

A close-up photograph of a watch movement, showing intricate gold and silver gears and components. The lighting is warm, highlighting the metallic textures and the precision of the mechanism. The background is a soft, out-of-focus blue.

GIBSON DUNN

The Rise of International Class and Collective Actions

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Agenda

1. Introduction and Overview
2. Multi-party litigation regimes and emerging trends:
 - a. United Kingdom
 - b. France
 - c. Germany
3. Questions

United Kingdom



Multi-Party Litigation: An Overview

- In England and Wales, there are numerous avenues for multiparty litigation i.e., litigation involving multiple claimants and/or defendants.
- High Court:
 - Group litigation orders (GLOs)
 - Representative Actions
- Employment Tribunals:
 - Multiple Joint Claims managed using Tribunal's case management powers
- Competition Appeal Tribunal (CAT):
 - Collective Proceedings Order (CPO)



Multi-Party Litigation: when will the English Courts have jurisdiction over a US Defendant?

- If the defendant is validly served with a claim while [physically within](#) the jurisdiction (even temporarily) the English courts will assume jurisdiction, but this can be challenged.
- If the defendant is [physically outside](#) the jurisdiction, the claimant will generally need to seek permission to serve, which will only be granted where it can show that:
 - the claim has ‘reasonable prospects of success’;
 - England is the proper place to bring the claim;
 - the claim falls within one of the established jurisdictional ‘gateways’, e.g.: the relevant contract was made in England or is governed by English law, the breach occurred in England, the relevant property is situated in England, etc.

Multi-Party Litigation: The Impact of Costs Regimes

Trends in multi-party litigation can be shaped by fees, costs, and availability of funding:

- **In the High Court:** costs typically “follow the event”, i.e. the loser pays, subject to discretionary considerations
- **In the Employment Tribunal:** there are no fees, and generally no cost awards other than to discourage abuses of process
- **In the Competition Appeal Tribunal:** Tribunal has a broad discretion to make “any order it thinks fit”; not necessarily the case that costs “follow the event” but in practice this is usually what happens. CAT will take account of many factors including the parties’ conduct, the result of the case (in part or whole), offers to settle, whether costs are proportionate and reasonable and have been reasonably incurred

Group Litigation Orders (GLOs)

- Main procedural mechanism for group litigation in the English courts.
- Discretionary 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

- Application may be made at any time before or after any relevant claims have been issued by either a claimant or by a defendant.
- No min/max number of claims – smaller numbers may be refused for reasons of inefficiency.
- Application should include a summary of the litigation, number of parties likely to be involved, the common issues of fact or law that are likely to arise.
- The court may require parties to make public the existence of the GLO – an important step to attract claimants.
- “Lead Solicitor” may be appointed.

The Register

- Once GLO made, a claim form is prepared and issued (naming all claimants) and claims are entered upon a “group register”.
- The court may refuse to add or remove a claim from the group register if the case can not be conveniently case managed with the other case or would adversely affect the case management of the other cases.
- The court will typically specify a ‘cut-off date’ after which no claim may be added to the group register without permission.
- Court may stay other claims brought outside the GLO proceedings.

Group Litigation Orders (GLOs)

Test Cases

- Court must exercise case management to strike the right balance between conflicting interests in common/individual issues among the parties.
- Court may direct separate trials of individual issues.
- Court may also direct that certain claims proceed as “test cases” and all other claims be stayed (with appropriate directions for cost sharing). No particular rules regarding selection of test claimants but must adequately cover the scope of the issues: likely to be selected on the basis that they represent common characteristics, e.g. test case may cover a specific type of claimant, specific time periods and/or heads of loss.

Judgment & Costs

- Judgment given in relation to any claim on the register (including test cases) will be binding upon claimants included on the register at the time of judgment (unless otherwise ordered).
- Court may give directions about the extent to which the judgment is binding on claims subsequently entered onto the register.
- General rule is that costs are paid by the unsuccessful party but court has wide discretion in GLOs. Each litigant severally liable for equal proportion of ‘common costs’ (irrespective of when they were entered onto the register) plus any ‘individual costs’.

