



GIBSON DUNN

Aggregated Claim Litigation in Europe:
Recent Developments and Emerging Trends

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Topics To Be Discussed

- I. Introduction
- II. Class Actions and Mass Actions in the United States
- III. Multi-Party Litigation in the United Kingdom
- IV. Emerging Trends in France
- V. Emerging Trends in Germany
- VI. Proposed EU Directive on Representative Actions
- VII. Questions

MCLE Certificate Information

- Most participants should anticipate receiving their certificate of attendance in four weeks following the webcast.
- Virginia Bar Association members should anticipate receiving their certificate of attendance in six weeks following the webcast.
- All questions regarding MCLE Information should be directed to Jeanine McKeown (National Training Administrator) at 213–229-7140 or jmckeown@gibsondunn.com.

United States



Class Action Basics

- A class action is a **claim aggregating device** in which one or a few plaintiffs may assert claims as a representative for a putative class of others similarly situated.
- Class actions can be **highly diverse**:
 - The representative plaintiff(s) can be individuals or entities who have standing to assert the claim—i.e., they have a cognizable claim of injury.
 - They affect nearly all industries, and they are not restricted to specific subject matters. In practice, class actions arise across a broad range of subject matters, including antitrust, consumer protection, employment, and securities.
 - Plaintiffs can seek money damages and/or injunctive relief.
- **Class actions present significant burdens**:
 - Companies spent \$2.24 billion on class action lawsuits in 2017 and the number of companies facing class actions climbed to 59%, up from 53.8% in 2016.
 - Labor and employment suits accounted for 24.7% of class actions; consumer fraud comprised 18.2%; product liability and antitrust matters followed.
- **Procedurally, class actions are similar to standard civil litigation**.
 - They are filed in the same federal or state courts.
 - They follow the same general progression: complaint, responsive pleading, discovery, summary judgment, trial, and appeal.
 - They do, however, have an additional procedural step for determining whether the case satisfies the requirements for class certification.

Class Certification

- The court must determine “[a]t an early practicable time” whether to certify the case as a class action.
 - There is considerable variability in when courts decide the certification issue, though it must be before trial.
 - Considerable discovery, including expert testimony, often occurs before certification is decided.
- Courts frequently appoint **interim class counsel** to act on behalf of the putative class before class certification is decided, and must appoint class counsel if a class is certified.
 - Rule 23(g) sets out the various standards a court must consider when deciding whether to appoint class counsel, including (1) counsel’s work in identifying and investigating potential claims; (2) experience handling class and complex litigation; (3) knowledge of the applicable law; and (4) resources.
 - When appointing class counsel, interim or otherwise, the Rule 23(g) order generally provides appointed counsel with the authority to control the litigation, authority to conduct settlement negotiations, and other abilities.



Class Certification Requirements

- The **moving party bears the burden** of proving that the prerequisites to class certification have been met by a preponderance of the evidence.
- Rule 23(a) sets forth **four threshold requirements** for class certification, each of which must be met:

(1)	Numerosity	The class is so numerous that joinder of class members is impracticable.
(2)	Commonality	There are questions of law or fact common to the class.
(3)	Typicality	The claims or defenses of the class representatives are typical of those of the class.
(4)	Adequacy	The class representatives will fairly and adequately protect the interests of the class.

Class Certification Requirements (cont'd)

- The movant must also demonstrate that **one** of the requirements set forth in **Rule 23(b)** is met:

(1)	Prosecution of separate actions risks either inconsistent adjudications which would establish incompatible standards of conduct for the defendant or would as a practical matter be dispositive of the interests of others;
(2)	Defendants have acted or refused to act on grounds generally applicable to the class; or
(3)	There are common questions of law or fact that predominate over any individual class member's questions and that a class action is superior to other methods of adjudication.

- Some courts have also added an implicit **ascertainability** requirement.

Class Membership

- If a class is certified, notice must be sent to class members.
- Anyone encompassed within the certified class definition is presumptively a class member.
- Class members are given a limited time to take affirmative action to “opt out” of the class.
 - Class members who choose to opt out can pursue their own lawsuits separately and will not be bound by any class settlement or judgment.
 - Class members who do not opt out will be bound by the judgment and subject to res judicata.



