Global Class Actions:

State of play

2025

Hogan Lovells

What's inside

Overview.

At Hogan Lovells, our Global Class Actions Practice is uniquely positioned to handle the most complex and high-stakes class action litigation across jurisdictions. With a cohesive team spanning the Americas, Europe, and Asia-Pacific, we deliver seamless, coordinated strategies to help global businesses navigate the challenges of cross-border class actions.

Craig A. Hoover
Partner and Head of Global Class Actions practice
Washington, D.C.

Dr. Matthias M. Schweiger
Partner, and Deputy Head of Global Class Actions practice
Munich

Our team combines deep local knowledge with global reach, enabling us to address jurisdiction-specific nuances while maintaining a unified defense strategy. We have extensive experience managing class actions in diverse areas, including; competition and antitrust, consumer protection, product liability, data privacy, securities, and ESG-related claims. Whether defending auto manufacturers and life sciences and health care companies through data-related disputes, or representing financial services firms facing regulatory challenges, we bring unparalleled industry-specific insights to every matter.

Our approach emphasizes collaboration across regions, ensuring our clients benefit from the collective expertise of a global team that understands both the legal and commercial implications of class actions. From pre-litigation risk assessment to trial, appeal, and settlement, we are equipped to manage the full lifecycle of class action disputes, no matter where they arise.

At Hogan Lovells, we recognize that class actions are business-critical events. Our proven ability to handle multijurisdictional matters with precision and efficiency makes us a trusted partner for global organizations facing these challenges.

The United States.

Class Action Regime

Modern class action litigation began with the United States' 1966 adoption of amendments to the Federal Rules of Civil Procedure which more efficiently allowed for claims to be pursued, in appropriate circumstances, on behalf of other similarly situated individuals. In the intervening years, the class action device has flourished in the U.S., and has become a leading source of litigation risk to businesses of all types. (Note: the class action device is distinct from, and presents different considerations than, other types of multi-party litigations in the U.S., such as mass actions.)

In the federal system, a specific federal rule (Federal Rule of Civil Procedure 23) governs class actions. In addition to the dominant federal class action system, most U.S. states have an analogue to Rule 23 or have, by common law, adopted similar rules. Subject to certain exceptions, U.S. plaintiffs can attempt to bring almost any type of legal or equitable claim as a putative class action, and classes can be certified (and litigated) for damages, injunctive relief, or even solely to resolve certain common legal or factual questions. Common examples of litigations pursued as putative class actions include actions under the federal and state securities laws, antitrust (competition) claims, and consumer and product-based claims. There is a substantial body of case law, commentary, and analysis addressing these and other types of class action litigation.

The prevalence and arguable abuse of the class-action device has generated regulatory scrutiny. To address such perceived abuses, the U.S. Congress adopted in 2005 a law known as the Class Action Fairness Act ("CAFA"). Among other things, CAFA made it easier for parties to direct class action cases to federal courts—which have been perceived as more attractive forums for parties seeking more rigorous application of the requirements for class treatment and related issues—as opposed to state courts. Specifically, CAFA gives federal courts jurisdiction over cases with at least $5 million in controversy, 100 or more plaintiffs, and at least one plaintiff who is a citizen from a different state from any defendant.

Putative class cases can also be, and regularly are, settled on a class-wide basis (subject to judicial supervision), either before or after a court certifies a class for litigation purposes. Courts are materially more willing to certify a class for settlement purposes than for litigation purposes. Because class-wide settlements bind absent class members, their provisions must be approved—and can be modified by—courts, who are tasked with ensuring that substantive and procedural requirements have been met. The potential abuse of the class action settlement device, in the face of insufficient supervision by courts, has been and remains the subject of various proposals for reforms.

Multidistrict Litigation

Distinct from the class action device, U.S. federal law contains a mechanism—the multidistrict litigation, or MDL process—in which individual civil cases filed in federal courts across the country can be consolidated for certain purposes into a single federal district court for pretrial purposes.

MDLs are typically created when there is a sufficient volume of individual civil actions involving similar issues, parties, or claims - ranging from circumstances where a handful of such cases are consolidated to MDLs where thousands of similar cases are housed. MDLs may involve circumstances in which a large number of plaintiffs file lawsuits against a single company or several similarly situated companies regarding the same or similar alleged conduct. While the cases in the MDL are similar (and may individually be class actions), they are not the same as class actions because plaintiffs can claim relatively different injuries from one another.

A specialized federal panel called the Judicial Panel on Multidistrict Litigation (JPML) decides whether a set of cases should be combined into an MDL. The panel consists of seven federal judges appointed by the Chief Justice of the U.S. Supreme Court, and they meet periodically to decide which cases should be consolidated. The panel can act on its own initiative or in response to a motion from the parties involved. The panel decides whether a MDL will be created, in what jurisdiction it will be located, and what judge will oversee it.

When a MDL is created, the assigned MDL district court judge manages all pretrial motions and proceedings, including civil discovery and, in most circumstances, pretrial dispositive motions. Indeed, that is the logic underlying the MDL process: to make pretrial proceedings more efficient from a systemic perspective. Once the pretrial phase concludes, the remaining cases are typically remanded to the originating courts for trial as appropriate. In some circumstances, the parties may waive the right to have a case remanded.

Given the broad geographic scope and diverse nature of MDL plaintiffs, the court typically appoints a Plaintiffs' Steering Committee. This committee works alongside defense counsel to manage strategy, handle pretrial motions, and coordinate other procedural matters.

If the cases do not settle during the pretrial phase, they often proceed to so-called bellwether trials. In these trials, both sides select specific cases that will serve as "test" cases to predict how the remaining cases might be resolved. The outcomes of these bellwether trials often play a significant role in shaping settlement negotiations for the rest of the cases in the MDL. However, not all MDLs involve bellwether trials – they are part of the broad case management discretion accorded to MDL judges.

Class certification/commonality

Because class actions are an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only, class treatment is not awarded as of right. Rather, a putative class representative must affirmatively demonstrate that the class action complies with the relevant portions of Federal Rule of Civil Procedure 23 (or its state-law analogues), with those requirements varying depending on what type of relief (damages, injunctive measures, or otherwise) is sought.

Broadly, Rule 23(a) requires plaintiffs to show that (1) the proposed class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims and defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. These prerequisites are often referred to as numerosity, commonality, typicality, and adequacy.

