operating e-stores
- Individuals arguing that social media sites have engaged in unfair practices regarding access and data use
- Claims against online retailers for unlawful "steering" of consumer purchases
- Complaints that platforms have failed adequately to monitor users' behaviour resulting in harm (trafficking, abuse, illegality)

TELECOMS

- Customers claiming that their privacy rights have been violated by data sharing or data mining
- Customers arguing that they have been historically overcharged for landline services

WHAT IS DRIVING THE GROWTH IN GROUP CLAIMS?



This growth in group claims is the result of a confluence of factors:

Evolving legal frameworks

Tailor-made class action mechanisms are being introduced across Europe. But we are also seeing increased judicial openness to existing procedures being expanded and used to bring group actions.

Growth in litigation funding

Litigation is becoming an increasingly popular investment asset, and large claim values often make group litigation an attractive funding prospect.

Claimant-focused law firms

The US plaintiffs' bar is exporting itself to the UK and Europe, and bringing the US "playbook" with it.

Evolving Legal Frameworks

The main legal change accelerating mass actions in the UK and Europe is a greater openness to "opt-out" actions, where claims are brought on behalf of a class of claimants, without the requirement to seek individual consent.

THE UNITED KINGDOM

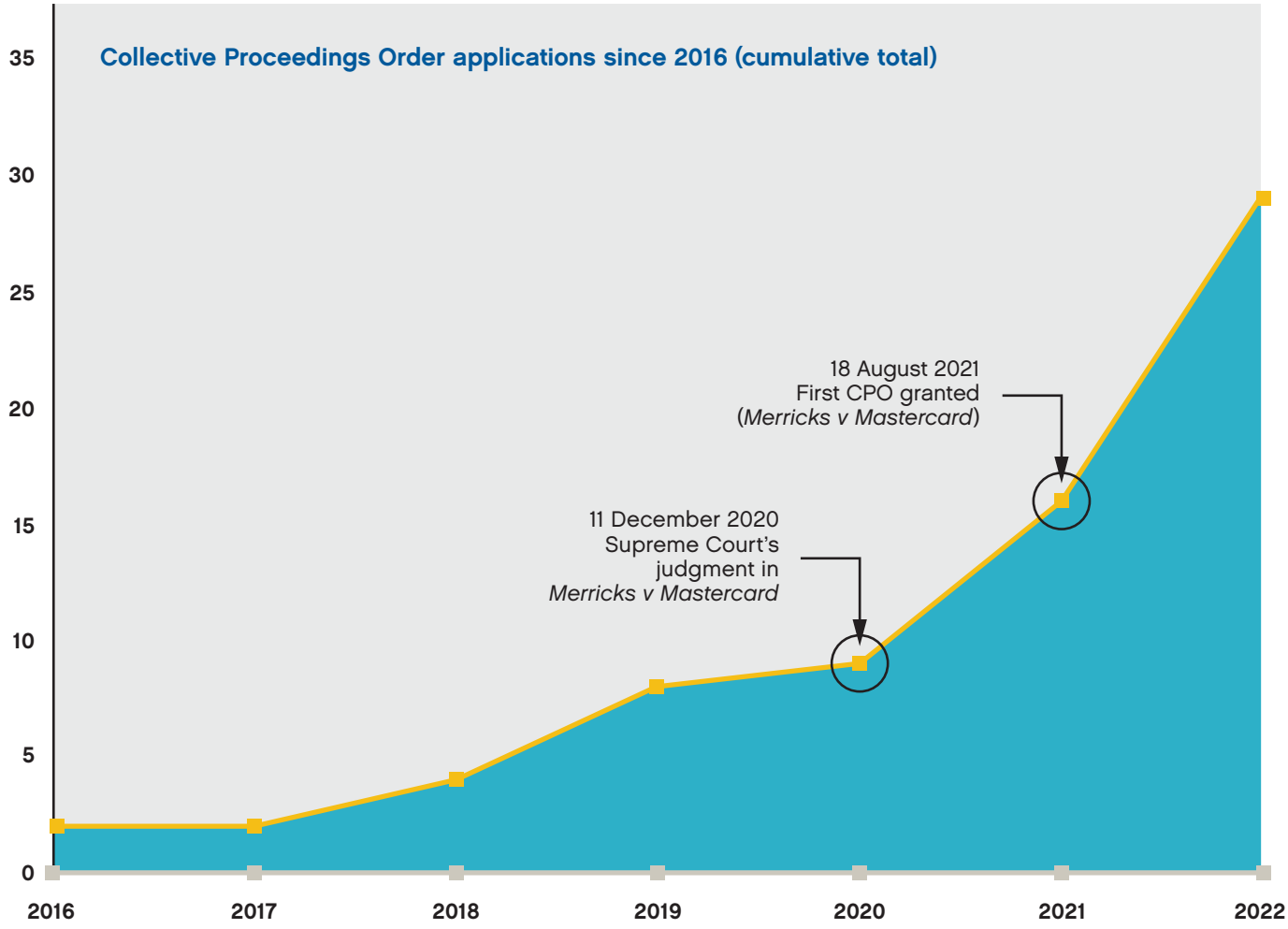
In the UK courts, there are now two principal forms of "opt-out" claims, being the collective proceedings regime, and representative actions. The growth in these types of action has been the main driver of the overall increase in mass litigation in the UK. There is also a mechanism for "opt-in" claims, where claimants' consent must be individually sought, known as a group litigation order, which continues to be used.