Pre- and Post-Certification Settlements

- Class certification is a **key inflection point** and opportunity to evaluate settlement.
- Before a class is certified a putative class action can be settled as an individual action or by using a class certified for settlement purposes.
 - When settled as an individual action, no court approval is required, but any release is not binding on the class.
 - A class settlement will bind the class, but it requires additional steps and court approval.
 - Notice of the settlement is given to the class, with an opportunity to opt out of the settlement. This process can be complex and expensive.
 - There is an opportunity for class members to file objections to the settlement.
 - The court must review the settlement and find that it is fair to the class before granting approval. The court will take a wide range of factors into account when determining fairness, including the strength of plaintiffs' case, the extent of discovery, and the risk, expense, and likely duration of further litigation.
- After a class is certified, the **court must similarly review and approve any settlement**.
 - Generally, the plaintiffs' bargaining power is improved after class certification because the likelihood of a trial and the defendant's exposure are greater.

Attorneys' Fees

- The parties generally bear the litigation costs and fees themselves, even if they win.
- Plaintiffs' class action counsel typically work on a **contingent fee basis** and obtain their fees as part of a settlement or after a favorable judgment.
 - Rule 23(h) allows a court to “award reasonable attorney’s fees and non-taxable costs that are authorized by law or by the parties’ agreement”, and sets out a process for attorneys to file a motion for fees after a certified class has recovered a settlement or judgment.
 - When an attorney makes a claim for fees, it must serve notice on all parties and class members in a “reasonable manner”, and any class member or party from whom payment is sought may object to that motion.
- Courts apply a **variety of tests to evaluate the reasonableness of plaintiffs’ counsel’s fee requests.**
- **Common fee methodologies:**
 - **Lodestar:** Fee is the product of a reasonable hourly rate multiplied by the number of hours spent reasonably spent litigating the action.
 - **Percentage of Recovery:** Fee is based on a percentage of the total recovery obtained by the class.

Recent Amendments to Rule 23

- **Notice to Class Members by Any “Appropriate Means” – Rule 23(c)(2)(B)**
 - Continues to require “best notice that is practicable under the circumstances,” but now explicitly mentions “electronic means” and “other appropriate means.”
 - Appropriate form will depend on the characteristics of the particular class and the circumstances of each case.
- **Notice of Proposed Settlement – Rule 23(e)(1)**
 - Parties seeking settlement approval must provide the court with information “sufficient to enable it to determine whether to give notice of the proposal to the class” by demonstrating that the court will be able to approve the settlement proposal and if necessary “certify the class for purposes of judgment on the [settlement] proposal.”
 - Courts were not previously required to consider the likelihood of approval of the proposed settlement or class certification prior to directing notice of the proposed settlement.

Recent Amendments to Rule 23 (cont'd)

- **Factors for Court to Consider in Approving Settlements – Rule 23(e)(2)**
 - Directs courts to consider whether:
 - The class representatives and class counsel have **adequately** represented the class;
 - The proposal was **negotiated at arm's length**;
 - The relief provided to the class is **adequate**;
 - The proposal treats class members **equitably** relative to each other.
- **Several other amendments aimed at:**
 - Discouraging bad faith objectors
 - Clarifying that appeals may not be taken from an order on request to direct notice of a proposed settlement

Mass Actions

- Mass actions involve **individually asserted** claims by **multiple plaintiffs** against one or more defendants based on injuries arising out of the **same or similar act of harm**.
 - Mass actions can include hundreds, or even thousands, of individual plaintiff claims.
- These actions can occur either by:
 - **mass joinder** in a single complaint
 - **consolidation** of individual lawsuits before a single judge (e.g., the MDL process)
- Mass actions frequently arise in the **tort context** for product liability claims, pharmaceutical product claims, and environmentally-based claims (i.e., so-called “toxic torts”) where class actions are harder to maintain due to the **predominance of individual over common issues**.