Numerosity requires examination of the size of the class; in some U.S. jurisdictions, a class of around at least 40 individuals is presumed to be sufficiently numerous. **Commonality** requires the plaintiff to show that the putative class has at least one question of law or fact in common. This is a low bar. **Typicality** requires a showing that the class representative's claims are sufficiently similar to those of other class members. **Adequacy** addresses, among other things, potential conflicts of interest between the class representative and the absent class members.

If a plaintiff can satisfy all these requirements they must also comply with at least one subsection of Rule 23(b)(1), (2) or (3). Rule 23(b)(2) and (b)(3) are the two most used. Rule 23(b)(2) applies when a defendant has taken action or refused to act on grounds that apply generally to the class as a whole and the plaintiff is seeking final injunctive or declaratory relief that would affect the entire class of individuals (e.g., actions vindicating civil rights).

Rule 23(b)(3) applies to suits seeking money damages. In such cases, plaintiff must show that (1) common questions of law or fact **predominate** over any individualized inquiries, and (2) that a class action is **superior** to other available methods for fairly and efficiently adjudicating the controversy. Predominance requires the court to examine whether the class can use common evidence to make a prima facia showing of the essential elements of its claims. If the evidence to make such a showing will vary from class member to class member, predominance will not be met. Superiority involves consideration of four factors: (1) whether class members have an interest in controlling their own litigation; (2) whether litigation already exists concerning the controversy; (3) the desirability of concentrating claims in one judicial forum; and (4) potential problems that could arise in managing the case as a class action.

Judges have considerable discretion in balancing and applying these tests, and litigation on these factors (and their various sub-elements) is hotly contested, involving expert testimony and standalone briefing.

Class member participation (opt-in/opt-out)

U.S. class actions can be pursued on an opt-in or opt-out basis, meaning once a class is certified, members can either choose to join (opt in) or are part of the class by default and need to actively choose not to participate (opt out). Opt-out classes make up the bulk of U.S. class action litigation. The relevant rules and precedents provide that absent class members must be accorded adequate notice of the action and, in class suits that seek predominately money damages, an opportunity to opt-out of the litigation. This notice and opportunity to opt-out is provided at least once, shortly after the action is certified for class treatment under Rule 23(a) and (b) and, if the parties reach a post-certification settlement, may also be required before the Court approves the settlement agreement and enters judgment. Actual notice is not required; rather, reasonable steps must be taken to contact putative class members, subject to court approval. If absent class members do not opt out, they will be bound by the outcome of the litigation.

Right to Appeal

A party's options to appeal in the United States will vary between the federal and state systems.

In the U.S. federal system, parties are subject to the final judgment rule, meaning that they typically must wait until a case is complete before they can appeal the trial court's decisions. A court's decision to grant or deny class certification is generally considered a non-final judgment that may not be appealed as of right. However, a party aggrieved by a court's class certification decision may seek discretionary interlocutory review pursuant to Federal Rule of Civil Procedure 23(f). A party seeking such review must seek permission from the appellate court to have their appeal heard, and in doing so must explain why their appeal should be successful. Federal appellate courts have broad discretion to grant or deny a petition seeking interlocutory appeal of a class certification decision, and may consider factors such as whether the appeal implicates new or unsettled questions of law, whether the district court's decision was erroneous, and/or whether the denial of class certification would effectively terminate the litigation. There is no as-of-right stay of litigation while interlocutory appellate review is pursued; a stay of proceedings must be requested and granted by either the trial or appellate court. In lieu of or in addition to seeking interlocutory review, a party may also move for decertification of a class or for reconsideration, both of which would be reviewed by the original trial court.

In the state court system, the appellate rules vary widely by state. Some states have similar appellate processes as the federal system and do not provide appeals of class certification decisions as of right. In other states, decisions on class certification may be appealed as of right under certain circumstances. One example is California, where an order denying class certification would be appealable as of right but an order granting class certification could only be challenged via interlocutory appeal.

Litigation Funding

Class action plaintiffs in the United States may receive outside funding or financial assistance to file and maintain their lawsuits. Such assistance might come from financing provided by a third-party litigation finance company, which is typically a private firm that obtains funds from investors and then receives a portion of the court's award or settlement if the plaintiffs win. If the plaintiffs are not successful, then the third-party funder typically receives nothing. Whether plaintiffs have received outside funding or financial assistance does not by default need to be disclosed throughout the course of litigation. Some courts have taken steps to require disclosure, and in some circumstances, defendants can obtain this information through discovery. Concerns have been raised that litigation funding may improperly influence plaintiff decisions and strategy in litigation.

In other circumstances—or in conjunction with outside litigation funding support—a plaintiffs' lawsuit might be funded by their own attorneys on a contingency basis. The United States has a notably large and sophisticated plaintiffs' class action bar that pursues and funds its own class action lawsuits, based on its own assessment of the expected risks and rewards of any given case. Class action plaintiffs' counsel recoup their "investment" of time and expenses if and when a case settles or proceeds to judgment. In the former circumstances, the fee award is subject to court supervision and approval, based on a number of factors. In the latter, the fee award is usually a portion of the plaintiffs' recovery, as determined by their retainer agreement and subject to other considerations (such as whether the substantive legal claims at issue provide for fee-shifting, different than the normal "American Rule," a legal principle that states that each party to a lawsuit pays their own attorney fees).

Connect with us

Washington, D.C.

Craig A. Hoover
Partner
Washington, D.C.

Adam Levin
Partner
Washington, D.C.

Carrie DeLone
Partner
Washington, D.C.

Rebecca Mandel
Partner
Washington, D.C.

New York

Phoebe Wilkinson
Partner
New York

Ben Fleming
Partner
New York

California

Michael Maddigan
Partner
Los Angeles

Trent Norris
Partner
San Francisco

Florida

Allen Pegg
Partner
Miami

The United Kingdom (England & Wales)

Regime overview

There are a number of routes for collective action in England & Wales[1]. Different procedural options are available depending on factors such as the nature and similarity of the claim. The most common mechanisms are as follows.

Group Litigation Orders (GLOs): GLOs enable the collective case management of multiple individual claims involving common issues of fact or law. It is an 'opt in' procedure whereby every individual claimant must be named on a claim form and then listed on the 'group register' if they meet the criteria for the group. The court appoints a single managing judge and all cases are transferred to the High Court. The cases are managed collectively, which can include appointing lead claimant solicitors, using generic pleadings, provisions for advertising the GLO, and a cut-off date by which claimants must have joined the GLO. Decisions in respect of the common issues bind all claimants on the group register. There is no minimum or maximum number of claims needed, but there must be sufficient claims for the court to consider that a GLO is the most efficient and cost-effective way to manage the group.

