european justice forum

Trends in European Mass Claims Actions

Dr. Herbert Woopen, Director of Legal Policy at EJF

28 September 2023

Agenda

1. Big Picture: Societal Trends and Macro-economic Impact

2. Drivers of Mass Actions in Europe

3. The changing EU Landscape on Representative Actions

Big Picture: Societal Trends and Macro-economic Impact

Societal Trends: Climate Change Regulation

SAMPLE GERMANY (HISTORY)

How has the Climate Action Law become a priority?
Environmental NGOs, including Friends of the Earth Germany (BUND) and WWF, have been calling for a climate action law for years, and research institute Ecologic prepared a legal opinion on how to adopt the British model into German law in 2009. From that point on, the Greens, the Social Democrats (SPD) and the Left Party have all pushed for the introduction of a federal climate action law.

In its 2013 election campaign programme, the SPD again called for the law. However, during coalition talks with the CDU and CSU, the negotiators agreed to introduce the government's Climate Action Plan 2050 that is not legally binding but sets out targets and policies for subsequent governments – instead of a law.

The 2018-2021 government coalition finally committed to introducing climate action legislation in its coalition agreement of March 2018.

The CDU/CSU and the SPD renewed their grand coalition and put a clear emphasis on reaching the 2030 climate targets. To this end, the government has set up the coal exit commission and similar multi-stakeholder bodies for transport and buildings to propose concrete measures to reach sector-specific goals.

2019: A so-called climate cabinet was set up by Chancellor Merkel. This was a group of ministers with responsibilities relating to climate issues, such as the environment, transport, buildings and energy. They were tasked with deciding the "legally binding implementation" of Germany's climate targets for 2030. The climate cabinet presented a detailed Climate Action Programme 2030 and the Climate Action Law on 9 October.

The EU's 2030 climate targets (2021-2030) are already legally binding for Germany. As the EU has decided in April 2023, a more ambitious greenhouse gas reduction target for 2030 („Fit for 55" package, reduction of 55% greenhouse gas for 2030), it is now in the process of updating all relevant climate and energy legislation. With consequences for politics.

Source https://www.cleanenergywire.org/factsheets/germanys-climate-action-law-begins-take-shape

Source: Ecologic, 2020

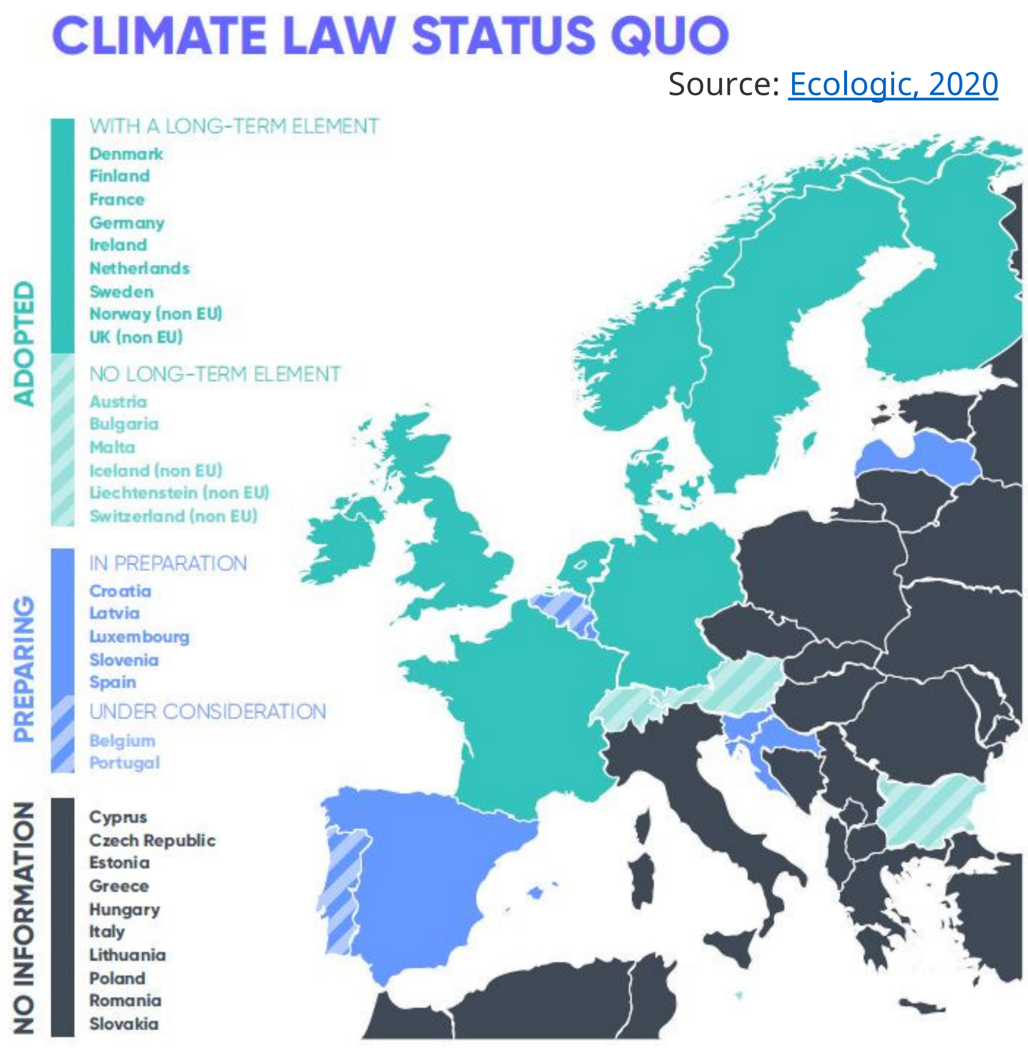


FIGURE 1: Geographic overview of the state of national framework climate laws in the EU

Source: Ecologic Institute research based on a range of sources (including legislative databases, direct legal texts, news reports and personal contacts)

Societal Trends: Climate Change Activists

… no political majority for wished changes in political framework, perception of democracy moving too slowly

“FFF” Mass Strikes

Civil disobedience, violations of law

Escalation to court !

Pictures from: www.cleanenergywire.org, blog.Macfarlanes.com, www.Spiegel.com

Societal Trends: Climate Change on Trial (1/2)

Objectives of activist NGOs

- Ideally: Courts order companies to stop emitting GHG emissions
- Next best thing: The companies have to pay damages for all (alleged) damages which their behaviour has caused
- In any event: Publicity

Sample: Activist Lawsuits in Germany

Protagonists: Roda Verheyen, Remo Klinger, Jürgen Resch

" We don't complain, we file complaints." Jürgen Resch, taz of 6th October 2017

Brief historical recap: Climate Litigation in Courts

2013: Urgenda vs. Dutch State (NL) → Case won in 2019 (after 6 years), confirming binding legal obligations of Governments based on international human rights law, to undertake strong reductions in emissions of greenhouse gases

*2015: Andean farmer vs. RWE (DE) → Case **preliminarily lost** in 2016*

2020: Milieudefensie at al. vs. Shell (NL) → Case preliminarily won in 2021, Shell has to reduce its CO2 emissions by 45% net by end of 2023

2021: Neubauer at al. vs. German State (DE) → Case won in 2021, the "BGH" court ordered the legislature to set clear provisions for reduction targets from 2031 onward by the end of 2022 (fundamental rights afford protection against CO2 emission)

2022: Minors/young adults/DUH vs. German State (DE) → case pending at "BVerfG" (German Constitutional Court), German State Climate Change Acts (GHG emissions reduction paths are insufficient)

*2022: Two individuals vs German State (DE) → Case finally **lost** in 2022 (General Speed Limit on German Highway)*

*2022: DUH/Greenpeace/FFF vs. VW/Daimler/BMW (DE) → Cases all **preliminarily lost** in 2023 (activists file lawsuit over carbon emissions)*

2023: Government of California vs. Big Oil (US) → pending (industry should pay into a fund covering negative impact of climate change, e.g. flooding)

Societal Trends: Climate Change on Trial (2/2)

Related playing fields

Liability of Directors

Mass Claims

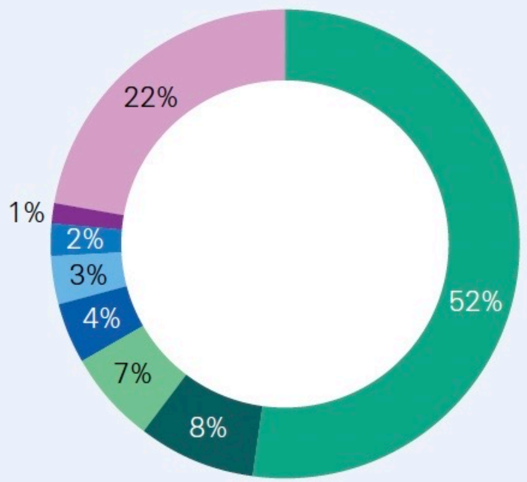
Liability of activists

Pictures from T-online.de,
Fortune.com,
The Guardian

Social Inflation 1/2 (US Data)

The US is the world's largest third-party litigation funding market, accounting for more than half (52%) of global activity.

TPLF investment globally rose 16% year-on-year to USD 17 billion in 2021.