Mass Actions (cont'd)

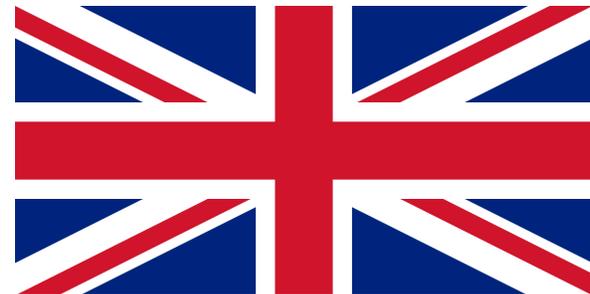
- **Mass Actions Have Important Differences From Class Actions:**
 - Unlike a certified class action, each plaintiff's claim stands on its own—there is no res judicata (claim preclusion) across the mass action plaintiffs based on the adjudication of individual plaintiffs' claims.
 - Issue preclusion can apply against the defendant but generally not against the plaintiffs.
 - Courts have considerable discretion in how mass actions are structured and managed.
 - Devising strategies to manage mass actions is critical given the potentially significant burdens and costs of discovery, and the risks of non-mutual issue preclusion.
 - Settlements occur with individual plaintiffs and can be difficult to structure.

United Kingdom



Multi-Party Litigation

- In England and Wales, there are numerous avenues for multiparty litigation (i.e., litigation involving multiple claimants and/or defendants).
- **High Court:**
 - Claims by multiple claimants managed together by the court using its case management powers
 - Representative actions
 - Group litigation orders (GLOs)
- **Competition Appeal Tribunal (CAT):**
 - Collective Proceedings Order (CPO)



Multi-Party Litigation – High Court

- **Multiple joint claims:**

- Claims which can be "conveniently" disposed of in the same proceedings.
- They can either be brought jointly or consolidated.
- The court exercises overall case management using its ordinary procedural rules.

- **Representative actions:**

- More than one person has the “same interest” in a claim and the claim is brought by or against one or more of those persons.
- “Same interest”: they must have a **common grievance**, and the relief sought must be **beneficial to all**. There is a strict commonality test.
- Represented persons do not need to be a party and an **order or judgment** will be **equally binding on a non-party**, although it is only enforceable with permission.

Multi-Party Litigation – High Court

- **Group litigation orders (GLOs) - introduced in May 2000:**
 - Case management regime designed to manage a large number of individual claims, which raise “common or related issues of fact or law.”
 - Each claimant must bring an individual claim (i.e., must “opt in”).

Applying for the GLO

- An application for a GLO may be made at any time before or after any relevant claims have been issued and may be made either by a claimant or by a defendant.
- The application for a GLO should include a summary of the litigation, the number of parties likely to be involved, and the common issues of fact or law that are likely to arise in the litigation.
- The court will typically require parties to make public the existence of the GLO.

The Register

- The claims are entered upon a “group register” and generally controlled by a management court.
- The court may specify the details to be included in a statement of case in order to show that the criteria for entry of the claim on the group register have been met.
- The court may refuse to add / remove a claim from the group register if the case can not be conveniently case managed with the other cases/would adversely affect the case management of the other cases.
- The court may specify a deadline after which no claim may be added to the Group Register without permission.

Multi-Party Litigation – High Court

Group litigation orders (GLOs) (cont'd)

Test Cases

- The court may direct that certain claims proceed as “test cases” to address specific issues of law or fact.
- The CPR does not specify rules regarding selection of test claimants and it is therefore open to the parties to agree. Test claims are likely to be selected on the basis that they represent common characteristics of the other claims on the group register. For example, each test claim may cover a specific type of claimant, specific time periods and/or heads of loss.
- In addition, you may also have trials of individual issues.

The Judgment

- As a general rule, judgment given in relation to any claim on the register will be binding upon claimants included on the register at the time of judgment.
- Claimants who enter the register after judgment may seek an order that the judgment is not binding on them.

