CLASS ACTIONS WORLDVIEW

A Study of Trends Around the Globe

PART III – AUSTRALIA, GERMANY, AND FRANCE • DECEMBER 2023

Part III: Australia, Germany, and France

Although class actions have been common in the United States for decades, they have not been as widely used in the rest of the world. The situation and risks remain in flux, however, as more countries have renewed momentum to enact class actions or class action-like procedures— sometimes without key procedural safeguards that exist in U.S. class proceedings. Jones Day has one of the largest and most successful groups of defense-side class action practitioners in the world. Building on the experience of litigators in 40 offices on five continents, this Guide examines new developments and risks in class action procedures around the globe (in particular, in Argentina, Australia, Belgium, Brazil, China, England and Wales, France, Germany, Italy, Japan, Mexico, Spain, and The Netherlands), and assesses the common trends and differences among respective national laws. It is our goal that, armed with these insights on class action trends, companies operating across the world can understand, assess, and manage class and collective litigation risks in the global marketplace.

In Part III, we examine class actions activities in Australia, Germany, and France. Class actions have existed at the federal level in Australia since 1992, and most of the Australian States now have class action regimes of their own. For most claims in Germany, each plaintiff must file his or her own case, but there also are five types of German collective proceedings. In France, while the regime of class action is already quite comprehensive compared to other EU Member States, it has not yet gained significant traction in the French litigation landscape.

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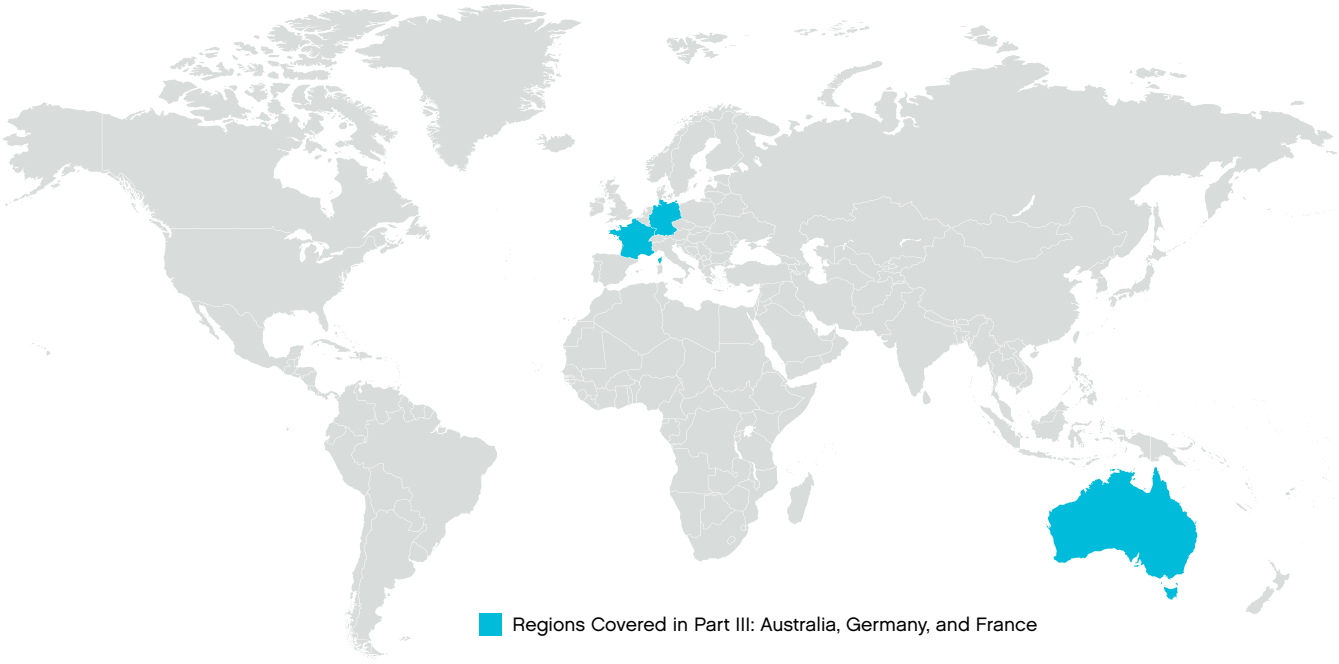

Australia

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A. BRIEF OVERVIEW AND HISTORY

Class actions at the federal level have existed in Australia since March 4, 1992, when the *Federal Court of Australia Amendment Act 1991* (Cth) took effect by adding Part IVA to the *Federal Court of Australia Act 1976* (Cth). In addition, most of the Australian States now have their own class action regimes. In Victoria, a procedure for "group proceedings" in Part 4A to the *Supreme Court Act 1986* (Vic) became effective as of January 1, 2000, through the *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* (Vic). In New South Wales, the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) added Part 10 to the *Civil Procedure Act 2005* (NSW) so as to make "representative proceedings" available in NSW courts after March 4, 2011. In Queensland, Part 13A was inserted into the *Civil Proceedings Act 2011* (Qld) so as to make "representative proceedings" available from March 1, 2017. Tasmania added "representative proceedings" through Part VII to the *Supreme Court Civil Procedure Act 1932* (Tas), which took effect from September 9, 2019. Most recently, Western Australia enacted the *Civil Procedure (Representative Proceedings) Act 2022* (WA), which commenced in full on March 25, 2023.

From March 4, 1992, through May 31, 2017, claimants filed 513 class actions in relation to 335 disputes. On average this means 20 class actions are commenced every 12 months, but this understates the current filing frequency as class actions are being brought more frequently today than when they first became available.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

Class actions can be used in all areas of law provided legislative requirements are met, and overseas claims and precedents have driven product liability and cartel class actions in Australia.