The collective proceedings regime

In 2015, the UK introduced the collective proceedings order (CPO), an opt-out class action regime specifically for antitrust claims. The first CPO was certified in 2021, following the landmark judgment of the Supreme Court in *Mastercard Incorporated and others v Walter Hugh Merricks*[10] (on behalf of millions of UK consumers alleging that the level of certain inter-bank payment card fees set by Mastercard was unlawful). Since then, interest in the regime has increased dramatically. Thirteen new CPOs were sought in 2022—the most in a single year since the regime was introduced, and nearly twice as many as in 2021. The chart on the following page shows these trends in CPO applications between 2016 and 2022

Claimants are also pushing the boundaries of what constitutes a competition law claim with a view to taking advantage of the CPO regime. Businesses that have a dominant market position are finding that practices as diverse as their collection, processing and sharing of users' data, or their failure to comply with environmental regulations, are alleged to be an "abuse" of that dominant position. By formulating their claim as relating to an abuse of a dominant position, claimants gain access to the CPO mechanism—which would not be available if they pursued a more straightforward tort or breach of contract claim.

Claims are being brought against major corporates across a broad range of sectors, including financial services, telecoms, rail transport, commercial vehicles—and perhaps most notably "big tech", with the likes of Apple, Amazon, Google and Meta all having now been targeted[11].



Representative actions

The second key route for an opt-out class action in the UK is the representative action regime. It is not confined to antitrust claims, and allows one party to bring proceedings on behalf of others who have the “*same interest*” in the claim. The courts historically interpreted that test very restrictively, and its use has therefore been fairly limited.

However, as with CPOs, in recent years the courts have signalled their willingness to take a more flexible, pragmatic approach, which will open this form of “opt-out” litigation to more claims.

While the Supreme Court’s judgment in *Lloyd v Google LLC*[12] ultimately dismissed the attempt to bring a representative claim on behalf of 4.4 million iPhone users relating to the use of tracking cookies, it did indicate that representative actions could be used where no individualised assessment is required. It also potentially opened the door to split trials, with “grouped” issues of liability being determined by way of representative action, and then “individualised” issues (such as the damages owed to a particular claimant) being assessed in a separate procedure.

The recent case of *Commission Recovery Ltd v Marks & Clerk*[13] went one step further, allowing a representative action to proceed despite complexities as to evidence and quantum. The judgment ended with a very clear comment about the need for legal systems to evolve to offer means of mass redress.

Group litigation orders

A group litigation order (GLO) is an “opt-in” mechanism, which allows claims with common or related issues of fact or law to be case managed together. The courts can also, under general case management powers, order for claims with similar or overlapping issues to be consolidated or jointly tried.

Technically these are collections of individual claims, with the burden on each claimant individually to prove its own case on liability and damage. However, the reality of managing evidence processes and damages assessments for what can be many thousands of claimants means that, in practice, these claims are often case managed using sample or test claimants. Driven by the need to dispose of cases in a cost-efficient and proportionate manner, the courts are showing increased willingness to employ some of the evidential and loss assessment tools more typically associated with opt-out class actions.

