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The Impact of Increased Mass Litigation in Europe

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EXECUTIVE SUMMARY

The purpose of this study is to better understand the growth of mass litigation in the European Union (EU) and its economic consequences. European authorities have long encouraged consumers to seek redress through private litigation in European competition law and, more recently, they have shifted their focus towards collective actions in a broad range of areas, including data privacy and product liability.

Facilitating access to justice through collective actions is not a cost-free option. Unfortunately, there is a lack of economic analysis on the consequences of an increase in collective action cases in the EU. It is crucial to understand the economic consequences of a "mixed regime" – that is, a regime based on both ex-ante public enforcement through regulation and ex-post enforcement through private litigation. The combination of these two enforcement models raises questions about how the system is intended to work together and what the consequences might be for the economy.

This study examines the economic implications of these developments in the EU.

Chapter 2 outlines the two models of enforcement: public and private enforcement of regulation. Private enforcement enables individuals or groups to pursue court-based legal action to enforce regulations. In contrast, public enforcement is conducted by government agencies and public institutions responsible for ensuring compliance with laws and regulations.

The public and private enforcement regimes each influence the economy in distinct ways. Private enforcement entails lower ex-ante compliance costs, as businesses face reduced regulatory oversight by public authorities. However, although the higher compliance costs associated with public enforcement are readily apparent, private enforcement entails additional costs, such as settlement payments or increased insurance premiums to cover potential litigation risks.

These costs affect companies' behaviour and ultimately the broader economy. For example, private enforcement systems generally provide greater flexibility for businesses, offering them more opportunities to innovate. However, this flexibility comes at the cost of increased uncertainty. Companies may face ambiguity regarding the compliance standards to follow, as these are largely shaped by court rulings resulting from private litigation, which may hinder innovation.

Two features distinguish the EU's enforcement system from other regions: the integration of national and EU legislation, and the prominent role of Ombuds Bodies.

Regarding the first feature, the EU adopted the Representative Actions Directive (RAD) to establish a unified framework with minimum standards for collective redress, aiming to prevent fragmentation and ensure equal procedural rights for consumers across the EU. However, while minimum standards have been implemented, the Directive's flexibility allows non-harmonised

rules to persist, and the potential for forum shopping remains, as some EU countries adopt a more permissive approach to mass litigation than others.

Regarding the second feature, Ombuds Bodies provide a middle ground between purely private and purely public enforcement, offering faster consumer redress and at a lower cost than collective actions. For instance, the enforcement powers available to the Swedish Ombuds Body may be linked to the low volume of collective actions in Sweden, as citizens are empowered to uphold their rights through the mechanisms offered by the Ombuds Body.

Chapter 3 presents the results of a database on collective actions, revealing a significant increase in the number of cases. The analysis identifies a two-phase trend: an initial peak around 2015, followed by a renewed surge in filings starting in 2020. This trend suggests a growing use of collective actions across the EU. Notably, the Netherlands, Portugal, Germany, and Slovenia report a higher volume of collective action lawsuits.

Across economic areas, consumer protection remains the primary driver of collective actions. However, as the volume of cases has increased, so has the scope of economic sectors affected. Notably, there has been a significant rise in cases related to data privacy, digital services, as well as the environment, energy, and climate.

The analysis of collective actions at the country level reveals significant variations. However, this variation cannot be fully explained by variables such as GDP, population, GDP per capita, or product quality. Other factors may contribute to the different levels of growth in collective action cases across EU countries.

Case studies from the Netherlands, Portugal, and Germany provide valuable qualitative insights.

In the Netherlands, the prevalence of collective actions can be attributed to the Dutch legal system's low threshold for initiating such cases compared to other countries. Dutch collective actions operate under an opt-out system, and ad hoc entities can be formed quickly to pursue specific claims. Additionally, the admissibility criteria for collective actions in Dutch courts are less stringent than in other EU countries, and cost-shifting risks are minimal. Likely for these reasons, a thriving ecosystem of law firms and funders actively pursuing collective actions has developed in the Netherlands.

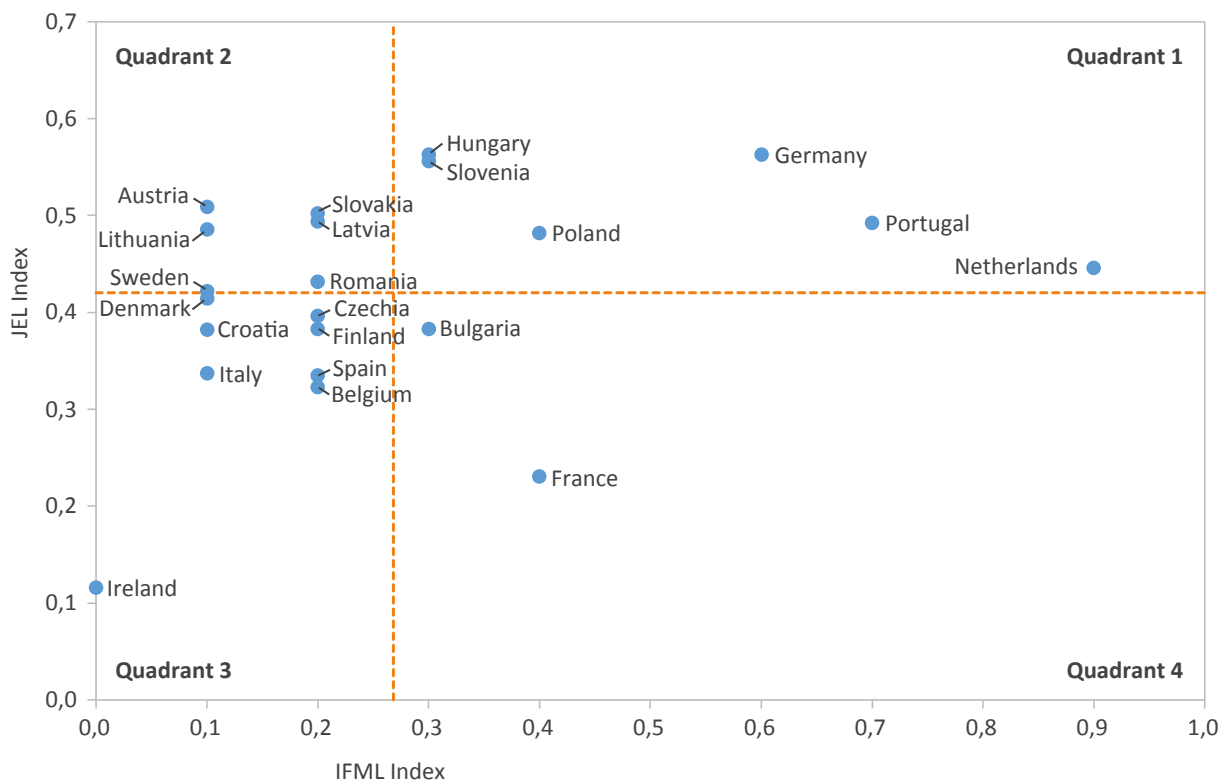
The legal system in Portugal is similarly favourable to collective actions. Alongside the opt-out system, there are no caps on the damages that can be claimed and no restrictions on forum shopping. These features make collective action in Portugal an appealing and comparatively low-cost option for litigants and funders.

The German system of collective actions can be characterised as a dual framework comprising the assignment model and the Redress Action Act. The assignment model's popularity, supported by the emergence of digital platforms facilitating the aggregation of mass claims, has been a major driver of the increase in collective actions in Germany.

Chapter 4 builds on these insights by developing two quantitative indices. The first is the Institutional Framework for Mass Litigation (IFML) Index, based on three variables: (1) existing collective action mechanisms; (2) characteristics of the legal system governing collective actions (e.g., opt-out systems, no requirement to disclose funding sources, no loser-pays principle, admission of ad hoc qualified entities (QEs)); and (3) institutional factors external to the legal system (e.g., number of funders). The second is the Judicial Efficiency for Litigation (JEL) Index, based on seven variables: (1) number of judges; (2) number of prosecutors; (3) number of lawyers; (4) judicial budget; (5) clearance rates; (6) cost of contract enforcement; and (7) disposition times.

The IFML and JEL indices can be combined to position each EU country within a quadrant framework based on their scores. The following figure illustrates EU countries positioned above or below the IFML and JEL averages.

FIGURE: IFML AND JEL INDICES ACROSS EU MEMBER STATES



The figure suggests that countries such as the Netherlands, Portugal, and Germany, all located in Quadrant 1 (High JEL, High IFML), may be more susceptible to an increase in mass litigation in the future. These countries exhibit above-average institutional factors supporting collective action, along with relatively efficient judicial systems, making them appealing venues for increased mass litigation activity.

Countries located in Quadrant 2 (High JEL, Low IFML), such as Austria, Lithuania, and Sweden, may be less susceptible to an increase in collective actions. Despite their efficient legal systems, these countries have implemented legal guardrails that constrain mass litigation.

Countries positioned in Quadrant 3 (Low JEL, Low IFML), such as Ireland, Italy, and Spain, have institutional frameworks that are less supportive of collective action, combined with relatively less efficient legal systems. This suggests that these countries may experience slower growth in the volume of collective actions.

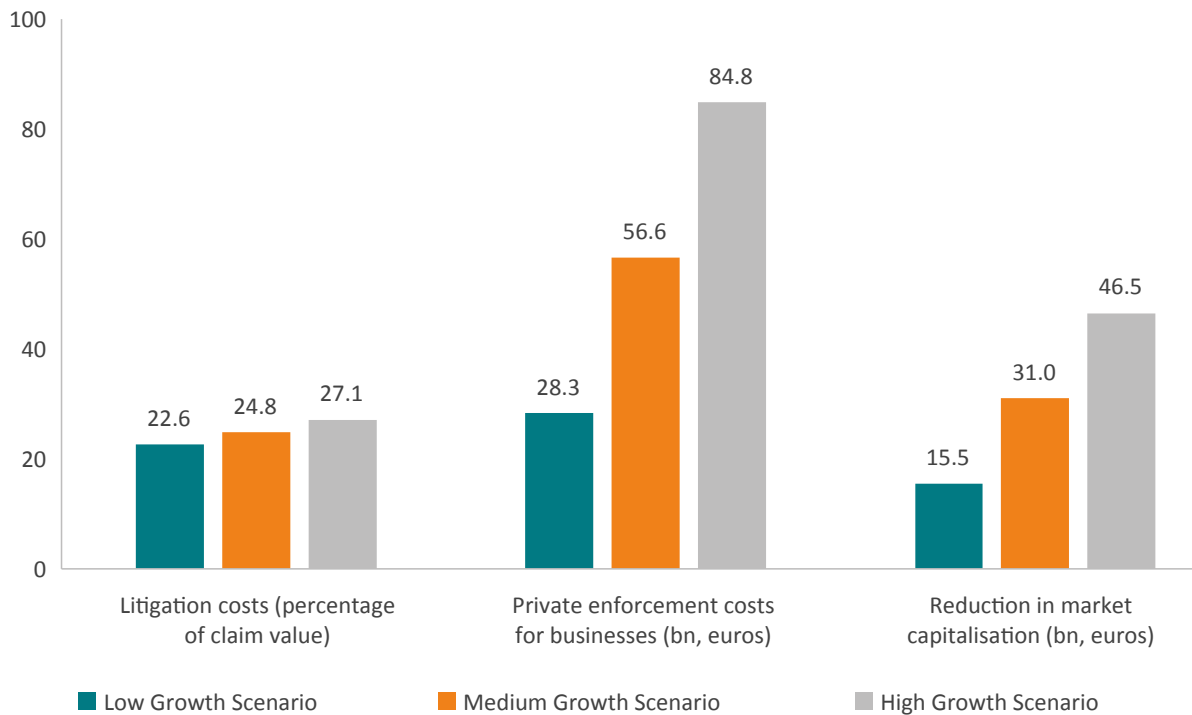
Finally, countries located in Quadrant 4 (Low JEL, High IFML), such as France and Bulgaria, present an intriguing case. Although they possess above-average institutional frameworks that support collective action, these factors might be offset by less efficient judicial systems, as evidenced by their low scores on the JEL Index.

The increase in the volume of collective action cases will have significant economic consequences.

Several studies have sought to estimate the costs of private enforcement on companies operating in the US. These estimates serve as the basis for assessing the potential impact of a higher volume of collective actions in the EU. However, it remains uncertain how closely the EU system of mass litigation aligns with its US counterpart. To address this uncertainty, a scenario-based analysis has been employed to capture a range of potential outcomes. The study outlines three scenarios (Low, Medium, and High Growth) which assume that as the number of collective actions in the EU rises, the economic effects of mass litigation observed in US empirical studies can be proportionally applied to the EU economy.

The Low Growth Scenario assumes that the economic impact of mass litigation growth in the EU will correspond to 10 percent of the effects observed in empirical studies in the US. The Medium Growth Scenario projects a 20 percent correspondence, while the High Growth Scenario estimates a 30 percent equivalence.

The scenario-based analysis highlights the potentially significant economic impact of a growing number of collective actions. Private enforcement costs for businesses are projected to range from €28.3 billion under the Low Growth Scenario, €56.5 billion under the Medium Growth Scenario, to €84.8 billion under the High Growth Scenario. Similarly, if these scenarios are applied to litigation costs as a share of claim value, such costs could increase from the current level of 20.3 percent to 22.6 percent (Low Growth), 24.8 percent (Medium Growth), or 27.1 percent (High Growth) of claim value. For the EU's most innovative companies, market capitalisation losses are estimated at €15.5 billion (Low Growth), €31.0 billion (Medium Growth), and €46.5 billion (High Growth).

FIGURE: ECONOMIC EFFECTS OF COLLECTIVE ACTIONS IN THE EU

Another way to interpret the results of the scenario-based analysis is to assess the benefits of avoiding a shift to the High Growth Scenario. The differences between the High and Low Growth Scenarios include a 20 percent reduction in litigation costs, savings of €56.6 billion for businesses, and a €31 billion reduction in the potential decline in the market capitalisation of innovative companies in the EU.

The EU and its Member States should carefully consider the implications of the economic modelling as they refine their institutional frameworks regulating mass litigation. The IFML Index demonstrates a strong correlation between the total number of collective action cases and the institutional framework that regulates them. EU countries can adopt measures to mitigate the adverse economic effects of increased mass litigation on the European economy. For instance, based on the IFML Index, EU Member States can:

- amend class participation rules by adopting an opt-in process instead of opt-out to prevent exaggerated claims,
- adopt or reinforce existing transparency rules to ensure disclosure of funding sources,
- ensure that the loser pays principle is reinforced and consistently applied,
- apply stricter criteria for forming a qualified entity to file collective action cases,
- exclude ad hoc entities and private persons as claimants, and
- mitigate the negative economic effects of private third-party funders in collective actions to ensure a larger share of the defendant's payments reaches consumers.

LIST OF ACRONYMS

ARN – National Board for Consumer Disputes in Sweden (Allmänna reklamationsnämnden)

CEPEJ – European Commission for the Efficiency of Justice

CSRD – Corporate Sustainability Reporting Directive

DCC – Dutch Civil Code

DCCP – Dutch Civil Code Procedure

DMA – Digital Markets Act

DSA – Digital Services Act

ESG – Environmental, Social and Governance

GDP – Gross Domestic Product

GDPR – General Data Protection Regulation

GDV – German Insurance Association

ICT – Information and Communications Technology

IFML – Institutional Framework for Mass Litigation

JEL – Judicial Efficiency for Litigation

KapMuG – Model Proceedings in Capital Market Disputes law
(Kapitalanlegermusterverfahrensgesetz)

OECD – Organisation for Economic Co-operation and Development

OREIFS – Open-ended Real Estate Investment Funds

PLD – Product Liability Directive

RAD – Representative Action Directive

R&D – Research and Development

TIC – Testing, Inspection and Certification

TPLF – Third Party Litigation Funding

SME – Small and Medium Size Enterprises

VW – Volkswagen

WCAM – Dutch Collective Settlement for Mass Damages Act

WAMCA – The Dutch Collective Actions for Mass Damages Act

1. INTRODUCTION

The purpose of this study is to better understand the growth of mass litigation in the European Union (EU) and its economic consequences. Mass litigation is defined in this study as a procedure in which a group of claimants with common interests brings a legal action against one or more defendants using any available court-based procedure (opt-in, opt-out, assigning claims, consolidating claims, etc). The study uses the terms "collective action" and "mass litigation" interchangeably.¹

There are historical precedents for mass litigation in Europe. Certain elements can be traced to traditional legal practices that go back several centuries, particularly in Anglo-Saxon and Nordic legal traditions, where laws permitted claimants to represent groups of claimants in certain situations.² The original objective of these collective actions was to enhance the court's efficiency by reducing "duplicative litigation".³ Indeed, this efficiency objective is still cited today. Mass litigation largely disappeared amid other political and economic developments that started in the 15th century and it ceased to exist altogether in England in 1850.⁴

However, collective actions have re-emerged in Europe during the 21st century as part of broader policy, legal, societal and technological developments that have brought about a new trend towards private litigation enforcement. The EU has encouraged consumers to seek redress via private litigation for breaches of European competition law for a long time. More recently they have made a decisive pivot towards collective actions in a broad range of new fields of law including data privacy, Environmental, Social and Governance (ESG) reporting requirements and product liability.

The spread of collective actions interacts awkwardly with certain civil law traditions in Europe. For decades EU countries have built up a robust compliance framework that is based on detailed ex ante rules backed up by rigorous public enforcement rather than non-prescriptive regulation backed by ex post enforcement through private litigation once damage has occurred.

However, supporters of more private litigation in Europe say they are not seeking to directly import the practice of US-style collective actions. Indeed, EU authorities have been at pains to point out that they are deliberately not adopting certain key aspects of the American litigation system – such as "contingency fees, punitive damages, jury trials, the American rule of cost, and a generally low threshold to extensive and expensive pre-trial discovery"⁵ – assuming that this is sufficient to ensure that the EU system is not in danger of becoming "Americanised". The underlying assumption among some European policy-makers appears to be that more

¹ Collective court procedures, prominent in the US, such as class actions, Multi-District Litigation (MDL claims), and non-contractual claims, commonly referred to as tort claims, are also included within the definition applied in this study.

² Stadler, A. (2021) Are Class Actions Finally (Re)conquering Europe? Available at: https://www.juridicainternationaleu/public/pdf/ji_2021_30_14.pdf

³ Coffee, J. C. (2015). *Entrepreneurial litigation: its rise, fall, and future*. Harvard University Press.

⁴ Stadler, A. (2021). (see note: 2)

⁵ Coffee, J. C. (2015). (see note: 3)

effective consumer redress and greater access to justice can be achieved by providing a more conducive framework for collective actions in the EU.