Key claims include:

- Class actions relating to climate change and ESG issues. Recent filings include two actions against the Australian Federal Government in relation to the alleged impacts of climate change on Australian island territories and Australian children.
- Class actions relating to cybersecurity and data privacy issues.
- Shareholder class actions based on disclosure obligations and other securities issues. From the time periods 1992–2004 to 2005–2017, shareholder class actions went from representing 5% to 23% of all filed class action proceedings,

and this remains a highly active space. The largest recovery to date was AU$200M. Total settlements in shareholder class actions since 2003 run into the billions of dollars.

- Investment and property schemes class actions including *Lehman Brothers Australia*, a case which held an investment bank liable for collateralized debt obligations ("CDOs") and cases against credit rating agencies in relation to their rating of complex financial products.
- Product liability claims involving pacemakers, Fen-Phen diet drugs, Vioxx, hip replacement products, and various other pharmaceutical products and medical devices.
- Cartel class actions involving vitamins, rubber, and air cargo markets. The largest recovery to date was AU$120M.
- Employee claims, which are predominantly wage underpayment claims.
- Consumer class actions in relation to financial products, including claims alleging that bank fees were a penalty and unfair or unconscionable contracts and more recently in relation to cryptocurrency.
- Consumer class actions involving alleged defective emissions devices in vehicles, some of which recently settled for AU$120M.
- Consumer class actions against law firms, brokerage fees, and pain relief products.
- Environmental claims dealing with floods and bushfires (including the East Kilmore fire that settled for AU$494M). Recently, the Queensland floods class action was settled for AU$440M.
- Class actions against the federal and State governments.
- Class actions brought by overseas plaintiffs, including Indonesian farmers whose crops were damaged by an oil spill against the Australian subsidiary of a Thai company, and Indian investors who lost money in a Ponzi scheme that had some funds traceable to an Australian company.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

Any person can represent the class provided they are a member of the class and have a sufficient interest to commence a proceeding. Notably, the High Court of Australia has also recently confirmed that class actions can be brought on behalf of group members residing outside of Australia, as well as Australian residents. The Supreme Court of Victoria also has found that it has jurisdiction to hear foreign (New Zealand) securities law claims and the power to award compensation.

Outside of the USA, the statistics suggest that the place a company is most likely to be sued in class action litigation is Australia. Further, a recent High Court of Australia ruling has confirmed that plaintiffs in Australian class actions can bring proceedings on behalf of class members residing in other jurisdictions.

D. KEY PROCEDURAL REQUIREMENTS

Section 33C(1) of the *Federal Court of Australia Act 1976* (Cth) defines the requirements for commencing a federal class action. The section provides that:

- Where seven or more persons have claims against the same person;
- The claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances;
- The claims of all those persons give rise to a substantial common issue of law or fact; and
- A proceeding may be commenced by one or more of those persons as representing some or all of them.

There are similar requirements for State-based class actions.

An application commencing a representative proceeding, or a document filed in support of such an application, must, in addition to any other matters required, describe or otherwise identify the group members to whom the proceeding relates, specify the nature of the claims made on behalf of the group members and the relief claimed, and specify the questions of law or fact common to the claims of the group members.

A class action may be discontinued by the court on its own motion or application of the defendant "where it is in the interests of justice to do so" because:

- The costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding;
- All of the relief sought can be obtained by means of a proceeding other than a representative proceeding;
- The representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
- It is otherwise inappropriate that the claims be pursued through a representative proceeding.

Therefore, even when the threshold requirements of a representative proceeding are met, a court may still use its discretion to order the discontinuance of a representative proceeding.

There is no certification requirement in the Australian class action regime. The plaintiff does not have to satisfy a court that the proceedings conform with the requirements for commencement of a class action. The plaintiff instead commences the class action in the same manner as other litigation, i.e., filing of the originating process with the court and service on the defendant. The defendant must then approach the court on an interlocutory motion to challenge compliance with procedural requirements and/or seek discontinuance of the class action for one of the reasons set forth above.

E. BINDING OTHERS

Section 33ZB of the *Federal Court of Australia Act 1976* (Cth) provides that a judgment in a representative proceeding binds all group members who have not opted out under section 33J. If notice is required, it is provided under section 33X, and then section 33J, in turn, allows group members to opt out if they do not want to be part of the proceedings. There are similar provisions in the State-based class action legislation.

Australian courts have also allowed the use of a "closed" class. A "closed" class representative proceeding involves group members defined, not just by being a member of the group claiming the right to a remedy, but also by some additional limiting characteristic, such as having entered into a funding agreement with a litigation funder or a retainer with a particular law firm. The Full Court of the Federal Court of Australia in the *Multiplex* class action approved this procedure, holding that section 33C(1) permits a representative party to commence a proceeding where they represent "some or all" of the group members. The right to opt out must be maintained, however, and the group cannot allow putative group members to opt into the proceedings once they have been commenced.

With the court's acceptance of a "closed" class, courts now refer to the traditional opt-out class action as an "open" class action.

F. REMEDIES AVAILABLE

The substantive cause of action defines the remedies available in an Australian class action. However, in contrast to U.S.-style class actions, a single representative action can proceed, even where class members claim different remedies. Even if they must be separately assessed for each individual group member, class action plaintiffs can pursue damages awards. The court can even award damages at an aggregate level without specifying the amounts to be awarded to individual group members, but only when a reasonably accurate assessment of damages is possible.