[1] Within the United Kingdom, England & Wales, Scotland and Northern Ireland are distinct jurisdictions with their own litigation procedural rules. This summary discusses collective action procedures in England & Wales only.

Representative actions. Representative actions enable one or more claimants to bring a claim on behalf of a larger group with the "same interest" in the claim. It is an opt-out procedure and the judgment binds all represented parties. The need for claimants to have the "same interest" has been strictly construed by the courts, which has to some degree limited the utility of this mechanism.

Collective Proceedings Order (CPO) class action under the Competition Act 1998. These proceedings are available for collective actions via a CPO before the Competition Appeal Tribunal (CAT) for follow-on or stand-alone competition claims. They are a "true" class action, normally brought on an 'opt out' basis by a representative, and must pass a certification process to proceed collectively.

'Joint' claims. Multiple individual claims can be issued and managed together if they make related allegations against the same defendant. This process involves using a single claim form and is more suitable for smaller groups of claimants as it does not involve formal group litigation procedures like a GLO, but are effectively managed by the court using its wide case management powers in the same manner as a GLO but on an ad hoc basis.

Test cases. Where a number of cases raising similar issues have been issued, the court may decide to progress a small number as 'test cases' while the others are stayed. The decisions in test cases establish a precedent that can be applied to attempt to resolve the wider group of individual claims that share the similar issues. This approach again sees the court use its wide case management discretion to identify the most efficient way to resolve the group without using a formal collective procedure.

Rules for commonality of claims/class certification

The requirement of commonality varies depending on the procedure pursued.

GLOs. Under a GLO the claims must share common or related issues of fact or law. These issues must be sufficiently specific and material to justify collective management. For instance, claimants may allege all claimants have similar claims arising from a shared set of circumstances, such as the use of defective products or exposure to harmful practices. The court ensures that only genuinely common issues are addressed collectively, while individual aspects of the claims are dealt with separately if necessary. However, the common issues do not act as a substitute for detailed pleadings.

Representative actions. Representative actions require the claimants to demonstrate the "same interest," which historically has been interpreted strictly. The "same interest" means that all members of the group must be affected in a sufficiently similar way by the issue at hand, which is inevitably a higher bar than the need for issues to be 'common' in a GLO. This requirement has limited the use of representative actions in practice, as differences in damages, defenses, or other case-specific factors often prevent claims progressing under this mechanism. However, courts are increasingly exploring a more flexible interpretation, which may allow broader use of this mechanism in future.

CPO class action. For CPOs before the CAT, commonality is assessed during the certification process. The tribunal considers whether the issues raised by the claims are suitable for collective resolution, as they raise the same, similar or related issues of fact or law. Common issues must be present, but they do not necessarily need to be more prevalent than non-common issues. A key factor is the courts assessment of the balance between the efficiency of group resolution against the individual rights of claimants.

'Joint' claims. In cases involving joint claims, they must have a sufficiently related legal and/or factual elements for informal collective management to be the most efficient approach. The court has a wide case management discretion and there is no formal test for commonality.

Test cases. Similar to 'joint' claims, the decision to use test cases is made by the court using its wide case management discretion. The court must be persuaded that the selected cases raise issues that are sufficiently representative of those in the remaining claims. This approach is particularly effective where an issue is clearly defined and widely shared, but the remaining vary in scope or complexity.

Class member participation (opt-in/opt-out)

Member participation varies depending on the procedure.

GLOs. GLOs operate strictly on an opt-in basis, meaning claimants must actively decide to participate by issuing a claim and being added to the group register. This can limit the size of the claimant group to a smaller proportion of those that could join, as individuals must take proactive steps to participate.

Representative actions. Representative actions function on an opt-out basis, with all individuals who share the "same interest" automatically included unless they expressly choose to withdraw.

CPO class action. Class member participation can be either opt-in or opt-out basis, depending on the application made and the certification decision by the CAT (which is free to order an opt-in class even where an application is made on an opt-out basis). The decision as to which is most appropriate is made on a case by case basis depending on the specific circumstances of the case.

'Joint' claims. Joint claims are opt-in on the basis that claimants file their claims together in a single claim form. There is no formal process for deciding participation.

Test cases. Test cases are opt-in on the basis that the claimants bringing both the test cases and the wider cases for which the test cases are representative need to have issued their own proceedings.

Right to appeal

In all cases, the decision to proceed under one of the collective action mechanisms described above is a case management decision. Case management decisions are appealable, however, only in limited circumstances given the wide discretion the court has.

Generally, the appeal court will not interfere with case management decisions where the correct principles have been applied and only the appropriate matters have been taken into account, unless the decision is so plainly wrong that it must be regarded as outside the "generous ambit" of the court's case management discretion.

Litigation funding

Litigation funding is widely available in the UK and very commonly used by claimants to fund many of the collective action mechanisms described above, including GLOs, representative actions and CPO class actions. The market has grown significantly in recent years, both in terms of the amount of capital available and the number of active funders. Funders are increasingly backing a broader range of claims and this expansion is contributing to an increase in the number of collective actions being brought.

Connect with us

London

Matthew Felwick
Partner
London

Valerie Kenyon
Partner
London

Ivan Shiu
Partner
London

France

Regime overview

Class actions *"à la française"*, i.e. with their own special features, were introduced into French law by Law no. 2014-344 of 17 March 2014. In subsequent years, several extensions in scope were adopted until there was a plan to reconsolidate the various regimes of French class actions into a simplified and more unified regime. The French system of class actions was thus expected to be thoroughly modified, as per a legislative bill in December 2022 filed at the French National Assembly. However, the French Senate disagreed on the amendments and the text was set aside.

From now on, the French government intends to focus on the (belated) transposition of the Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers, without adding any more far-reaching changes to the existing regime. A Government Bill was thus introduced on 31 October 2024. It will likely not be debated in public session in the National Assembly before early 2025.

Class actions in France are currently available in the fields of consumer protection, discrimination, environment, health products and personal data.

Class actions may be initiated to:

- put an end to the defendant's failure to fulfill its statutory or contractual obligations;
- obtain compensation for the loss suffered[2].