What are the economic consequences of these developments in Europe? Unfortunately, the answer is that no one really knows. Despite the encouragement of mass litigation by a series of regulatory changes at both EU and national levels, there is a dearth of economic analysis of the consequences. Nor have the regulatory developments been supported by impact assessments that go beyond the most shallow and obvious economic aspects.

The EU's revised Product Liability Directive (PLD) is a case in point. The new PLD makes it considerably easier to bring liability claims to court including via mass litigation and substantively modifies the burden-of-proof to that end, especially in cases that involve "complex" technology, including even in collective actions. The assumption underlying the new PLD was that the threshold for consumers to successfully bring a product liability claim was too high and that the amounts of compensation awarded under the old PLD were insufficient; however, the material evidence for these claims was, to put it generously, inadequate. In fact, there was very little supporting economic evidence at all. Concerns that under the new PLD the low bar for cases to be brought and the low bar for the burden-of-proof to be shifted might have an impact on how EU companies innovate were categorically dismissed.⁶

Admittedly, collective actions remain relatively uncommon in most EU countries; however, the number of cases is growing year on year as policy developments such as the Digital Markets Act (DMA) and the General Data Protection Regulation (GDPR) expand collective redress into new areas of EU law. Now is, therefore, a good time to review not just the current developments but the objectives, structure and economic impact of policies that seek to encourage more private enforcement of EU law via court-based litigation.

Finally, it is particularly urgent to understand the economic consequences of a "mixed regime" – that is, a regime based on both prescriptive regulation with ex ante as well as ex post public enforcement on the one hand, and relatively looser regulation with tough ex post enforcement by private litigation on the other – and there is an informed discussion to be had about the comparative costs and benefits of each of these approaches. The EU has embarked on the introduction of a unique and untested civil enforcement regime by encouraging greater enforcement via private litigation whilst also maintaining a regulatory framework that is widely accepted to be prescriptive and restrictive. The combination of these two enforcement models raises questions about how they are intended to work in tandem and what the consequences will be for the European economy and its competitiveness.

Therefore, this study takes a closer look at recent changes in the EU collective action regime and examines the economic aspects of these developments. In addition to this introductory chapter, the study comprises another three chapters:

⁶ EJF (2023, November 2) Product Liability Directive: European industry calls for a major rethink. Available at: <https://europeanjusticeforum.org/files/Contents/Documents/Downloads/PLD%20Revision%20Industry%20Joint%20Trilogues%20Letter%20-%20Oct%202023.pdf>

Chapter 2 describes the two distinct enforcement models that have already been mentioned, one being public and the other private, as well as how these models influence the behaviour of companies, consumers, and regulators. This chapter separates the two systems for clarity, although most countries operate under a mixed enforcement regime in which both models are employed. This is the case for the EU, where public enforcement has typically been dominant. However, as explained, the rise of mass litigation has introduced an additional layer of private enforcement that is no longer only of marginal significance.

Chapter 2 also presents two features that make the EU's enforcement model distinct from other countries: the interplay between national and EU legislation and the role played by Ombuds Bodies. An Ombuds Body is an independent public or private institution that acts as an interlocutor, and in some cases, as a regulatory agency, for individual citizens in order to protect and assist in enforcing their consumer rights.

The following questions serve as a guideline for this chapter:

- What are the public and private regimes for the enforcement of regulation in the EU? How do they work? What are the differences between them? And how do these differences impact the broader economy?
- How does enforcement of regulation work in the EU? What is the balance between public and private enforcement in the EU? And what are the features that make enforcement in the EU different from other regions?

Chapter 3 examines the evolution of mass litigation in the EU. This analysis is conducted following a two-pronged approach. The first component of the methodology comprises a database of 373 collective action cases from 23 Member States. These cases have been gathered from public registries, consumer associations, and reputable websites. The cases are examined by year, by country, and by economic area. In addition, the chapter explores the potential reasons for the large variation in the number of mass litigation cases between the EU countries, including economic size, population, and the prevalence of defective products.

The second component expands the database for three countries that have seen particularly significant increases in the volume of collective actions: the Netherlands, Portugal, and Germany. These case studies provide a more in-depth textual analysis, accompanied by data, to understand the legal and institutional factors that are driving the surge in mass litigation.

To investigate these topics, Chapter 3 explores the following questions:

- How did the volume of collective actions in the EU evolve over the years? Which EU countries and which economic sectors have seen the highest growth in the number of collective actions? And what are the factors that can explain the differences?
- What are the main legal features of collective actions in the Netherlands, Portugal and Germany? What explains the change in the use of collective actions over the years in these countries? What are the economic areas that have been most affected so far?

Chapter 4 explores the economic impact of mass litigation in the EU. The first part of this chapter uses two indices to assess the potential drivers behind the increase in collective action cases across the EU: one quantifying the country's Institutional Framework for Mass Litigation (the IFML Index) and another quantifying the efficiency of the national legal system (the Judicial Efficiency for Litigation, the JEL Index). These two indices are employed in tandem to categorise each EU country using a quadrant framework within which those EU Member States that are likely to see greater increases in volumes of collective claims in the future are identified.

The second part of Chapter 4 assesses the economic consequences of a surge in collective action lawsuits. Building upon the existing empirical literature for the US, it outlines three scenarios: Low Growth, Medium Growth, and High Growth of collective actions in the EU. These scenarios are used to quantify the potential costs associated with an increase in collective actions including the impact on the EU's economy, businesses, and innovation.

Chapter 4 is guided by the following questions:

- Which EU countries have an institutional framework that makes it easier to start collective actions? Does the efficiency of the judicial system make a country more attractive for law firms and third-party funders seeking to bring collective actions? How do these factors – the institutional framework and the efficiency of the judicial system – contribute to the likelihood that a collective action will be filed in a particular jurisdiction?
- What could be the impact of an increase in the number of collective actions on the EU economy? Which EU Member States could be impacted the most? How could an increase in collective actions impact economic variables such as business costs and innovation?

Finally, Chapter 5 presents the main conclusions and findings.

2. OVERVIEW OF ENFORCEMENT OF REGULATION IN THE EU

2.1 Introduction

The objective of this chapter is to answer the following questions:

- What are the public and private regimes for the enforcement of regulation in the EU? How do they work? What are the differences between them? And how do these differences impact the broader economy?
- How does enforcement of regulation work in the EU? What is the balance between public and private enforcement in the EU? And what are the features that make enforcement in the EU different from other regions?

To answer these questions, Section 2.2 presents and describes the models of public and private

enforcement of regulation, their advantages and disadvantages and how the two models influence the behaviour of companies and consumers. This chapter separates these two systems for clarity although most countries, including the EU Member States, operate under a mixed enforcement regime where both the public and private enforcement systems co-exist and function in parallel.

Section 2.3 builds on this outline of the mixed model to describe how the enforcement of regulation in the EU impacts the EU's economy. It also provides insights into two features that make EU private enforcement distinctly European: the interaction between national and EU legislation (Section 2.3.1) and the role of Ombuds Bodies (Section 2.3.2).

Section 2.4 explains the main findings of the analysis by answering the two sets of questions above.

2.2 Public and Private Enforcement

2.2.1 A Model of Public Enforcement

In a public enforcement model, norms and regulations are specific and prescriptive. They set out in detail what companies can and cannot do and the steps to be followed to achieve regulatory compliance. These norms entail costs for businesses and the broader economy. The most immediate impact is through compliance costs, which includes the resources spent by companies on adhering to new regulations. A recent report by former Italian Prime Minister and President of the European Central Bank, Mario Draghi, highlighted that the total administrative cost of EU regulation could be as large as €150 billion, or 1.3 percent of the EU's Gross Domestic Product (GDP) per year.⁷

In certain sectors, regulatory compliance involves collaboration between companies and designated regulatory agencies. A regulatory approval decision from the public agency provides to both consumers and companies the assurance that a product adheres to relevant regulations and can be safely introduced on the market. In addition, regulatory agencies actively monitor markets for potential safety issues or infringements. In cases of non-compliance, the regulatory agency can impose penalties on companies, and they may also facilitate a compensation award for consumers.

Consumers also value regulation that provides safeguards to prevent unsafe products entering the marketplace. Detailed and prescriptive norms ensure that products have undergone rigorous testing, enhancing consumer confidence. However, this heightened level of regulatory scrutiny may lead to delays in product availability, and businesses may transfer some of the associated compliance costs to consumers through increased prices.

⁷ Draghi, M. (2024). The future of European competitiveness: In-depth analysis and recommendations. European Commission, p. 317. Available at: https://commission.europa.eu/document/download/ec1409c1-d4b4-4882-8bdd-3519f86bbb92_en?filename=The%20future%20of%20European%20competitiveness_%20In-depth%20analysis%20and%20recommendations_0.pdf

Public enforcement of regulation requires the deployment of significant resources. The development of comprehensive norms, ensuring compliance with these norms, and providing consumers with mechanisms for dispute resolution requires a robust institutional framework and dedicated human resources. The costs of these requirements are ultimately borne by taxpayers.

2.2.2 A Model of Private Enforcement

In a private enforcement model, regulation is less prescriptive and less detailed than that of a public enforcement model. Private enforcement relies more on general principles-based regulation that prioritises broad goals over specific rules and focuses on outcomes rather than dictating specific methods of compliance. As a result, companies have more discretion when deciding on the approach that they adopt to ensure compliance. Crucially, enforcement under this model is primarily undertaken on the initiative of private actors via courts rather than public administrative authorities.

In a private enforcement model, consumers can sue companies if their products fail to comply with regulations. Consequently, enforcement and compliance are based on probabilities, hingeing primarily on the likelihood of a lawsuit being brought or not. This introduces uncertainty into the regulatory compliance regime. To mitigate this uncertainty, companies can employ two tactics: firstly, ensure rigorous compliance with the regulation and secondly, take out adequate insurance coverage. Consequently, private enforcement includes two costs for companies: insurance premiums and potential fines or penalties in case a lawsuit is lost.

Consumers may sue for compensation due to non-compliance, and the defendant's size significantly influences this decision. Larger companies are more likely to be targeted by lawsuits since they have deeper pockets to pay for any compensation that may be awarded. Conversely, Small and Medium Enterprises (SMEs) might be seen as less attractive targets. However, the financial burden of higher insurance premiums and the legal costs in case of a lawsuit, fall disproportionately on SMEs as they have lower revenues.

The inherent uncertainty associated with private enforcement can divert valuable time and resources away from core business activities⁸. A study examining US private companies found that the threat of lawsuits, including potentially frivolous or unfair claims, influenced the business decisions of 62 percent of respondents, leading them to prioritise litigation avoidance over other strategic considerations⁹. Another example comes from Italy where doctors began ordering unnecessary tests and procedures to document thoroughness, even when these were not clinically required, in order to avoid medical malpractice claims and the subsequent litigation¹⁰.

The potential impact on innovation should be considered in policy-making decisions in the area of mass litigation. Increased private enforcement of regulation may incentivise companies to

⁸ McKnight, D. L., & Hinton, P. J. (2013). International Comparisons of Litigation Costs: Europe, the United States and Canada. US Chamber Institute for Legal Reform.

⁹ McKnight, D. L., & Hinton, P. J. (2011). Creating conditions for economic growth: the role of the legal environment. NERA Economic Consulting.

¹⁰ Fiorentini, G., Lorenzoni, V., & Mammi, C. (2014). Defensive medicine and malpractice insurance: Evidence from Italian public hospitals. *Health Economics*, 23(3), 376-378. <https://doi.org/10.1002/hec.3031>

focus on risk-averse strategies that minimise the likelihood of lawsuits. This poses two important implications for innovation. First, since innovative products inherently carry more uncertainty about potential risks and side effects, they often incur higher insurance costs. These higher costs may disincentivise companies from developing innovative products. Second, if higher litigation risks are primarily associated with innovative products, companies may decrease their investment in new technology which can lead to a shift in focus towards ensuring legal compliance instead of focusing on product development.

On the other hand, private enforcement models provide some advantages for innovation to prosper. Reduced regulatory hurdles and potentially lower upfront costs may facilitate faster product development and market testing. Additionally, companies have greater flexibility to adapt and experiment within a less rigid compliance framework. From an innovation perspective, litigation risks become an additional cost that must be managed (and insured against) compared with the high costs of a more rigid compliance structure, including potentially slow regulatory approval decisions, of a public enforcement regime.

In theory, consumers benefit from private enforcement in two ways. First, the threat of litigation incentivises companies to prioritise safety as part of their product development processes. Second, mass litigation empowers consumers to act as "private attorneys general" and lowers litigation costs for individual claimants.

However, there are also drawbacks for consumers in a private enforcement model. The compliance and insurance costs mentioned earlier may be passed on to consumers in the form of higher prices. Additionally, a portion of any awarded compensation will go to funders, lawyers and other intermediaries, significantly reducing the amount received by consumers. Furthermore, there is a clear risk of high agency costs. This refers to a situation where a lawyer may prioritise their own financial gain over the best outcome for the consumer. In such cases, key litigation decisions may be driven by the lawyer's, or the funder's, economic interests rather than by the merits of the case¹¹.

2.3 Enforcement of Regulation in the EU

Both public and private enforcement models operate in the EU, though public enforcement remains the prevailing policy instrument. The EU is characterised by a prescriptive regulatory framework with detailed rules, active oversight by regulatory agencies, and a compliance culture fostered through regular communication between companies and regulators. Consequently, compliance costs within the EU are generally already higher than in most other countries.

On the other hand, a key strength of the European model lies in the greater predictability and clarity as to compliance and liability risks that it provides to players in the market. This is achieved by having powerful regulatory agencies that oversee the compliance framework, and breaches being subject to sanctions imposed by those agencies.

¹¹ A review of the empirical literature quantifying the economic impacts of collective action can be found in Chapter 4, Section 4.4.1.

The rise of private enforcement and mass litigation complicates this picture. Even those companies that diligently comply with EU regulation may still face lawsuits, introducing an important element of uncertainty into the public enforcement model. Companies operating in the EU, particularly within sectors where private litigation is more prevalent, may be compelled to seek additional insurance to mitigate potential legal risks.

Private enforcement emerges as an additional layer on top of, rather than replacing, existing public enforcement mechanisms and this hybrid approach presents new challenges for companies in the EU: the high compliance costs associated with detailed regulations are compounded by the legal uncertainty and additional insurance expenses triggered by increasing private litigation. The cumulative effect results in higher business costs that may impact economic growth.

Many other countries, apart from the EU Member States, have a regulatory system that mixes public and private enforcement. Yet, there are two features making the EU system unique: firstly, the interplay between national jurisdictions and EU legislation, and secondly, the role played by Ombuds Bodies in many Member States.

2.3.1 National and EU Legislation

Many EU countries already had in place a national framework for mass litigation prior to the implementation of the RAD. However, most of them – with some important exceptions – were limited in scope¹² and served primarily as a fall-back option to resolve issues for which other enforcement tools were deemed inadequate¹³.

The mass litigation regimes of most of the Member States shared certain features: they apply the loser pays rule and they largely prohibit contingency fees; there are no juries in civil proceedings and punitive damages are only awarded in exceptional circumstances; furthermore, before the adoption of the new EU PLD, European civil law procedures generally took a restrictive approach to the disclosure of documentary evidence¹⁴.

However, despite these common features, the development of mass litigation across EU countries has been strongly shaped by national approaches to civil procedures, access to justice, consumer protection, and the overall balance between public and private enforcement of regulation in each country. For example, in Germany, collective actions have been brought by associations that can provide a form of collective non-compensatory redress by seeking

¹² The European Commission identified the following nine EU countries out of 28 at the time as those without any compensatory collective redress mechanism: Croatia, Cyprus, Czech Republic, Estonia, Ireland, Latvia, Luxembourg, Slovakia and Slovenia, see Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU). COM(2018) 40 final, p. 3. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0040>

¹³ Hodges, C., Woopen, H., Tulibacka, M., *The Evolution of Collective Redress in Europe*, Introductory Chapter to: *Collective Litigation in Europe: Law and Practice* Mary E. Bartkus, Magdalena Tulibacka, István Varga & Stefaan Voet (eds.), Juris forthcoming 2025.

¹⁴ Hodges, C., Vogenauer, S., & Tulibacka, M. (2010), *Costs and Funding of Civil Litigation: A Comparative Study*. *Costs and Funding Of Civil Litigation*, C. Hodges, S. Vogenauer and M. Tulibacka, eds., Hart Publishing. The paper was published as part of the Oxford Legal Studies Research Paper, Paper No 55/2009. Available at: <http://ssrn.com/abstract=1511714>

injunctions on behalf of consumers under different sector-specific legislation¹⁵. In contrast, and as described in the following section, the Nordic countries rely heavily on Ombuds Bodies to resolve mass claims. Countries such as Portugal have had a system of collective actions or *ação popular* (popular action) for a long time¹⁶ but have not experienced an increase in the number of cases until recently. The Netherlands has the longest experience with and the most sophisticated model of mass litigation in the EU.

The surge of private enforcement in some Member States worried the European Commission that saw the emergence of different mass litigation models and procedures as a possible source of market fragmentation in the EU¹⁷. As a result, the European Commission decided to establish a common EU framework for private enforcement¹⁸ and the RAD was finally adopted in 2020.¹⁹

The goal of RAD is to enable consumers to seek collective redress and injunctions for harm suffered due to breaches of EU law by establishing a unified mechanism based on a set of minimum common standards. The Directive provided Member States with considerable flexibility in their implementation in national law, including in several key areas: the adoption of an opt-out or opt-in process, the criteria to be used by judges when assessing the certification of a collective action, the selection of the organisations that would be authorised to bring domestic collective actions and the qualification criteria that they must meet and the safeguards to be implemented to control third-party funding (some of these elements are also discussed in Chapter 4, Section 4.2.1). However, this flexibility has led to a lack of consistency between Member States in their implementation of RAD which may result in forum shopping by claimants within the EU and works against the objective of avoiding market fragmentation.²⁰

It is important to note that even though RAD has had a relatively limited effect in those EU countries that already had their own mass litigation framework in place, such as the Netherlands and Portugal, in other Member States it constituted a crucial milestone by establishing a set of rules to govern collective actions for the first time.

The RAD must be applied by Member States in a wide spectrum of 66 harmonised areas of EU law that are set out in its Annex 1 which the EU legislator is encouraged (in recital 17) to expand with every new piece of consumer protection legislation). Included in the list are data protection, product liability, financial services, travel and tourism, telecommunications, energy, and general consumer protection regulations. Member States are permitted to bring other areas of law within the scope of RAD, and recital 18 of the directive explicitly encourages them to do so. In

¹⁵ For instance, the Act on Injunctive Relief for consumer rights and other violations (Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Unterlassungsklagengesetz – UKlaG)).

¹⁶ 1995 *Ação Popular* regulated by Law 83/95.