Australian law recognizes exemplary damages—the equivalent of U.S. punitive damages. However, Australian courts rarely award exemplary damages, and such awards tend to be for small amounts.

Parties can seek injunctive or declaratory relief through the class action mechanism, consistent with the equity powers or statutory authority of the court.

G. SETTLEMENTS AND FINANCING

Section 33V(1) of the *Federal Court of Australia Act 1976* (Cth), and the equivalent provision in the State-based regimes, provides that: "A representative proceeding may not be settled or discontinued without the approval of the Court." The parties accordingly must persuade the court that:

- A proposed settlement is fair and reasonable with regard to the claims and members who will be bound by the settlement; and
- A proposed settlement is in the interests of group members, not just the applicant and the respondent(s).

A representative party in an Australian class action has two costs exposures: (1) the cost of the lawyer acting for the class; and (2) the risk of being liable for the defendant's costs if the class action is unsuccessful.

Australian lawyers often take cases on a conditional or "no-win no-fee" basis and, if they are successful, charge their base rate multiplied by some factor or a specified additional amount up to a maximum of 25% of the base rate. Fee arrangements between lawyers and clients are less permissive in Australia than in the United States, however, and in most Australian jurisdictions fees cannot be set as a percentage of the client's recovery (i.e., contingency fees). However, in 2020, one State of Australia, Victoria, amended its class action legislation to provide for "group costs orders"—effectively, contingency fee arrangements—in class actions. The amendment provides a court with power to order that the legal costs payable to the plaintiff's lawyers be a percentage of the amount recovered in the proceedings; and the plaintiff and group members share liability for those legal costs. The court can only make the order if it is satisfied that it is "appropriate or necessary to ensure justice is done in the proceeding".

The losing party usually pays the other side's costs in Australian litigation, albeit only a portion of the costs actually incurred. This is referred to as "loser pays" or "costs follow the event" and is usually given effect through an adverse cost order. It follows that a successful litigant will recover most of the costs of the litigation. In class actions, however, the costs rule applies to the representative party only and not to group members. Nonetheless, a claimant may hesitate to take on the role of representative party due to the potential liability. The Victorian amendment for "group costs orders" also impacts the liability to pay an opponent's costs as it provides that the lawyer agree to be liable for the costs of the defendant if the case fails.

Since about 2005/2006, third-party litigation funding has supported Australian class actions. By contract, the funder pays the costs of the litigation (such as the lawyer's fees, disbursements, project management, and claim investigation costs) and accepts the risk of paying the other party's costs in the event that the claim fails. In return, if the claim is successful, the funder receives a percentage of any funds recovered and the benefit of any adverse costs order. The agreed share for the third-party financier is typically between 15% 40% of the proceeds (usually after reimbursement of costs). Regulation of litigation funding has vacillated. At present, minimum regulation applies to litigation funders in Australia, with oversight largely left to the courts.

The opt-out class action created a free-rider problem for litigation funders as group members who had not contracted to pay a fee to the funder were able to still participate in the class action. Litigation funders first addressed this through the "closed" class described above. However, an alternative approach has been to seek a court order that all group members, regardless of contractual obligation, pay a share of the funding fee, referred to as a common fund order. The power of the court to make such an order at commencement of the class action was denied by the High Court of Australia. However, at present it is accepted that power exists to make a common fund order at settlement. The ability of the funder to get paid has become a key driver of whether, and how, litigation funding is provided for class action.

H. OTHER KEY CLASS ACTION ISSUES

Class action procedures have continued to develop in the shadow of the High Court of Australia decisions in *BMW Australia Ltd v Brewster* [2019] HCA 45; 269 CLR 574 and *Wigmans v AMP Limited* [2021] HCA 7; 270 CLR 623. Class closure orders (requiring group members to register, with various incentives to do so, such as being unable to participate in a settlement if there is no registration) are a key step in identifying group members, quantifying claims for compensation and achieving finality. However, there has been a split between two of Australia's main class action jurisdictions as to when an order may be made and when notice of an intention to seek such an order may occur—the Supreme Court of NSW (neither class closure orders nor notice of an intention to pursue such orders permitted prior to settlement) and the Federal Court of Australia (notice of the intention to seek class closure orders may be given prior to settlement).

The substantive cause of action defines the remedies available in an Australian class action. However, in contrast to U.S.-style class actions, a single representative action can proceed, even where class members claim different remedies.

Competing class actions have increased in Australia with the result that an additional procedural step has arisen where carriage of the class action must be determined. The High Court of Australia has endorsed a multifactorial approach to resolve the problem of multiplicity. However, the major driving factors are the representative parties' funding proposals and what is in the best interest of group members. Competing class actions may see all but one proceeding stayed or proceedings consolidated. There have also been instances where the issue has been dealt with through group definition so that one class action was "closed" and brought on behalf of a defined group, and another was "open" to all other group members. Competing class actions may also be allowed to continue together. As a result, there is uncertainty as to how competing class actions may be addressed.

Class action waivers (contractually agreeing not to be part of a class action), a staple of the U.S. system, have been considered by the High Court of Australia in the context of a U.S contract entered into by a Canadian resident (as representative of a U.S. subgroup) for a cruise departing from Sydney, Australia, and operated by a corporation carrying on business within Australia. The waiver clause was held to be void as it met the definition of an unfair contract term pursuant to the Australian Consumer Law, which had extra-territorial effect in the circumstances. Further, the clause granting exclusive jurisdiction to a U.S. court was not to be enforced because the waiver clause was an unfair term, enforcing the exclusive jurisdiction clause would fracture the litigation with some claims in the United States and some in Australia, and the U.S. subgroup would be deprived of the juridical advantage of an Australian class action.