[2] A Government Bill tabled on October 31st, 2024 which has not yet been passed provides for compensation for all damages - bodily, material or moral - regardless of the field concerned by the action.
[3] The Government Bill tabled on 31st October, 2024 removes this condition.
[4] The Government Bill tabled on October 31st, 2024, which transposes Directive 2020/1828, will open up legal standing to qualified entities from other Member States, by means of a cross-border approval procedure set up in each Member State in accordance with the principle of mutual recognition. A list published in the Official Journal of the European Union will identify the organizations that have such authorization

In consumer law, class actions are subject to a specific regime. It allows only for the compensation of losses, and only those resulting from a material damage.

Except in the case of health-related group actions, before bringing the class action, the plaintiff must give prior formal notice to the defendant to cease its wrongful actions or to compensate the damage suffered. The action is inadmissible until four months have lapsed from receipt of this formal notice (six months when in relation to a claim for discrimination)[3]. The filing of the class action interrupts the statute of limitation for collective proceedings, as well as the statute of limitation for individual actions for compensation based on the same facts as those underlying the class action.

There are two successive stages in French class actions:

- The Court first rules on the principle of the defendant's liability. If the defendant is held liable, the Court must define the group of persons in respect of whom the defendant is liable and set the criteria for inclusion in the group. The decision must also determine the losses that may be compensated for each of the categories of persons making up the group. Finally, the decision must set the time limit within which persons who meet the criteria and wish to rely on the judgment on liability may join the group to obtain compensation for their losses.
- The judgment can then be enforced to obtain compensation for individual damages. The Court orders appropriate publicity at the defendant's expense to inform people likely to have suffered losses as a result of the infringement giving rise to liability. Difficulties in enforcing judgments on liability in consumer law class actions must be referred to the Judge in charge of procedural matters.

Rules for commonality of claims/class certification

French national law provides for a class action procedure when "several persons placed in a similar situation suffer damage caused by the same person, having as its common cause a breach of the same nature of its legal or contractual obligations."

The victims must be in a similar legal situation with regard to the infringement allegedly committed by the defendant. This does not mean that their individual situations must be identical, particularly with regard to the value of the loss suffered.

In France, class actions can only be brought by:

- authorized organizations (in consumer law matters, only authorized organizations may bring class action); and/or
- organizations that have been duly registered for at least five years, and whose statutory purpose includes the defense of interests that have been affected; and/or
- representative trade union organizations at company, branch or national level when related to a discrimination or data breach claim.

The above-mentioned qualified organizations can take legal action to require compensation for individual losses suffered by several victims. The losses must be caused by the same professional and have a common origin[4].

The qualified organization must be mandated by at least two of the consumers concerned. These individual cases of these consumers are presented as the basis for the class action. This means that procedurally speaking the claimant is an organization meeting certain criteria, and not plaintiffs themselves even though a few individual plaintiffs have to be named in the claimant brief.

Class member participation (opt-in/opt-out)

Class actions in France are based on explicit adhesion, i.e. an opt-in system. Membership to the group is subject to the deadlines and conditions set by the judgment ruling on the defendant's liability. Joining the group requires filing a request for compensation, which must notably contain the full name and address of the person concerned. It is necessary to prove that the criteria for inclusion in the group have been met.

By joining the group, the consumer mandated the qualified organization to act on their behalf to seek enforcement of the judgment on liability against the defendant company. Thus, the organization can then carry out all procedural acts on all members' behalf in order to obtain compensation and falling within the scope of the class action, as well as exercise appeal rights.

If an individual fails to join the group within the time limits and in the form specified, his/her claim for compensation will be inadmissible, but only in the context of the class action. In other words, individual plaintiffs keep the right of initiating individual claims against the same defendant and for the same cause of action.

For defendants residing in France, the class action must be brought before the judicial court where the defendant has its domicile. For defendants residing outside France or having no known residence, exclusive jurisdiction is conferred to the Paris judicial court.

Once the court has ruled on liability, the procedure leading to a decision on compensation for damages can be of two types:

- Global agreement concerning all members can be authorized by the Court at the request of the claimant when the evidence produced and the nature of the losses allow it. This procedure is designed to deal with the simplest cases, i.e. those where the amount of damages is known at the time of the liability judgment or can be quantified. It implies a negotiation between the qualified organization and the defendant to determine the amount of the compensation for the members of the group. The agreement must then be referred to the Court for approval. The Court may refuse to do so if it considers that the interests of the parties and the members of the group are not sufficiently protected in the light of the judgment on liability. In such case, the Court will refer the matter back to negotiation.
- Compensation may also follow an individual procedure. Members of the group who meet the criteria and have joined the proceedings submit a claim for compensation, and the defendant pays individual compensation for the losses suffered.

Right to appeal

The judgment on liability may be subject to appeal under a fast-track procedure.

Litigation funding

Under the current legal regime for class actions, it is the qualified entity that bears the costs of the proceedings.

French law does not yet regulate third-party funding, so that it is neither organized nor forbidden as a matter of principle.

Note: Article 20 of Directive (EU) 2020/1828 provides that Member States must facilitate access to justice for entities (legal aid) and ensure that the costs of proceedings are not dissuasive by limiting the applicable fees or providing for public funding. The bill tabled by the French Government on 31 October 2024 does not appear to include such provisions.