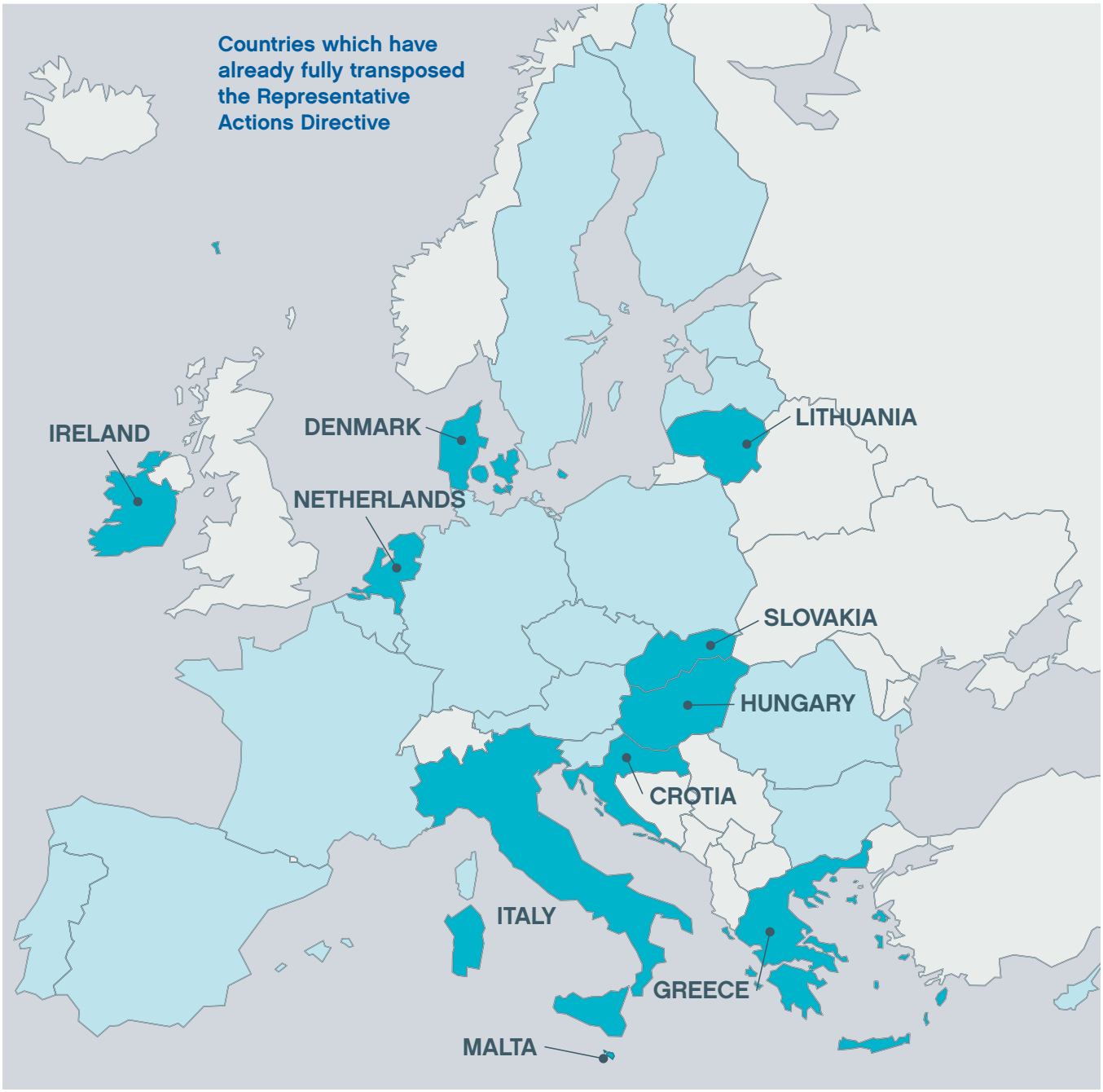
THE EUROPEAN UNION

In early 2018, the European Commission introduced the "New Deal for Consumers"—a proposal aimed at modernising and enhancing consumer protection in the EU. As part of this, the Representative Actions Directive was adopted on 25 November 2020. The Directive requires each of the 27 Member States to have in place a mechanism allowing consumers to bring class actions relating to various EU law infringements, covering a broad range of areas including energy, telecommunications, financial services, travel and tourism, data protection and product liability. The establishment of this common legal framework is expected to drive a significant increase in the number of class actions launched in the EU.

The Directive only provides guidelines, giving Member States a degree of flexibility over the class action regime that they implement. It can, for instance, be opt-in or opt-out. Similarly, while it must apply to consumer-to-business actions, Member States can choose for it to cover business-to-business actions too (in all cases only a "qualified entity", designated by each Member State, will have standing to bring a class action).

The Member States were required to incorporate the Directive into their national laws. At present, 10 countries have now completely transposed the Directive, with the new legislation entering into force on 25 June 2023 in most instances.

It therefore remains to be seen precisely how these new mechanisms will operate in practice in each jurisdiction, and in turn how the anticipated growth of mass litigation will play out across the EU. That said, the experience of the Netherlands provides some insight, as it already had in place a class action regime largely in line with the Directive's requirements. That country has been a very popular forum for this form of litigation in recent years, with well-publicised claims being launched against global giants such as Shell[14], Google and Meta[15].