¹⁷ Mullenix, L. S. (2021). For the Defense: 28 Shades of European Class Actions. In Uzelac, A. and Voet, S. (eds). *Class Actions in Europe. Holy Grail or a Wrong Trail?* (pp. 43–60). Springer.

¹⁸ For instance, in 2011, the European Commission launched a consultation titled "Towards a Coherent European Approach to Collective Redress." The consultation emphasised that access to justice via collective redress relies on coherence between procedural laws and that uncoordinated efforts in this field could lead to fragmented laws, hindering access to justice. In 2013, the European Commission issued a non-binding recommendation (Recommendation 2013/396) outlining common principles for judicial, compensatory, injunctive, and out-of-court collective redress mechanisms.

¹⁹ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

²⁰ Pinsent Masons. (2024, September 12). The impact of new EU mass actions directive. Available at: <https://www.pinsentmasons.com/out-law/guides/the-impact-of-new-eu-mass-actions-directive-across-europe>

addition, Annex 1 creates overlaps between RAD and other EU legislation. For instance, Article 80 of the GDPR establishes an EU right to collective action for data protection violations which, together with the provisions included in the RAD, increases the viability of mass litigation in this domain²¹. Similarly, the DMA establishes mechanisms for cooperation between the Commission and the courts while its Article 42 refers to RAD and enables Member States to bring collective actions against DMA infringements by gatekeepers that harm consumers' collective interests. Finally, and as explained in Chapter 1, the recently adopted PLD²² expands the scope of products covered to include software, widens the definition of compensable damages to include the loss or corruption of data, and it lays the groundwork for consumers to seek compensation if they are harmed by a defective product. As a result, the new PLD, combined with the RAD, could be a further vector for increased mass litigation in the EU.

2.3.2 Ombuds Body

Though there are important variations across the Member States, Ombuds Bodies in the EU share several key features: they can easily be approached by individual consumers and they seek to solve conflicts by negotiation first. Some are organised as independent entities paid by the government and unconnected with business or consumer associations, sometimes with far-reaching powers. Others are funded by industry, either on a voluntary basis or because they are obliged to do so by law. The Ombuds Bodies use redress as a tool to address legal breaches for consumers. Some can aggregate individual cases into mass claims, and they can require businesses to engage in negotiation, facilitating out-of-court settlements. Moreover, Ombuds Bodies offer their services free of charge for consumers²³ and increasingly function as a centralised information and guidance hub, providing advice and serving as a one-stop shop for diverse consumer issues.

As such, the Ombuds Body offers a middle way between the private and public approaches to enforcement. They leverage the deterrent power of public enforcement, while also enabling consumers and businesses to pursue redress for specific grievances. These benefits have been recognised by the Organisation for Economic Co-operation and Development (OECD)²⁴ and by the European Commission²⁵.

²¹ Directive (EU) 2020/1828 (see note: 19); also see: the CJEU in the Case C-319/20 – Meta Platforms Ireland, Limited vs. Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V., held that a consumer protection associations could pursue GDPR claims without a mandate of consumers, i.e. regardless of whether an actual infringement of the data subjects' rights has been claimed and the action has been authorised by them, Judgment of the Court (Third Chamber) of 28 April 2022 (request for a preliminary ruling from the Bundesgerichtshof – Germany) – Meta Platforms Ireland Limited, formerly Facebook Ireland Limited v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V. (Case C-319/20). Available at: <https://curia.europa.eu/juris/document/document.jsf?jsessionid=D8F4B41ED63F2C9E2426128E2AE5A041?text=&docid=261210&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1635387>

²² Directive 2024/2853 of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC.

²³ Hodges, C., Benöhr, I., & Creutzfeldt-Banda, N. (2012). Consumer ADR in Europe. Hart Publishing.

²⁴ Andrews, S. (2005). OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace: Background Report OECD Digital Economy Papers, No. 92. OECD Publishing, 15.

²⁵ Commission Recommendation of 11 June 2013 (see note: 12).

Comparing them with the mass litigation model as a way to provide redress to consumers, Hodges (2019)²⁶ found that the model of the Ombuds Body is superior in terms of its ability to deliver substantive and procedural justice, improve economic competitiveness, remove illicit gains from wrongdoers, restore victims to their original position, promote future compliance, provide accessibility and simplicity, deliver timely outcomes, and mitigate risks of abuse. Importantly, the study found that the Ombuds Bodies provide access to consumer redress at a lower cost than collective actions.

The model of the Ombuds Body is particularly well-established in the Nordic countries²⁷. Table 1 presents some of the main features for Ombuds Bodies in Denmark, Finland and Sweden.

TABLE 1: OMBUDS BODIES IN DENMARK, FINLAND AND SWEDEN

Country	Main features
Denmark	The primary function of the Ombuds Body (Forbrugerombudsmanden) is to enforce compliance and influence traders to act in accordance with good market practices. For example, the Danish Ombuds Body imposed a fine on Vivus, a payday loan provider, for misleading advertising related to the interest rates of its financial products. ²⁸
Finland	The Finnish Ombuds Body (Kuluttaja-asiamies) oversees compliance with consumer protection laws and facilitates dispute resolution. The Ombuds Body is financed by public funds and can launch collective actions but the court must assess whether the case meets the criteria for certification of a collective action. Finland also has a Consumer Disputes Board (Kuluttajariitalautakunta), an independent expert body that issues non-binding recommendations for resolving consumer-business disputes. As an example of its work, the Finnish Ombuds Body examined the environmental claims of the online shops of Marimekko and Stockmann, two Finnish design and retail companies, and found them to be vague and insufficiently explained. As a result of the actions of the Ombuds Body, the companies corrected their environmental marketing. ²⁹
Sweden	Sweden's consumer protection system is underpinned by a strong cultural preference for amicable settlements. The Swedish Consumer Agency (Konsumentverket) oversees consumer protection, while the National Board for Consumer Disputes (ARN) (Allmänna reklamationsnämnden) handles consumer complaints outside the court system. The Director-General of the Consumer Agency also serves as the Ombuds Body (Konsumentombudsmannen) and can represent consumers in court and negotiate with businesses to improve their practices. Moreover, the Swedish Ombuds Body possesses the authority to initiate a collective action in disputes that have a public interest dimension. ARN helps consumers in cases of cancelled or delayed travel, and in certain cases, it may recommend compensation. ³⁰ ARN is a highly authoritative body whose decisions are respected by the airlines.

Data on cases dealt by Ombuds Bodies in the EU is scattered and cross-country comparisons are difficult to make since the statistics are not consistently defined. For example, some countries measure cases by the number of people that contact the Ombuds Body while others record

²⁶ Hodges, C. (2019) Collective Redress: The Need for New Technologies. *Journal of Consumer Policy*, 42, 59-60. <https://doi.org/10.1007/s10603-018-9388-x>

²⁷ Dowsett, W. T. (1967). Pragmatism in Politics (With Reference to Swedish Democratic Practice). *The Australian Quarterly*, 39(3), 49-64.

²⁸ JBHO. (2018). Denmark. JBHO Blog. Available at: <https://jbho.blog/european-union/denmark/>

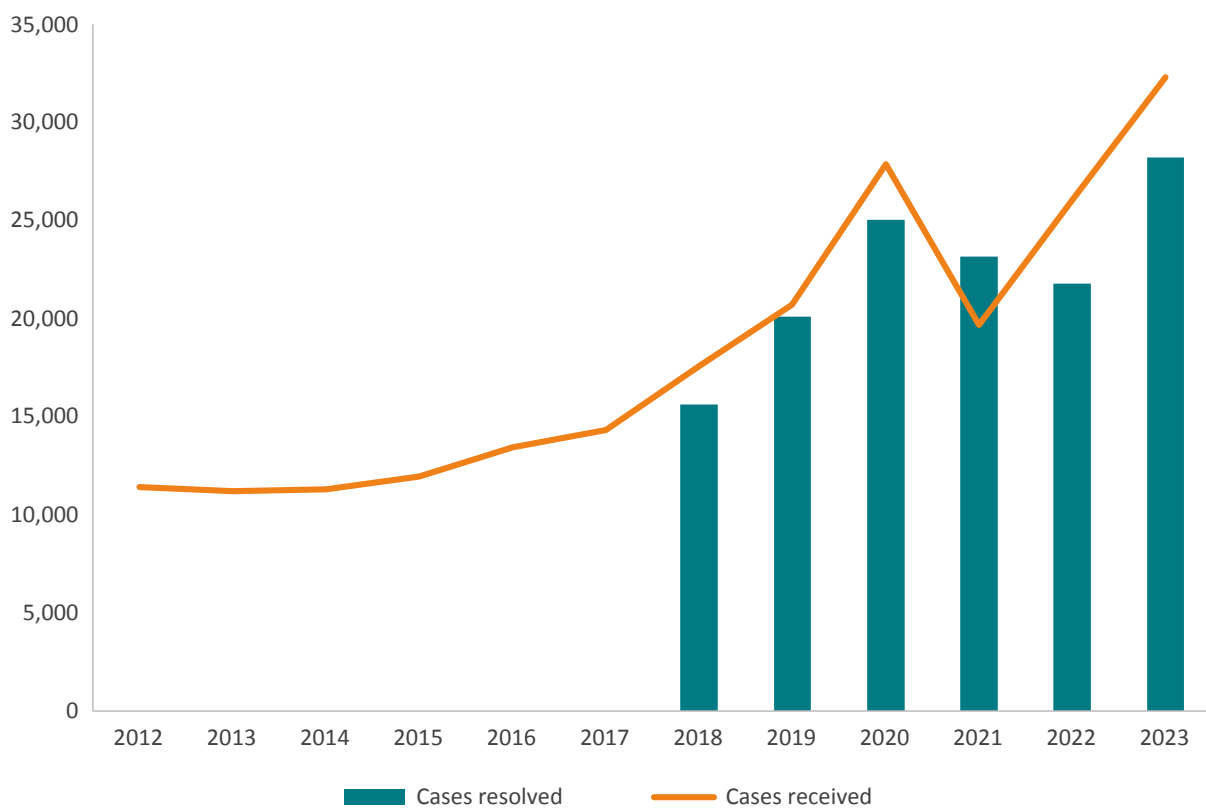
²⁹ Finnish Competition and Consumer Authority. (2023, December 5). The Consumer Ombudsman calls for accuracy in environmental marketing – Environmental claims made by Marimekko and Stockmann online shops were misleadingly broad. Finnish Competition and Consumer Authority. Available at: <https://www.kkv.fi/en/current/press-releases/the-consumer-ombudsman-calls-for-accuracy-in-environmental-marketing-environmental-claims-made-by-marimekko-and-stockmann-online-shops-were-misleadingly-broad/>

³⁰ Swedish Consumer Agency. (2024). Missed connection. Hallå Konsument. Available at: [from https://www.hallakonsument.se/en/articles/missed-connection/](https://www.hallakonsument.se/en/articles/missed-connection/)

cases by the number of formal complaints. Therefore, an individual country analysis offers a better route to understand how a system that relies on the Ombuds Body works in practice.

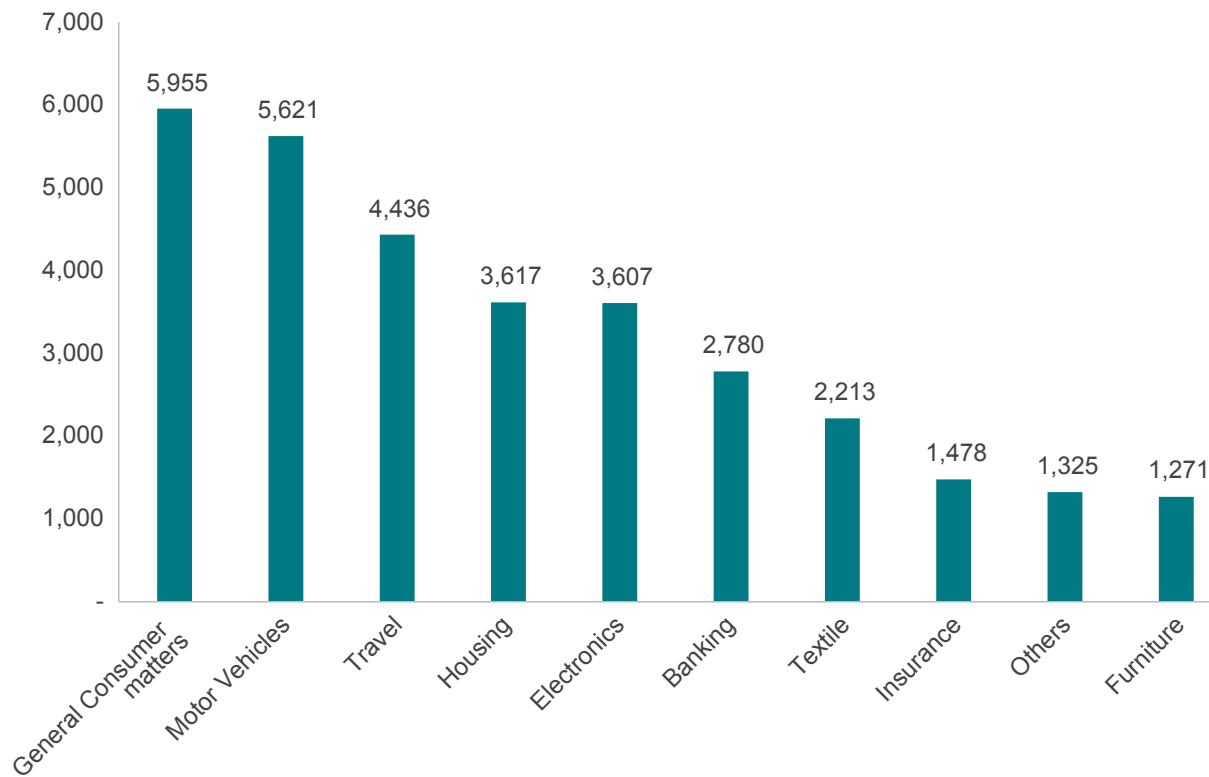
According to the Annual Reports of the Swedish National Board for Consumer Disputes (ARN) between 2012 and 2023, the Swedish Ombuds Body received an average of more than 18,000 cases annually, and the number of new cases has increased over this period. This growth in caseload coupled with a resolution rate that exceeds 90 percent of new cases demonstrates the increasing popularity and effectiveness of the Ombuds Body as an appropriate forum to address public concerns. The figure below shows the number of cases received between 2012 and 2023 and the number of cases resolved by the Swedish Ombuds Body for the period 2018 and 2023.

FIGURE 1: TOTAL NUMBER OF CASES RECEIVED (2012-2023) AND RESOLVED (2018-2023) BY THE SWEDISH OMBUDS BODY



Source: National Board for Consumer Disputes, Annual Reports.

The distribution of cases between the main economic sectors has been relatively stable in recent years as sudden spikes in certain sectors reverted back to the average during the following years. The following figure shows the number of cases received by the Swedish Ombuds Body per economic sector in 2023. The category of general consumer matters was the most popular (18 percent of all received cases); followed by cases related to motor vehicles (17 percent), travel (14 percent) and housing (11 percent).

FIGURE 2: PROPORTION OF CASES RECEIVED ACROSS ECONOMIC SECTORS BY THE SWEDISH OMBUDS BODY (2023)

Source: National Board for Consumer Disputes, Annual Reports.

The high caseload does not necessarily indicate that there is a positive bias of the Ombuds Body towards Swedish consumers. In 2023, only 39 percent of cases were decided in their favour. Additionally, a high compliance rate of 83 percent by companies during the same year demonstrates the system's effectiveness in achieving results³¹. Furthermore, when companies challenge the Ombuds Body's recommendations in court, rulings tend to favour the Ombuds Body, reinforcing the system's authority³².

The popularity of the Swedish Ombuds Body contrasts with the relatively low number of collective actions filed in Sweden³³ despite it having a legal framework that, in theory, would be conducive to mass litigation. Sweden has had a law governing collective actions since 2002³⁴ and it allows ad hoc qualified entities to represent groups of claimants. It could be concluded that the Swedish Ombuds Body provides effective services for consumers to obtain redress, making collective actions in court a less attractive option in comparison.

³¹ Source: ARN Annual Report. Retrieved from <https://www.arn.se/om-arn/arsredovisning/> ARN Statistics. Available at: <https://www.arn.se/om-arn/statistik/>

³² Source: Konsumentverket. Cases, judgments and injunctions. Available at: <https://www.konsumentverket.se/aktuellt/mal-domar-och-forelagganden/>

³³ See evidence presented in Chapter 3 of this report or in CMS (2023). European Class Action Report 2023. Available at: <https://cms.law/en/media/international/files/publications/publications/european-class-action-report-2023?v=2>

³⁴ Referred as the Group Proceedings Act (2002:599). See BIICL. Collective Redress Sweden. Available at: https://www.collectiveredress.org/documents/29_sweden_report.pdf

The Dutch Ombuds Body is also a popular agency, with about 20,000 to 30,000 people contacting the Ombuds Body yearly³⁵. However, the work of the Dutch Ombuds Body is mostly dedicated towards handling citizens' questions and requests for clarification or information. Importantly, the Dutch Ombuds Body, unlike its Swedish counterpart, has no role in representing consumers in court³⁶. At the same time, and as discussed in Chapter 3, the Netherlands is one of the EU countries where collective actions are most popular. There might be a connection between the lack of authority that hampers the Dutch Ombuds Body and the popularity of collective actions in the Netherlands. In other words, deprived of the option to pursue consumer redress through the Ombuds Body, Dutch citizens are compelled to take the route of private litigation through mass litigation instead.

2.4 Conclusion

This chapter described the EU's enforcement framework and the economic context within which it operates. We focused on two aspects in particular: the rules that govern collective actions and the role of Ombuds Bodies. The goal of this chapter was to answer the following questions:

What are the public and private regimes for the enforcement of regulation in the EU? How do they work? What are the differences between them? And how do these differences impact the broader economy?

There are two main kinds of enforcement systems: one is based on private enforcement, the other public. Private enforcement empowers individuals or groups to take court-based legal action to enforce regulations and it often involves collective actions where private parties jointly seek redress for damages due to breaches of the law. On the other hand, public enforcement is carried out by government agencies and public institutions that have been tasked with ensuring compliance with laws and regulations.

The public and private enforcement regimes each impact the economy in different ways. Private enforcement involves lower ex ante compliance costs since businesses face less regulatory oversight from public authorities. However, while the higher compliance costs from public enforcement are readily apparent, private enforcement also involves further costs in the form of higher premiums for insurance against potential litigation.³⁷

These costs impact companies' behaviour and ultimately the broader economy. For example, private enforcement systems generally offer greater flexibility for businesses, allowing them more space to innovate. However, this flexibility comes at the expense of greater uncertainty.

³⁵ Numbers obtained upon conversation with the authorities at the Dutch Ombuds Body.