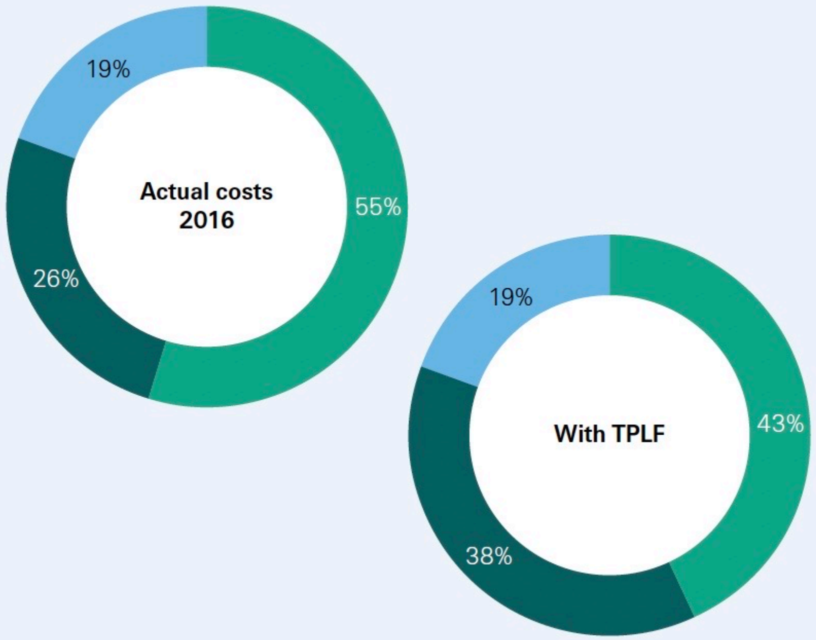
US Australia UK Germany
France Japan Spain Row

Note: the sum of percentages may not add up to exactly 100% due to rounding.
Source: Research Nester, Swiss Re Institute

Third-party funding alters the distribution of legal costs in commercial liability cases.

We model the effect of litigation funders' charges on the total awards in cases. This finds that TPLF investors take a higher share of legal awards, resulting in lower net awards for plaintiffs.

Distribution of tort system costs without TPLF (left) and with TPLF (right)



Plaintiffs' compensation Plaintiffs' legal costs (incl. TPLF)
Defendants' legal costs

Source: SwissRe Institute "US litigation funding and social inflation", December 2021

Social Inflation 2/2 (US Data)

Investment returns from TPLF outperform other risky asset classes.

TPLF-funded cases in all three major liability segments have generated average IRRs of between 20% and 35% in recent years and are forecast to perform similarly in 2021. These outperform returns on risky asset classes such as venture capital and private equity. The costs of such excess returns are paid for by plaintiffs, defendants, and ultimately by consumers.

Average TPLF returns by segment

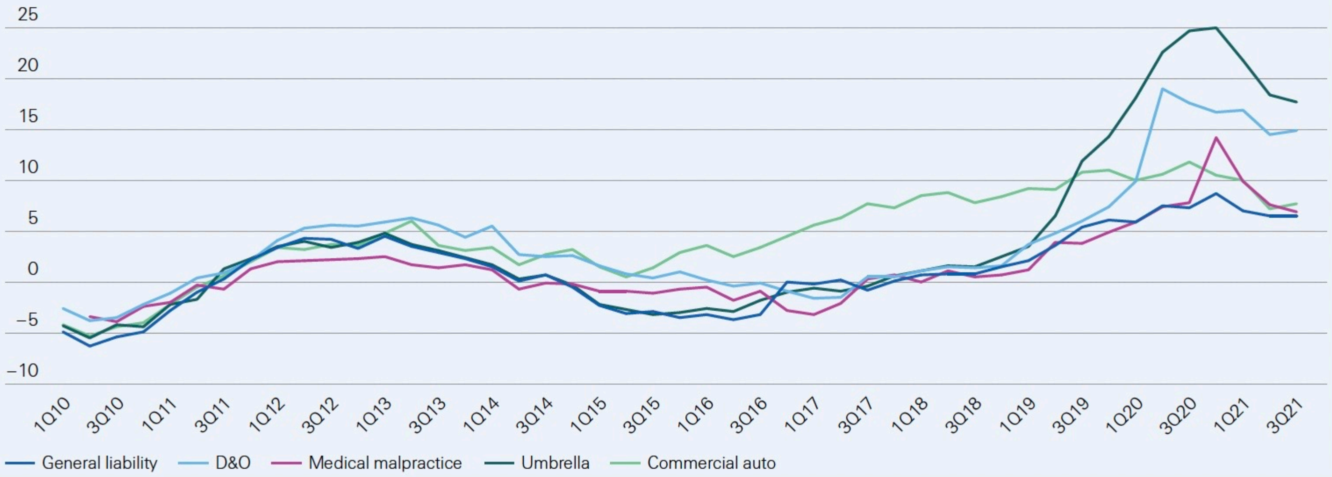
Average IRRs	2019	2020	2021F
Personal injury	32.7%	24.6%	35.3%
Commercial litigation	29.5%	26.5%	29.9%
Mass tort	21.2%	25.5%	26.0%

Source: Morning Investments

Large legal awards to plaintiffs are causing escalating insurance claim losses to defendants' insurers.

Conning, a US insurance asset manager, estimates the average combined ratio for US general liability in 2020 at 105.7%, and for medical malpractice at 117.5%, the seventh consecutive year of underwriting losses for both lines. In response, insurers are increasing premium rates, limiting policy coverages, and in some cases exiting the market altogether.

US commercial insurance premium trends, 1Q 2010 to 3Q 2021 (year-on-year percentage change)



Source: Council of Insurance Agents & Brokers (CIAB), Swiss Re Institute

Source: SwissRe Institute "US litigation funding and social inflation", December 2021