The Australian Parliament has conferred powers on the Federal Court of Australia to award damages in an aggregate amount or lump sum in the original class action legislation. However, the power has rarely been used until recently when it was employed in motor vehicle class actions based on a failure to comply with consumer protection legislation. The award was for a reduction in value of motor vehicles and estimated at AU$2B. However, on appeal, the approach to the calculation of the reduction in value was overturned and as a consequence the orders for aggregate damages were set aside. The judgment has been appealed to the High Court of Australia. The use of aggregate damages awards has the potential to result in very large compensations sums based on streamlined proof of damages—thus adding to class action risk presented for companies by the Australian regime.

Germany

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A. BRIEF OVERVIEW AND HISTORY

Class actions per se are not part of the German system. Consequently, for most claims, each plaintiff must file his or her own case. There are, however, five types of German collective proceedings that parties can pursue.

First, in 2005, Germany enacted the Capital Markets Model Case Act (*Kapitalanleger-Musterverfahrensgesetz*, or *KapMuG*), which permits investors to have certain issues in securities and investment cases decided collectively. Under the *KapMuG*, any plaintiff or defendant may apply to the trial court for issues to be decided collectively in a model case. If at least 10 applications relating to similar issues are filed, the trial court will certify a model case and refer it to the appellate court. The appellate court then appoints a model plaintiff from among the applicants and conducts proceedings in the model case until it reaches a final judgment. The judgment binds plaintiffs who filed the request for model case treatment, but has no effect on other plaintiffs. Once the appellate court issues the judgment, the cases return to the trial court to decide remaining individual issues. One example of such a *KapMuG* case is litigation against Deutsche Telekom AG alleging a misleading prospectus due to an overvaluation of its real estate portfolio. Another example is a case against Volkswagen AG alleging securities fraud as a result of defective devices in its cars. The Capital Markets Model Case Act expires on August 31, 2024, and is to be comprehensively reformed by then. A draft proposal is not yet available.

Outside the securities context, consumer and commercial associations can seek injunctive relief on behalf of their members. In 2002, Germany enacted the Injunction Act (*Unterlassungsklagengesetz*, or *UKlaG)*, which reaffirmed this practice and permitted qualified consumer associations to seek injunctive relief with respect to all consumer interests. The *UKlaG*, therefore, provides associations with standing to sue and does not introduce class actions in Germany. Some German antitrust and environmental laws also permit certain interest groups to sue for injunctive relief. These association-initiated complaints are relatively common, particularly in unfair competition suits and challenges to unfair standard contract terms. In 2014, for example, the largest commercial association, the *Wettbewerbszentrale*, brought more than 600 actions. In December 2015, Germany passed a new law extending these injunctive procedures to data privacy cases. In October 2023, the legislator extended the scope of application to include many other cross-sector, consumer protection laws from European and national legislation.

A combination of the above-mentioned collective proceedings was enacted in November 2018 and added to the Code of German Civil Procedure (*Zivilprozessordnung* or *ZPO*), the so-called *Model Declaratory Action* ("MDA" or

Musterfeststellungsklage). It was introduced to facilitate claims of consumers against businesses. By way of such an action, certain factual or legal preconditions of consumer claims against businesses can be determined in a binding manner in a single procedure for a large number of affected consumers. Similar to the *UKlaG*, the *MDA* only provides qualified associations with right to sue. A popular example is the already mentioned Diesel complex against Volkswagen AG. In these proceedings, consumers claimed damages for allegedly manipulated cars, and qualified associations filed a MDA in order to clarify key aspects of these cases.

In addition to these formal collective procedures, some plaintiffs have created a synthetic class action, whereby class members assign their cases to a single litigation entity, which then brings an individual claim and distributes the proceeds back to the class members.

The German legislature implemented the abovementioned Directive EU 2020/1828 with the Consumer Rights Enforcement Act (*Verbraucherrechtedurchsetzungsgesetz* or *VDuG)* in addition to several amendments to existing laws on October 13, 2023, into German national law. The VDuG introduces a new representative redress action (*"RA"* or *Abhilfeklage*) alongside the abovementioned *MDA*. In addition, the *MDA* is no longer regulated in the *ZPO* but, like the *Redress Action,* with some adjustments in the new VDuG. With the consolidation of both types of actions into the new VDuG, the same basic requirements apply for both proceedings: Only qualified (consumer) associations are granted with right to sue and at least 50 consumers must be concerned. Both actions cover all civil law disputes with regard to claims and legal relationships of consumers against companies. With the help of the new *RA*, consumer associations can sue directly for the fulfillment of consumer claims. Previously, the model declaratory action could be used to determine the essential requirements of the claim in a binding manner, but the requested redress then had to be claimed again in separate proceedings unless a settlement agreement is reached.

In addition to these formal collective procedures, some plaintiffs have created a synthetic class action, whereby class members assign their cases to a single litigation entity, which then brings an individual claim and distributes the proceeds back to the class members. For example, in 2005, 36 companies allegedly injured by a cement cartel assigned their claims to Cartel Damage Claims ("CDC"), a Belgian company. CDC then sued the alleged cement cartel. In 2013, the German Federal Supreme Court ruled that such assignments were valid generally. However, in 2015, the appellate court in Düsseldorf ruled that CDC was not a proper plaintiff because it was not adequately funded and therefore would be unable to pay attorneys' fees under Germany's loser-pays system if it lost the case. Another example of recruiting plaintiffs and raising assigned claims for a synthetic class action is the platform www.myright.de ("MyRight"), which was created to collect consumer claims against Volkswagen alleging defects in emission devices.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

The *KapMuG* is limited to securities cases. These cases may include both securities fraud cases and certain breach of contract cases regarding acquisition and takeover offers. They require at least 10 investors who believe that they have been misled in connection with an investment to file suit collectively. Associations may seek injunctive relief under the Injunction Act in consumer protection (including financial consumer protection), unfair competition, antitrust, and environmental cases.