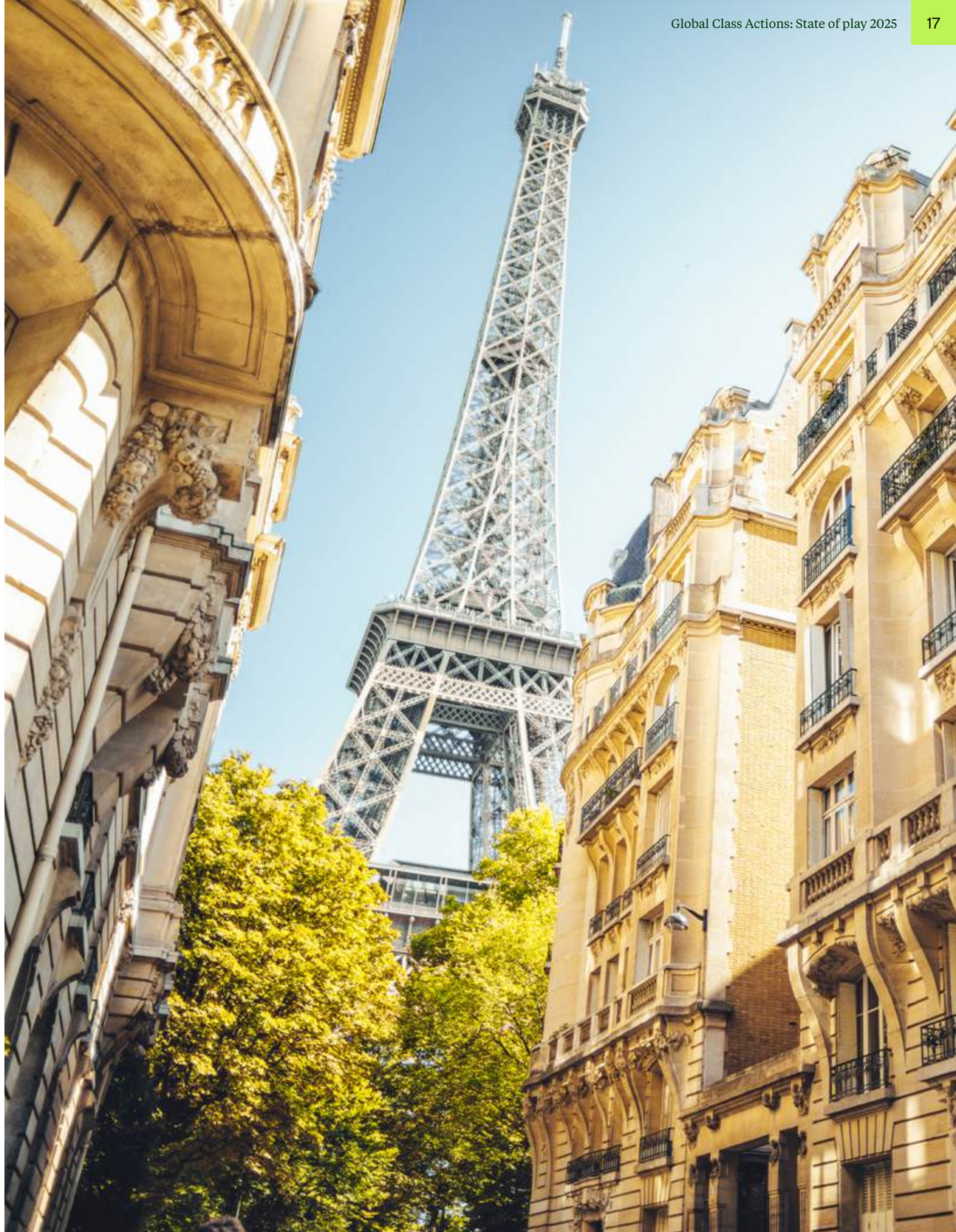
However, Article 10 of the Government Bill does provide for a stricter framework for the funding of qualified entities and class actions, in order to prevent conflicts of interest. The Bill thus intends to regulate third-party funding in order to guarantee greater transparency and the absence of conflicts of interest. The absence of conflicts of interest will also be one of the criteria for cross-border approval as an authorized organization (as mentioned in question 3).

Connect with us

Paris

Christelle Coslin
Partner
Paris

Nicolas Rohfritsch
Senior Associate
Paris



Germany

Regime overview

Germany has been late to the game, but is trying to catch up with other European jurisdictions and will eventually see more collective actions for redress. Before the implementation of the Representative Action Directive (EU) 2020/1828, a procedural mechanisms for collective action in the interest of consumers existed in Germany since November 2018, enabling qualified entities to request declaratory rulings in the interest of consumers (*Musterfeststellungsklage*) and a model procedure for certain disputes concerning capital market instruments existed since 2005 (*Kapitalanleger-Musterverfahren*). Now that the Directive has been implemented, Germany added actions for redress in the collective interest of consumers (*Abhilfeklage*) to the collective action options.

An action for an injunction also already existed, which was and is regulated in the law against unfair competition (Gesetz gegen den unlauteren Wettbewerb (UWG)) and the Law on injunction (Unterlassungsklagegesetz (UKlaG)). The European Directive on Representative Actions, adopted at the European level on 4 December 2020, stipulates that each member state must provide consumers with representative actions in the form of redress and injunctive relief. Since the Directive (EU) 2020/1828 aims at minimum harmonization, member states may continue to use existing and possibly more far-reaching instruments of collective redress. The German provisions on model declaratory actions and actions on injunction did not fully meet the requirement of the Directive (EU) 2020/1828, since according to Art. 7 (4) (b) of the Directive on Representative Actions a redress procedure is required.

The Directive (EU) 2020/1828 was implemented by amendments to the law against unfair competition (Gesetz gegen den unlauteren Wettbewerb (UWG)) and the Law on injunction (Unterlassungsklagegesetz (UKlaG), the Code of Civil Procedure (ZPO), and – most importantly the new consumer rights enforcement act (Verbraucherrechtdurchsetzungsgesetz (VDuG)). The VDuG was adopted by the Federal Parliament on 7 July 2023 and entered into force on 13 October 2023. This was the first time an action for collective redress was introduced in Germany. The Musterfeststellungsklage was kept as an alternative option, now regulated in the VDuG, and can still be used to seek a collective declaratory judgment regarding the existence or non-existence of factual or legal prerequisites for the existence or non-existence of claims or legal relationships between a consumer and a trader. Actions for redress and for model declaratory rulings are possible for all civil law disputes concerning the claims and legal relationships of a large number of consumers against traders. This e,g, includes consumers' contractual claims, tort claims, consumer law remedies as well as antitrust damages actions by consumers, and claims in the context of environmental social governance (ESG) or supply chain compliance. In this respect, the scope of the collective actions is broader than that of the injunctive actions which limit the scope of application for injunctive relief to the consumer protection laws listed in Section 2 (2) UKlaG. Furthermore, the German legislator has chosen to implement the Directive (EU) 2020/1828 in such a way that only the association, and not the affected consumer, becomes a party to the collective action under VDuG. All collective actions are to be heard in the first instance before the Higher Regional Courts. The associations entitled to bring an action under VDuG can freely choose which type of action they prefer in each individual case–redress or declaratory ruling. The principle of subsidiarity of declaratory actions as usually given in German civil procedure is expressly waived for the actions under the VDuG.