Examples of Recent GLOs

109

granted since 2000

Not widely used to date: 5 granted between 2018 - 2021

Omega Proteins (Jan 2018): emission of odours effecting nearby homes

Berkeley Burke SIPP (Jan 2018): financial loss to personal pension funds

VW NOx Emissions (May 2018): false representations regarding vehicle manufacture

British Airways (Oct 2019): damages for data breach/misuse of private information

Nchanga Copper Mine (March 2020): personal injury and widespread environmental damage due to pollution

Representative Actions

- Permits group claims to be brought in a ‘representative capacity’, i.e. not all claimants need to be parties (more akin to “opt-out” model).
- Brought where more than one person has the “**same interest**” in a claim (more stringent than the GLO test).
- Representative claimant decides how to run the litigation: those represented are not ‘parties’ to the proceedings and therefore disclosure obligations are limited.
- Non-parties not ordinarily liable for costs but court may order a represented person to pay/contribute to costs if unsuccessful.
- Judgment binding on a non-party, although only enforceable with permission.
- Recent case illustrates some of the difficulties with representative actions: *Lloyd v Google LLC* [2021] UKSC 50

Multiple Joint Claims in Employment Tribunals: An Ideal Forum

- Multiple claimants may make their claims on the same claim form if their claims “**give rise to common or related issues of fact or law or if it is otherwise reasonable for their claims to be made on the same claim form**”.
- Alternatively, parties could apply for a Presidential Direction combining claims started separately.
- Tribunal make an order specifying ‘**lead claims**’: decisions in respect of lead claims apply in respect of related claims by default (with provision for parties to object).

Flexibility

- Flexibility of practice and procedure designed to promote access to justice
- Overriding objective emphasises dealing with cases “fairly and justly” by avoiding unnecessary formality, seeking flexibility, saving expense, and ensuring equal footing

No Fees

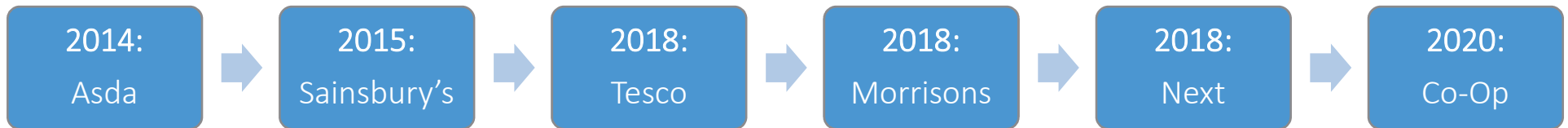
- Supreme Court in *R (UNISON) v Lord Chancellor* [2017] UKSC 51 held the fees regime (introduced under 2013 Rules) to be unlawful
- Post *Unison*, claimants can file without liability for fees, removing a significant practical barrier to group claims

Limited Cost Sanctions

- Costs do not “follow the event”; costs awards are only used to discourage abuses of process, e.g. vexatious, unreasonable or abusive conduct.

Multiple Joint Claims in Employment Tribunals: Current Key Cases

- Many large UK retailers are facing equal pay claims in Employment Tribunals brought by their employees.
- Retail store workers comparing their work to warehouse workers and seeking equal pay for work of equal value.



- These are 'pathfinder' cases against private sector employers and are of great importance to both employees and employers in the sector, and for the UK economy more generally.