³⁶ Conversation with the authorities at the Dutch Ombuds Body. Secondary source: nationale ombudsman. The institution. Available at: <https://www.nationaleombudsman.nl/english/the-institution> Dutch Ombuds Bodies are only in charge of complaints against the public administration.

³⁷ In the US, pharmaceutical companies are concerned about being exposed to product liability claims not covered by insurance. While the companies do maintain a coverage, the product liability coverage for pharmaceutical companies is becoming more expensive and increasingly difficult to obtain. See: USSEC. (2023). Teva Pharmaceutical Industries Limited. Available at: <https://www.sec.gov/Archives/edgar/data/818686/000119312524097752/d706461dars.pdf>; also see: USSEC. (2023). BioMarin Pharmaceutical Inc. Available at: https://s203.q4cdn.com/846063244/files/doc_financials/2023/q4/fdoe0f2c-c93d-4f16-a677-a14d321ea560.pdf. It is important that these developments do not get replicated in the EU.

Companies may face uncertainty regarding the compliance standards to apply as these are primarily determined through court decisions as a result of private litigation which could have negative effects on innovation. In contrast, public enforcement systems provide a clearer and more predictable framework for compliance. While the compliance costs for public enforcement are significantly higher, businesses have a defined set of rules to adhere to, reducing ambiguity and potentially facilitating innovation within established boundaries.

From the public administration's perspective, private enforcement involves fewer direct costs since regulation based on the application of certain principles and ex post regulatory oversight requires fewer resources. However, for society as a whole, the overall cost of the private enforcement model may be higher because the cost burden does not disappear; instead, it is shifted from the public administration on to the courts which again citizens and companies as tax payers will have to bear.

Both public and private enforcement regimes incentivise companies to comply with regulations, either because of the risks of regulatory sanctions for non-compliance or because of the risks of litigation, and they involve costs that may be passed on to consumers. The main difference between the two systems is the mechanism employed to apply for compensation in case of a non-compliant product that causes harm. Private enforcement systems rely on ex post private litigation, including collective action, while in the public enforcement model, regulatory agencies and Ombuds Bodies take a more prominent role. In the case of mass litigation, consumers can receive compensation, which may be substantial; however, consumers generally also have to pay a significant portion of their compensation to the lawyers and, if applicable, funders that were involved.

How does enforcement of regulation work in the EU? What is the balance between public and private enforcement in the EU? And what are the features that make enforcement in the EU different from other regions?

The EU predominantly applies the public enforcement model to ensure regulatory compliance. EU regulation is prescriptive and detailed, and EU regulatory agencies engage in proactive and robust oversight of market operators while, at the same time, building relationships with companies to foster a culture of compliance and certainty.

However, the EU model is becoming less uniquely based on public enforcement because private enforcement has taken on a growing role in recent years. This has resulted in a model where the private and public enforcement regimes apply in parallel, one on top of the other. This hybrid approach carries substantial risks. If the two systems overlap, operators in the EU may be confronted by the higher compliance costs inherent in a model based on public- enforcement as well as the higher insurance premiums, the litigation costs, and the regulatory uncertainty of the private enforcement model. The degree to which these risks materialise will depend on the amount of space accorded by EU policymakers to private enforcement and mass litigation.

Two features make the EU system of enforcement of regulation distinct from other regions: the combination of national and EU legislation and the role played by Ombuds Bodies.

National rules on collective actions varied widely, leading to uneven growth in the number of cases across the EU. The EU passed the RAD as a way to impose a minimum framework based on minimum standards for collective redress and to avoid potential fragmentation and unequal procedural rights for consumers across the EU. However, while minimum standards have been applied, the flexibility of the Directive means that non-harmonised rules and the potential for forum shopping are likely to persist as some EU countries take a more permissive approach to mass litigation than others (see Chapter 4, Section 4.2).

Another feature of the EU's enforcement system which could affect the growth of mass litigation across the EU is the role of national Ombuds Bodies. These agencies offer a middle way between purely private and purely public enforcement and they can deliver consumer redress at a lower cost than collective actions. The Swedish Ombuds Body along with the other Nordic Ombuds Bodies offers an example of a system where consumers can file their complaint with a public body and request compensation without resorting to expensive litigation themselves. In contrast, the Dutch Ombuds Body has no power to represent consumers in court; therefore, it can only play a more limited role compared to its Swedish counterpart.

The different enforcement powers at the disposal of Ombuds Bodies may impact the number of collective actions that are brought by consumers in the Member States. In Sweden, where the Ombuds Body has extensive authority to ensure enforcement, the volume of collective action cases in court so far is very low, whilst in the Netherlands, where the role of the Ombuds Body is more limited, the number of such collective action cases in court driven by other claimants is much higher.

3. COLLECTIVE ACTIONS IN THE EU

3.1 Introduction

The objective of this chapter is to answer the following questions:

- How did the volume of collective actions in the EU evolve over the years? Which EU countries and which economic sectors have seen the highest growth in the number of collective actions? And what are the factors that can explain the differences?

To answer these questions, the following sections analyse a database of mass litigation lawsuits that we have built up. Both the database and the methodology used to collect the data are presented in Section 3.2. Section 3.3 analyses the database to assess the growth in the volume of collective action cases over time as well as between the EU Member States and economic areas. Section 3.4 explores whether economic size, population, GDP per capita, and the prevalence of defective products can explain the variation in the number of collective actions between countries and sectors.

The database has certain limitations. To ensure the representativeness of the database across the EU countries, the data collection followed a systematic method that left out certain data

sources that were only available in certain countries and not in all of them. To compensate for this limitation, Section 3.5 presents three case studies that focus on the Netherlands, Portugal and Germany respectively, for which all the publicly available data on collective actions have been used. These case studies explore the following questions:

- What are the main legal features of collective actions in the Netherlands, Portugal and Germany? What explains the change in the use of collective actions over the years in these countries? What are the economic areas that have been most affected so far?

3.2 Methodology

Several reports by law firms and others have highlighted an increase in the number of collective actions in the EU in recent years.³⁸ The quality of the data available varies considerably among EU Member States and this makes the creation of a unified EU database particularly challenging. In those EU Member States where academic research³⁹ has been undertaken or where comprehensive public registries⁴⁰ of collective actions have been established, the number of recorded cases is greater than in countries lacking such information. However, the absence of research or a public database of recorded collective actions in the other EU Member States does not necessarily imply that such cases have not been brought. As a result, we do not know the actual number due to the lack of reliable data.

The lack of consistent data across the EU presents two main methodological difficulties. The first relates to missing data. If the number of collective actions in certain EU Member States is underreported, it could introduce bias into the analysis, resulting in erroneous conclusions. Similarly, the second issue relates to the inclusion of cases from those EU Member States where the data is more readily accessible. These cases could distort the data, leading to an overrepresentation of a particular country or of an economic area within that country.

To address these two issues, the study adopts a twofold approach. Firstly, we compiled our own database of collective action cases, incorporating cases from comparable sources across the EU. The aim of this exercise was not to capture all potential cases, but to assemble a database that is representative of the EU Member States and of the economic areas covered.

³⁸ CMS (2024). European Class Action Report 2024, Available at: <https://cms.law/en/esp/publication/cms-european-class-action-report-2024>; and CMS (2023) European Class Action Report 2023, Available at: <https://cms.law/en/media/international/files/publications/publications/european-class-action-report-2023?v=1>; DWF (2024, January 23) Consumer Trends 2024: The future of Class Action funding, Available at: <https://dwfgroup.com/en/news-and-insights/insights/2024/1/ct24-the-future-of-class-action-funding>; In-house legal (2021, June 28). European class actions expected to rise as opt-outs become more popular, Available at: <https://inhouse-legal.eu/current-development/european-class-actions-expected-to-rise-as-opt-outs-become-more-popular/>; JD Supra (2023, March 2) Class Action Filings on the Rise in Europe, Especially in Product Liability Cases Ahead of Full Implementation of the EU's Representative Actions Directive, Available at: <https://www.jdsupra.com/legalnews/class-action-filings-on-the-rise-in-1355797/>

³⁹ Tillema, I. (2019). Entrepreneurial mass litigation: balancing the building blocks.

⁴⁰ de Rechtspraak (Netherlands) Available at: <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2023:14036>; Bundesamt für Justiz Verbandsklagenregister (Germany), Available at: https://www.bundesjustizamt.de/DE/Themen/Verbraucherrechte/VerbandsklagenregisterMusterfeststellungsregister/Verbandsklagenregister/Verbandsklagen/Klagen/201901/KlagRE_1_2019_node.html#doc23310bodyText8; Class Action – Azioni di Classe (Italy), Available at: https://serviziopst.giustizia.it/PST/it/pst_2_16.wp?d=8032343-p=4#; Wykaz postępowań grupowych (Poland), Available at: <https://www.gov.pl/web/sprawiedliwosc/wykaz-postepowan-grupowych>; Kolektivne tožbe (Slovenia): https://www.sodisce.si/sodni_postopki/kolektivne_tozbe/?page=1&perPage=10&ord=date&drc=asc&extra=0

The representativeness of the database was essential for conducting a statistical analysis of mass litigation trends in the EU. Importantly, the analytical findings align with other reports generated by law firms and academics.⁴¹

The database contains 373 cases from 23 Member States. It includes variables such as claim description, year the case was filed, country, and economic area. Cases were sourced from public registries and case repositories maintained by law firms, law associations, and consumer associations. Annex 2 provides a comprehensive list of data sources, while Annex 3 details the database structure, including the number of observations for each variable, and data collection limitations.

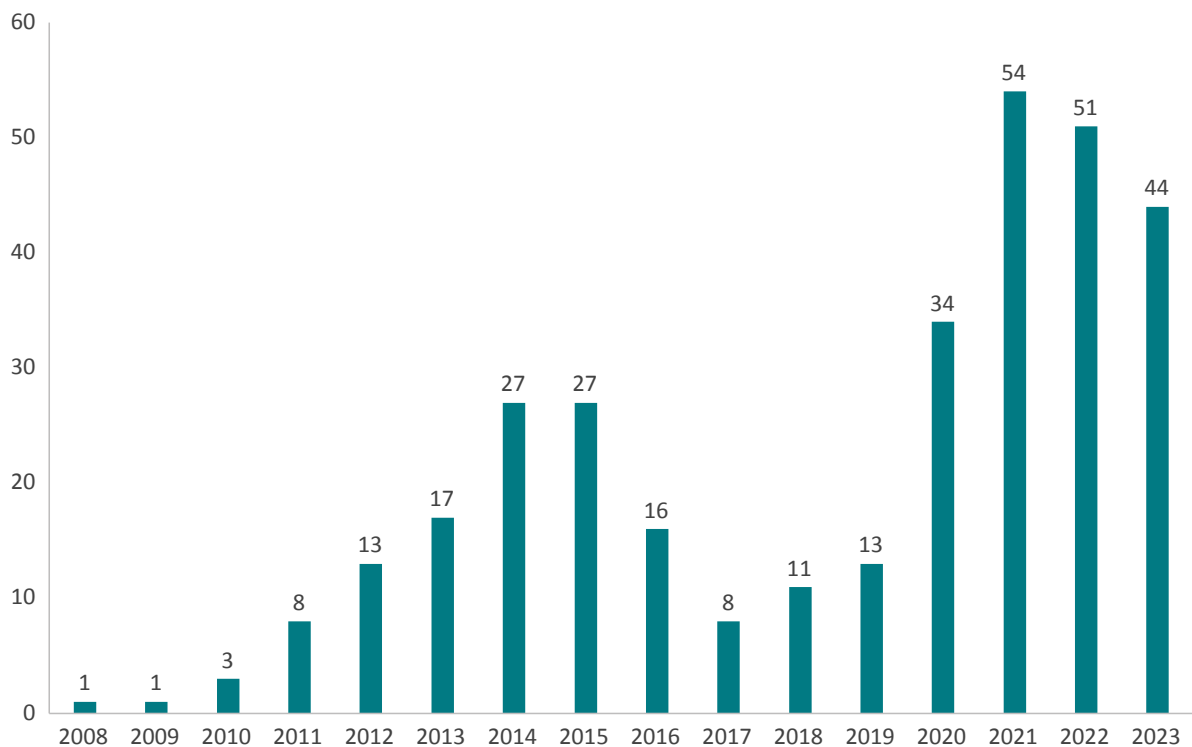
The most important shortcoming of our database is its size: the real number of mass litigation cases in the EU, during the years considered, is higher than 373. To mitigate this limitation, the study introduces a second layer of analysis by conducting more detailed case studies on the Netherlands, Portugal, and Germany, analysing for each all the publicly accessible data in order to provide a more granular understanding of the trends in collective actions in these jurisdictions.

3.3 Analysis of Collective Actions in the EU

3.3.1 Collective Actions Across the EU Member States

This section delves into the database to examine the trends in the volume of collective actions across the EU and across certain economic areas. The data reveals a significant increase in the number of collective actions in Europe. This trend can be divided into two distinct periods. Firstly, the rise in the number of collective actions that started in 2011 and peaked in 2014 and 2015; and the second period that began in 2020 and reached a new peak in 2021. Notably, unlike the decline observed in 2016, the number of collective actions in 2022 and 2023 remains high.

⁴¹ CMS (2023) European Class Action Report 2023. Available at: <https://cms.law/en/media/international/files/publications/publications/european-class-action-report-2023?v=1> and Tillema, I. (2019). (see note: 39)

FIGURE 3: TOTAL NUMBER OF COLLECTIVE ACTION LAWSUITS IN THE DATABASE (2008-2023)

Source: ECIPE's database of collective action lawsuits.

The analysis of the database reveals a concentration of collective actions in certain countries. Between 2008 and 2023, the Netherlands (28 percent of the EU total), Germany (14 percent), Poland (9 percent), and France (9 percent) collectively accounted for the highest number of recorded cases in the EU. However, the relative ranking of these countries has changed over time. Between 2020 and 2023, the Netherlands (48 percent), Germany (19 percent), Slovenia (11 percent), and Portugal (10 percent) represented 88 percent of all recorded cases. When considering the number of cases relative to each country's population size, Slovenia, the Netherlands, and Portugal exhibit a significantly higher number of cases per million inhabitants than the other Member States.

TABLE 2: TOTAL NUMBER OF COLLECTIVE ACTION LAWSUITS IN THE DATABASE PER EU MEMBER STATES AND PER 1 MILLION POPULATION (2008-2023) AND (2020-2023)

	2008-2023		2020-2023	
	N	Number of cases per million population	N	Number of cases per million population
Austria	11	1.2	5	0.56
Belgium	8	0.7	1	0.09
Bulgaria	11	1.8	0	
Croatia	4	1.0	0	
Cyprus	2	2.2	0	
Denmark	10	1.7	0	
Estonia	2	1.8	0	
Finland	3	0.5	0	
France	28	0.4	9	0.13
Germany	45	0.5	35	0.43
Greece	3	0.3	0	
Italy	12	0.2	0	
Latvia	5	2.7	1	0.53
Lithuania	8	2.9	0	
Malta	2	3.8	0	
Netherlands	93	5.3	88	5.00
Poland	31	0.8	1	0.03
Portugal	20	1.9	18	1.74
Slovenia	20	9.5	20	9.47
Spain	7	0.1	4	0.08
Sweden	3	0.3	1	0.10

Source: ECIPE's database of collective action lawsuits.

3.3.2 Collective Actions across Economic Areas

The database covers nine broad economic areas. Each of the sectors and a description of the type of case is presented in the table below.

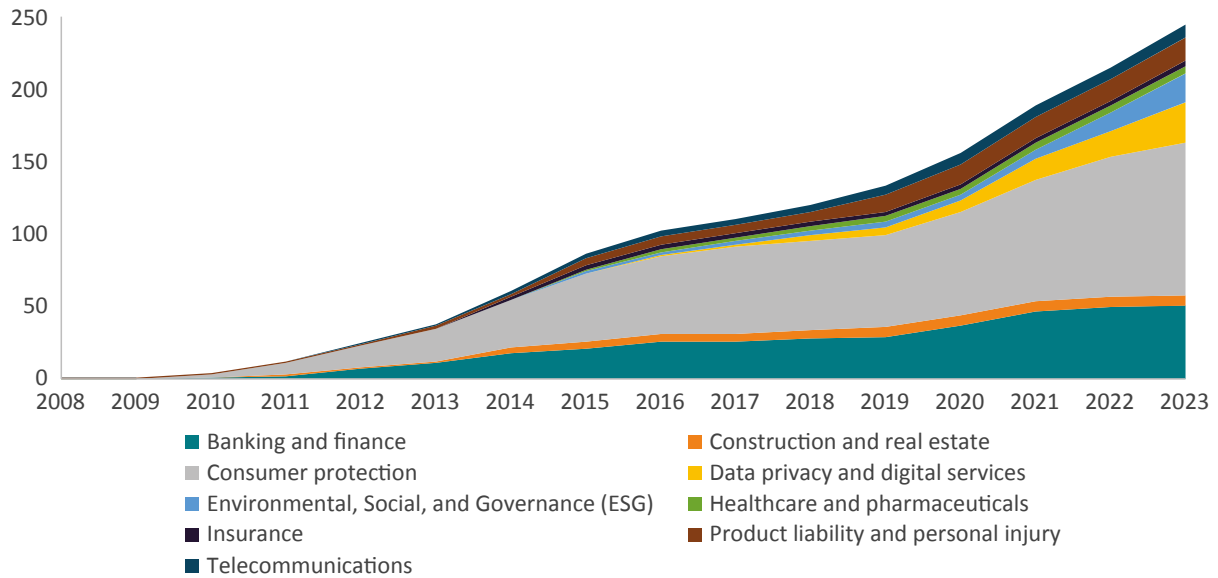
TABLE 3: ECONOMIC AREAS IN THE DATABASE

Economic area	Description
Banking and finance	Banking, capital markets, financial services, securities, and investments.
Construction and real estate	Residential and non-residential sector.
Consumer protection	Consumer rights, contractual obligations, unfair commercial practices, human rights, civil law related to audits and accounts, automotive industry, entertainment and tourism
Data privacy and digital services	Data protection and data privacy, cybersecurity, and the supply of digital services.
Environmental, Social, and Governance (ESG)	Excessive CO2 emissions, energy pricing and greenwashing.
Healthcare and pharmaceuticals	Negligence, defective products and malpractices in the medical technology and pharmaceutical sectors.
Insurance	Contractual obligations and consumer protection in the insurance sector.
Product liability and personal injury	Product liability and personal injury, also actions concerning tort liability.
Telecommunications	Consumer protection related to the telecommunications sector.

The next figure shows the cumulative number of collective actions across the same economic areas within the EU over the period 2008 to 2023. The figure shows the importance of consumer protection laws as a driver of collective actions in the EU⁴². However, as the overall volume of cases has grown, the range of economic areas impacted has also broadened.