The *Model Declaratory Action* and the *Redress Action* can be applied more broadly on any civil law disputes. It is available for any consumer actions against a business, whereby small companies are considered consumers if they employ fewer than 10 people and their annual turnover or balance does not exceed 2 million EUR. Only qualified consumer associations may bring the action. Furthermore, the qualified association has to demonstrate reasonably that claims or legal relationships of at least 50 consumers may be affected (in case of the *Redress Action*) or be dependent on the declaratory objectives (in case of the *Model Declaratory Action*). Providing full evidence of being affected or dependent is not necessary.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

The *KapMuG* does not place limitations on class representation, but instead allows any plaintiff or defendant to initiate model proceedings. Once model proceedings begin, the appellate court appoints a model plaintiff from among the plaintiffs who applied. In doing so, the appellate court generally chooses a model plaintiff with a larger claim and more representative issues, and will also give weight to the plaintiffs' own agreements as to who should be the model plaintiff.

Only German commercial or consumer associations registered with the German Federal Office for Justice, or non-German associations registered with the European Commission, may file injunctive collective actions. Many of the German associations are government-funded.

The same applies to the qualified associations that may file a *Model Declaratory Action* or a *Redress Action*. They need to be registered either with the German Federal Office for Justice or the European Commission. In addition, consumer associations registered in Germany have no standing to sue if they receive more than 5% of their funding from companies.

There are no clear requirements to be a proper litigation entity for a synthetic class action, except that the litigation entity must be properly funded so that it is able to reimburse defendants for all of their compensable litigation costs and attorneys' fees if it loses the case. In the case of MyRight, the allegedly affected car owners assigned their claims to MyRight thereby giving the organization standing to sue.

D. KEY PROCEDURAL REQUIREMENTS

The *KapMuG* has minimal requirements for certifying a model case. A plaintiff or defendant need only show that the issues to be certified are significant in other cases as well. In addition, a trial court decision to certify a model case cannot be appealed, but a decision refusing to certify a model case can be appealed.

When originally enacted, the *KapMuG* permitted parties to apply for model case treatment only after they were already in individual disputes. Reforms passed in 2012, however, now permit investors to register their claims and apply for model case treatment before deciding whether to bring their claims.

The basic requirements for the admissibility of the *Model Declaratory Action* and *Redress Action* are: (i) that it is brought by a qualified association; and (ii) that it is reasonably shown to the satisfaction of the court that claims or legal relationships of at least 50 consumers may be affected or be dependent on the declaratory objectives. The *Redress Action* is further subject to the requirement that the claims covered by the action must be materially similar in the sense that the claims are based on the same facts, or on essentially comparable facts, and that legal issues are relevant for the outcome of the case.

E. BINDING OTHERS

Although the *KapMuG* was strictly opt-in at first, the 2012 reform now provides that the result in the model case binds all plaintiffs who have individual claims pending and do not opt-out. The model case results are still not binding on plaintiffs who had not filed individual claims at the time of the resolution.

A *Model Declaratory Judgment* does not award damages to the individual consumer, rather, it grants only a declaratory relief. This means that the findings of the judgment will be binding in any follow-on litigation of a consumer, who registered its claim up to three weeks after the end of the oral hearing of the proceedings. However, each consumer will still need to file a claim individually. The *Model Declaratory Judgment* will not bind consumers who did not register their claims.

In contrast, the new *Redress Action* grants the individual consumer compensation in different possible ways, if they have

registered their claims within the same period of time, i.e., up to three weeks after the end of the oral hearing of the proceedings: (i) If the filing consumer association knows the names of the affected consumers, the court can order the company to pay directly to the consumers; or (ii) If the association seeks compensation for consumers unknown at this moment, and only identified by common group characteristics, the court can award a collective total amount in the judgment and can determine the method according to which the individual amounts due to the respective consumers are to be distributed. This is followed by implementation proceedings, in which a trustee distributes the individual amounts to the relevant consumers. A judicial review on the trustee's decision or subsequent individual actions are possible if the trustee has rejected or disregarded the individual claim in the implementation procedure.