Collective Actions in the Competition Appeal Tribunal (CAT)

- Competition law is the one area in the UK for which opt-out ‘US-style’ class actions can be brought
- Proposed collective proceedings can be brought by a proposed class representative pursuant to the Competition Act 1998 for damages caused by: (i) agreements that have as their object or effect the restriction, prevention or distortion of competition (e.g., price fixing); or (ii) an abuse of a dominant position
- The current regime of collective proceedings for competition law breaches was introduced in 2015. Under this regime:
 - Claims can be brought on an “opt-in” or “opt-out” basis
 - They can be on a “follow-on” basis (e.g., following a decision from a competition authority) or “standalone” basis (e.g., where the Claimant must still prove there was a competition infringement)
 - Any proposed collective proceeding must first be certified by the CAT, and a **Collective Proceedings Order (“CPO”)** granted, before it can proceed to a substantive trial. For a CPO to be granted, the CAT must be satisfied that:
 - The claims meet the eligibility criteria for inclusion in collective proceedings (**the “Eligibility Condition”**)
 - It is just and reasonable for the proposed class representative to act in the proceedings (**the “Authorisation Condition”**)

Collective Actions in the Competition Appeal Tribunal (CAT) – the certification test

1. Eligibility Condition

In determining whether the claims are suitable to be brought in collective proceedings, the Tribunal shall take into account all matters it sees fit, including:

- whether the proposed claims are brought on behalf of an identifiable class
- whether the proposed claims raise common issues of facts and law
- whether the proposed claims are suitable to be brought in collective proceedings and, if so, on whether an opt-in or opt-out basis, taking into consideration, for example, the costs and benefits of the claims proceeding as a collective action, the fair and efficient resolution of the common issues, the size and nature of the class and whether the claims are suitable for an aggregate award of damages

2. Authorisation Condition

- Low threshold in determining whether it is ‘just and reasonable’ for the applicant to act as the proposed class representative
- Main purpose of the assessment is to ensure that the proposed class members are adequately and fairly represented

Merricks v Mastercard: Supreme Court Decision

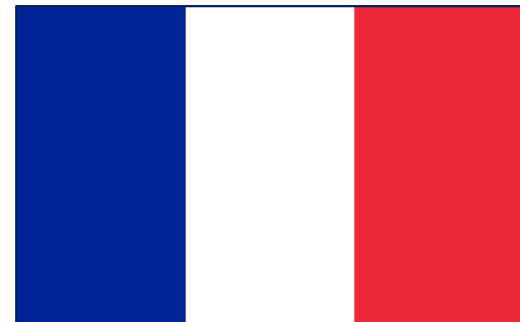
- Collective “opt-out” proceedings brought on behalf of 46 million UK consumers claiming damages of more than £14 billion. Mr. Merricks, the proposed class representative, relied on a European decision that Mastercard breached EU competition law by charging businesses excessively high multilateral interchange fees for cross-border transactions between 1992 and 2008
- Mr. Merricks’ original application for a CPO was denied by the CAT and that decision was subject to a number of appeals that concluded with the Supreme Court’s judgment in December 2020 which overturned the CAT’s original decision and is seen as significantly lowering the threshold for certification of these types of claims. In particular, the Supreme Court held that:
 - One of the key questions in determining whether to certify an action is whether the claims are “suitable to be brought in collective proceedings rather than individual proceedings, and suitable for an award of aggregate rather than individual damages”;
 - Claimants should not be deprived a trial because of “forensic difficulties” regarding evidence and quantifying loss;
 - The certification process should not generally involve an examination of the merits.
- The Supreme Court’s judgment was welcomed by the UK claimant law firms and funders who considered that it would make it easier to launch class actions for competition law breaches in the UK.
- Since the judgment, a flurry of applications for CPOs have been filed with the CAT on a follow-on and standalone basis. These include large consumer actions against some of the world’s largest technology firms alleging various abuses of dominance.

France



French Courts jurisdiction

- In France, **class actions and collective actions regimes** are not restrictive as to the nationality or domicile of the claimants or the defendants.
- Jurisdiction on US-based corporations is therefore determined by applying the **standard rules of French civil procedure**.
- Criterion for jurisdiction are :
 - In **contract**, the place of performance or place of delivery ; and
 - In **tort**, the place where the damage is suffered.
- For class actions : French Civil Courts have exclusive jurisdiction (as opposed to French Commercial Courts).