European Justice Forum

Trends in European Class actions

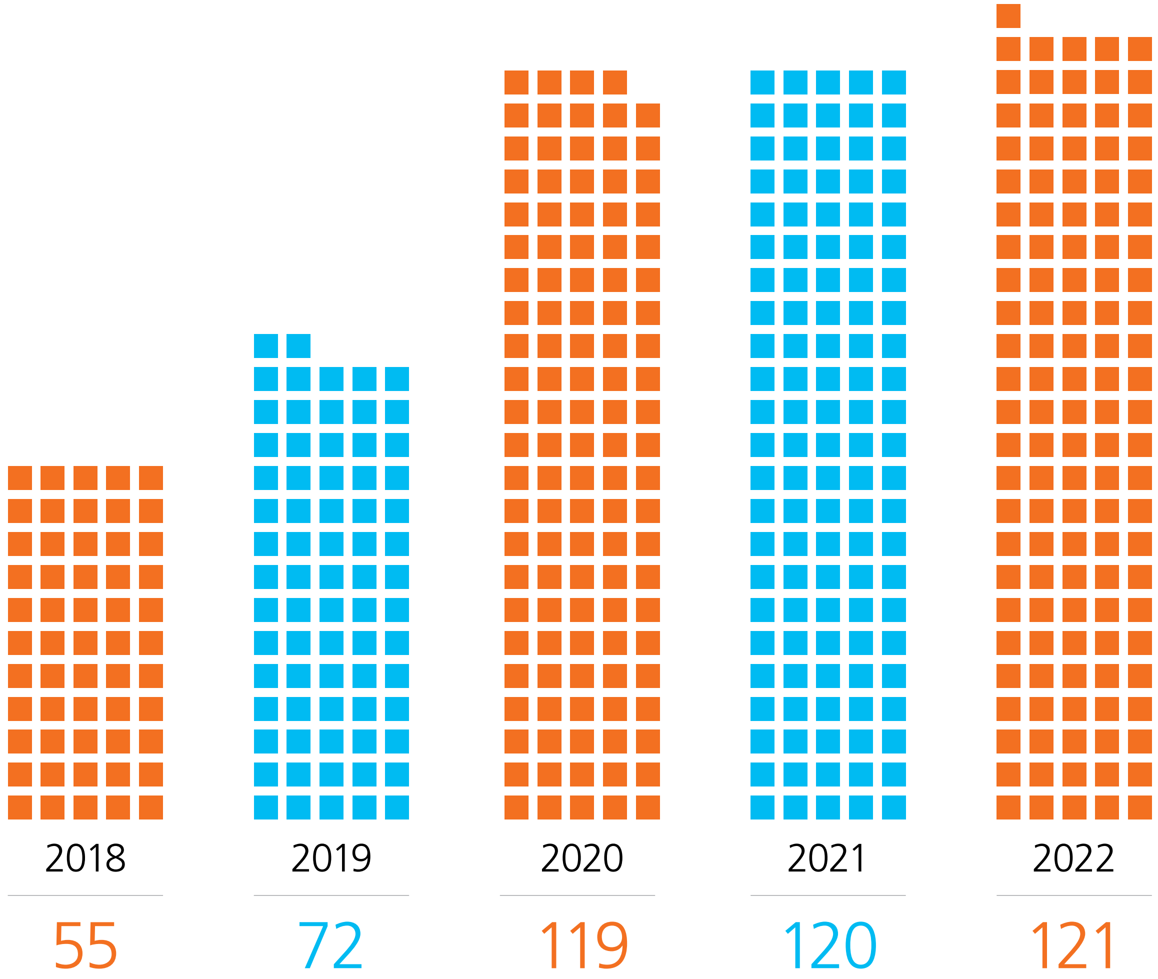
21 September 2023

September 2023

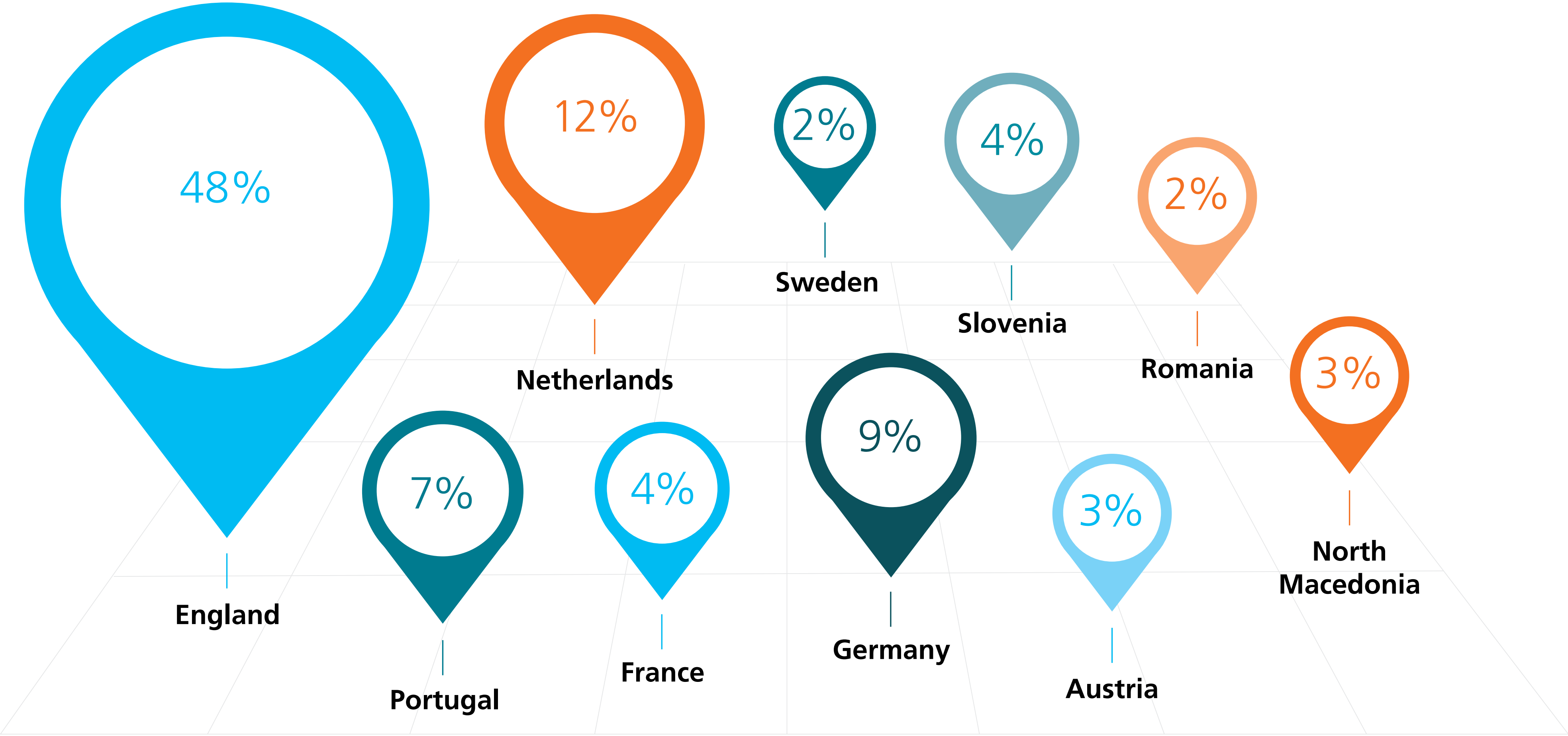
Number of class actions filed per year

121

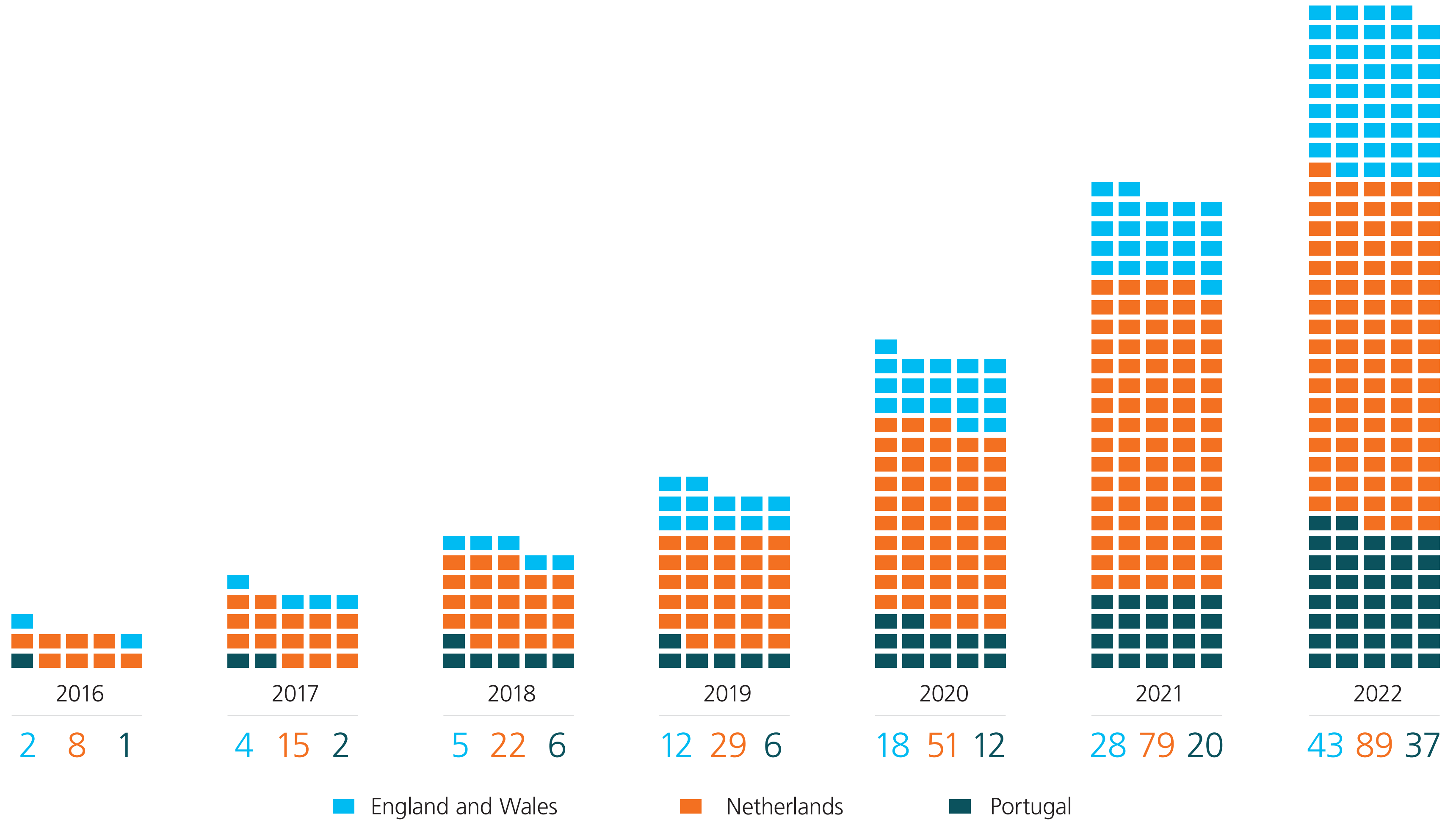
claims filed in 2022



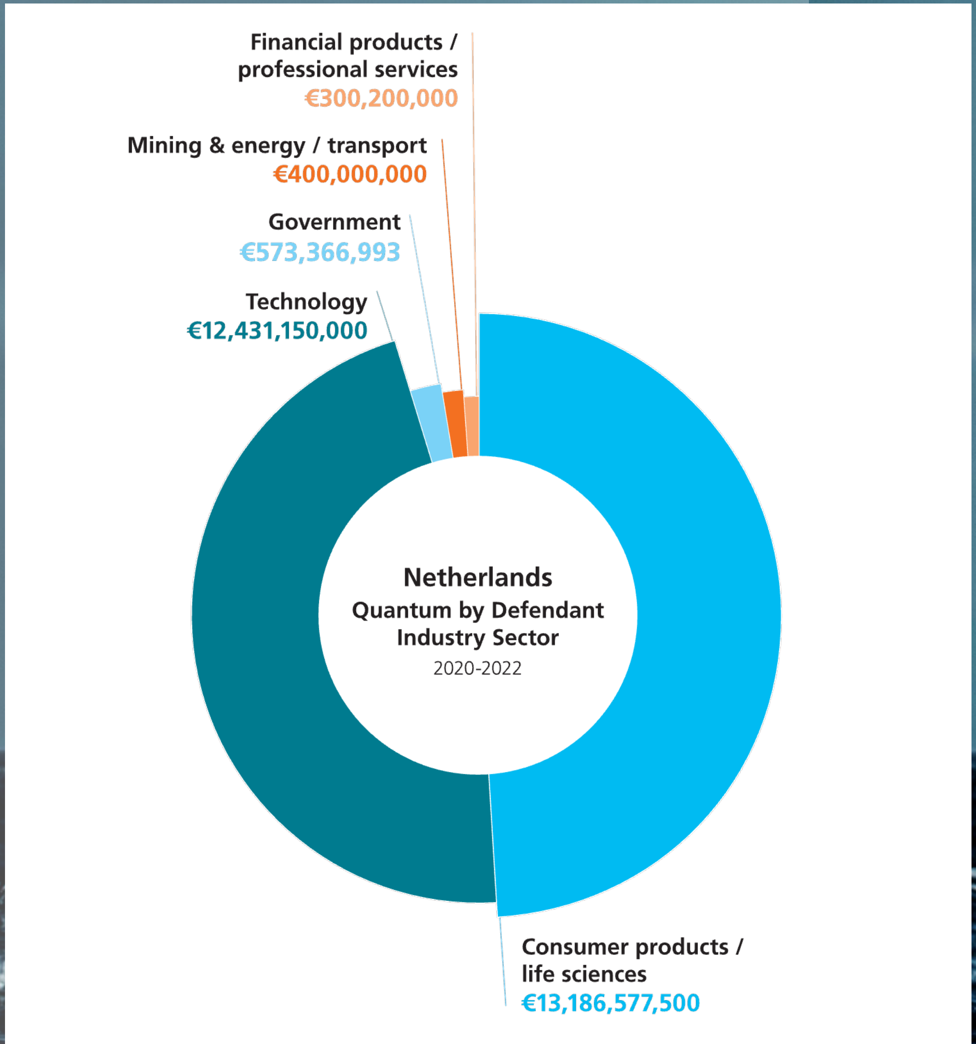
Countries with most claims



Opt-out trends

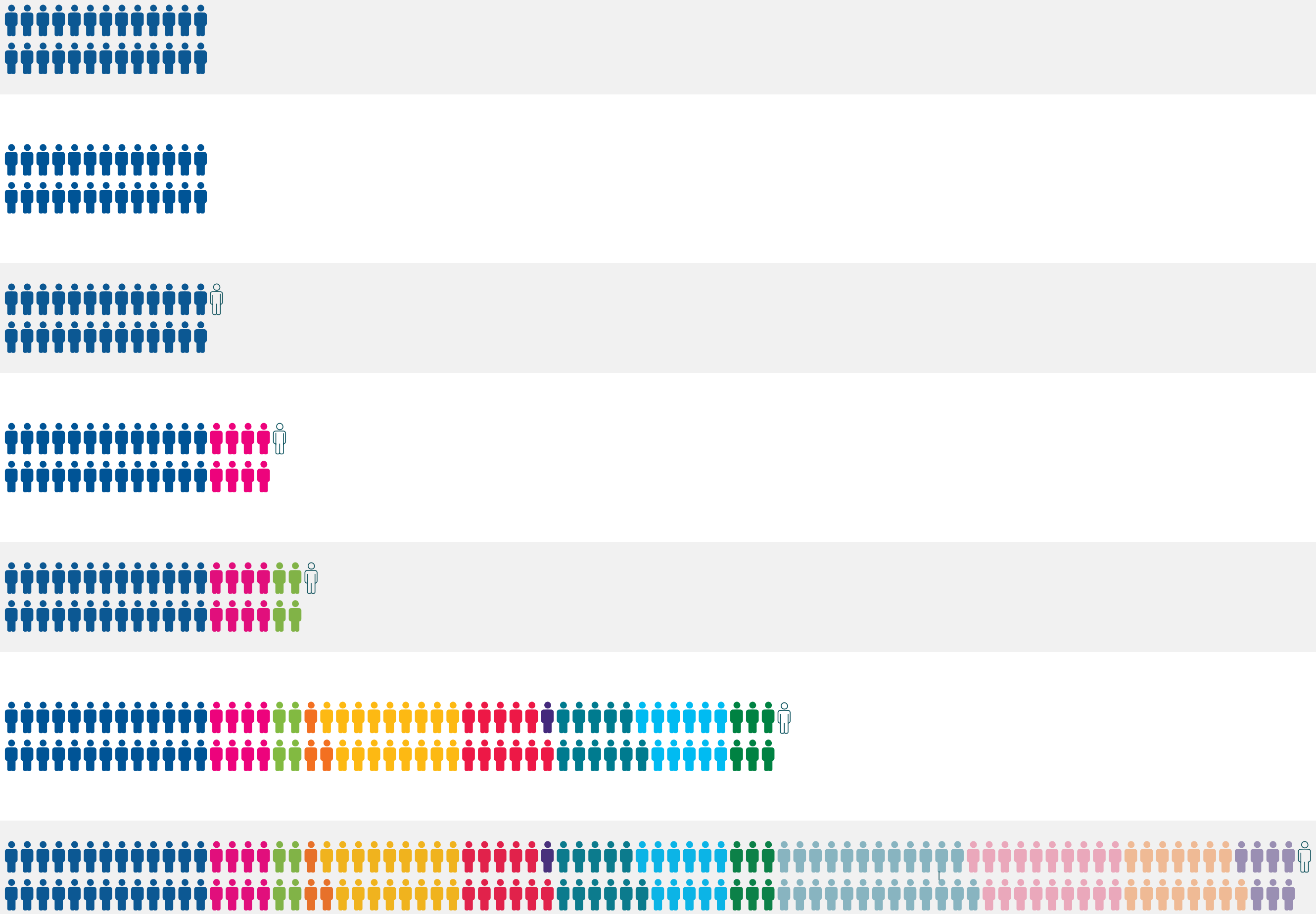


Quantum of Dutch claims



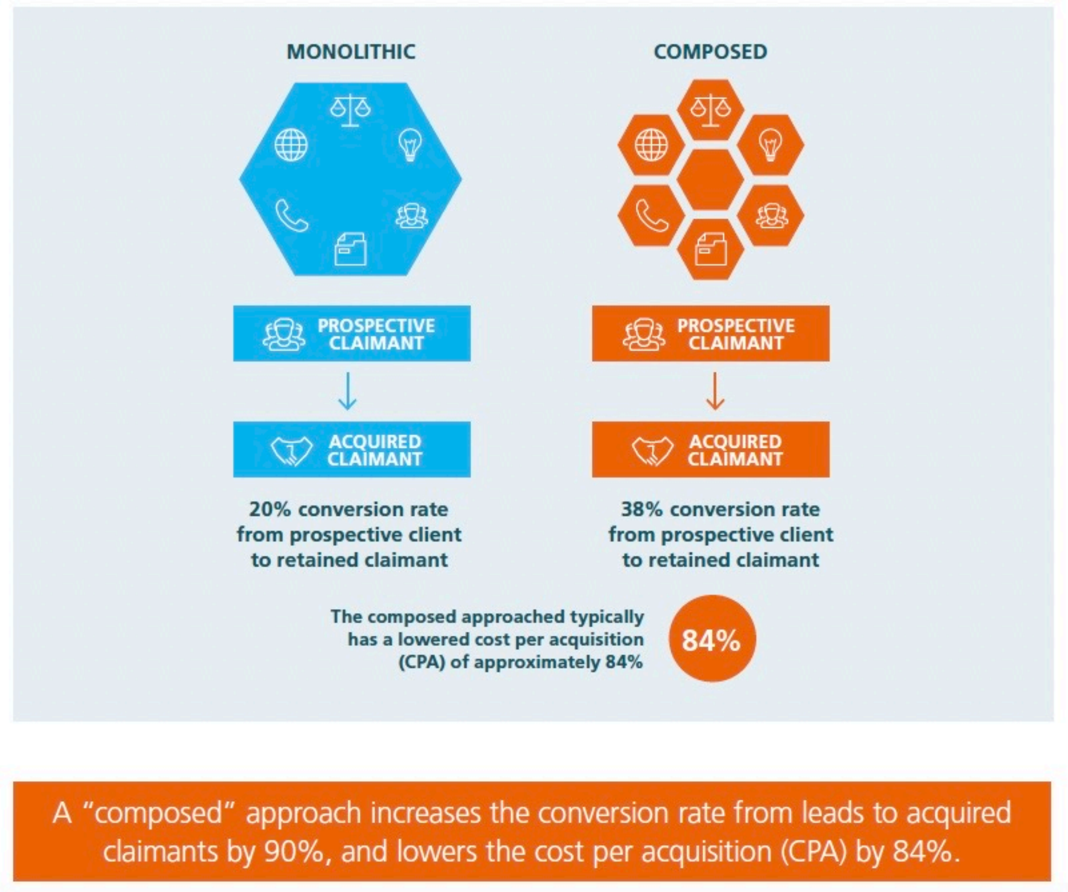