Consumers can register their claims and thereby are prevented from pursuing their claims individually for the duration of the representative action proceedings, including the enforcement procedure; actions brought by registered consumers after registration are inadmissible. In the case registered consumers' actions are already pending, the proceedings are to be stayed, and the decision in the collective action proceedings is binding on the consumer. For consumers who have not registered their claims by the deadline or have withdrawn their registration, the collective action has no direct legal significance.

While this article will mainly discuss the procedure under the VDuG, it is important to note that there were was a reform of the Capital Markets Model Case Act that came into force on 20 July 2024. With these amendments, the German legislator has expanded the scope of application of the Capital Markets Model Case Act and aligned it with the other collective action instruments. Among other things, the changes affects providers of crypto assets and crypto asset services that hold or manage crypto assets for customers, as well as persons who apply for admission to trading in crypto assets. Specifically, model proceedings will in future also be possible for investor claims for damages for losses of crypto-assets or the funds for accessing them under Art. 75 (8) of Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023, on markets in crypto-assets ("MiCA Regulation").

Rules for commonality of claims/ class certification

Pursuant to Sec. 15 (1) sent. 1 VDuG, the action for redress is only admissible if the claims of the consumers concerned by the action are essentially the same. This is the case if 1) the claims are based on the same facts or on a series of essentially comparable facts and 2) the essentially identical factual and legal issues are relevant to the decision for the claims.

Introduction and system

Sec. 15 (1) sent. 1 VDuG contains requirements regarding the homogeneity of the claims to be asserted in the context of a representative action. In this regard, the provision navigates the difficult balance between the effectiveness and attractiveness of the representative action instrument on the one hand and the practicability of the enforcement procedure on the other. Thus, the provision establishes a special admissibility requirement for the action for redress by regulating the similarity of consumer claims and the information provided when applying for a collective total amount.

Similarity as a condition for admissibility/criteria for similarity

In the case of similarity, a distinction is made in accordance as to whether the claims arise from the same facts ("single event"), as for example in the case of an aircraft crash, or from a series of similar facts ("single cause harm"), as for example in the case of product damage. Section 15 (1) no. 2 VDuG requires that the decision on all asserted claims must also be based on the same factual and legal issues, which means that an identical basis for the claim is regularly required. Whether this similarity exists is determined on the basis of whether the court would need to conduct an individual examination of the specific case. Therefore, the claims must be sufficiently similar to enable the court to conduct a template-based, abstract, and typified examination of the factual and legal requirements for the claims. The similarity must be presented by the plaintiff in the statement of claim. The trial court does not examine whether the claims subsequently filed are actually of the same kind. Ultimately, this is the task of the administrator in the implementation proceedings, based on the criteria specified by the trial court. The effectiveness of the administrator procedure depends to a large extent on the administrator being able to make the distribution decision on the basis of provable characteristics.

Class member participation (opt-in/opt-out)

When the VDuG was drafted, no use was made of the option of an opt-out procedure under Article 9 (2) of the Directive (EU) 2020/1828; instead, a late opt-in solution was adopted. Section 46 VDuG is the central provision governing registration in the Register of Representative Action. Consumers can register themselves for the claims register without the assistance of a lawyer and must comply with the deadline (para. 1) and the content (para. 2) of the registration.

Deadline according to section 46 (1) VDuG

Registration in the claims register must be made within three weeks of the end of the oral proceedings, which means that an opt-in solution as late as possible has been chosen. The end of the oral proceedings arises from the fact that the court sets a date for the pronouncement of judgment in accordance with section 310 (1) ZPO. If no judgment is actually pronounced at this date, the deadline does not apply.

Effectiveness requirements for opt-in

The substantive requirements for opt-in of consumers are listed in section 46 (2) VDuG and are based on section 253 (2) ZPO. This provision specifies the minimum information that a statement of claim must contain. According to Section 46 (2) no. 1 VDuG, which requires the name and address of the consumer, the aim is to ensure that the defendant is informed of the identity of the registered consumers. According to no. 2, an applicant that is a small business must indicate this separately. More important in practice is the precise description of the potential subject matter of the dispute according to no. 5. The information on the subject matter of the dispute must make it possible to individualize the claim/legal relationship to determine whether the judgment in the class action has a binding effect in subsequent proceedings. The individualization of the claim is also important for the question of the suspension of the statute of limitations according to § 204a para. 1, no. 3, 4 German Civil Code (Bürgerliches Gesetzbuch (BGB)). In addition, according to no. 6, the correctness and completeness of the information must be assured to prevent abuse. Furthermore, in the case of claims for monetary benefits according to section 46 para. 2 sentence 2. VGuG, the amount of the claim must be stated. The Federal Office of Justice does not check the content of the information provided in the application, but only for formal requirements to ensure it is complete.

Consequences of the registration

The law attaches a number of legal consequences to the application. For example, consumers have a right to information concerning their registration. Section 11 (2) of the Act precludes individual actions of consumers who have registered, and an court approved settlement also applies to consumers who have registered in accordance with Section 9 (1) VDuG.

Right to appeal

Both judgments, i.e. redress action and preliminary judgment on the merits of the case, are subject to appeal on points of law. The possibility to appeal is given by law and the appeal is heard by the Federal Court of Justice (BGH). This means that there is only one instance of fact in the German class action proceedings. Unlike in general civil proceedings, the appeal is not dependent on the fulfillment of admission requirements.

An appeal on points of law is provided for in the case of preliminary judgment on the merits, judgments granting performance, combined judgments, and judgments dismissing the , as well as final judgments granting relief in accordance.

Litigation funding

The regulation of funding is intended to protect against abuse in two ways: on the one hand, it is about protecting the company from the influence of competitors, and on the other hand, it is about protecting consumers from funding-related disadvantages. When considering financing before taking legal action the primary concern is the assumption of the financial risk of partial or complete failure, as well as advances on legal fees and court costs at the beginning of the proceedings and, if necessary, on appeal. In Germany, external financing will often be taken into consideration because the limit on the amount in dispute is set at EUR 250,000 or EUR 300,000 in accordance with section 48 (1) sentence 2 court fees act (Gerichtskostengesetz (GKG)), thereby limiting the statutory fees for lawyers.

No financing by competitors

(Section 4 (2) no. 1 VDuG) Pursuant to Section 4 (2) no. 1 VDuG, a representative action is inadmissible if it is financed by a third party that is a competitor of the defendant company. The rationale for this is the consideration that companies may have an interest in damaging the image of a competitor by bringing an unfounded action or threatening to do so, or in harming it financially by means of “compensation payments”.