⁴² At the end of the period, collective actions related to consumer protection have been boosted by claims related to product liability and personal injury actions.

FIGURE 4: CUMULATIVE NUMBER OF COLLECTIVE ACTION LAWSUITS IN THE DATABASE ACROSS ECONOMIC AREAS (2008-2023)



Source: ECIPE's database of collective action lawsuits.

Similarly, the next table shows the number of collective actions filed across the nine economic areas during the periods 2008-2023 and 2020-2023. Consistent with the overall trend, consumer protection remains the leading category throughout the period and during the last four years. However, the table also highlights a notable shift: the growing proportion of cases involving data privacy and digital services, as well as ESG litigation. The share of cases in these two sectors went from 11 and 8 percent of cases in 2008-2023 to 21 and 14 percent in 2020-2023, respectively.

TABLE 4: NUMBER AND PERCENTAGE OF COLLECTIVE ACTION LAWSUITS IN THE DATABASE ACROSS ECONOMIC AREAS (2008-2023; 2020-2023)

Sector	2008-2023		2020-2023	
	Number of cases	Percentage	Number of cases	Percentage
Banking and finance	51	21%	22	20%
Construction and real estate	7	3%		
Consumer protection	106	43%	42	38%
Data privacy and digital services	28	11%	23	21%
Environmental, Social, and Governance (ESG)	20	8%	16	14%
Healthcare and pharmaceuticals	5	2%	1	1%
Insurance	4	2%	1	1%
Product liability and personal injury	16	7%	4	4%
Telecommunications	9	4%	3	3%

Source: ECIPE's database of collective action lawsuits.

These changes in the sectoral distribution of collective actions can be partially attributed to the rise in the number of cases in some EU Member States. For instance, the Netherlands witnessed a significant increase in data privacy and digital service-related collective actions, and both the Netherlands and Germany experienced a surge in ESG-related collective actions.

Table 5 identifies the top three countries with the highest number of cases filed in each economic area. The data reveals that a select group of countries dominates mass litigation activity across several sectors. For instance, Germany accounts for 45 percent of all cases in banking and finance, while the Netherlands holds 63 percent of all data privacy and digital services related cases. In sectors with a lower volume of cases, the top three countries tend to represent the bulk of the cases. This also happens in the economic areas with a higher case volume, such as ESG, banking and finance, and data privacy and digital services, where the top three Member States also account for a large share of cases, ranging from 69 to 85 percent.

TABLE 5: TOP THREE EU MEMBER STATES BY NUMBER OF COLLECTIVE ACTION LAWSUITS IN THE DATABASE ACROSS ECONOMIC AREAS (2008-2023)

	First Highest			Second Highest			Third Highest		
	Country	Number of cases	Percentage	Country	Number of cases	Percentage	Country	Number of cases	Percentage
Banking and finance	Germany	23	45%	Poland	7	14%	Denmark	5	10%
Construction and real estate	France	3	43%	Poland	2	29%	Germany	1	14%
Consumer protection	Poland	19	18%	France	15	14%	Netherlands	14	13%
Data privacy and digital services	Netherlands	18	64%	Portugal	3	11%	Austria	2	7%
Environmental, Social, and Governance (ESG)	Germany	8	40%	Netherlands	7	35%	Austria	2	10%
Healthcare and pharmaceuticals	France	3	60%	Italy	1	20%	Sweden	1	20%
Insurance	Poland	2	50%	France	1	25%	Netherlands	1	25%
Product liability and personal injury	Portugal	3	19%	Spain	3	19%	France	2	13%
Telecommunications	Austria	4	44%	Belgium	1	11%	Estonia	1	11%

Source: ECIPE's database of collective action lawsuits.

3.4 Potential Factors Associated with the Rise of Collective Actions

3.4.1 Economic Size and Population

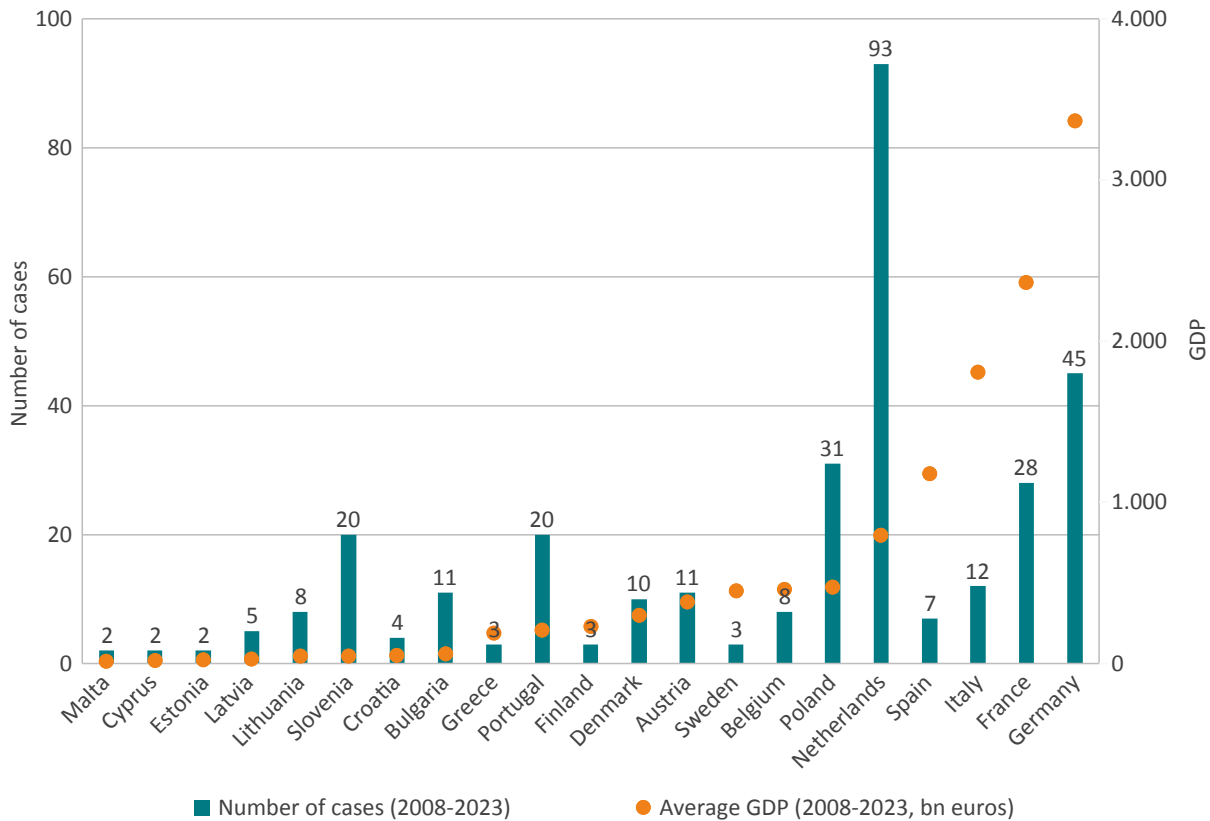
Our analysis reveals a higher proportion of cases in certain EU countries and certain economic areas than others, a result which was expected. It would be natural to anticipate more collective actions in countries that have larger economies, larger populations and economic activities more at risk from mass litigation that occupy a larger share of the economy.

However, our research shows that this is not necessarily the case and that the relationship between a country's economic size and its volume of cases is not always linear. The figure below shows the number of cases between 2008 and 2023 and the average GDP for the same period in each of the EU Member States recorded in our database. The figure clearly shows that the proportion of cases in countries such as the Netherlands, Portugal, or Slovenia is higher than expected based on their economic size. Similarly to Figure 5, Annex 9 shows that the relationship between the volume of collective actions and average population size, as well as the volume of collective actions and GDP per capita across EU Member States, is not always proportionate.

The correlation between the number of collective actions and GDP is only moderate at 0.4.⁴³ Moreover, when Germany – the largest EU economy with a large number of collective action cases in our database – is taken out of the sample, the correlation falls to 0.3. When the same analysis is made between the number of collective actions and the average population, and the number of collective actions and the average GDP per capita for the period 2008-2023, the correlation is also relatively low, at 0.4 and 0.3 respectively.

⁴³ Correlation is a statistical measure that describes the strength and direction of a relationship between two variables. A correlation of 1 indicates a perfect positive relationship, meaning that as one variable increases, the other variable also increases in a perfectly linear manner. A correlation of -1 indicates a perfect negative relationship, meaning that as one variable increases, the other variable decreases in a perfectly linear manner. A correlation of 0 suggests no linear relationship between the variables. This correlation was calculated using 42 data points. Therefore, it should be regarded as a summary statistic, and it should be interpreted with caution.

FIGURE 5: NUMBER OF COLLECTIVE ACTION LAWSUITS (2008-2023) IN THE DATABASE AND AVERAGE GDP (2008-2023) ACROSS EU MEMBER STATES



Source: ECIPE's database of collective action lawsuits; Eurostat (GDP, measured as chain linked volumes (2020), billion euro).

This analysis can be replicated for each economic sector and, in this case too, the number of cases is only weakly related with the size of the sector. For instance, Table 5 shows that the Netherlands accounts for the majority (64 percent) of all data privacy and digital services cases. However, in closely related economic sectors such as computer programming and information services, the Netherlands contributes only 7 percent of the EU total economic value-added⁴⁴, significantly below its 64 percent share of overall collective actions⁴⁵.

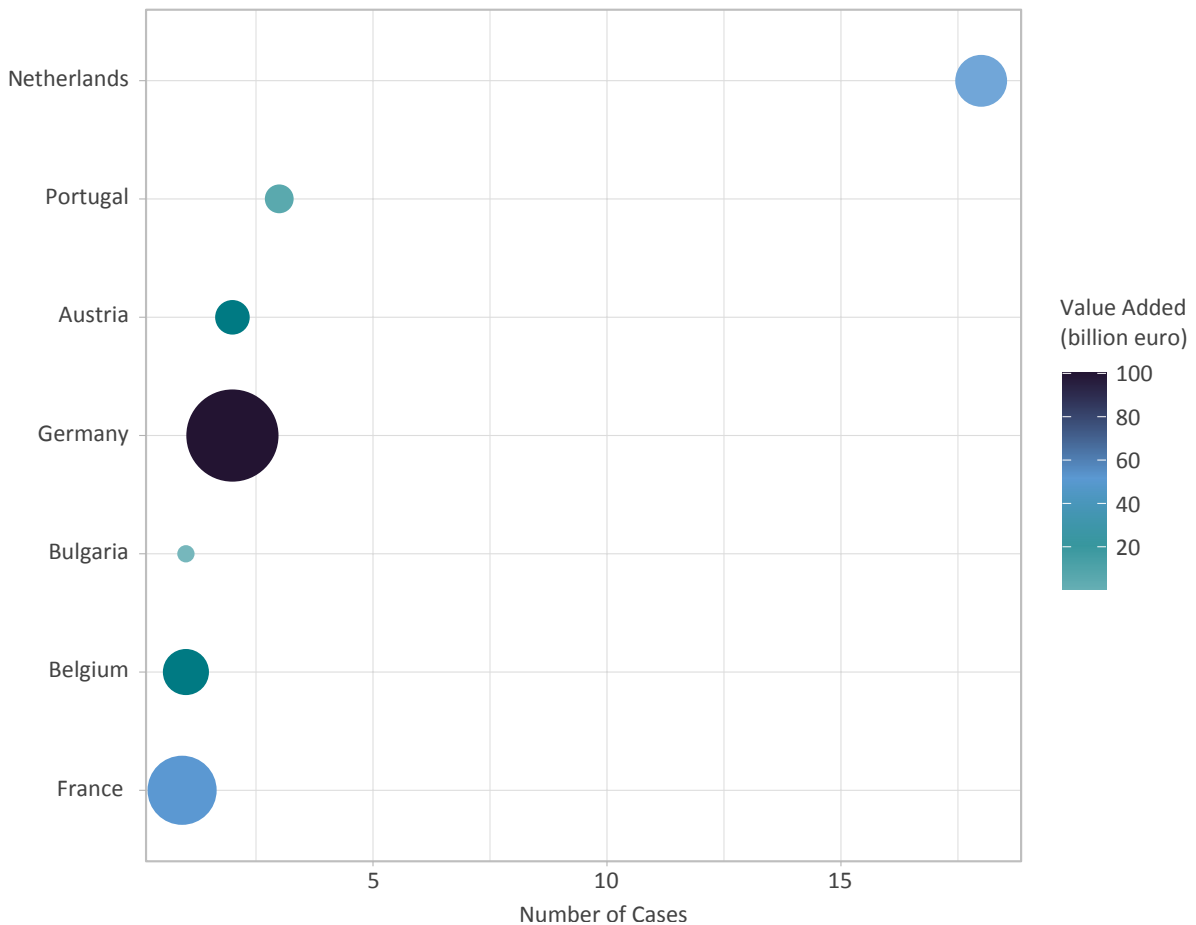
The following figures further illustrate the lack of correlation between the economic size of a country's sector and the prevalence of collective actions in that sector. As previously noted, the Netherlands is a clear outlier in the data privacy and digital services category, having a high number of cases but only a relatively small share of that sector's total value in the EU economy. Similarly, the economic size of the computer programming and information services sector in countries such as Germany and France – measured by the size of the

⁴⁴ Value-added refers to the net output of a company after subtracting intermediate consumption. This essentially represents the difference between the value of goods and services produced by a company and the cost of inputs (such as raw materials and services) used in the production process. Source: Eurostat: Value-added, million euro. NACE Code 62 Computer programming, consultancy and related services and NACE Code 63 Information service activities.

⁴⁵ Data privacy breaches can occur in economic areas beyond computer programming and information services. However, the combination of national and EU regulation supporting collective actions – such as the RAD, Digital Service Act (DSA), DMA, and GDPR – is more likely to impact Information and Communication Technology (ICT) sectors, such as those analysed here.

circles as shown below – was larger but the corresponding number of cases was lower than in the Netherlands. As a summary indicator, the correlation between the sectoral economic size at country level and the number of collective actions was only -0.05, which indicates no meaningful correlation⁴⁶.

FIGURE 6: NUMBER OF COLLECTIVE ACTION LAWSUITS (2008-2023) IN DATA PRIVACY AND DIGITAL SERVICES AND THE AVERAGE VALUE-ADDED OF COMPUTER PROGRAMMING AND INFORMATION SERVICES (2021-2022) ACROSS EU MEMBER STATES



Source: ECIPE's database of collective action lawsuits; Eurostat (Value-added, billion euro). Note: size of the circles corresponds to the value-added of the sector. Value-added refers to the company's net output after subtracting intermediate consumption.

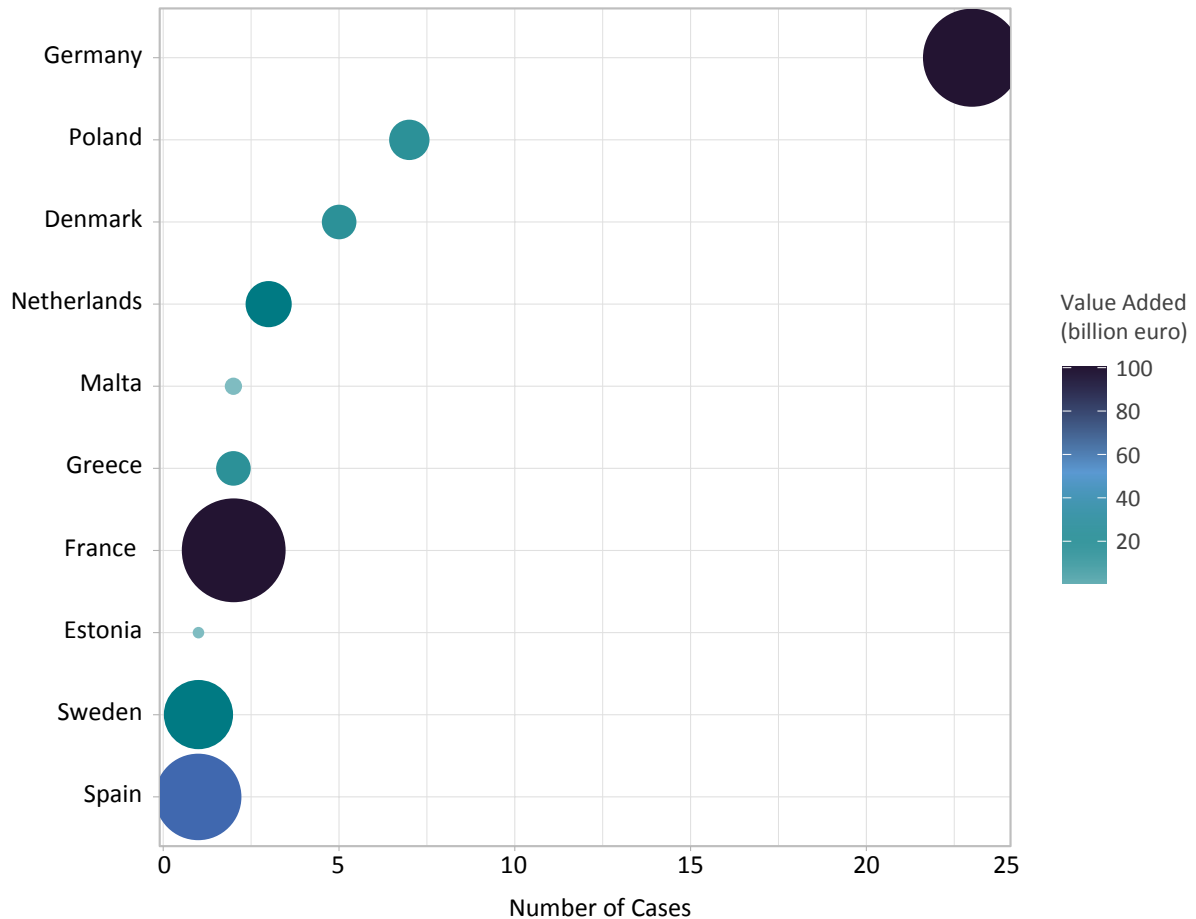
The analysis of the banking and finance sector in the next figure partly echoes the findings from the data privacy and digital services sector. While Germany represents an example of a positive correlation between the sector's size⁴⁷ and the number of cases, this trend is not universal. For instance, countries such as Poland or Denmark show a higher number of cases compared to other Member States that have larger banking and financial sectors. In

⁴⁶ This correlation was calculated using 14 data points. Therefore, it should be regarded as a summary statistic, and it should be interpreted with caution. Moreover, due to data limitations, the correlation corresponds to two different periods: 2008-2023 for the number of collective action cases and 2021-2022 for value-added.

⁴⁷ Source: Eurostat; Value-added, million euro. NACE Code 64 Financial service activities, except insurance and pension funding.

this case, the correlation between economic size and the number of collective actions was 0.6. However, when Germany was excluded from the sample, the correlation fell to -0.2⁴⁸.