UK competition class actions

2016	**46,232,000**
2017	**46,232,000**
2018	**46,250,000**
2019	**62,493,819**
2020	**69,393,819**
2021	**171,003,819**
2022	**340,013,333**



Drivers of Mass Actions in Europe

Driver: Ecosystem



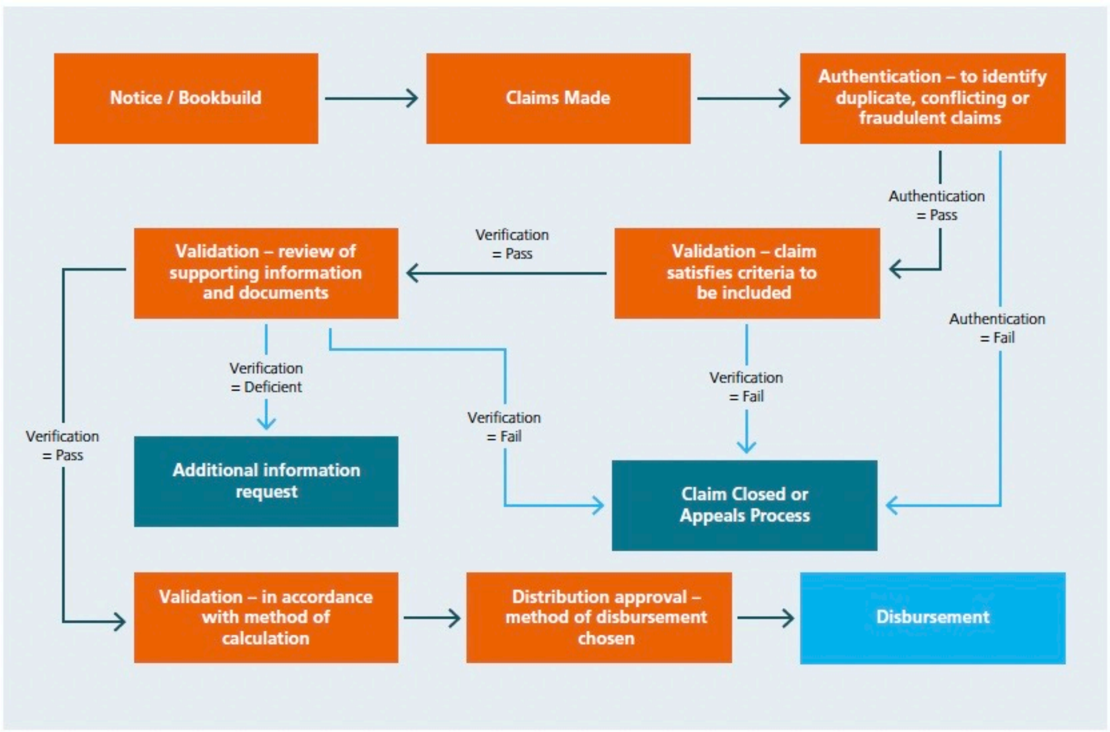
Source: CMS, European Class Action Report 2023, p. 50

The power of Composability lies in the capacity to facilitate seamless coordination between disparate parts of complex processes.