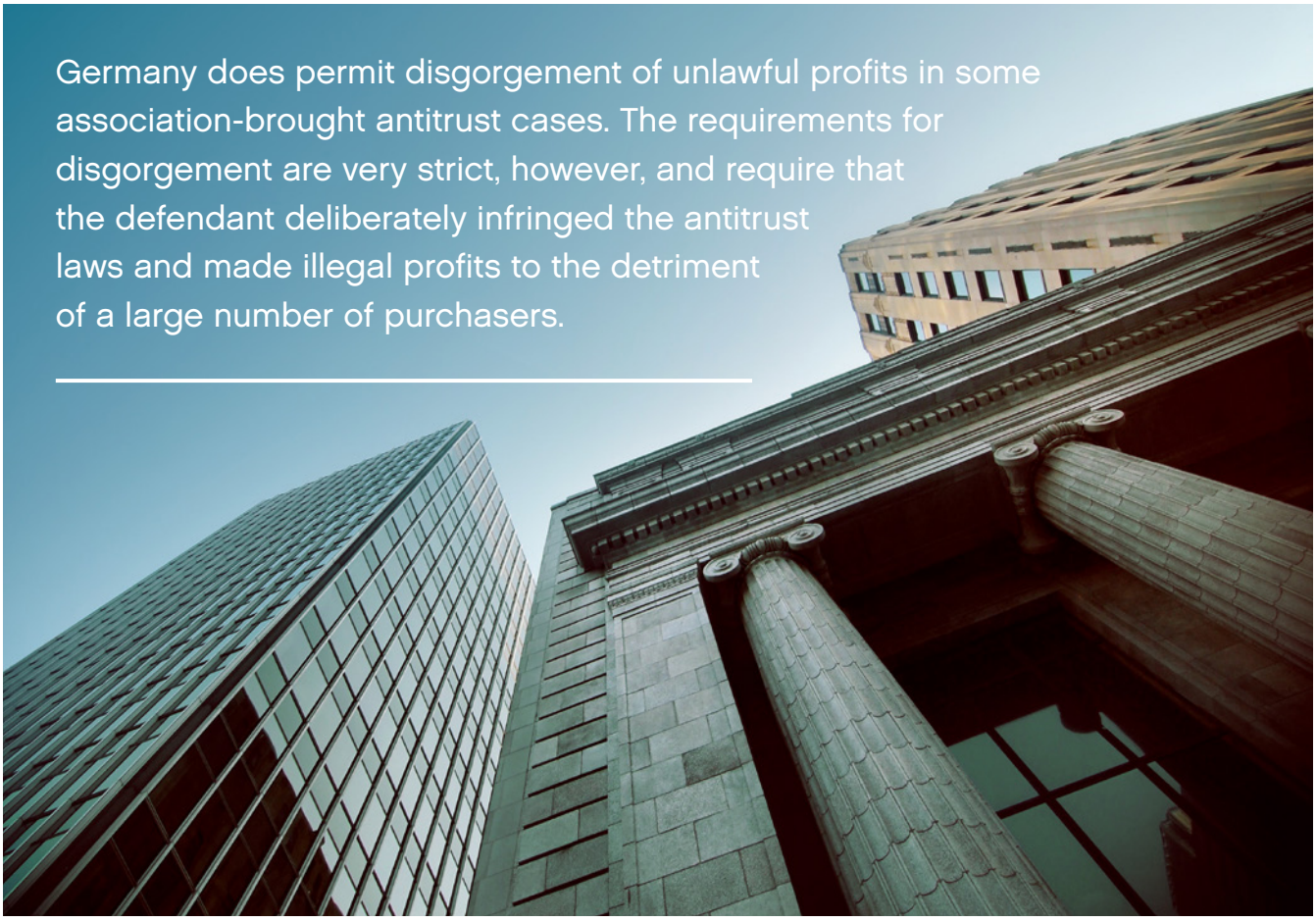
Synthetic class actions apply only to plaintiffs who assign their claims to a litigation entity.

F. REMEDIES AVAILABLE

The *KapMuG* permits recovery of damages, although the trial court ultimately awards these damages after the appellate court finishes adjudicating the model case.

With regard to the UKlaG, associations bringing claims are generally limited to injunctive relief, and the court order in such cases binds only the association and the defendant. Germany does permit disgorgement of unlawful profits in some association-brought antitrust cases. The requirements for disgorgement are very strict, however, and require that the defendant deliberately infringed the antitrust laws and made illegal profits to the detriment of a large number of purchasers. Additionally, the disgorged profits go to the German federal government rather than the association or individual victims.

After a *Model Declaratory Judgment,* the individual consumers need to bring their claims to seek recovery of damages. Thus, the trial court decides on the compensation after the court



finishes adjudicating the *Model Declaratory Case*. With the *Redress Action*, consumer associations can sue directly for the fulfillment of consumer claims.

G. SETTLEMENTS AND FINANCING

Under the *KapMuG*, all plaintiffs in a model case must consent to settle that case. Additionally, following the 2012 reforms, the appellate court must approve the settlement. Therefore, parties typically do not settle model cases. Once the model case is adjudicated, there are no special rules governing the settlement of remaining individual claims. There are also no special rules governing the settlement of association-brought complaints or synthetic class actions.

The qualified association can settle the *Model Declaratory Action* or *Redress Action* on behalf of registered consumers with the approval of the court. However, a registered consumer may opt out. If a particular consumer wishes to opt out, it must be done within a month after the settlement has been published in the register. If a consumer opts out, the settlement will not bind the particular consumer. If a valid agreement is reached, such a settlement usually contains not only the compensation to be paid by the respondent, but also an agreement on the allocation of costs between the parties.

Besides an agreement on the costs, the losing party typically pays the winner's attorneys' fees (calculated based on a statutory tariff), and a plaintiff seeking to bring these collective-style actions should be adequately capitalized to pay those fees in the event that it loses. To reduce the risk for model plaintiffs, the *KapMuG* provides that a prevailing defendant's attorneys' fees be apportioned among all the plaintiffs, not just the model plaintiff.