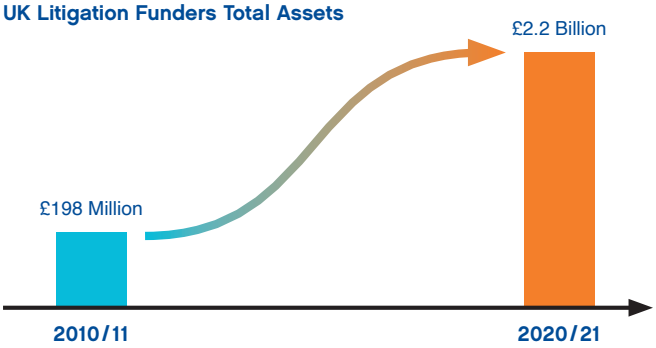


Growth in Litigation Funding

The availability of procedural mechanisms alone would not be sufficient to fuel a rise in class actions. These claims are complex, require careful management, and can therefore be expensive to pursue, often with a significant up-front spend. However, the procedural mechanisms that allow these claims to be grouped together can also make them easier for third-party litigation funders to invest in.

Litigation funder assets in the UK have significantly increased over the last decade or so, going from just under £200 million in 2011/2012 to £2.2 billion in 2020/2021. The market in the EU is also growing; funders already operate in various Member States (including Austria, France, Germany, the Netherlands, Portugal and Spain), and are continuing to expand their presence here, often joining forces with claimant firms. Its value was estimated to be €1 billion in 2019, and is projected to reach €1.6 billion in 2025. Funders plainly have the appetite to deploy these vast funding resources to back class actions across the UK and the EU.

UK Litigation Funders Total Assets



Claimant-Focused Law Firms

In response to the growing frameworks for class actions in the UK and Europe and the availability of litigation funding, more and more US claimant law firms with particular expertise in this field are establishing a presence here.

These claimant law firms are working hand in hand with litigation funders to identify potential claims and build "books" of claimants. With advertisements on the London Underground, national newspapers and social media, they are recruiting interested or indicative claimants, to illustrate the viability of a claim to the court. In some cases they are seeking to build on the success of existing judgments in the USA, exporting their case theories and arguments directly to the UK or Europe on behalf of claimants based here. This process is often conducted publicly and noisily, not just to raise awareness among potential claimants but also in an effort to apply pressure on defendants for early disclosure or settlement.

CONCLUSION

Class action litigation is no longer a US-specific phenomenon.

The UK and Europe are experiencing similar factors to those which drove the growth of class actions in the USA: an upswing in the third-party litigation funding market, increasingly sophisticated and experienced claimant law firms, and liberalised group claim procedures. Group claims increasingly pose a very real threat for businesses across a broad range of sectors.

Endnotes

1 Case no. QB-2020-000208.

2 Court of Amsterdam, 15 March 2023, ECLI:NL:RBAMS:2023:1407.

3 Court of Amsterdam, 9 November 2022, ECLI:NL:RBAMS:2022:6488.

4 Court of Amsterdam, 29 December 2021, ECLI:NL:RBAMS:2021:7647.

5 *Municipio de Mariana and others v BHP Group plc and another* [2022] EWCA Civ 951.

6 Case no. QB-2022-001698.

7 Case no. QB-2022-000220.

8 Court of The Hague in first instance, 26 May 2021, ECLI:RBDHA :2021:5339.

9 Court of Amsterdam, 7 June 2023, ECLI:NL:RBAMS:2023:3499.

10 UKSC 2019/0118.

11 *Elizabeth Helen Coll v Alphabet Inc. and Others* (case no. 1408/7/7/21); *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others* (case no. 1433/7/7/22); *Dr Rachel Kent v Apple Inc. and Apple Distribution International Limited* (case no. 1403/7/7721); *Mr Justin Gutmann v Apple Inc., Apple Distribution International Limited, and Apple Retail UK Limited* (case no. 1468/7/7/22); *Julie Hunter v Amazon.com, Inc. and others* (case no. 1568/7/7/22); *Charles Arthur v Alphabet Inc. and others* (case no. 1582/7/7/23); and *Claudio Pollack v Alphabet Inc. and others* (case no. 1572/7/7/22).

12 UKSC 2019/0213.

13 [2023] EWHC 398 (Comm).

14 Court of The Hague in first instance, 26 May 2021, ECLI:RBDHA: 2021:5339.

15 Court of Amsterdam, 15 March 2023, ECLI:NL:RBAMS:2023:1407.

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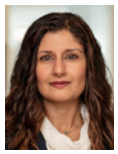

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