Background

- Historically, no class action mechanism; **limited remedy** available through **collective actions** i.e. individual actions collectively filed/investigated/ruled upon
- **Class action** mechanism introduced in 2014 for **consumers** and certain **competition** issues
- 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)

Common regime

- Action available to **qualified entities only** and not to individuals, groups of individuals or lawyers
- Depending on the field, standing is reserved for certified associations or associations that have been registered for 5 years with a statutory purpose that includes the defense of the interests that have been damaged
- The common regime provides for a **3-step process** :
 - ✓ **Phase 1: Judgment on liability**
 - A judgment on the merits rules on the liability of the defendant
 - Determination of the conditions and time frame to join the group, possibility of sub-categories, available remedies and the publicity measures to be taken by the defendant
 - ✓ **Phase 2 : Adhesion phase (opt-in)**
 - Opt-in procedure in the time frame set by the judge
 - ✓ **Phase 3 : Payment**
 - Individual or collective payment procedure
 - Duration: Difficult to assess, no class action has been successfully completed to date (e.g., Sanofi case recently came to a judgment on liability on 5 January 2022 after being initiated in May 2017, but an appeal has been formed).

Specific regime

- Action only available to certified consumer protection association
- The specific regime also provides for a 3 step-process :
 - ✓ **Phase 1: Judgment on liability**
 - A judgment on the merits rules on the liability of the professional
 - It determines the criteria on the basis of which consumers can claim compensation and sets the amount of compensation.
 - ✓ **Phase 2 : Publicity** (only when judgment on liability is final - unlikely to take less than 5 years)
 - The publicity of the decision allows the claimants to join the procedure (opt-in) in the time frame set by the judge (2 to 6 months following the completion of publicity measures)
 - ✓ **Phase 3 : Payment**
 - The claimants are awarded the compensation fixed by the judgment or through a settlement

Common rules applicable to both regimes

- **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
 - 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, 21 class actions have been introduced in France since 2014**
 - 14 cases concerning consumer law, 3 concerning health product liability, 2 concerning employment discrimination and 2 concerning personal data
 - Wide variety of sectors, wide variety in status of cases: 5 cases were dismissed, 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
- **Leading to...**
 - The use of alternative regimes
 - **Reputational risk** : associations tend to extensively communicate in the media even before filling a proper claim
 - Calls for reform

A recent case of class action: Sanofi (5 January 2022)

- For the first time in the **health field**, the Paris Civil Court (*Tribunal judiciaire*) ruled that an association's group action was **admissible**.
- Paris Civil Court also held that Sanofi has « *committed a serious fault by failing in its duty of care and its obligation to inform* » on the risks of *Depakine* medication, an anti-epileptic drug, when taken during pregnancy.
- The decision implements a 5-year limitation for claimants to allow the class members to opt-in.
- The decision shows that, despite a complex framework, French Courts start getting familiar with the new regime.
- However, the decision will only be enforceable and class members allowed to opt-in once it has become « *definitive* » i.e., subject to no appeal or cassation claim.
- Sanofi appealed the day after the judgment was rendered.

Alternative : collective actions

- In order to avoid the restrictive legal framework of class actions, claimants rely on general mandate law:
 - By granting special and individually-written mandates to an organization to represent them and act on their behalf in a proceeding or,
 - By giving *ad litem* mandates to a lawyer, in order to limit and mutualize the costs of the proceedings and the lawyer's fees.

This method has met with recent success in France thanks to the use of digital platforms (Vpourverdict; WeClaim; etc.). Either the platform finances the costs of the proceedings, or the individual participates by paying a modest fixed fee. A result fee is provided in case of success of the claims.