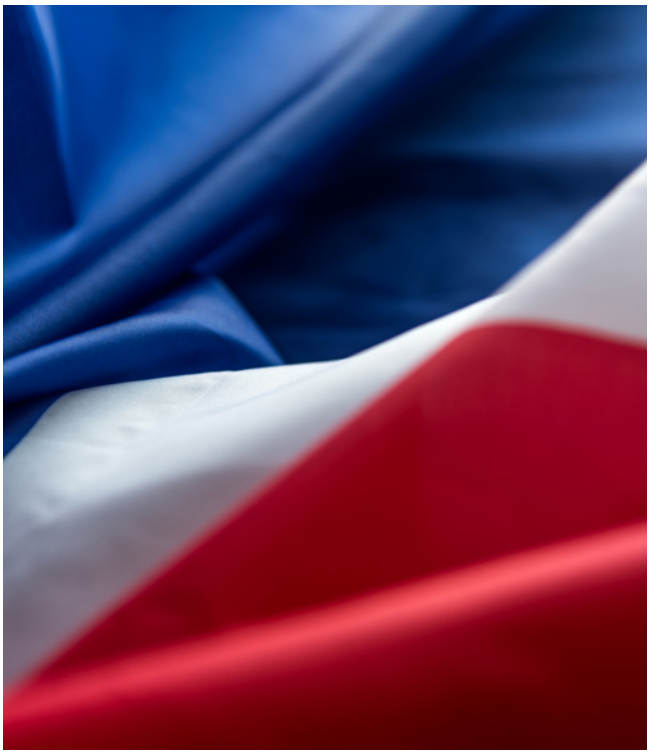
With regard to the *Model Declaratory Action* and *Redress Action*, litigation funding by third parties is subject to certain requirements permitted. It is inadmissible if: (i) the third party is a competitor of the defendant; (ii) the third party is dependent on the defendant; (iii) the litigation funder's agreed success fee exceeds 10% of the sum to be paid by the defendant; or 4) it is to be expected that the third party will influence the litigation of the qualified association to the detriment of the consumer.

In all other respects, contingency fee arrangements are allowed only for individual cases, and only if the client is subject to special circumstances that would prevent him or her from raising legal claims without the fee arrangement. In the case of MyRight, the affected car owners have executed a contingency fee agreement with MyRight, authorizing a success fee of 35%. Also, third-party funding is available.

H. OTHER KEY CLASS ACTION ISSUES

The German government originally enacted the *KapMuG* for a five-year trial period, but has now extended it to August 31, 2024. Germany, therefore, may enact more plaintiff-friendly procedures, especially regarding long proceeding durations, and expand in the scope of the *KapMuG* when it is up for renewal in 2024.

In March 2017, in response to the European Union Directive 2014/104/EU (the "Antitrust Damages Directive"), the German Parliament enacted a law making significant changes to its antitrust legislation. The amended law provides *inter alia* for stronger rights to demand document production from the plaintiff and creates more plaintiff-friendly presumptions such as the (refutable) presumption that a cartel caused damages. This bill is expected to make Germany a more attractive venue for additional synthetic antitrust class actions.



France

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A. BRIEF OVERVIEW AND HISTORY

After many years of debates, on March 17, 2014, France adopted a class action procedure statute (Law No. 2014-344) for consumer and competition claims. The enactment of this statute followed the European Commission's recommendation dated June 11, 2013, urging Member States to have redress mechanisms in their legislation to ensure effective access to justice.

In order to bring improvement to the mechanism, the scope of class action procedures has been gradually broadened to include disputes related to health, discrimination, environment, and protection of personal data (see. esp., Law No. 2016-1547 dated November 18, 2016).

Still, while the regime of class action is already quite comprehensive in France compared to other EU Member States, it has not yet gained significant traction in the French litigation landscape. To date, less than 40 class actions have been filed in France. The limited number of class actions filed so far has resulted in numerous calls for reform.

On March 8, 2023, the French National Assembly passed a bill aimed at harmonizing several procedural aspects, encouraging the initiation of proceedings, and serving as a transposition of the Directive EU 2020/1828 on Representative Actions (the "Directive on Representative Actions") (the "Bill"). Indeed, as part of the "New Deal for Consumers," a new Directive on Representative Actions was published on November 25, 2020, which had to be implemented by December 25, 2022. The Bill is currently awaiting approval by the French Senate.

B. TYPES OF CLAIMS AND SCOPE OF LAWSUITS THAT CAN BE FILED

The scope of class actions procedures has been gradually broadened and now covers the following fields, as provided by statutes:

- Consumer law;
- Discrimination;
- Environmental liability;
- Health product liability; and
- Protection of personal data.

Under French law, class actions procedures are currently aimed at: (i) compensating individuals which are in a similar or identical situation, caused by a failure of an entity to comply with its legal obligation(s); and (ii) putting an end to the breaches.

C. CLASS REPRESENTATIVES AND STANDING TO SUE

In order to prevent abusive actions, French law limits the number and type of entities that may bring a class action.

With respect to consumer law, only duly certified associations for the defense of consumers, recognized as being representative at a national level, are entitled to bring class actions in France (Article L. 623-1 of the French Consumer Code). To date, there are 16 associations that can bring suit. (See the Minister of Economy website.) Hence, French lawyers are not entitled to bring such actions on behalf of consumers since they are not recognized as being representative of consumers' interests.

However, in some other fields, this principle has been altered so that more entities could bring class actions. For example, with respect to personal data protection, trade unions or associations that have been duly registered for five years and whose articles of association so provide, may bring a class action.

In addition, French law also provides for other types of collective actions:

- Actions for the joint representation of consumers. An authorized association may, if expressly mandated by at least two individuals who have suffered damage resulting from the same cause, bring an action on their behalf. Such actions are permissible in the areas of: consumer law (Article L.622-1 of the Consumer Code); investment law (Article L.452-2 of the Monetary and Financial Code); and environmental law (Article L.142-3 of the Environmental Code) but they are rarely used.
- Actions brought in the collective interests of consumers. Under Article L.621-1 of the Consumer Code, authorized consumer associations may take legal action to seek compensation for harm caused by a criminal offence to the collective interest of consumers. The harm for which the association seeks compensation must be caused to the "collective interest of consumers."