Players:

- NGOs / Activists
- LegalTech
- Private Third Party Litigation Funders
- Specialised Consultants (Human Rights, ESG)
- Social Media Platforms
- Adhoc entities as representative claimants
- Etc.

Driver: Digitalisation & Collaboration



Source: CMS, European Class Action Report 2023, p. 51

Leveraging technology, collaborating with other providers, adopting digital tools, use of third party data and to bundle it in a professional (outsourced) litigation team is a game changer.

Own remark:
Opt-out systems make it easier to do the book building. The larger the groups, the higher the pressure potential.

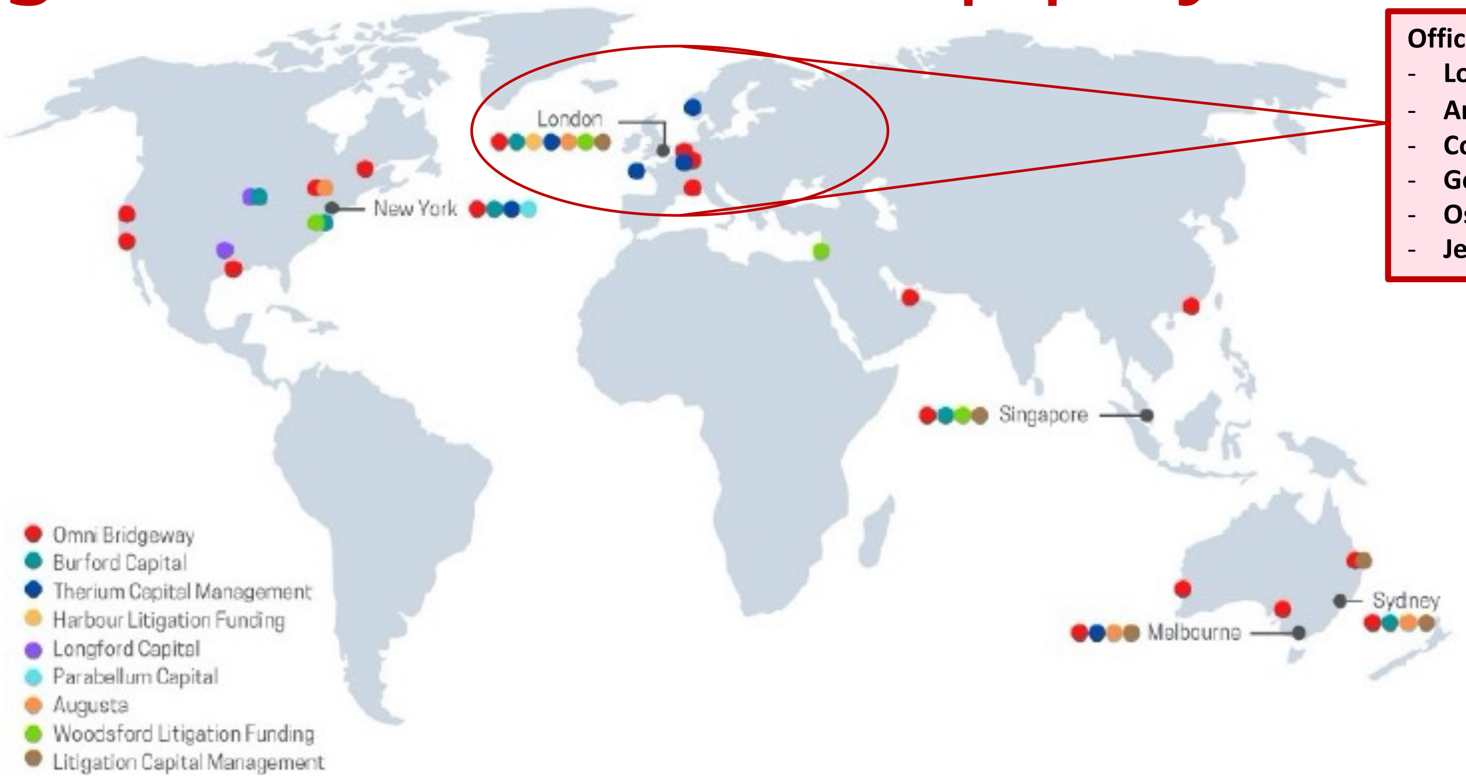
Most EU countries have opt-in but here the trend has shifted to a later opt-in which is supporting book building.

Driver: TPLF → Events September / October

	General Trends: Emory University (Atlanta) & Leuven (Leuven)	ESG: Nivalion (Frankfurt)	Human Rights: Erasmus University (Rotterdam)
Date	15.9.2023	26.-27.9.2023	19.-20.10.2023
Partici-pants	***EU Commission (M. Posnow-Wurm)***, **BEUC**, Academics	Lawyers, Legal Insurers, Business, ***OPEC***, **LegalTech** (JUNE, Uncover), **Ius Omnibus**, Academia, Public Affairs Consultants, **Funders** (Nivalion, Litigium Capital)	***EU Commission (A. Stein)***, Lawyers (Human Rights, Corruption), **TPLF consultants**, Academics; **Funders** (Nivalion, Omni Bridgeway), **Asset Management** (Lex Capital), **PILP** (Public Interest Litigation Project)
Akademia	**Magdalena Tulibacka (Emory Univ.)** **Stefaan Voet (KU Leuven University)** **Chris Hodges (Oxford University)** ***Xandra Kramer (Erasmus University)*** Ianika Tzankova (Tilburg University) Maria Jose Azar-Baud (Univ. Paris-Saclay) …	*Xandra Kramer (Erasmus University)*	***Xandra Kramer (Erasmus University)*** Rachel Mulheron (Queen Mary Univ.Ldn) Eduardo Silvia de Freitas (PhD candidate Erasmus School of Law) Eva Storskrubb (Uppsala University) Marias Carlota Ucin (Postdoc Erasmus School of Law) Emma van Gelder (Utrecht Univeristy) Catherine Rogers (Bocconi Univ. …) **Stefaan Voet (KU Leuven Univ.)** … etc.
Topics	▪ Class Action Developments in Europe and the US ▪ Privatization of litigation funding, digitalization of civil justice and impact on class actions	▪ Need for regulating funding industry? ▪ Navigating the rising tide: - ESG Risks & trends in funding - Predictions, preparations & strategies for ESG litigation - Power in numbers – players, forces & impact ▪ Tech trends shaping the industry	▪ Emerging trends: Crowdfunding, TPLF, and other innovative models ▪ Altruistic Ventures ▪ Future trends of ADR and ODR ▪ Entrepreneurial Lawyering

Background on TPLF - “Top players” (2020)

Source:
Omni Bridgeway, 2020
(in EPRS study)



Offices in:
- **London (UK) (7)**
- **Amsterdam (NL) (2)**
- **Cologne / Bonn (DE) (2)**
- **Geneva (CH) (1)**
- **Oslo (NO) (1)**
- **Jersey Island (UK) (1)**

Germany:

Roland Prozess Finanz (one of 2 leaders) → expanding to Austria and Switzerland (EJF own research)

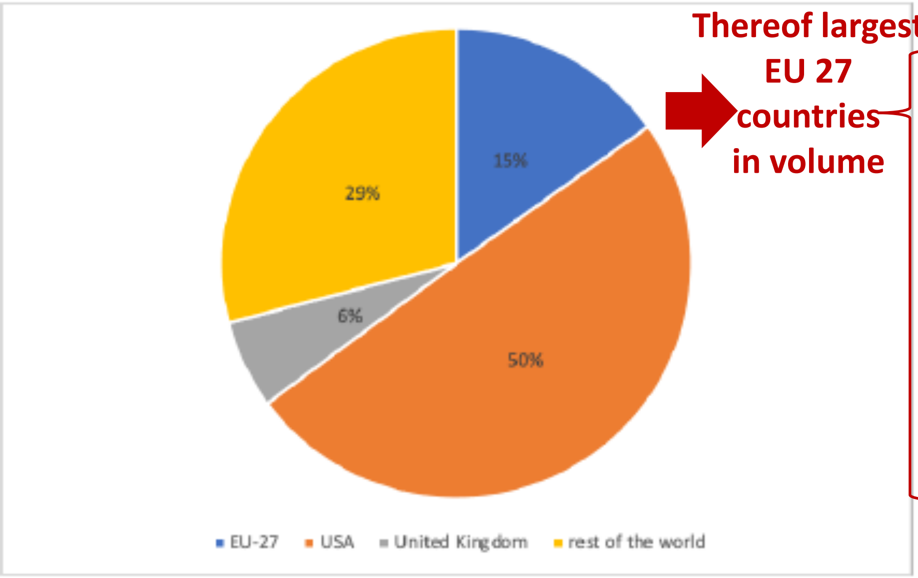
	Buford	Omni Bridge-way	Harbour	Therium	Longford	Para-bellum	Augusta	Woods-ford
Fund size (€ million)	€2 589	€1339	€982	€800	€497	€402	€266	€89-€268
Offices	6	18	1	6	2	1	4	4
Team	125+	160+	30+	35+	12	18	85	20+
Founded	2009	1986	2007	2009	2011	2012	2013	2010