- We have encountered this mechanism in some of our litigation or debt restructuring cases :
 - La Halle (claim for compensation for asbestos exposure) : 243 claimants before the Châteauroux labor court
 - Amazon (tax fraud claims) : 500 claimants before the Paris civil court
 - Appart'City: 8,800 landlords under the aegis of a conciliator and the President of the commercial court of Montpellier
 - Pierre & Vacances: 19,000 landlords under the aegis of a conciliator and the President of the commercial court of Paris

A recent case of collective action: Renault, Dacia, Nissan

- On 10 January 2022, a law firm invites car owners of Renault, Dacia and Nissan to join a collective action suit for compensation following the failure of their gasoline engines.
- Engines affected by an electronic miscalibration were able to operate with too low a lubricant level, with varying consequences.
- Newspapers reported that between 400,000 and 600,000 vehicles could be potentially affected in Europe.
- Proceedings costs on the merits are proposed to the amount of c.500 euros (c.550 US dollars) for each claimant.
- On its website, the law firm offers to take as fees "12% of the sums recovered by the client, either by legal means or by negotiation".
- The lawyer's website announces its plan to implement a US-type procedure in 2 phases (and by referring to US proceedings) : discovery (Phase 1) and recovery (Phase 2), but using the tools available in the French Code of Civil Procedure.

THE EU Representative Action Directive

- **Adoption** : The Representative Action Directive, was endorsed on November 24, 2020. Member States must adopt and publish provisions necessary to comply with the directive within 24 months.
- **Purpose** : The legislation was adopted in reaction to complex cross-border litigations involving breach of consumers' rights across the EU. This Directive seeks balance between consumer's rights and protection against abusive lawsuits.
- **Scope** : Qualified entities across multiple states will be able to bring in a single suit crossborder litigation. The action has to be based on a limited range of EU laws (such as general consumer law, energy, health...).
- **What can be requested ?** Redress, such as compensation, repair, replacement, price reduction, contract termination, or reimbursement as well as injunctive relief, such as the cessation and the prohibition of an infringing practice.
- **Qualified entities definition** : 12 months of effective public activity, a legitimate interest, non profit and independence from private or public interests (except from consumers).
- **Procedural aspects** :
 - States can choose between opt-in/opt-out.
 - National courts will be able to order the disclosure of evidence by the defendant.
 - Settlements admitted.
 - the « loser pay » principle prevails.

How will this impact France

- The transposition is not mandatory : EU Member States such as France, where representative actions already exist, will not be required to adopt new mechanisms if the existing regime already meets the conditions set out in the European model.
- An opportunity to reshape the legislation ? This directive could remedy the existing limits of the model :
 - The qualified entity has to be registered for only **a year**, when French laws require a 5 year registration.
 - The limits on damage allocation, such as the exclusion of **non-material prejudice**.
 - The fragmentation of procedures, which could be directly remedied through the adoption of a **single regime modeled after the European regime**.
 - The consumers could more easily **obtain evidence with the evidentiary** rules under the Representative Action Directive.



What's next ?

Will new class action arise out of recent regulations?

- **Duty of vigilance** : companies subject to the Duty of Vigilance under French law are required **to establish and effectively implement a vigilance plan** to identify risks and prevent serious **violations of human rights and health, safety, and environmental rules**, that may result from their activities, as well as those of the companies they control and the activities of subcontractors or suppliers with which they have an established business relationship.
 - Arguably, follow-on type class actions and/or collective actions might arise if a company was held in breach of its duty of vigilance
- **Data protection**: follow-on type class actions and/or collective actions might also arise following regulator's sanctions (e.g. breach of GDPR Regulations) or following data privacy leakages/breach
- **Climate change** : in 2016, the French Civil Code was amended to introduce the concept of « *environmental damage* » and states that the person liable for any environmental damage is liable for its compensation. The Code then provides that compensation is to be made in kind "*by priority*" and, if not possible, in damages which are to be used to remedy the environmental damage, and attributed to the claimant or, if he cannot take appropriate measures to remedy the damage, to the State.