Examples of Current GLOs

Approximately

105

granted since 2000

3 granted in 2018



VW NOx Emissions (Slater & Gordon, Leigh Day, third party litigation funding)



Omega Proteins (emission of odours effecting nearby homes - Hugh James environmental law and group actions firm)



Berkeley Burke SIPP (financial loss to personal pension funds - NeglectAssist, no-win no-fee)

Costs and Funding

- Greater use of contingency fee arrangements to address access to justice issues.
- Two types of **contingency fee** arrangements:
 - **Conditional Fee Arrangement (CFA)**: if the claimant succeeds, lawyers could be paid a “success” fee in addition to base costs. If unsuccessful, some percentage of legal fees must be paid by the claimant.
 - **Damages Based Agreement (DBA)**: a form of no win, no fee. If the claimant succeeds, lawyers are paid a percentage of the damages recovered. If unsuccessful, no legal fees are paid by the claimant.
- In the High Court, “loser pays”.

Collective Actions in the Competition Appeal Tribunal (CAT)

- There has been much debate about the need for greater access to justice and collective redress mechanisms. The approach seems to be reform on a sector by sector basis.
- Following consultation, the government decided to introduce a mechanism in the Competition Appeal Tribunal (CAT) for collective actions which can be the subject of a “collective proceedings order” (CPO) and can proceed on either an opt-in or opt-out basis.
- Implemented in the Consumer Rights Act 2015.
- Specialised regime introduced for civil damages as a result of certain breaches of competition law (cartels, abuse of dominance).
- The UK CAT is a specialist judicial body whose function is to hear and decide cases involving competition or economic regulatory issues.
- Controls in CPOs include:
 - Judicial certification of the class;
 - Limiting opt-out option to UK-domiciled claimants only (non-UK claimants are able to opt in);
 - Prohibiting treble or exemplary damages and the use of DBAs;
 - Requiring any opt-out settlement to be judicially approved by the CAT; and
 - Maintaining the loser pays costs rules.

Collective Actions in the Competition Appeal Tribunal (CAT) – The CPO

- **Two conditions for making a CPO:**

- The claims raise the “same, similar or related issues of fact or law” in relation to an identifiable class of persons and are suitable to be brought in collective proceedings (**Class Certification**)
- It is **just and reasonable** for the proposed class representative to act in the proceedings (**Authorisation of Class Representative**)

- **Class certification – CAT Rule 79**

In determining whether the claims are suitable to be brought in collective proceedings (“CPs”), the Tribunal shall take into account all matters it thinks fit, including—

- (a) whether CPs are an appropriate means for the fair and efficient resolution of the common issues;
- (b) the costs and the benefits of continuing the CPs;
- (c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
- (d) the size and the nature of the class;
- (e) whether it is possible to determine whether any particular person is or is not a member of the class;
- (f) whether the claims are suitable for an aggregate award of damages; and
- (g) the availability of ADR, including redress through voluntary scheme.

Collective Actions in the Competition Appeal Tribunal (CAT) – The CPO

- **Class Certification: Opt in or Opt out?**

In determining whether the collective proceedings should be conducted on an opt-in or opt-out basis, the Tribunal may take into account all matters it thinks fit, including:

(1) The strength of the case

- Tribunal will usually expect the strength of the claims to be more immediately perceptible in an opt-out than an opt-in case
- Does not require the Tribunal to conduct a full merits assessment
- Follow-on claims will generally be of sufficient strength for the purpose of this criterion

(2) Whether it is practicable for the proceedings to be brought as opt-in proceedings

- The Tribunal will consider all the circumstances, including the estimated amount of damages that individual class members may recover
- General preference is for proceedings to be opt-in where practicable (e.g., if the class is small but the loss suffered by each class member is high, or the fact that it is straightforward to identify and contact the class members)

Collective Actions in the Competition Appeal Tribunal (CAT) – The CPO

Authorisation of Class Representative (“CR”) – Rule 78:

In determining whether it is **just and reasonable** for the applicant to act as the CR, consider whether that person—

- (a) would fairly and adequately act in the interests of the class members;
- (b) does not have a material interest that is in conflict with the interests of class members;
- (c) is the most suitable, if there is more than one applicant seeking to act as the CR;
- (d) will be able to pay the defendant’s recoverable costs if ordered to do so; and
- (e) where an interim injunction is sought, will be able to satisfy any undertaking as to damages required by the Tribunal.