Total ±7 bln

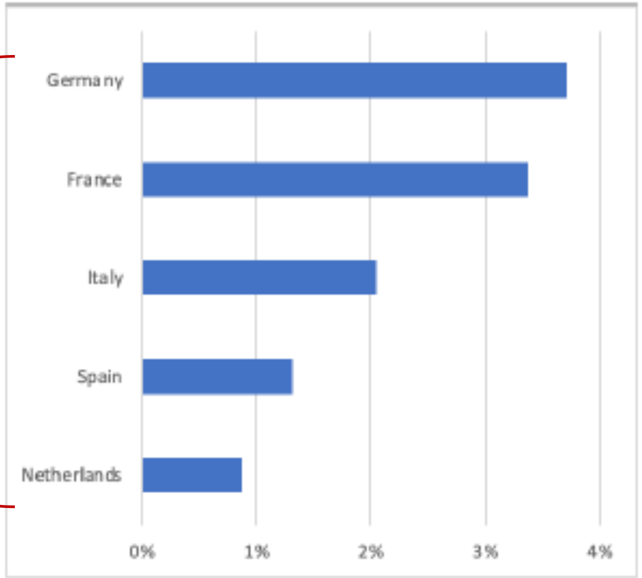
Background on litigation service “market”

Estimated global market distribution and largest EU litigation service markets, 2019 (in % of global market)

Source: EPRS Study Paper, 2021

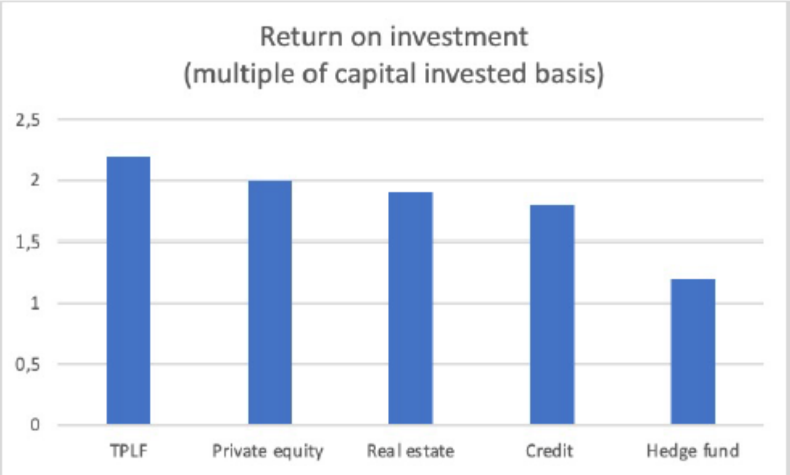


Thereof largest EU 27 countries in volume



Global return estimates in TPLF investments

Source: Bloomberg, 2018



TPLF being the most profitable (roi) asset class !

The changing EU Landscape on Representative Actions

RAD Landscape: Opt-in vs. Opt-out

Status
(25.09.2023)

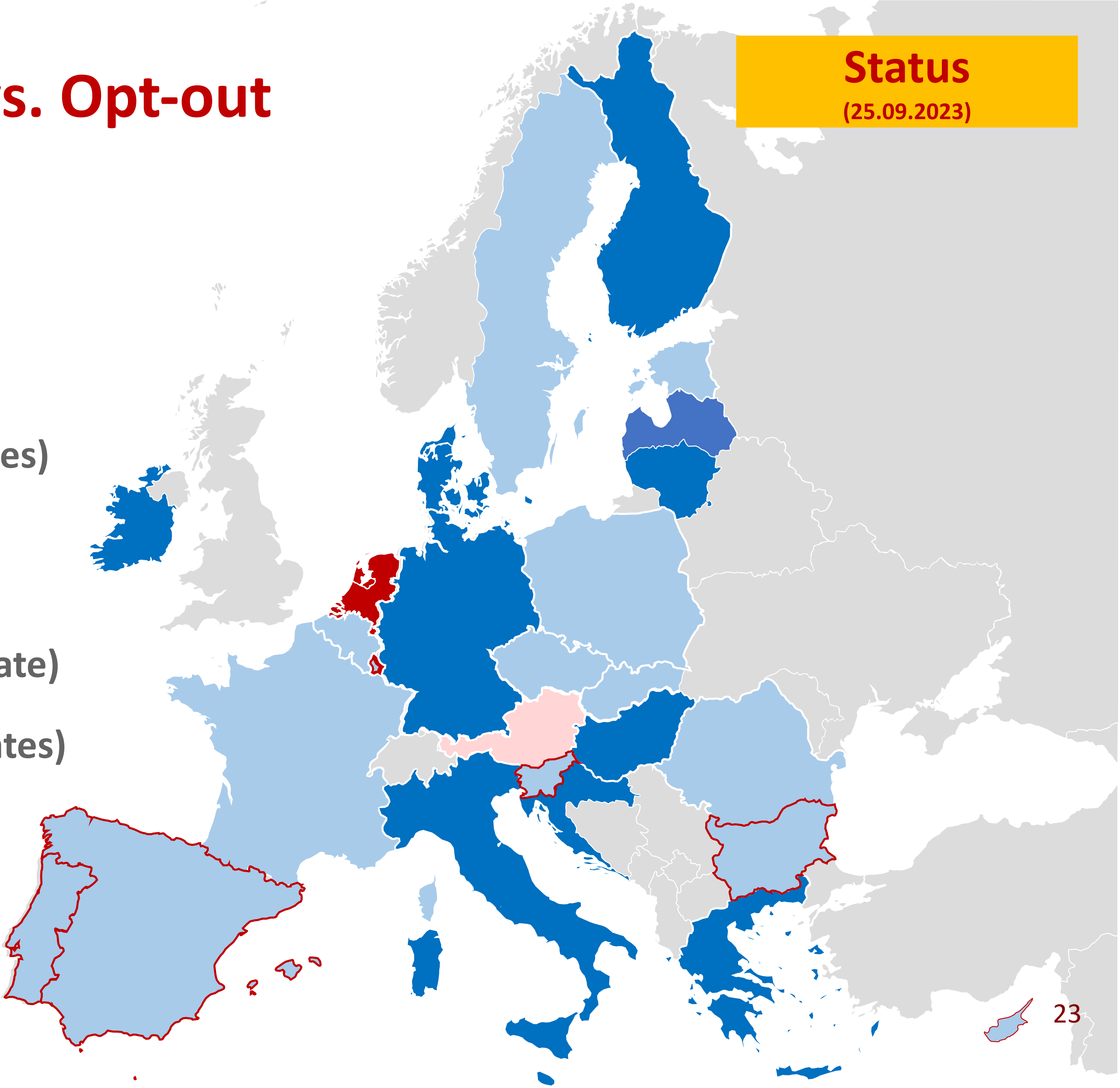
No draft yet (1 Member States)

(initial) Drafts (14 Member States)

Current or intended
(partial) opt-out systems (6 Member States)

Adopted law with opt-out (1 Member State)

Adopted law with opt-in (11 Member States)
Note: In Germany adoption so far only in plenary
of the Parliament



RAD Transposition: EJF Actions

No draft yet

Initial drafts

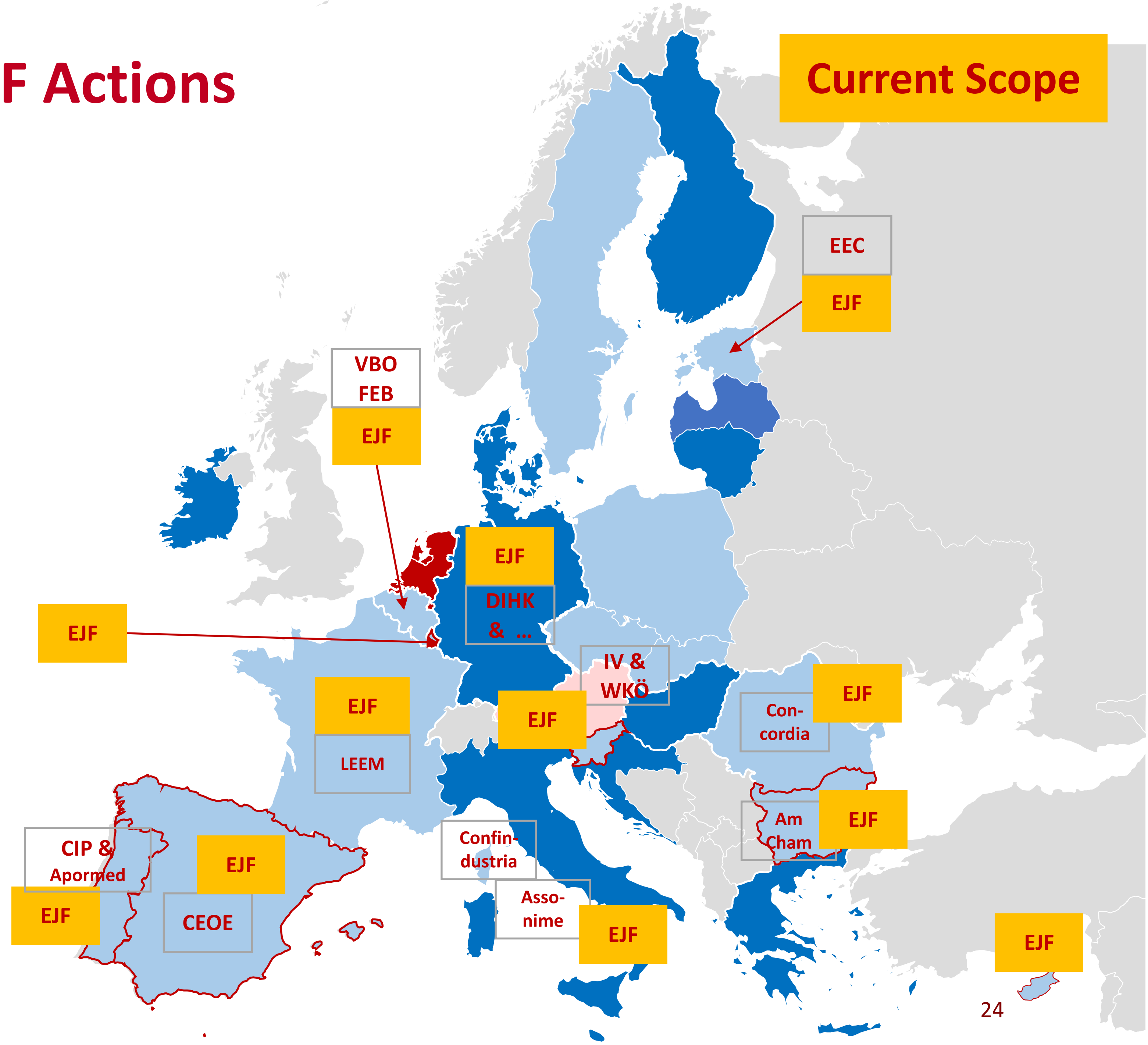
Current or intended (partial) opt-out systems