FIGURE 7: NUMBER OF COLLECTIVE ACTION LAWSUITS (2008-2023) IN BANKING AND FINANCE AND AVERAGE VALUE-ADDED OF FINANCIAL SERVICE ACTIVITIES (2021-2022) ACROSS EU MEMBER STATES



Source: ECIPE's database of collective action lawsuits; Eurostat (Value-added, billion euro). Note: size of the circles corresponds to the value-added of the sector. Value-added refers to the company's net output after subtracting intermediate consumption.

3.4.2 Product Quality

An alternative hypothesis suggests a link between product quality and the volume of collective actions. This hypothesis assumes that those Member States that score lower in overall product quality rankings, as evidenced by a higher prevalence of defective goods, may see an increase in the number of collective actions. Testing this hypothesis empirically is challenging due to the

⁴⁸ This correlation was calculated using 20 data points. Therefore, it should be regarded as a summary statistic, and it should be interpreted with caution. Moreover, due to data limitations, the correlation corresponds to two different periods: 2008-2023 for the number of collective action cases and 2021-2022 for value-added.

absence of a comprehensive database; however, the combination of a study⁴⁹ by the Testing, Inspection, and Certification (TIC) Council examining the regulatory compliance of household appliances and the number of collective actions across the EU offers some insights.

The following table presents the percentage of defective products identified by the TIC Council, in addition to the total number of collective actions and the number of collective actions related to consumer protection. The low correlations between the percentage of defective products and both the total number of collective actions and the number of collective actions for consumer protection indicate that differences in the prevalence of defective products are unlikely to explain most of the variability in the number of mass litigation cases between Member States.

TABLE 6: NUMBER OF COLLECTIVE ACTION LAWSUITS (2008-2023) IN THE DATABASE AND PERCENTAGE OF DEFECTIVE PRODUCTS PER COUNTRY (2018)

	Percentage of defective products per country	Number of collective actions (all)	Number of collective actions (Consumer protection)
Germany	10%	45	7
Denmark	33%	10	5
Spain	24%	7	2
Finland	7%	3	2
France	13%	28	15
Italy	20%	12	5
Poland	20%	31	19
Correlation		-0.3	-0.1

Source: ECIPE's database of collective action lawsuits; TIC Federations Consumer Product Market Survey (percentage of defective products per country). Note: Correlations were calculated using 14 data points. Therefore, it should be regarded as a summary statistic, and it should be interpreted with caution. Moreover, the correlations were calculated for variables across two different time periods.

⁴⁹ IFIA & CEOC, (2018). TIC Federations Consumer Product Market Survey Position Paper – Effective Market Surveillance. Available at: http://www.ifa-federation.org/content/wp-content/uploads/IFIA_CIPC_239_2014-2016_Market_survey_report.pdf

3.5 Case Studies

3.5.1 The Netherlands

There are three different collective redress mechanisms available under Dutch law⁵⁰: (1) The Dutch Collective Settlement for Mass Damages Act (WCAM); (2) The Dutch Collective Actions for Mass Damages Act (WAMCA)⁵¹; and (3) actions on the basis of power of attorney or transfer or assignment of claims to a special purpose vehicle.⁵²

For this study, we will focus on WCAM and WAMCA. The Dutch Collective Settlement for Mass Damages Act (WCAM) came into force in 2005 to enable the efficient settlement of mass damages claims. In 2020, the Collective Actions for Mass Damages Act (WAMCA) became effective. WAMCA empowers ad hoc entities to seek financial compensation on behalf of consumers for breaches in new areas beyond competition law. Importantly, WAMCA already met most of the requirements of the EU's RAD⁵³. The most significant change brought about by the implementation of RAD was that any qualified entity in any EU Member State is entitled to initiate a collective action in the Netherlands, irrespective of where the members of the represented group are domiciled, intending to expand the reach of Dutch courts well beyond the Dutch borders.

The threshold for starting a collective action in the Netherlands is lower than in other jurisdictions. Firstly, Dutch collective actions use the opt-out system, where individuals with similar claims are automatically included in a lawsuit which leads to a significantly larger number of beneficiaries entitled to claim their share of compensation if the court decides in their favour.⁵⁴ Secondly, Dutch law upholds the principle of freedom of contract; therefore, parties are free to settle a case as they see fit provided they do not violate public policy⁵⁵. This approach to settlements makes the Dutch system more attractive to claimants. Thirdly, the losing party pays the court costs and legal fees⁵⁶. However, the Netherlands has minimal cost-shifting risks, which means that if the

⁵⁰ BIICL & ICLJ. (2023) Class and Group Actions Laws and Regulations Netherlands 2024. Available at <https://iclg.com/practice-areas/class-and-group-actions-laws-and-regulations/netherlands>

⁵¹ Under Article 3:305a of the Dutch Civil Code, the law provided the possibility for representative organisations to file a claim for defending the similar interests of other persons (collective actions). These actions are covered by the regular rules of the Dutch civil procedural code. WAMCA made it possible to award monetary damages collectively for the first time.

⁵² Other mechanisms also exist for mass actions, allowing claims to be bundled together. A claimant can either bundle individual claims based on a power of attorney granted by individual claimants or bring a bundle of claims in their own names after obtaining ownership through assignment. The term "special purpose" refers to ad hoc legal entities - stichting (foundation) or claimstichtingen. See: BIICL. (2020). Collective Redress: The Netherlands. Available at: https://www.collectiveredress.org/documents/31_the_netherlands_report.pdf; also see: Knigge, A. and Wijnberg, I. (2020, September 1). Class/collective actions in The Netherlands: overview. Houthoff. Available at: https://www.houthoff.com/-/media/houthoff/publications/aknigge/thomson-reuters_class_collective-actions-in-the-netherlands_overview.pdf

⁵³ The changes have been introduced by the Implementation Act of 2 November 2022 (the "Implementation Act"), amending Book 3 of the Dutch Civil Code ("DCC") and the Dutch Code of Civil Procedure ("DCCP").

⁵⁴ This applies extra-EU only for non-consumer matters, provided courts in other Member States accept the Dutch legislator's intentions, an outcome that remains uncertain. The EU legislator has explicitly excluded the opt-out approach for cross-border consumer matters under the RAD, prompting the Dutch legislator to limit WAMCA accordingly for such cases.

⁵⁵ Kramer, X. E., Tzankova, I. N., Hoevenaars, J., & van Doorn, C. J. M. (2024) Financing Collective Actions in the Netherlands. Erasmus, 9(789047), 302186.

⁵⁶ Article 237 (1) of Dutch Code of Civil Procedure.

defendant wins, they are awarded only a small fraction of the actual expenses incurred.⁵⁷ Finally, Dutch rules allow for the creation of qualified entities on an ad hoc basis; these entities can be formed quickly to address specific claims, often with the backing of litigation funders⁵⁸.

The emergence of an ecosystem of claimant law firms and funders is another crucial aspect of the Dutch system. Funders provide financial backing to claimants in order to pay the high costs of litigation⁵⁹. If the funded party is successful in the proceedings, the funder receives a share of the award which may be based on a fixed percentage or on a graduated scale.⁶⁰ The popularity of third-party funding in the Netherlands is not an arbitrary coincidence. Only limited regulations apply to third-party litigation funding (TPLF) and Dutch courts are not strict in applying the conditions. As a result, many US funders are active in the Netherlands.⁶¹ Our research has identified at least 47 litigation funders that are active in the Netherlands, making it the EU country with the highest number of funders, ahead of larger countries such as Germany, Spain and France. Based on population size, the Netherlands has five times more funders than Germany.

Funders are not the only beneficiaries from the significant pay-outs in collective action cases. The costs associated with damages claims mostly remain confidential but lawyers' fees represent a significant part of the non-damages costs. These fees could be about €25,000 for summary proceedings; between €40,000 and €50,000 for substantive proceedings, depending on the complexity of the case; and €150,000 to €500,000 for drafting the summons⁶². In the Shell settlement, claimants' counsel walked away with \$47 million. In the Converium settlement, claimants' counsel pocketed 20 percent of the \$58 million payout to claimants.⁶³

⁵⁷ The losing party is ordered to pay the litigation costs, including the legal fees. Legal fees, in particular, are determined based on a liquidation tariff (Liquidatietarief), which is a standardised fee schedule that takes into consideration the complexity and financial importance of the case. The amount awarded based on the liquidation rate is often lower than the actual fees paid to the attorney or representative. Additionally, in certain instances, the court may choose to offset the litigation costs if both parties were partially unsuccessful. The court may also decide to waive or reduce costs if specific circumstances exist that would prevent fully burdening the losing party with costs. See: Heussen. Understanding Litigation Costs. Available at: <https://www.heussen-law.nl/es/noticias/news-archive/view/241#:~:text=NEWS-Understanding%20Litigation%20Costs.-Legal%20costs%20can>.

⁵⁸ Tzankova, I. N. (2011). Funding of mass disputes: lessons from the Netherlands. *JL Econ. & Pol'y*, 8, 549. referenced in BIICL. Collective redress: The Netherlands. Available at: https://www.collectiveredress.org/documents/31_the_netherlands_report.pdf

⁵⁹ Among the activities required are: initial assessment; the factual and legal investigation; raising funds; expert analysis; identification and activation of the injured group; mandatory negotiation with defendants; and settling and payment of damages. The total costs can easily amount to over a million euros in damages cases.

⁶⁰ Fieldfisher (2023, December 29). A maximum fee for litigation funders in class actions? Available at: <https://www.fieldfisher.com/en/insights/a-maximum-fee-for-litigation-funders-in-class-actions>

⁶¹ The following funders are included in our database: Lief Cabraser Heimann & Bernstein LLP (2 cases), Bench Walk Guernsey PCC Ltd, managed by Bench Walk Advisors LLC Hagens Berman Sobol Shapiro via multiple entities (in total 4 cases), Consumer Justice Network B.V., financed by US law firms Whitfield, Bryson & Mason LLP and Greg Coleman Law (2 cases). Other major international players like Omni Bridgeway, Innsworth, Therium and the Jersey-incorporated newcomer BPGL Funding I Limited have also funded collective action cases in the Netherlands. For instance, the US claimant firm Lief Cabraser is supporting a class action lawsuit against Facebook. Additionally, a foundation targeting Airbus has partnered with securities law firm DRRT, while a claim vehicle pursuing claims against car manufacturers such as Mercedes and Renault has engaged US claimant law firm Hagens Berman. See: Thompson, L. (2022, February 17). How the Netherlands Became Europe's Prime Class Action Jurisdiction. Available at: <https://www.law.com/international-edition/2022/02/17/how-the-netherlands-became-europes-prime-class-action-jurisdiction/>

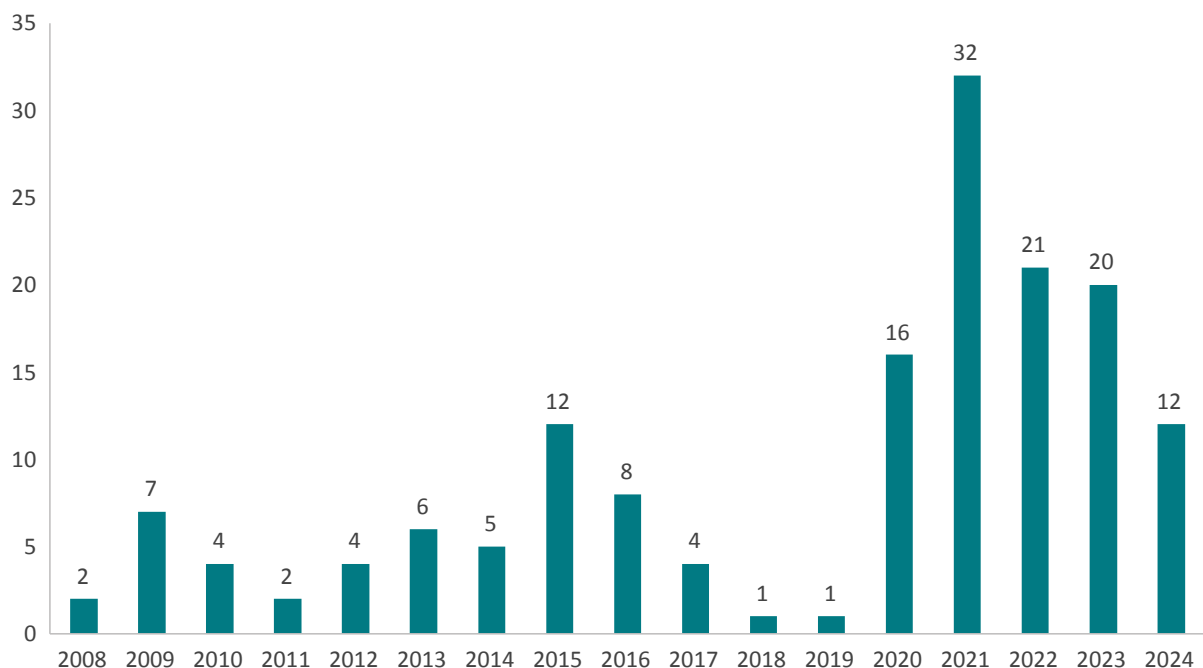
⁶² Kramer, X. E. et al. (2024) (see note: 55)

⁶³ In an essay based on a keynote address given at a conference at the George Washington University Law School, the author discusses insights from several interviews conducted with the participants in the Shell case. It was disclosed that Grant & Eisenhofer covered the legal fees and expenses for the foundation involved. The fees paid to both US and non-US law firms as part of the global settlement did not require review or approval from the Amsterdam Court of Appeals, although the amount was disclosed during the approval process. Grant & Eisenhofer received \$47 million for negotiating the settlement of claims which they reportedly shared with two other firms. See: Hensler, D. R. (2010). The future of mass litigation: Global class actions and third-party litigation funding. *Geo. Wash. L. Rev.*, 79, 306.

As a result, the Netherlands has become the preferred destination for mass litigation in the EU, and this is reflected in the data. In our database, the Netherlands was the EU country with the highest number of cases. In addition to the cases presented previously, we gathered 79 cases from other academic research⁶⁴, making the total number of collective actions in the Netherlands equal to 184.

The next figure shows that the number of collective action lawsuits in the Netherlands can be broken down into two distinct periods. In the first period, from 2008 to 2019, the number of cases averaged only 5 cases per year with a peak of 12 cases in 2015. During the second period, which begins in 2020 after WAMCA became effective, the average rose to 20, with a peak in 2021 at 32.

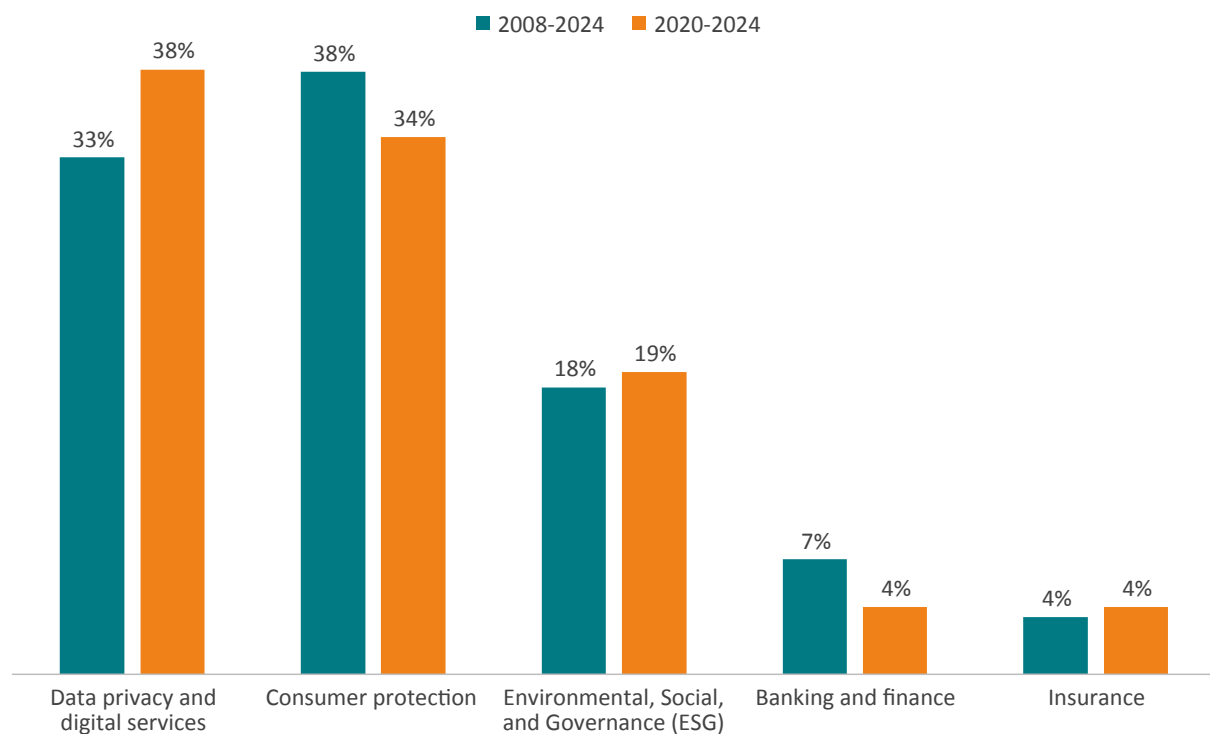
FIGURE 8: NUMBER OF COLLECTIVE ACTION LAWSUITS IN THE NETHERLANDS (2008-2024)



Source: ECIPE's database of collective action lawsuits.

Figure 9 shows that between 2008 and 2024 consumer protection was the sector in which the most collective actions lawsuits were filed. However, the data also shows that privacy and digital services became the sectors with the largest number of cases in the period 2020 to 2024.

⁶⁴ Tillema, I. (2019). (see note: 39) and Centraal register voor collectieve vorderingen, Available at: <https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen>

FIGURE 9: SHARE OF COLLECTIVE ACTION LAWSUITS BY ECONOMIC AREA IN THE NETHERLANDS (2008-2024) AND (2020-2024)

Source: ECIPE's database of collective action lawsuits. Note: not all the cases included sufficient information to allocate the case to a particular economic area. In the period 2008-2024, 37 percent of the cases could not be allocated and for the 2020-2024 period, the figure was 47 percent.

The significant growth in collective actions in the Netherlands may impact its economy. The Netherlands is an open economy and many companies operating in the Netherlands have international operations which makes them more likely to be targeted by claimants. Stricter environmental laws and the requirements of the EU's Corporate Sustainability Reporting Directive (CSRD) are likely to lead to an increase in shareholder litigation, which may affect Dutch companies operating in the energy sector. For instance, the *Milieudefensie vs. Shell* case is an example of how far-reaching such litigation can be,⁶⁵ even if the Amsterdam appeal court recently reversed that judgment without having final legally binding effect⁶⁶.