Identity of the financier

According to Section 4 (2) no. 3 VDuG, a representative action is inadmissible if it is financed by a third party that is dependent on the defendant’s business. The exclusion of this constellation serves to protect consumers, as it prevents the defendant from steering the action against him toward failure. Structural conflicts of interest should be voided, which is also why the suing association must disclose the identity of the financier in accordance with section 4 (3) sentence 1 VDuG.

Cap on the success fee (Section 4 (2) no. 3 VDuG)

According to Section 4 (2) no. 3 VDuG, a representative action is inadmissible if it is funded by a third party who is promised an economic share of more than 10 percent of the performance to be rendered by the defendant. In the context of traditional litigation funding, the financier assumes the legal costs rise in return for a share of the potential proceeds of the action (participation rate). This figure of 10 percent is well below the usual margins of 25-35 percent and will make third-party financing relatively unattractive.

Expectable influence on the financed process

According to Section 4 (2) no. 4 VDuG, a representative action is inadmissible if it is financed by a third party who can be expected to influence the conduct of the action by the entity entitled to bring an action, including decisions on settlements, to the detriment of consumers. Section 4 (2) no. 4 is intended to take into account the risk that the litigation financier will influence the conduct of the proceeding to the detriment of the consumers concerned in order to maximize their own profits. ears that the financier will prioritize its interests therefore are regularly raised when a settlement is reached, if the financier insists on an early settlement contrary to the consumers’ interest in order to save further costs.

Disclosure in the statement of claim

Disclosure of the financing must always be made when the action is brought. The content of the duty to provide information initially relates to the origin of the funds and the content of the agreements made with the financier. If third-party financing is only provided after the action has been brought, the duty to provide information applies accordingly.

Connect with us

Munich

Dr. Matthias M. Schweiger
Partner
Munich

Dr. Stefan Mayr
Counsel
Munich

Lena Bauer
Associate
Hamburg

Italy

Regime overview

Italian law provides for three types of class actions: traditional class actions, collective injunctions and representative actions.

Traditional class actions aim to obtain compensation for damages or restitution for events occurred after 19 May 2021 (the previous regime applies to prior events, but it only covers consumers). It can be brought by any member of the class or non-profit organizations active in the protection of the disputed rights and consists of three phases, regarding respectively:

- the admissibility of the action and the perimeter of the class;
- the merits of the claim (defendant's liability and class members' right to compensation or restitution);
- the quantification of the amounts due to class members who opted-in.

Actions for collective injunction aim to obtain an order to cease/prohibit/impose certain conducts. It can be brought by anyone with an interest and non-profit organizations. The procedure is streamlined and may end after one round of submissions and a hearing.

Representative actions aim to obtain injunctions and/or compensatory relief for breach of specific provisions protecting consumers. They can be brought by authorized consumer associations or independent national public bodies, even without a mandate from the affected consumers. The procedure envisages an admissibility phase and then varies based on whether an injunctive or compensatory relief is sought.

Rules for Commonality of Claims /Class Certification

Class actions are admissible if (inter alia) the disputed individual rights are homogeneous, but the law fails to provide a definition of homogeneity. Case law suggests that homogeneity exists when the judge can conduct a single evidentiary process covering all the individual positions involved, through standardized assessments and a joint procedural management of the claims, with no need for specific inquiries over each position. Ultimately, the assessment is made on a case-by-case basis.

Class Member Participation (Opt-In/Opt-Out)

The law provides for an opt-in mechanism (which only applies to traditional class actions and representative actions for compensatory measures). Class members may opt-in either (i) once the order declaring the admissibility of the action is issued or (ii) after the judgment establishing class members' right to compensation/restitution or compensatory measures. Class members who did not opt-in are entitled to bring individual claims.

Right to Appeal

The rules for appeals are as follows:

For class actions and **representative actions seeking compensatory relief**:

- The order deciding over admissibility is challenged within 30 days before the Court of Appeal
- The judgment deciding over the merits of the action is challenged within six months before the Court of Appeal
- The decree deciding claims of class members opting-in is challenged within 30 days before the same Court

For collective injunctions, the decree deciding over the merits of the action is challenged within 10 days before the Court of Appeal.

For representative actions seeking injunctions:

- The ruling on admissibility is challenged within 30 days before the Court of Appeal
- The judgment deciding over the merits of the action is challenged within 30 days or six months, depending on the case, before the Court of Appeal

Litigation Funding

The use of third-party litigation funding is still limited in Italy. The rules governing representative actions empower judges to declare an action inadmissible or require to them reject or modify funding arrangements in cases of conflicts of interest.

Connect with us

Rome

Andrea Atteritano
Partner
Rome

Emanuele Ferrara
Senior Associate
Rome

Spain

Regime overview

The implementation process had reached an advanced stage (i.e., it was included in a broader legislative initiative aimed at expediting judicial proceedings, that was published on 22 March 2024) but, a few days ago, **due to a lack of consensus among the government's coalition partners, the provisions regarding collective actions transposing Directive 2020/1828 were excluded from the draft bill.**

The notes included below are therefore based on the proposal, which should be re-sent for parliamentary discussion arguably early next year.

Rules for Commonality of Claims /Class Certification

The **statement of claim** should state, among others, (i) consumers to be affected by the collective action or, if individual identification is impossible, the characteristics and requirements of the eventual beneficiaries; and (ii) the existence of homogeneity between the claims.

The defendant may object to (i) and (ii) and the parties will be summoned to a **certification hearing.**

The court shall individually determine the consumers to be affected by the action, or if not possible, declare the characteristics and requirements that must be met to be considered as beneficiaries.

The court shall only certify the collective action if homogeneity is sufficiently proven. Homogeneity shall be deemed to exist if it is not necessary to consider factual or legal aspects that are particular to each of the consumers.

The decision on the certification of the collective action can be preferentially appealed.

Class Member Participation (Opt-In/Opt-Out)

- Consumers domiciled in Spain: opt-out system, so the process will bind all those affected, unless they expressly request to be excluded. Consumers will have to expressly state their wish to withdraw from the action within two to six months.
- Exception: if advisable for the good administration of justice, provided that the amount claimed for each beneficiary exceeds EUR 3,000, the Court can (but is not obliged to) process the collective action by means of an opt-in system.
- Consumers domiciled outside Spain: an opt-in system shall apply. The court shall establish the manner and time limit for consumers to join the action.