Germany



Collective redress in Germany – law on the books

2005

Securities Model
Action („KapMuG“)

2018

Declaratory Model
Action („DMA“)

2023

EU Consumer
Action – *to come*



**New German government
anticipates to reform collective
redress in Germany**

Collective redress in Germany – law in action

Individual Mass Claims

- Low threshold for process financing by legal expenses insurance
- In the ongoing diesel litigation, insurances have financed legal actions for 380,000 consumers
- No MDL-type mechanism

Claims Bundeling

- New legal tech providers bundle consumer claims in a single lawsuit
- Legality of business model previously uncertain

The „Anti-US Class Action“



Attorney General Katarina Barley in 2018:

The Declaratory Model Action will not be the dawn of US-style class action litigation in Germany.

The DMA's deterrents against a „US-style“ class action industry

1

Only qualified consumer protection organizations can sue on behalf of consumers

2

Recoverable lawyer's fees are capped at approx. USD 8,000 (!)

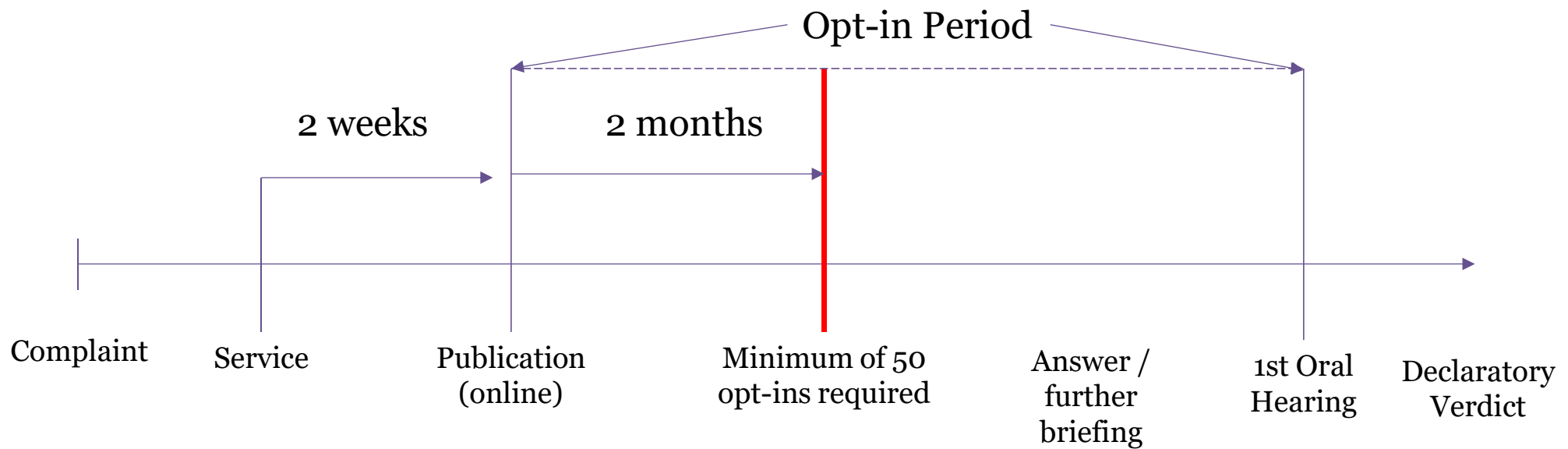
3

No „class certification“: consumers have to actively opt-in; parallel lawsuits can continue

4

Only declaratory verdict, no class-wide monetary relief (except settlements)