Adopted law with opt-out

Adopted law with opt-in

Assoc. — Cooperations (selection) with national associations and via EJF members

EJF — Current EJF actions with Governments and/or Parliaments



RAD Transposition: State-of-Play

Status
(25.09.2023)

12	***Adopted:*** **Croatia, Denmark, Finland, Germany*, Greece, Hungary, Ireland, Italy, Latvia**, Lithuania, Malta, the Netherlands**
7	***Parliament Discussion:*** **Cyprus, France***,Luxembourg, Portugal, Romania, Slovakia****, Slovenia**
3	***Government Draft Law:*** **Poland+, Spain+, Sweden**
4	***Preliminary Government Draft Law:*** **Belgium, Bulgaria+, Czech Republic, Estonia**
1	***Government Draft expected in Q4 2023:*** **Austria+**

* Adoption in Plenary on 7.7., formal approval of Federal Council end of September, application approx. October 2023.

** Adoption in Plenary, President must still proclaim the law to become effective

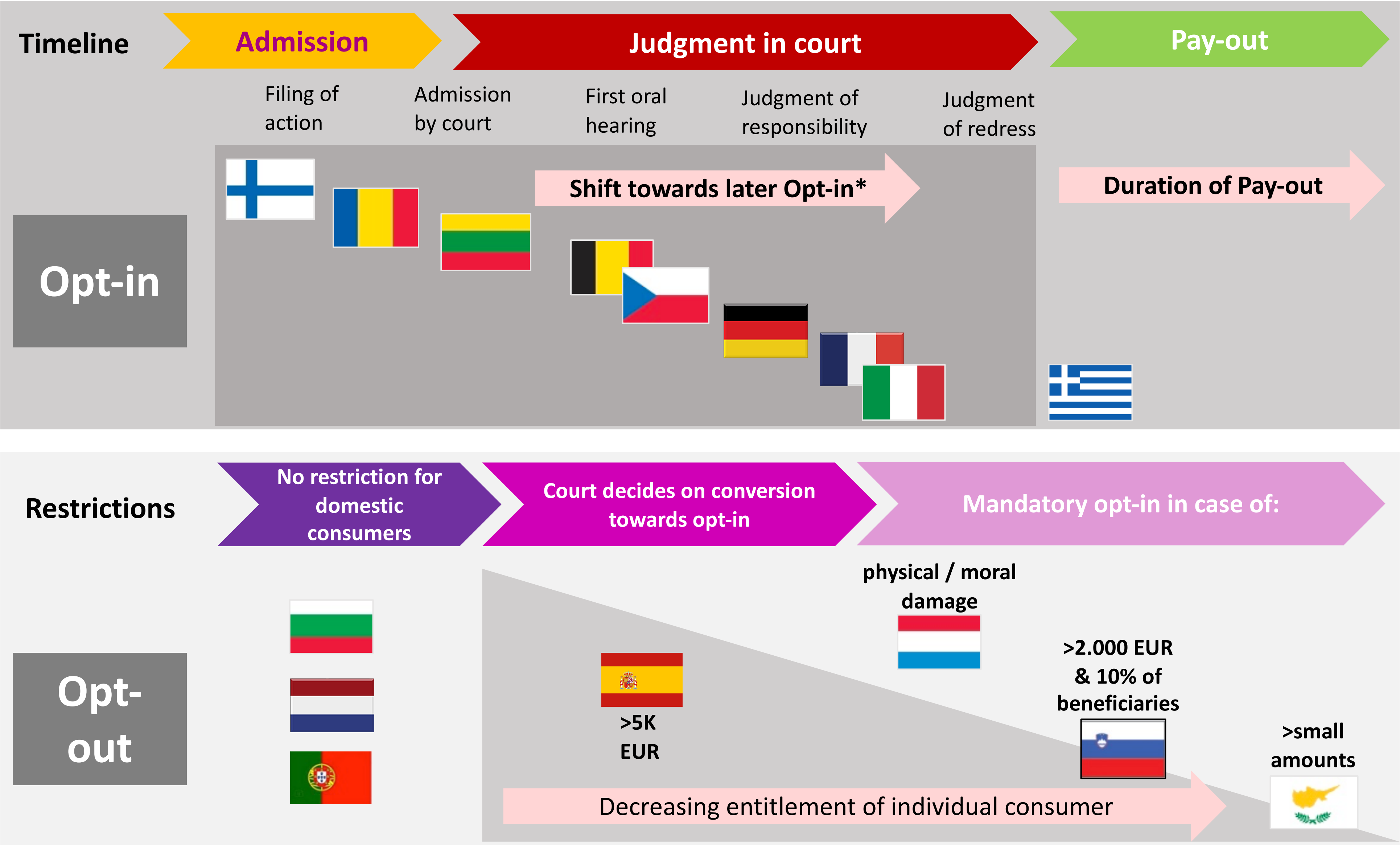
*** Accelerated procedure with only one reading in Parliament, Senate's decision pending.

+ Difficult political environment, partially due to elections

**** Madame President exercised her constitutional rights and returned the Act for further negotiations to the Parliament at the end of May 2023, due to legal objections to the wording. Specially on the opt-in procedure going beyond RAD and being too administrative: at least 20 consumers shall register within 2 months via a notary, including a participation fee, publication at the Commercial Gazette (quite unknown).

Opt-in vs. Opt-out (Zooming in)

* **Flag location: Estimated time until court decision**



Positive procedural factors

(a) Public (digital) infrastructure:
- register for consumer
- court
- pay-out

(b) "Ontario Formula" to avoid court congestion

"old Danish System"
(a) Opt-out possible only for small amounts
(b) Choice of opt-out or opt-in exclusively by (public/state) ombuds entity

RAD Transposition: Potentially Accumulating Risk Factors

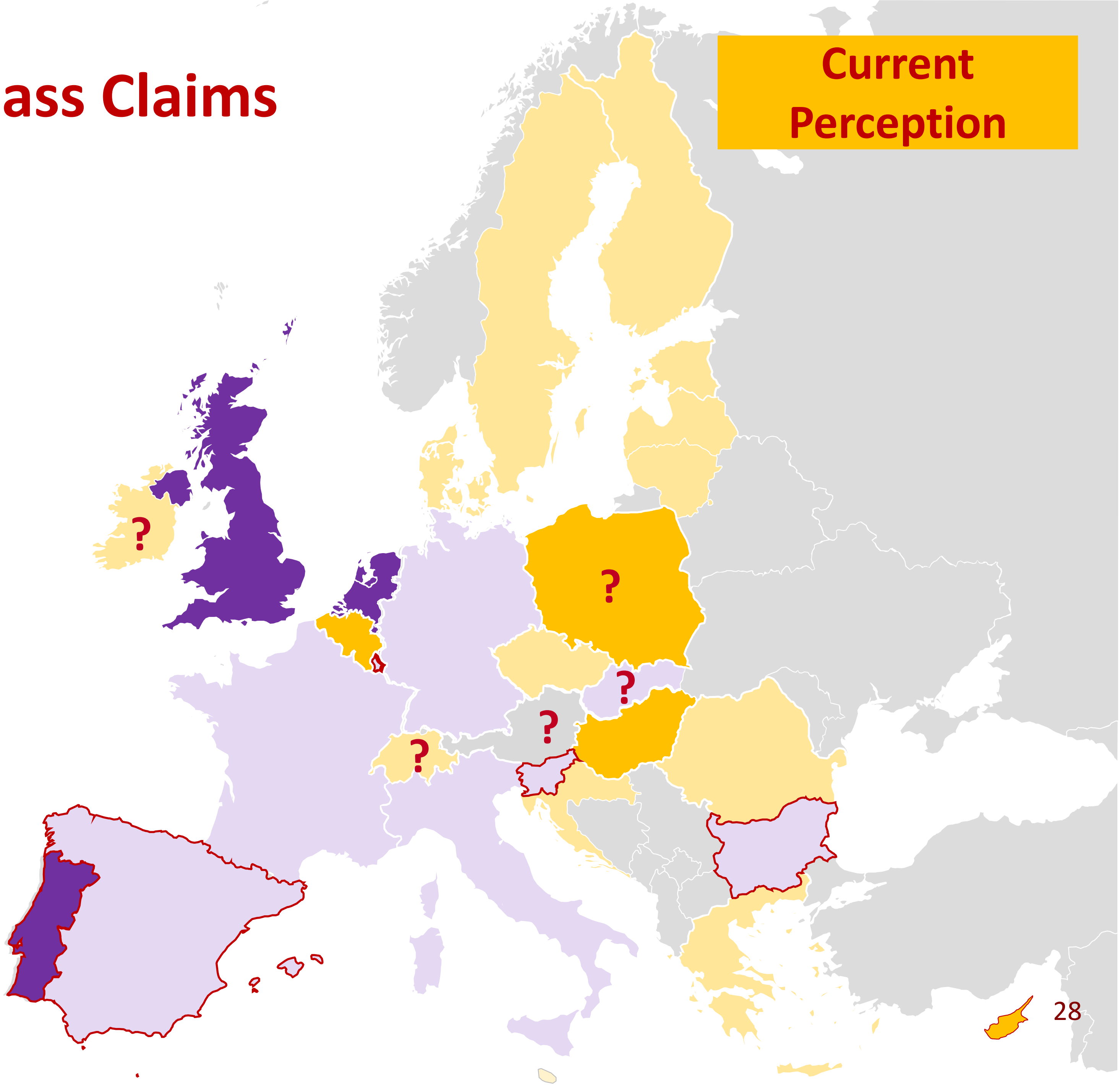
	RAD Admission & Participation	QEs	More Mass Claims Mechanisms	National Scope	Others
	**Opt-out**	**Adhoc**	Assignment Model, WCAM (RAD transposition via WAMCA)	Larger Scope than RAD incl. human rights & climate change	**“Global” reach**
	**Opt-out**	**Adhoc**	(Older) Class Action Law remains	National Scope can go beyond RAD Annex I	**Diverting 60% of unclaimed funds to funds promoting consumer rights**
	**Opt-out**	**Adhoc under old CPA**	In parallel general class action ruling under Consumer Protection Act (CPA), some duplications with new REPCICA		**Contingency fee possible**
	**Opt-out**		(Older) Class Action Law remains	Larger Scope than RAD covering all consumer protection matters (also damage collection of cartels)	
	Late opt-in		Assignment Model	Larger scope than RAD requires (**but no** human rights & climate)	**Legal Tech, debt collectors, loser pays principle undermined**
	Late opt-in	**Adhoc, many QEs**	(Older) Class Action Law remains	Larger Scope than RAD incl. human rights & environment	**Civil Fine in case of lucrative misconduct lack of regulatory details**
	Late opt-in		Coexistence of 2 sets of diffe-rent Collective Redress provi-sions with cross references	Former collective action law with inclusion of environmental matters	**No disclosure of evidence can be required by defendant**