Right to Appeal

Both appeal (i.e., 2nd instance) and extraordinary appeal before the Supreme Court, preferentially processed, are foreseen.

Litigation Funding

The **claim** must fully state the sources of funding including the existence of financing by a third party, which shall be duly identified. Two discussions could take place:

1. The judge may request the financing contract to verify if its terms affect consumers rights, for discussion at a **meeting with all parties and the funder.**
2. In the **certification hearing**, the defendant shall be entitled to allege about the financing of the proceedings by the claimant. The court shall refuse third party funding if it considers that:

- There is a conflict of interest which shall be deemed to exist if the defendant is a competitor, or a person subordinated to the funder; the decisions of the claimant are influenced by a funder in a way that may be detrimental to the collective interests of the consumers.
- The funder has an economic interest in the exercise or outcome of such an action that would remove the class action from the protection and defense of the rights and interests of consumers.

Connect with us

Madrid

Jon Aurrekoetxea
Partner
Madrid

Gonzalo Ardila
Partner
Madrid

Eugenio Vázquez
Counsel
Madrid

Margarita Morales
Counsel
Madrid

The Global Class Actions 2025 Core Team

Global practice group heads

Craig A. Hoover
Partner
Washington, D.C.

Dr. Matthias M. Schweiger
Partner
Munich

United States

Michael Kidney
Partner
Washington, D.C.

Michelle Roberts Gonzales
Partner
Los Angeles

David Barnes
Senior Associate
San Francisco

Carrie DeLone
Partner
Washington, D.C.

David Maxwell
Counsel
Washington, D.C.

Trent Sterneck
Senior Associate
Washington, D.C.

United Kingdom

Matthew Felwick
Partner
London

Nicholas Heaton
Partner
London

Ben Fleming
Partner
New York

Alicia Paller
Senior Associate
Washington, D.C.

European Union

Manon Cordewener
Partner
Amsterdam

Andrea Atteritano
Partner
Rome

Lena Bauer
Associate
Hamburg

Christelle Coslin
Partner
Paris

Emanuele Ferrara
Senior Associate
Rome

Sarah De Magalhaes
Associate
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About our firm.

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Global leader that delivers exceptional legal services in highly regulated sectors, achieving results for our clients and society.

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Ambitious
Be dynamic
Be precise

Supportive
Be authentic
Be committed

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US$ 2.68bn
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11th largest
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Litigation Leaders
BTI, 2024

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Law360, 2018

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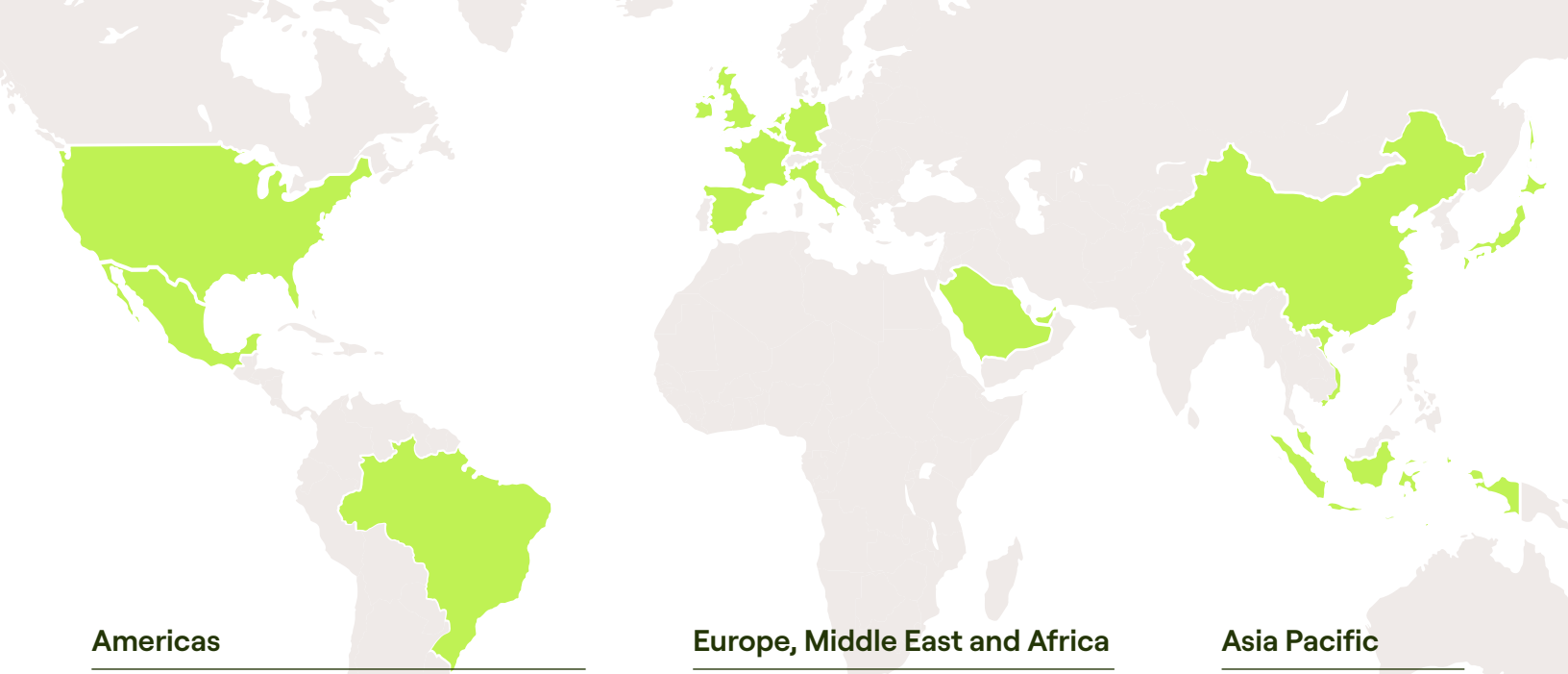
100 score on Corporate Equality Index 2023 (Human Rights Campaign [HRC])

Top Leaders Global Class Actions Head Craig Hoover named "Litigation Star" in Benchmark Litigation's 2025 guide

Top 3 Best Law Firms for Pro Bono in the UK 2023 (Law.com International 2023)



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