Statutory timeline of a DMA



Interface DMA – individual actions

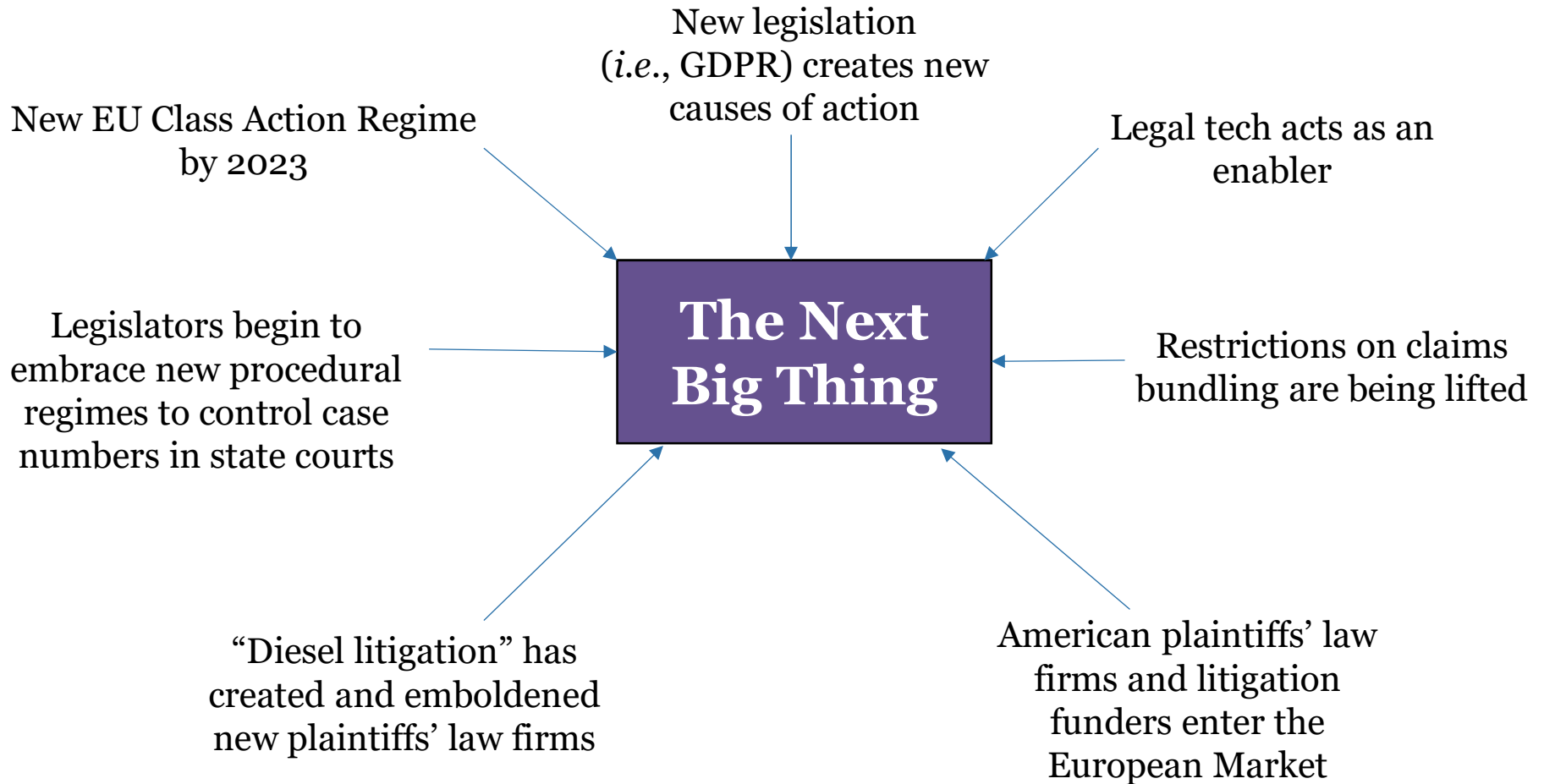
Parallel actions and statute of limitations

- Additional representative actions are blocked, new actions of individual consumers remain possible
- Opt-in suspends the statute of limitation for all registered consumers
- Parallel individual actions are stayed if consumer has opted-in

Subsequent actions and settlement

- Declaratory judgment binds any court in subsequent individual case between the opt-in consumer and the defendant
- Settlement binds all opt-in consumers, if they do not specifically opt-out of the settlement within a month after publication

What the future holds...



Speakers – Thank you!



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