In determining whether the proposed class representative would **act fairly and adequately in the interests of the class members**, the Tribunal shall take into account all the circumstances, including—

- (a) whether the CR is a member of the class, and if so, its suitability to manage the proceedings;
- (b) if the CR is not a member of the class, whether it is a preexisting body and the nature and functions of that body;
- (c) whether the CR has prepared a satisfactory plan for the collective proceedings including notification of class members, governance and consultation, cost budgets, etc.

Damages Assessment in the CAT

- **No exemplary damages.** Damages usually limited to the loss suffered, including interest if appropriate.
- **The CAT can award damages in collective proceedings without assessing the amount of damages recoverable by each represented person** (i.e., it can award aggregated damages in relation to the class as a whole).
- **An aggregate damages award is designed to be a practical and proportionate method of assessing damages in collective proceedings.** This could be by way of a lump sum award against the defendant, or by using a formula to determine each represented person's claim without requiring individual proof. This type of award is likely to be more suitable where there is a large class with largely identical individual claims.
- **If it is not appropriate to make an aggregate award of damages for the entire class, it may be possible to determine the entitlement of sub-classes on a group basis** (by amending the CPO, and authorizing the appointment of class representatives for those sub-classes). If that is not possible, quantification of damages may proceed as individual issues.

CPO – Recent Decisions

- *Gibson v. Pride Mobility Products, Ltd.*
 - Judgment in March 2017, adjourned – later withdrawn.
 - Sought guidance on certification from Canadian cases.
- *Walter Hugh Merricks CBE v. Mastercard Inc. and Others*
 - Judgment in July 2017, dismissed the CPO application.
 - Generally, no appeal against the CAT’s decision on an application for a CPO. Any challenge can only be brought by way of judicial review.
 - However, on 13 November 2018 the Court of Appeal held that it did have jurisdiction to hear the appeal against the CAT’s decision in so far as it involved a question of law.
 - Permission to appeal and appeal pending.

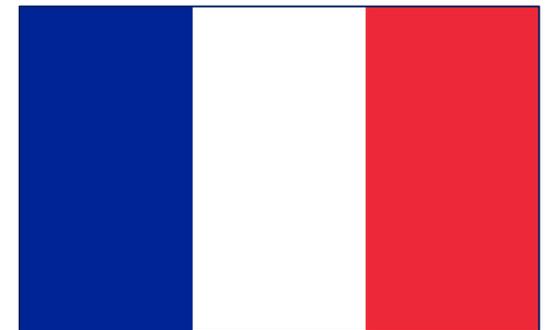


France



Background

- Historically, no class action mechanism; **limited remedy** available through **collective actions** i.e. individual actions collectively filed/investigated/ruled upon
- Mechanism introduced in 2014 for **consumers** and certain **competition** issues (notably, regime detailed in the Consumer Code and not in the Code of Civil Procedure)
- Extended to health product liability in January 2016 and subsequently in November 2016 to general discrimination, employment discrimination, environmental matters, and personal data
- Today, **two procedural regimes** coexist:
 - A specific regime in the **Consumer Code** for class actions related to consumers and competition law
 - A common regime in the **Code of Civil Procedure** for all other types of class actions with specific provisions for each of the following types of disputes:
 - Personal data
 - Health products and related services
 - Environment
 - Discrimination (with specific provisions for employment discrimination)



General Features

- Action available to **qualified entities only** (mainly non-profit associations) and not to individuals, groups of individuals or lawyers
- In the common regime, **3-step process**:
 - ✓ **Formal notice with a 4-month time-period** before the claimant can file a claim (except in health and consumer matters)
 - ✓ **Phase 1: Judgment on liability**
 - Application of general tort liability conditions regarding the individual test cases (minimum of two) presented by the claimant
 - Determination of the conditions to join the group, possibility of sub-categories, available remedies and the publicity measures to be taken by the defendant
 - ✓ **Phase 2: Payment** (only when judgment on liability is final - unlikely to take less than 5 years)
 - Opt-in procedure in the time frame set by the judge (2 to 6 months for consumers; up to 5 years for health-related matters)
 - Individual or collective payment procedure
 - Duration: Difficult to assess, no class action has been successfully completed to date