 ? Open: late opt-in, scope, TPLF, but assignment model remains

 ? Choice of opt-in or opt-out (incl. forced opt-in), only one mechanism

EU Risk Landscape for Mass Claims

- Not yet evaluated or hard to judge (AT)
- Lower perceived risk
- Medium perceived risk
- Higher perceived risk
- High perceived risk
- ? Potential changes
- Current or intended (partial) opt-out systems (6 EU Member States)



How to do it properly … more important than ever!

BERUFSPRAXIS | LA PAGE DES PRATICIENS

www.sjz.ch

Verbandsklagen in der Schweiz

Lösung eines Problems oder ein Hammer auf der Suche nach Nägeln?

Dr. iur. Herbert Woopen, Rechtsanwalt, Docteur en droit (Clermont-Ferrand), Köln und Brüssel*

I. Einleitung

Für jemanden, der als einziges Instrument einen Hammer hat, sieht jedes Problem aus wie ein Nagel. Sollte man sich den Blick so verstellen lassen? Stehen der Schweiz nicht mehr Werkzeuge zur Verfügung als ein Hammer?

Die EU hat nach langen Diskussionen, vor allem aus-

Die Schweiz tut gut daran, sich für die Überlegungen zur Behebung von Massen- und Streuschäden mehr Zeit zu nehmen. Technische Entwicklung und rechtsvergleichende Durchdringung der Materie seit der Motion von 2013 deuten darauf hin, dass bessere Lösungen in Instrumenten zu finden sind, die sich gerade in der Schweiz mit ihrer

Source: SJZ, #12, 1.7.2022

Umsetzung der Verbandsklagenrichtlinie in Österreich

Spät, aber innovativ und gründlich?

Herbert Woopen

Der Autor meldet sich aus rechtsvergleichender Perspektive mit einem Zwischenruf zur Umsetzung der Verbandsklagenrichtlinie[1] in Österreich.

Dr. Herbert Woopen, Docteur en droit (Clermont-Ferrand) ist Rechtsanwalt, Vorstand eines Versicherungsunternehmens in Köln sowie Director of Legal Policy des European Justice Forum, Brüssel.

1. Spät

Seit Juni 2023 ist Österreich neben Estland eines der beiden Schlusslichter bei der Umsetzung der Verbandsklagenrichtlinie. Abgeschlossen ist die Umsetzung mittlerweile in Dänemark, Finnland, Griechenland, Irland, Italien, Kroatien, Litauen, Malta, den Niederlanden und Ungarn. In der Slowakei gab die Präsidentin des Landes das bereits im Mai 2023 verabschiedete Gesetz an das Parlament zurück, um es nachzubessern. Auch in den Parlamenten von Deutschland,[2] Frankreich, Lettland, Luxemburg, Rumänien und Slowenien ist das jeweilige Umsetzungsgesetz noch nicht vollständig angenommen oder ausdiskutiert. Während die Re- soeben beschlossen hat, erneut noch nicht in die parlamentarische Erörterung der Vorlage des Bundesrats zum kollektiven Rechtsschutz einzutreten: Die vor einem Jahr angeforderte Regulierungsfolgenabschätzung und die rechtsvergleichende Studie sollen erst einmal durch Befragung von direkt betroffenen Unternehmen validiert werden. Auch sollen mögliche Sicherheitsmaßnahmen zur Verhinderung von missbräuchlicher Nutzung der Sammelklage-Instrumente geprüft werden.[3]

2. Doch zunächst: Was nicht gewollt ist

Es ist *cantus firmus* bei den europäischen Institutionen wie auch bei den Mitgliedstaaten, dass man

Source: ZVERS, 4/2023

How to do it properly … Regulatory Redress (IT)

Banca d'Italia Redress Cases

Since 2012, the Bank of Italy has initiated seven proceedings pursuant to art. 128-ter of the Italian Consolidated Banking Law, addressed to seven different regulated entities.

Impact

*In **four** cases, the **proceedings** had been **filed before the issuance of an order to redress** because the regulated entity involved promptly refunded their customers, or consented to provide the Bank of Italy with detailed information about their initiatives **(granted refund of 692,345 EUR).***

*In 2014, the Bank of Italy has issued **two** redress orders concerning **mistakes in the calculation** of interest **(total amount of 118,506,000 EUR)**.*

The Bank of Italy, when discharging its supervisory duties, usually asks regulated entities to adopt initiatives in order to refund customers for sums unduly paid, even without initiating a proceeding pursuant to art. 128-ter of the Consolidated Banking Law.

Impact

*In 2015, refunds stemming from **informal requests** totalled* **around 65.000.000 EUR !**

Source: Christopher Hodges, Stefaan Voet, Delivering Collective Redress, New Technologies, Hart Publishing 2018, page 176.

How to do it properly … Public Consumer Ombudsman (DK, FI)

The Nordic Model

Denmark, Finland, Norway and Sweden each have a public official responsible for enforcement of consumer law called a Consumer Ombudsman who is the principal national enforcement officer of consumer law, with power to initiate prosecutions for breaches of the national Marketing Practices Act, and usually brings cases in the Market Court. The Nordic Consumer Ombudsmen do not have a conflict of interest by the potential to benefit from the action.

> *In **Finland**, the application for prosecution can only be made by the Consumer Ombudsman, and not by a class member or anyone else. The reason for this restriction was 'to diminish suspicions concerning the possible misuse of the new act' and 'to ensure the actions could not be taken for the purpose of blackmail or damage'. In **Denmark**, the Consumer Ombudsman has strong powers, but is subject to a 'principle of negotiation', must 'seek by negotiation to influence traders to act in accordance with good market practices'.*

Example

In DK, many customers were unlawfully charged for so-called 'extra-entries' in a telephone directory. When challenged by the Consumer Ombudsman, no contractual relationship could be shown. Settlement of 2009 comprised all consumers unlawfully charged including commitment to send letter to all customers affected, enabling also those not having complained to claim compensation.

Source: Christopher Hodges, Stefaan Voet, Delivering Collective Redress, New Technologies, Hart Publishing 2018, page 160, 166.

How to do it properly … Private Ombuds Entities (DE)

Open-ended Real Estate Investment Funds 2012: Legal action for damages according to the German Capital Markets Model Case Act („KapMuG“) based on prospectus and sales issues.

Ca. 1,000 claims on behalf of private investors were filed by a law firm:

- ca. 250 cases where private investors had a legal protection insurance went to **court** and
- ca. 750 cases where private investors had **no** legal protection insurance went to the **Ombudsman Scheme for Investment Funds**

basically to achieve a suspension of the period of limitation. The ombudsman decided to **bundle the 750 cases** (with reference to Civil Procedure Regulation) as the complaints where identical in terms of a few legal questions.

Impact

Ombudsman: *issued a final proposal* ***within 6 months*** *after having received the complete complaint files. The Ombudsman Scheme for Investment Funds calculated the* ***costs of the internal procedure (750 cases)*** *which had to be born by the investment management company on real efforts.*

Entire court procedure (by comparison): *took much longer, was substantially more expensive, and not least the* ***German Federal Court of Justice finally came in essence to the same conclusions*** *as the ombudsman. The court cases were closed in 2018, i.e.* ***around six years later****.* ***The costs (court & lawyers)*** *had been paid mainly by the legal protection insurers of the claimants.*

Source: Interview with Timm Sachse, Head of Ombudsman Scheme for Investment Funds, on 23rd of May 2019 in Berlin.