Chapter 4 assesses the extent to which the legal and institutional regime in each of the EU Member States facilitates the take-up of mass litigation; it concludes with an Index that puts the Netherlands at the top. Moreover, our modelling shows that the economic costs of mass

⁶⁵ ECLI:NL:RBDHA:2021:5339. Also see: *Milieudefensie. How We Defeated Shell*. Available at: <https://www.foei.org/wp-content/uploads/2021/11/How-we-defeated-Shell.pdf>; the court found that "common interest of preventing dangerous climate change by reducing CO₂ emissions can be protected in a class action", but held that the "interests of current and future generations of the world's population ... is not suitable for a class action under Dutch Law." The interests of current and future generations of Dutch residents were similar, and a class action would be an effective way to serve these interests because climate change affects all Dutch residents similarly. See: White and Case (2021, May 28) *Milieudefensie et al v. Shell: Climate change claimants prevail again in Dutch court – this time, against corporations*. Available at: <https://www.whitecase.com/insight-alert/milieudefensie-et-al-v-shell-climate-change-claimants-prevail-again-dutch-court-time>

⁶⁶ Van den Berg, S., Meijer, B., & Bousso, R. (2024, November 12). *Shell wins appeal against landmark Dutch climate ruling*. Reuters. Available at: <https://www.reuters.com/business/energy/shell-wins-appeal-against-landmark-dutch-climate-ruling-2024-11-12/>

litigation could be substantial in the Netherlands, also triggering a possible fall in the market capitalisation of the most innovative Dutch companies.

3.5.2 Portugal

According to Article 52 of the Portuguese Constitution, every citizen has the right to individually or jointly with others submit representations, claims or complaints to defend their rights in court. In Portugal, collective actions (*ações populares*) were introduced by law in 1995, later amended by Decree-Law 214-G/2015. Article 17 of the Consumer Protection Act (Law 24/96, of 31 July, last amended by Law 63/2019, of 16 August) sets out the conditions for consumer associations to be recognised as entities that are empowered to bring a collective action⁶⁷. In addition, the RAD has been transposed without requiring significant changes to the national law⁶⁸. Finally, collective actions can be filed in all economic sectors and in all areas of the law.

In comparison with other EU countries, bringing a collective action in Portugal is relatively easy. The opt-out mechanism, absence of a robust collective certification process, no limits on the amount of damages that can be claimed, and no restrictions on forum shopping, make Portugal an attractive destination for bringing collective actions.⁶⁹

Over the years there have been some large cases.⁷⁰ For instance, the Portuguese consumer association Ius Omnibus filed a collective action against Sony based on competition law infringements where it sought compensation of €235 million. Similarly, another consumer association, Citizens' Voice, has initiated various collective actions against Vodafone, Ryanair, and Aldi on the basis of breaches of consumer rights. Finally, the Portuguese consumer association Deco filed a collective action against Meta due to breach of data privacy which includes 63,000 Portuguese users⁷¹.

Portugal is also one of the EU countries with the highest number of new cases⁷²; however, a central registry of collective actions has not been set up. Therefore, information on collective actions has to be retrieved from other sources including the websites of Portuguese and EU consumer associations.⁷³ An extensive review of these websites resulted in 118 cases being added to the number included in the overall database analysed in the previous section. The

⁶⁷ According to the Portuguese law, consumer associations should be non-profit-making with a legal personality the main goal of which is the protection of the rights and interests of consumers in general or of their members as consumers.

⁶⁸ Diário Da Republica. Decreto-Lei n.º 114-A/2023, de 5 de dezembro. Available at: <https://diariodarepublica.pt/dr/detalhe/decreto-lei/114-a-2023-225265456>

⁶⁹ Chambers and Partners (2024, November 7) Collective Redress & Class Actions 2024. Available at: <https://practiceguides.chambers.com/practice-guides/collective-redress-class-actions-2023/portugal/trends-and-developments>

⁷⁰ Lexology (2024, April 3). Year in review: class actions in Portugal. Available at: <https://www.lexology.com/library/detail.aspx?g=53f91e81-7004-4b19-abf4-e74ea58650e8>

⁷¹ The lawsuit was withdrawn in 2021, after Meta and Deco agreed to implement a three-year program to improve the digital experience of Portuguese consumers. Deco Proteste. Deco and Facebook reach agreement. Available at: https://www.deco.proteste.pt/acoes-coletivas/os-meus-dados-sao-meus?int_source=decoproteste&int_medium=hp_actionblock&int_campaign=facebook_2021

⁷² CMS (2024) (see note: 38) and CMS (2023) (see note: 33).

⁷³ Citizens' Voice. Popular Actions. Available at: <https://citizensvoice.eu/acoes-populares/>; Deco. Available at: <https://www.deco.proteste.pt/>; Ius Omnibus. Available at: <https://iusomnibus.eu/>

analysis of these cases reveals a huge spike in the number of collective actions filed in 2023 and 2024, with 86 percent of all cases launched in this period⁷⁴.

These figures should be analysed with caution. First of all, the information disclosed by consumer organisations may be biased since these organisations may not present the cases in a systematic manner and they may prefer to disclose only those that are likely to have the biggest impact. Secondly, information gathered from the websites includes cases that are at different stages of the legal process: some of them may be only at a preliminary stage while proceedings may be well underway in others. Thirdly, not all the cases have the same significance. For instance, in the case of Pingo Doce, multiple similar collective actions have been launched against the supermarket. Moreover, in comparison with the 24 Portuguese cases included in our database, the information available on the additional 118 cases is much more limited and incomplete. This is also an argument in favour of our methodological approach. If we were to have included the 118 Portuguese cases found online in our general database, Portugal would have represented 38 percent of all EU cases.

However, the additional cases provide some important insights. The first one refers to the high volatility in the number of cases in Portugal, increasing and declining repeatedly over time, a phenomenon that has been found in other studies.⁷⁵ The second insight refers to the ability of consumer associations and other qualified entities to launch a significant number of collective actions in Portugal due to the relatively low legal costs involved, which may also exacerbate the fluctuations in the number of cases per year. Finally, most collective actions in Portugal have been targeted at large companies.

The recent increase in the number of collective actions in Portugal is also noteworthy because collective actions have not been popular in the past as consumers had generally preferred to file injunction claims under the Portuguese Consumer Protection Law. The main problem faced by litigants in collective actions is that the Portuguese system has been slow and Portuguese judges have tended to dismiss mass claims on procedural grounds.⁷⁶ However, if consumer organisations continue to bring new cases and promote this type of action against companies, courts will become more familiar with the proceedings,⁷⁷ speeding up the process and eventually judges may be less inclined to dismiss the cases without ruling on the merits.

⁷⁴ Two data collection methods were used for Section 3.5.2: Firstly, the cases in the main database (as explained in Sections 3.2 and 3.3) include those which have been identified as important by law firms, and other organisations. See Lexology (2024, April 3) Class Actions: Portugal. Available at: <https://www.lexology.com/indepth/class-actions/portugal> and CMS. Tech and social media: a new wave of class actions in Portugal? Available at: <https://cms.law/en/int/publication/international-disputes-digest-2023-summer-edition/tech-and-social-media-a-new-wave-of-class-actions-in-portugal>. Note that additional collective action cases were gathered from the websites of three Portuguese consumer organisations: lus Omnibus, Deco and Citizens' Voice. See Citizens' Voice. Popular Actions. Available at: <https://citizensvoice.eu/accoes-populares/>; Deco. Available at: <https://www.deco.proteste.pt/>; lus Omnibus. Available at: <https://lusomnibus.eu/>

⁷⁵ Casanova, S. N., & Rosa, A. M. (2021) Class Actions Law Review: Portugal. Law Reviews. Available at: https://www.uria.com/documentos/colaboraciones/2998/documento/Portugal.pdf?id=12326_en; also see: Antunes, S. H., (2022). Class Actions in Portugal. Available at SSRN 4050500.

⁷⁶ Conversation with a Portuguese lawyer, on-record.

⁷⁷ Antunes, S. H., (2022). (see note: 75).

3.5.3 Germany

Germany has had a system of collective actions according to which cease-and-desist orders could be sought collectively by claimants⁷⁸ for decades.⁷⁹ This type of collective action was and still is being used by consumer associations and sector-specific industry bodies in particular to address anticompetitive practices. More recently, however, the German government passed three laws that codified collective actions: the Model Proceedings in Capital Market Disputes law (Kapitalanlegermustersverfahrensgesetz (KapMuG)) in 2005; the Model Declaratory Action law (Musterfeststellungsklage) in 2018; and the Redress Action Act (Abhilfeklage) in 2023 which is the transposition of the Representative Actions Directive.

The law on Model Proceedings in Capital Market Disputes was introduced in 2005 as a response to the mispricing of assets by Deutsche Telekom during its third public offering⁸⁰. The objective of the law was to streamline the handling of mass claims arising from inaccurate or misleading financial information.

Similarly, the Model Declaratory Action law was introduced in 2018 as a response to another corporate scandal. In 2015, Volkswagen (VW) in the US was found to have installed software in millions of its diesel vehicles in order to cheat emissions tests. The German Government passed the Model Declaratory Action law as a way to help handle collective action cases in which large groups of consumers were affected, as in the VW emissions fraud case. The law provides a mechanism to bring collective actions to obtain declaratory judgements, but it does not provide for consumer redress. If successful, consumers can later use the court's findings to seek compensation in individual follow-up cases but this part of the process is usually slow and requires funding by the individual consumer to the extent he or she had not previously taken out legal protection insurance.

This shortcoming was corrected by the Redress Action Act. This law implemented the EU's RAD, expanding the Model Declaratory Action to also allow qualified entities to seek compensation.⁸¹ The scope of beneficiaries was extended to include, in addition to private individuals, small companies if they have less than 10 employees and less than €2 million turnover or less than €2 million total assets. The opt-in process must be used for claims under the Act.

The Redress Action consists of three stages. In its first stage, the court issues a judgment on the merits of the case in principle, i.e., on the liability of the defendant without addressing the individual beneficiaries in detail. This is followed by a settlement stage as the second step. If a settlement is not reached, the court will issue its own final redress judgment (third step), which

⁷⁸ Hodges, C., & Voet, S. (2018). *Delivering collective redress: new technologies* (Vol. 7). Bloomsbury Publishing.

⁷⁹ Hodges, C., et al. (Forthcoming 2025) (see note: 13).

⁸⁰ Deutsche Telekom shares were offered at €66.50 per share for retail investors during the public offering in 2000. However, by 2002, the share price had dropped to around €10, representing a loss of more than 85 percent from its initial public offering price in 2000. Reuters. (2014, December 11). Court rules Deutsche Telekom misinformed investors in 2000 share offer. Available at: [https://www.reuters.com/article/deutsche-telekom-court/update-1-court-rules-deutsche-telekom-misinformed-investors-in-2000-share-offer-idINL6N0TV1LA20141211/#:~:text=FRANKFURT%2C%20Dec%2011%20\(Reuters\),the%20group%20to%20compensate%20shareholders](https://www.reuters.com/article/deutsche-telekom-court/update-1-court-rules-deutsche-telekom-misinformed-investors-in-2000-share-offer-idINL6N0TV1LA20141211/#:~:text=FRANKFURT%2C%20Dec%2011%20(Reuters),the%20group%20to%20compensate%20shareholders).

⁸¹ Becker, M., de Lind van Wijngaarden, & Mallmann, R. (2023, September 29). Redress Action in Germany – the new kid on the block? Freshfields. Available at: <https://riskandcompliance.freshfields.com/post/102iowe/redress-action-in-germany-the-new-kid-on-the-block>

may include an order to pay compensation to defined beneficiaries. After a judgment has been handed down, a trustee examines the claims filed by the beneficiaries and later pays them the compensation, or establishes a redress fund and organises the payout procedure. The Redress Action Act covers a wide range of consumer rights and other fields of law, including product liability, data protection, and cartel damages.⁸²

Collective actions in Germany may also be filed using other mass claims mechanisms in addition to the three described above. A prominent feature of the German collective action system is the assignment model (Abtretungsmodell). The assignment model refers to a procedure in which individual claims are assigned to a third party that then pursues these claims in court on behalf of the claimants. This model is not explicitly regulated under one law but it is derived from several general provisions of German civil and procedural law.⁸³

Therefore, a collective action can be initiated under the assignment model or through established legal avenues such as the Redress Action Act. As explained, a crucial difference between the two is that in the assignment model individual consumers assign their claims to a third party that becomes the legal party in the lawsuit, while under the Redress Action Act only qualified consumer organisations (QEs) can bring a representative action on behalf of consumers. Another important difference is that litigation funding is only allowed in the Redress Action when the amount to be allocated to funders does not exceed 10 percent of the compensation that may be awarded,⁸⁴ while there is no such limitation under the assignment model. Furthermore, the qualified entity in the Redress Action Act must always disclose in its claim the sources of the funds used and, in case of third-party funding, the full unredacted text of the funding contract (e.g., to check for potential conflicts of interest).

Funding and the financial returns earned by funders are two key elements that help to explain the effectiveness of the assignment model and its ecosystem. In general, lawyers in Germany cannot work for contingency fees. Therefore, another third party is required to pay a law firm for its legal services and finance the necessary work to collect the claims. In exchange for this investment and the financial risks involved, the third-party litigation funder receives a portion of the compensation that is awarded. As a result, the primary goal of the collective action under the assignment model is not necessarily to obtain justice but to receive an attractive return for the investments made by funders. Based on our analysis, the number of private funders that are active in Germany is over 40, the second largest in the EU only after the Netherlands, and increasing.

Two specific developments should be considered to understand the popularity of collective actions through the assignment model: the German Act to Promote Consumer-Oriented Offers in

⁸² Norton Rose Fulbright. (2023). New type of action: remedial action for mass proceedings in Germany. Available at: <https://www.nortonrosefulbright.com/de-de/wissen/publications/5c56dc49/new-form-of-action-redress-action-for-mass-proceedings-in-germany>

⁸³ For example, the German assignment model is supported by Section 398 the German Civil Code (Bürgerliches Gesetzbuch) (assignment) and Section 59 of the German Code of Civil Procedure ZPO (Joinder of parties in communities of interest with regard to the disputed right, or where the cause is identical). Available at: https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0231

⁸⁴ Becker, M., et al. (2023). (see note: 81).

the Legal Services Market of 2021, referred to as the German Legal Tech Law, and the availability of legal protection insurance.

First, the German Legal Tech Law allowed collection agents that offer debt recovery services to collect and realise single claims in return for a success fee or against a profit-sharing rate. This was then extended to lawyers for the collection of claims in general and for claims up to €2,000⁸⁵ in value and for them to provide counselling in such cases. These exceptions to the general prohibition on success fees aimed to prevent discrepancies between legal tech companies and traditional lawyers. The debt collection agents set up online platforms that typically charge 20 to 40 percent of the compensation awarded to consumers,⁸⁶ a high amount that is also indicative of the lack of competition between debt collection agents. The platforms have been successfully set up to gather claims in the Dieselgate and Truck Cartel cases as well as cases related to flight cancellation claims, tenants' rights and rent control disputes,⁸⁷ increasing the total number of collective actions in Germany.

Second, legal protection insurance, which is very popular in Germany,⁸⁸ provides coverage for legal costs such as attorney fees, court costs, and other legal expenses and substantially lowers the cost and the effort required for an individual to claim compensation. Once collective actions gained popularity in Germany – on the back of the VW emissions scandal – hundreds of thousands of individual claims were filed on a wide variety of issues such as increases in private health insurance premiums, interest rate compensation and the VW and other emission fraud cases. The high volume of these cases, the statements of claims for which ran into hundreds of pages, clogged up the German judiciary system. As a result, they have become an argument in favour of collective litigation as a way of lightening the load on the legal system.

It must be said, however, that the assignment model also requires significant work from the judiciary. In order to maximise their potential compensation, third parties such as legal tech companies are incentivised to group and standardise as many claims as possible. This could violate the commonality principle which ensures that the lawsuit addresses a shared concern of the claimants. As a result, courts are obliged to look into and assess each individual case on its own merits. There have been instances when German Courts have held the assignment model invalid and dismissed claims because of the way that they have been bundled together without meeting the main condition that they must all share a common concern.⁸⁹

There is another important observation that goes to the core of the criticism against the assignment model and private enforcement model more generally (see Chapter 2, Section 2.2.2).

⁸⁵ See section 4a (1) no. 1 German Lawyers' Fees Act (RVG) and section 13b Rechtsdienstleistungsgesetz (RDG).

⁸⁶ Plog, P. (2019, May 29). German draft law on legal tech: Take the plunge! Fieldfisher. Available at <https://www.fieldfisher.com/en/insights/german-draft-law-on-legal-tech-take-the-plunge>

⁸⁷ See MyRight (<https://www.myright.de>); Financialright (<https://www.financialright.de>); Flightright (<https://www.flightright.com>); WenigerMiete.de (<https://www.wenigmiete.de>).

⁸⁸ Expat info. Legal insurance in Germany. Available at: <https://www.iamexpat.de/expat-info/insurance-germany/legal-insurance-in-germany>

⁸⁹ For instance, District Court Hanover Judgment, 1 February 2021, 18 O 34/17 and District Court Stuttgart Judgment, 20 January 2022, 30 O 176/19. In both cases, the Courts reasoned that grouping claims became an atypical activity when compared with traditional debt collection, and were therefore not allowed under the Legal Services Act; as referenced under Unseld, C. & Petrasincu., A. (2022, August 24). Collective redress in Germany for cartel damages claims. Hausfeld. Available at: <https://www.hausfeld.com/en-de/what-we-think/competition-bulletin/collective-redress-in-germany-for-cartel-damages-claims/>

Funders focus on the cases where they can obtain the highest financial reward at the lowest cost. As a result, justice is delivered as a by-product of this process and only on a piecemeal basis. In this situation, civil law enforcement can become driven by a selective profit-based model instead of following a mandatory public justice-based approach according to which the rules must be enforced objectively across the board. As an example, the assignment model is particularly popular in competition cases⁹⁰ where the infringement has already been established by public authorities and third parties only need to collect the follow-up claims.

In addition to the assignment model and Redress Action, Germany also has sectoral Ombuds Bodies in the energy, banking, telecommunications and insurance sectors that are empowered to provide consumer redress. This was the case of the Ombuds Scheme for Investment Funds that provided an out-of-court dispute resolution for consumers affected by the Open-ended Real Estate Investment Funds (OREIFs) crisis.⁹¹ In 2012, OREIFs suffered a liquidity issue as many investors sought to exit them due to market instability. In response, many funds suspended redemptions, preventing investors from withdrawing their funds. Around one thousand claims were filed against fund managers, one quarter of them went to court and three quarters of the cases, involving those private investors that had no legal protection insurance, went to the Ombuds Body. The Ombuds Body solved the 750 cases in just six months while the cases that went through the courts took substantially longer and were significantly more expensive. Moreover, at the end of the process, the German Federal Court of Justice came to the same conclusions as the Ombuds Body.