General Features (cont'd)

- **Legal regime:**
 - Possible for individuals to settle *separately* or bring an *individual action*
 - Members of the group can still bring an individual action for *individual damages* not compensable in the framework of the class action
 - *Limited benefit* for the defendant which cannot eliminate its risk: limited release effect
 - Impact on time limitations: time limitation suspended until final judgment on liability + 6 months minimum
 - There cannot be several successive class actions for a breach recognized by a first judgment, but there is a possibility or risk of parallel actions
 - No clause can circumvent the possibility to participate in a class action: arbitration clause is not a way-out
- **Possibility to settle:**
 - The law provides for a possible mediation between the *qualified entity* and the *defendant*
 - The agreement must be *approved by the judge* who ascertains the protection of the rights of the members of the group
 - Defendants are then subject to *publicity measure* for potential members to opt in
- **According to available sources, fewer than 20 class actions have been introduced in France since 2014**
 - 11 cases concerning consumer law, 2 concerning health product liability and 2 concerning employment discrimination
 - Wide variety of sectors, wide variety in status of cases: 4 cases were dismissed (but no final decision to date), 2 cases were settled, all others are on-going

A Slow Start

- **Complex framework linked to the government’s commitment to avoiding “US-type” excesses . . .**
 - **Multiple constrains:** limited scope, qualified entities, limited compensation
 - **Complex procedure:** in practice, multiplication of preliminary issues/challenges which impact the duration of the trial
 - **Cost:** few associations have enough resources to bear the costs of the procedure + expert costs + lawyers’ fees which cannot be based solely on a success fee
- **. . . For limited reward**
 - Limited reward for the victims: no punitive damages
 - Limited reward to the claimant: damages to be distributed to the victims, i.e. no money to be kept by the qualified entity/claimant
 - Professional conduct rules for French lawyers: prohibition of full success fee arrangements
 - As a result, consumers’ class actions regarding goods or services have had very limited reach and success so far
- **But . . .**
 - Anticipation that data breach cases might create renewed interest because of the number of users involved
 - Reputational risk: associations tend to extensively communicate in the media even before filling a proper claim

Alternatives

- Complexity of the new tool ironically brought the advantages of the “old” collective action into focus:
 - Standard/well-known procedure available for all kinds of disputes
 - Multiplication lately through digital platforms that connect similar claimants
 - Allows possible cost sharing without giving up on independence of the case
- Criminal proceedings: possible to claim damages from the criminal courts
- ADR-type mechanism:
 - Sector type initiatives: specific offer of mediation services by the stock market regulator (“AMF”) that issues recommendations for compensation
 - Private initiatives: The Paris Mediation and Arbitration Center (CMAP) mediation rules for mass claims



Germany



Background

- For several years, potential legislation about **collective actions** has been the subject of a vivid public discussion in Germany.
 - Problem of “rational indifference”
- General agreement that legal remedy should **have certain features**:
 - ✓ Enhance consumer protection
 - ✓ Low threshold to bring a claim
 - ✓ Speed up proceedings
 - ✓ Facilitate settlements
- **BUT**: No “U.S. style” class action industry
- 2005: Introduction of model case proceedings for **securities litigation**
 - Widely regarded as a legislative failure



Background

- Discussion reached new heights after the **Volkswagen diesel scandal**
- More than **2 million consumers** in Germany were affected but only 1% had filed a complaint
- In contrast, consumers in the U.S. obtained **billions** through class action settlements
- Problem: VW **statutes of limitations** arguably ended on December 31, 2018
- Pressure on German legislator
- Representative action modeled after other European jurisdictions (Austria, Netherlands) entered into force on November 1, 2018
- Since then, **two** representative actions have been filed (automotive and financial industry)