D. KEY PROCEDURAL REQUIREMENTS

There are general procedural rules that apply to class actions in France, keeping in mind that specific rules may apply depending on the ground on which the claim is brought.

Consumer law class actions in France follow a four-step procedure:

- The first judgment on liability. First, the court assesses whether the requirements for a class action have been met (i.e., whether the consumers are in the same or similar situation, have been harmed by the failure of the same professional to comply with its obligations and claim compensation for economic losses) and whether the defendant is liable.
- The opt-in phase. After ruling that the action is admissible, the court first defines the group of consumers towards whom the defendant is liable, then determines how the consumers who suffered a loss will be informed and eventually determines the loss that can be compensated for each consumer that constitutes the group. After the consumers entitled to do so have decided to join the group, the court will issue a judgement and set the quantum and nature of damages.
- The liquidation of the assessed loss. The consumer association will handle the transfer of the financial compensation awarded by the court through an escrow account.
- Possible second judgment on liquidation. A second judgment might be issued in case of any difficulties arising during the liquidation phase.

French law also provides for a simplified procedure, which is applicable when: (i) the identity and the number of affected consumers are known; and (ii) all the affected consumers suffered a loss of the same amount. In that case, the court can, after having ruled on the liability of the professional, compensate directly and individually the consumers.

In the event where a class action would fail, consumers may still seek individual redress.

E. BINDING OTHERS

The French class action system is an opt-in system, meaning that individuals who want to take part in the class action have to come forward to join the procedure. Consumers wishing to take part in the class action must express their willingness to do so (depending on the requirements set by the court, the consumers will either give their names to the accredited consumer association or to the designated entity).

The court determines how to inform potential consumers of its decision. Depending on the group size, on whether the consumers are identified or not, and on the defendant's financial means, the court will choose the more appropriate measure (e.g., the sending of a letter to each consumer, the publication in the press or on the internet). The court will also set a deadline to join the proceeding.

As a result of this opt-in system, non-parties cannot be bound by the court's final decision.

F. REMEDIES AVAILABLE

The French principle of full reparation of damages implies that the person responsible for the damage must compensate all the damage and only the damage, without impoverishing or enriching the victim. It is a principle of strict equivalence between the compensation and the damage.

Initially, class actions were only aimed at compensating material loss suffered by consumers.

With respect to consumer law, the Law adopted on March 17, 2014, only provides for the compensation of economic losses (and not non-pecuniary damages for moral or physical injuries) (Article L. 623-2 of the French Consumer Code).

However, the subsequent laws have increased the types of compensable injuries and remedies available. For example:

- With respect to health products or their application, claimants may recover damages for physical injuries;
- With respect to discrimination, claimants may recover damages for any loss suffered, moral or material;
- With respect to personal data protection, claimants may recover damages for moral or material losses.

As a general rule, damages are the main relief available, but injunctive relief can also be granted to stop misconduct in class actions related to environmental matters, discrimination, and breaches of personal data.

Punitive damages do not exist under French law but the unsuccessful party can be required to pay the costs and the legal fees incurred by the other party.

The French principle of full reparation of damages implies that the person responsible for the damage must compensate all the damage and only the damage, without impoverishing or enriching the victim.

G. SETTLEMENTS AND FINANCING

For consumer law claims, the association bringing the class action can participate in a mediation proceeding (Article L. 623-22 of the French Consumer Code). Any agreement reached on behalf of the group is subject to the approval of the court, which verifies whether the agreement is in the interest of said group. The agreement specifies the publicity measures required to inform concerned individuals of the possibility to opt-in, as well as the time limits to do so.

For now, there are no specific provisions regarding fee arrangements or third-party funding under French law. In practice, class actions are funded by the association bringing the claim. Under French regulations, attorneys' fees cannot be solely based on a contingency fee arrangement.

H. OTHER KEY CLASS ACTION ISSUES

Since their implementation into the French legislation, class actions have not had the impact some might have hoped. Most practitioners, commentators, and lawmakers have pointed out the low success rate of class action proceedings in France, particularly due to the lack of financial incentives.

Most practitioners, commentators, and lawmakers have pointed out the low success rate of class action proceedings in France, particularly due to the lack of financial incentives.

On June 11, 2020, the French Parliament published an "information report," listing 13 propositions to reform and improve the class action procedural framework. In particular, the Parliament suggests:

- To establish a common framework for all class action proceedings in civil matters;
- To broaden the number of associations entitled to initiate a class action;
- To authorize associations to advertise the class action they intend to initiate in order to facilitate the identification of the number of consumers harmed;
- To provide full compensation for damages, whatever their nature; and
- To provide for a civil penalty (i.e., the payment by the professional of a fraction of its turnover to the benefit of the French Public Treasury).

This lead to the adoption of the Bill, which is currently awaiting approval by the French Senate. Once passed into law, the Bill will eliminate existing disparities between preexisting sectoral class actions by providing a common procedural ground: the legal standing to initiate class actions will include a wider range of registered and *ad hoc* associations (which are made up of at least 50 physical persons or at least five companies or five local authorities) as well as the public prosecutor; there will be a 3% annual turnover civil penalty where there is deliberate misconduct by the offending party; the State will bear the costs of the proceedings when the action is of a serious nature.

At the same time, the Bill ensures the transposition of the Directive on Representative Actions by extending legal standing to certain entities authorized in other Member States, authorizing French entities to bring cross-border actions, and regulating third-party funding. The Directive on Representative Actions changes do not appear fundamental in France (similarity of the characteristics).

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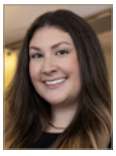

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