Volkswagen

Representative Actions for Declaratory Relief

- **Collective action through public interest groups filing their own law suit**
 - **Two-tiered system**
 - Judgment in representative action only grants declaratory relief, no payment claims permitted
 - Consumers need to file their own individual law suits, but courts in these subsequent actions are bound by the findings in the representative action
 - Individual law suits by consumers outside the representative action remain permissible (“opt-in principle”)
- **Original jurisdiction of the appellate court as trial court**
- **Requirements for a representative action:**
 - Applies to “C2B” disputes – “consumer” defined by law
 - Arguably, no representative action for employment disputes – despite broad definition of “consumers” by labor law courts
 - Standing is **limited** to consumer protection organizations or other “qualified institutions”:
 - Must have at least 350 members, four year-registration in public register, no commercial interest in the litigation, and industry sponsorship only up to 5%
 - No representative action can be brought by affected individuals or the government
 - No class – no class certification

Representative Actions for Declaratory Relief (cont'd)

- Subject of declaratory relief must be relevant for a group of at least 10 affected consumers
 - Existence or non-existence of factual circumstances relevant for consumer claims
 - E.g., to determine whether a car model employs a defeat device
 - Decision on relevant legal questions
 - E.g., to declare whether the fact that a car model employs a defeat device makes it “defective” under the law
- Not limited to specific substantive areas of the law
 - Covers *inter alia* purchase of goods or services, data privacy, medical treatment
- Pleading standard: as high as in normal German proceedings
- At least 50 consumers must actively **opt in** by registering in a public “claim index”
 - Deadline: two months after filing in order for collective action to go forward
 - If threshold is reached within deadline, additional consumers can opt in until the day prior to the first oral hearing
- Opt in for consumers by simple form (no formal pleading required)

Representative Actions for Declaratory Relief (cont'd)

- **Legal effects:**
 - Additional representative actions are **blocked**, actions of individual consumers remain permissible
 - Suspension of statutes of limitations for “opt-in” consumers
 - “Non opt-ins” need to file individual actions to prevent claims from becoming time-barred
 - **Binding effect**
 - **Declaratory judgment** binds any court that subsequently decides a dispute between the defendant and an “opt-in” based on the same facts
 - **Settlement** reached by the parties binds all “opt-ins”, but consumers have the possibility to opt-out of the settlement within a month after settlement was published
 - Legislator hopes that declaratory findings or settlement have a practical effect on the “non opt-ins”, leading them to seek a corresponding resolution, so that no further court action is required

“U.S. Style” Class Action Industry – Now Also in Europe?

	France	Germany	UK - GLO	UK - CPO	United States
Applicability	Limited to Specific Areas of Law	C2B Disputes	All Disputes	Limited to Competition Law	All Disputes
Right to Bring Action	Qualified Entities Only	Qualified Entities Only	Any Allegedly Affected Party	Qualified Entities or Class Member	Any Allegedly Affected Party/Class
Binding Effect	Opt-in Necessary	Opt-in Necessary	Opt-in Necessary	Opt-in or Opt-out	All Class Members
Relief Sought	Injunction to End the Infringement and/or Monetary Relief	Declaratory Relief	Monetary or Injunctive Relief	Compensatory Damages or Injunctive Relief	Monetary or Injunctive Relief
Discovery	No Discovery	Generally, No Discovery	Discovery	Discovery	Broad Discovery
Costs	Loser Pays Rule, Limited in Practice	Loser Pays Rule, but No Cost Risks for Opt-ins	Loser Pays Rule	Loser Pays Rule	Each Party Bears Its Own Costs

European Union



EU Directive on Representative Actions for the Protection of Collective Interests of Consumers

- EU Commission published a **proposal for the directive** in April 2018
- Committee on Legal Affairs **approved** amended proposal in December 2018
- Goal of the directive is to ensure a minimum level of rights for European consumers by providing a harmonized system for collective actions across the EU
- Key features of the proposed directive:
 - Available to qualified institutions only, which may file the action **without a mandate** from a specific consumer
 - In addition to a declaratory judgment, **qualified institutions** may also seek an **injunction** or a **redress** order (e.g. compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid)
 - Final decision may also **bind courts of other Member States** → **rebuttable presumption** that a violation of consumer protection laws has also occurred in that country
 - Consumers do not need to opt-in to benefit from the **binding effect** of a judgment

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