Germany has a public registry of collective actions established under the Model Declaratory Action and the Redress Action laws,⁹² but there is no centralised or official record that tracks collective actions under the assignment model. In addition to the 45 cases gathered in our database, we found 20 additional cases advertised in the websites of German consumer associations⁹³ and law firms.⁹⁴ The number of collective actions has increased from 2019 onwards, reaching a peak of 16 cases per year in 2021. After this peak, the number of collective actions declined but continues to be higher than in the period before 2019.

⁹⁰ The sugar cartel resulted in approximately 90 lawsuits filed by the food industry against sugar producers in German courts, addressing the damages incurred by food retailers. This legal action is based on the assignment model. Other notable cartel cases include those involving Hydrogen Peroxide, Paraffin Wax, and Cement. See: Seegers, M. and Kruger, C. (2023, August 23). Effective Enforcement of Cartel Damage Claims through the Assignment Model: The Preliminary Ruling Procedure before the CJEU in Case C-253/23 (ASG) – A Comment. Kluwer Competition Law Blog, Available at: <https://competitionlawblog.kluwercompetitionlaw.com/2023/08/25/effective-enforcement-of-cartel-damage-claims-through-the-assignment-model-the-preliminary-ruling-procedure-before-the-cjeu-in-case-c-253-23-asg-a-comment/>

⁹¹ E.J.F. ADR/Ombudsman & Regulatory Redress. Available at: <https://europeanjusticeforum.org/topics/adr-ombudsman/details/>

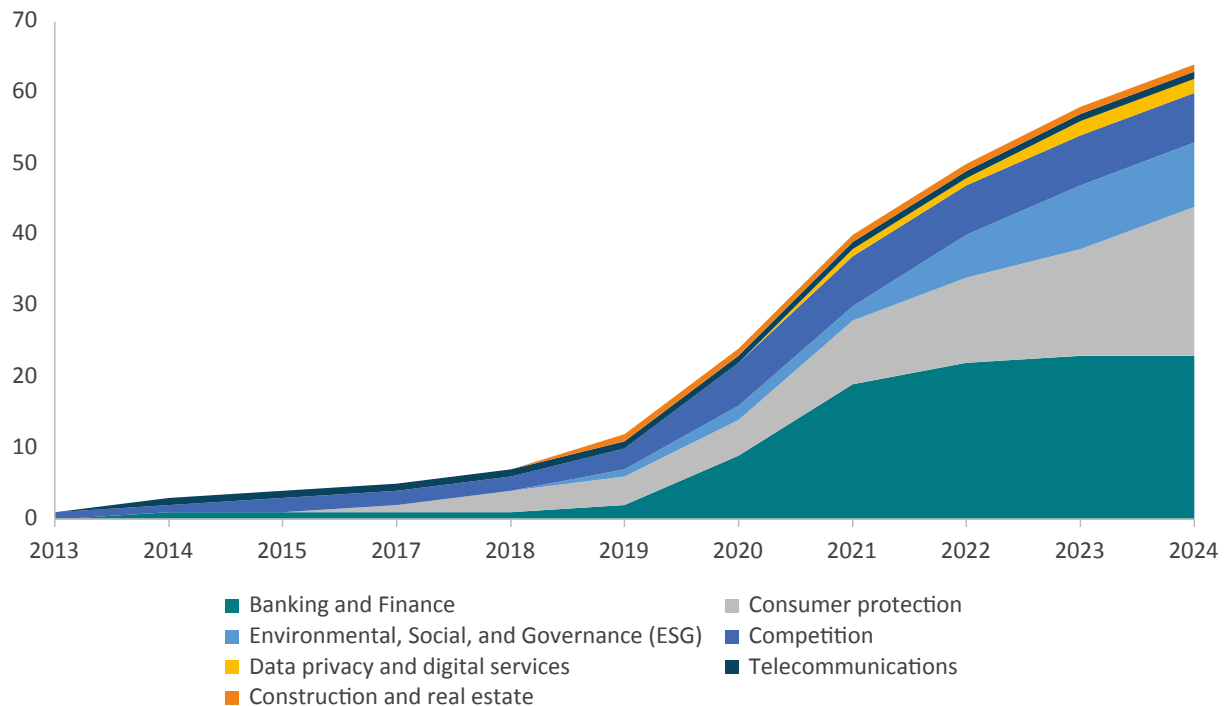
⁹² Bundesamt für Justiz. Verbandsklageregister. Available at: https://www.bundesjustizamt.de/DE/Themen/Verbraucherrechte/VerbandsklageregisterMusterfeststellungsklagenregister/Verbandsklagenregister/Verbandsklagen/Verbandsklagen_node.html

⁹³ Verbraucherzentrale Bundesverband. Available at: <https://www.sammelklagen.de/verfahren/avacon>

⁹⁴ *ibid*; also see: Petrasincu, A., & Kneblsberger, M., (2021, August 31). The Airdeal ruling: German Federal Court of Justice strengthens collective redress in Germany. Hausfeld. Available at: <https://www.hausfeld.com/en-us/what-we-think/competition-bulletin/the-i-airdeal-i-ruling-german-federal-court-of-justice-strengthens-collective-redress-in-germany/>; Gleiss Lutz. Financialright claim vehicle breaks down in trucks cartel. Available at: <https://www.gleisslutz.com/en/news-events/know-how/financialright-claim-vehicle-breaks-down-trucks-cartel>; Hertel, T., & Wittinghofer, M., (2019, November 13). One year of Model Declaratory Action in Germany – taking stock and outlook. Herbert Smith Freehills. Available at: <https://www.herbertsmithfreehills.com/insights/2019-11/one-year-of-model-declaratory-action-in-germany-%E2%80%93-taking-stock-and-outlook>

The next figure presents the cumulative number of collective actions across broad economic areas between 2013 and 2024. The figure below includes the category "Competition", which encompasses cases such as the Truck Cartel.⁹⁵ As with the trends in the Netherlands and the EU, Figure 10 also shows that as the overall volume of cases grew, the range of economic areas impacted has also broadened.

FIGURE 10: CUMULATIVE NUMBER OF COLLECTIVE ACTION LAWSUITS ACROSS ECONOMIC AREAS, GERMANY (2008-2024)



Source: ECIPE's database of collective action lawsuits.

The growth of collective actions in Germany is closely linked with the German economy and some of its largest companies. As explained, the Model Proceedings in Capital Market Disputes law was introduced in response to Deutsche Telekom's incorrect valuation of real estate; and the Model Declaratory Action was designed to handle claims such as those against VW, which also fuelled the rise in collective actions through the assignment model. Moreover, German companies may be more susceptible to collective actions outside Germany than others due to their expansion into global markets. This was the case for Bayer, which, after acquiring Monsanto, faced multiple collective action lawsuits in the US.⁹⁶

These collective actions have impacted German companies. The scale of the impact is reflected in the compensation paid by German businesses in collective actions and the decline in their market value. A year after the Diesel scandal broke in September 2015, VW's stock price was

⁹⁵ Hertel, T., (2019) *ibid.*

⁹⁶ Bayer. (2020, June 24). Bayer announces agreements to resolve major legacy Monsanto litigation. Bayer. Available at: <https://www.bayer.com/media/en-us/bayer-announces-agreements-to-resolve-major-legacy-monsanto-litigation/>

down by 30 percent⁹⁷ as investors factored in the reputational damage and the potential payments in compensation. In 2015, VW agreed to a \$14.7 billion⁹⁸ settlement in the US while in Germany the company paid €830 million to 260,000 car owners.⁹⁹ Additionally, other German automakers have also faced lawsuits for allegedly cheating in their emissions tests. The German Insurance Association (GDV) estimated that the diesel scandal has resulted in €1.52 billion in legal costs, making it the most expensive claim in the history of German legal insurance. However, only 10.4 percent of the claims were fully successful, 42.1 percent only partially successful, and almost half (47.5 percent) were totally unsuccessful.¹⁰⁰

Moreover, as shown in Figure 10, collective actions in Germany affect multiple sectors, not just automakers. The assignment model has been used to file cases concerning a variety of goods and services, from food¹⁰¹ to district heating¹⁰². The combination of EU legislation that promotes collective actions, and the German assignment model and Redress Action law that also cover a broad spectrum of industries, may drive collective actions into new sectors of the German economy, including technological fields such as IT and cybersecurity.

3.6 Conclusion

This chapter explored the development of collective actions in the EU over the past decade, including a review of observable trends per Member State and per economic area. Factors such as economic size, population, GDP per capita and the prevalence of defective products are analysed as potential explanations behind the variability in the number of collective actions across the EU. This analysis is supplemented by case studies on the Netherlands, Portugal and Germany. The analysis of the case studies allowed us to understand in more detail the reasons behind the rise in collective actions in these countries. Ultimately, the goal of this chapter is to answer the following questions:

How did the volume of collective actions in the EU evolve over the years? Which EU countries and which economic sectors have seen the highest growth in the number of collective actions? And what are the factors that can explain the differences?

Over the past decade, the number of collective actions in the EU has increased significantly. The analysis revealed a two-part trend: an initial peak around 2015 followed by a renewed surge in filings beginning in 2020. This trend indicates a growing acceptance and use of collective

⁹⁷ Independent UK. (2016, September 17). Volkswagen diesel emissions scandal: the toxic legacy. Available at: https://www.independent.co.uk/news/business/leading_business_story/volkswagen-diesel-emissions-scandal-the-toxic-legacy-a7312056.html

⁹⁸ Office of Public Affairs, US Department of Justice. Available at: <https://www.justice.gov/opa/pr/volkswagen-spend-147-billion-settle-allegations-cheating-emissions-tests-and-deceiving>

⁹⁹ VW. (2020, February 28). VW to pay €830m settlement to German consumers. Available at: <https://www.dw.com/en/dieselgate-volkswagen-to-pay-830-million-settlement-to-german-consumers/a-52572281>

¹⁰⁰ "Fully successful" means that claimants received the full compensation, while "partially successful" means that claimants received less than what they demanded. Source: GDV. Abschlusszahlen zum Diesel-Skandal: Streitwert bei 10,8 Milliarden Euro. Available at: <https://www.gdv.de/gdv/medien/medieninformationen/abschlusszahlen-zum-diesel-skandal-streitwert-bei-10-8-milliarden-euro-162788>

¹⁰¹ Cartel Damage Claims. Sugar. Available at: <https://carteldamageclaims.com/cases/sugar/>

¹⁰² Verbraucherzentrale. Federal Association of Consumer Organizations is examining class action lawsuit against Avacon Natur GmbH. Available at: <https://www.sammelklagen.de/verfahren/avacon>

actions across the EU. In particular, the Netherlands, Portugal, Germany, and Slovenia exhibit a higher volume of collective action lawsuits.

Across economic areas, consumer protection remains the primary driver of collective actions, focusing on unfair commercial practices, breaches of contractual obligations, and violations of consumer rights. However, as the volume of cases has risen, so too has the breadth of economic areas that are impacted. There has been a significant rise in the number of cases involving data privacy and digital services, as well as the environment, energy and climate. Some of these changes are driven by increases in a small group of EU countries in particular in which collective actions in these economic areas have become more popular. For instance, the Netherlands witnessed an increase in data privacy and digital services-related collective actions, while the Netherlands and Germany each experienced a surge in collective actions concerning environmental and energy issues.

The analysis of collective actions at country and sectoral levels reveals significant variations. It could have been expected that the number of cases in a Member State largely mirrored its economic weight or population size. However, the correlations between GDP and population and the number of collective actions is relatively low. Smaller countries such as the Netherlands, Portugal or Slovenia saw much higher increases in the numbers of cases compared to their larger neighbours. Other factors such as GDP per capita and product quality are also only weakly correlated with the number of collective actions per country or per economic area.

What are the main legal features of collective actions in the Netherlands, Portugal and Germany? What explains the change in the use of collective actions over the years in these countries? What are the economic areas that have been most affected so far?

Section 3.5 includes the case studies for the Netherlands, Portugal, and Germany. Our database shows that these three countries are among those with the highest number of collective action cases.

In the case of the Netherlands, the prevalence of collective actions can be explained by the fact that the Dutch legal system sets a low threshold for bringing collective actions compared to other countries. Dutch collective actions use the opt-out system and ad hoc entities can be formed quickly to bring specific claims. In addition, the admissibility criteria for collective actions in Dutch Courts are less strict than in other EU countries and the cost-shifting risks are minimal. Probably for these reasons, a thriving eco-system of law firms and funders that actively pursue such collective actions has built up in the Netherlands. For example, the Netherlands is, by far, the EU Member State where the highest number of third-party litigation funders are active. These factors make it one of the preferred destinations for mass litigation in the EU, which is reflected in the increase in the number of cases from 2020 onwards.

The legal system in Portugal is similarly welcoming for collective actions. In addition to the opt-out system, there are no limits on the amount of damages that can be claimed and no restrictions on forum shopping. All of this makes collective action in Portugal an attractive and relatively low-cost option for litigants. These features have been exploited in particular by

Portuguese consumer organisations that have filed multiple new cases, making Portugal one of the EU countries with the highest number of collective actions. This represents a break from the past as collective actions previously had not been a popular choice for consumers seeking redress in Portugal.

Germany's system of collective actions can be described as a dual system composed of the assignment model and the Redress Action Act. These two systems have distinct features. Under the Redress Action Act only qualified consumer organisations (QEs) such as the VZBV can bring a representative action on behalf of consumers. Moreover, litigation funding is only allowed when the funders' share in the proceeds does not exceed 10 percent. In contrast, under the assignment model, consumers assign their claims to a third party that becomes the legal party in the lawsuit, and there are no limitations as to how much of the final compensation funders can receive. The popularity of the assignment model, supported by the establishment of digital platforms that enable the collection of mass claims with minimum effort being required of consumers, has been a key driver behind the increase in the number of collective actions in Germany.

4. THE ECONOMIC CONSEQUENCES OF MASS LITIGATION

4.1 Introduction

Chapter 3 showed the absence of any significant correlation between the number of collective actions in a Member State and either its economic size, population or, GDP per capita respectively. The correlation with the prevalence of defective products was equally low. If these variables are not strongly associated with the number of collective actions, other factors might be driving them. The first part of Chapter 4 (Sections 4.2 and 4.3) assesses whether the institutional frameworks and the efficiency of the judicial system provide a more realistic rationale. The following questions have guided our analysis:

- Which EU countries have an institutional framework that makes it easier to start collective actions? Does the efficiency of the judicial system make a country more attractive for law firms and third-party funders seeking to bring collective actions? How do these factors – the institutional framework and the efficiency of the judicial system – contribute to the likelihood that a collective action will be filed in a particular country?

The second part of Chapter 4 (Section 4.4) quantifies the potential economic impact of an increase in mass litigation in the EU. Using comparisons based on empirical estimates for the US, our economic modelling presents three scenarios to outline the potential impact on the EU exploring the following questions:

- What could be the impact of an increase in the number of collective actions on the EU economy? Which EU Member States could be impacted the most? How could an increase in collective actions impact economic variables such as business costs and innovation?

4.2 Quantifying the Likelihood of Mass Litigation in the EU

4.2.1 The Institutional Framework for Mass Litigation (IFML) Index

As explained previously (see Chapter 2, Section 2.3.1), mass litigation in the EU is regulated by both national and EU legislation. The interplay between the two has led to variations in the rules applicable to collective actions across the EU. In those EU Member States where the rules are more favourable to the development of mass litigation, an eco-system of companies and other intermediaries has emerged, providing legal, financial and other services to fuel the growth in cases.

The Institutional Framework for Mass Litigation (IFML) Index captures these elements. The index is the result of a conceptual model based on three variables: (1) existing collective action processes; (2) characteristics of the legal system governing mass litigation; and (3) institutional factors outside the legal system. These three variables are explained further below:

1. Existing Collective Action Processes

Collective actions or similar instruments of regulatory private enforcement were already in place in many EU countries prior to the implementation of the RAD. In some of these countries the existing legal processes supported the emergence of collective actions but this is not the case for all of them. This variable captures those countries where a legal system for collective action has been in place prior to RAD and there has been a significant number of collective action cases (see Annex 8 for a full explanation of the variable and how it was calculated).

- **Widely used mass litigation system already in place prior to the implementation of RAD:** this variable scores 1 if a country had a system of collective action prior to RAD and the number of collective action cases between 2008 and 2023 was above the average. Chapter 2, Section 2.3.1 presented the EU countries with a system of collective action or a similar mechanism prior to RAD; Chapter 3 quantifies the number of collective actions between 2008 and 2023; and Annex 8 includes a full explanation of this variable and how it was calculated. The advantage of this variable is that it simultaneously captures those Member States where there was a legal procedure already in place for mass litigation and where there was a significant number of such cases. France, Germany, the Netherlands, Poland, and Portugal meet these two criteria and they each score 1 in this variable.

2. Characteristics of the Legal System that Regulates Mass Litigation

Certain features of the legal system that regulates mass litigation have a direct impact on the likelihood of these cases being brought in a particular jurisdiction. The following four variables describe some of the features that support the emergence of mass litigation.

- **Opt-out system:** an opt-out system leads to a much higher number of included beneficiaries in collective action cases.¹⁰³ Conversely, an opt-in system requires proactive participation already during the court procedure, potentially limiting the number of future beneficiaries. A score of 1 for a country indicates that collective actions followed the opt-out model or that the opt-out model is allowed under certain conditions. Bulgaria, Hungary, the Netherlands, Portugal, Slovenia, and Spain score 1 in this variable¹⁰⁴.
- **No requirement to disclose funding sources:** the emergence of third-party litigation funding (TPLF) incentivises mass litigation by providing financial backing to claimants. TPLF is a process which involves a third party otherwise unconnected to the dispute that funds the proceedings, usually on the claimant side, in exchange for a share of any resulting financial award.¹⁰⁵ If the funded party is not successful then the funder loses its investment.¹⁰⁶

Greece and Ireland have banned TPLF for the time being,¹⁰⁷ and several other EU countries have established procedural rules aimed at mitigating conflicts of interest between funders and claimants, such as an option for the court to request disclosure of the funding agreement to the court. The TPLF variable scores as 1 when there is no systemic or compelling requirement for such disclosure. This means that more litigation may result because third-party funders are permitted to operate without needing to comply with transparency requirements. This is the case in many Member States (i.e., Belgium, Bulgaria¹⁰⁸, Czechia, Denmark, Finland, France, Italy, Latvia, Lithuania, Netherlands, Poland, Romania and Slovakia), with each country scoring 1 for this variable.

- **No loser pays principle:** unlike the US system where each party generally bears its own legal costs, the EU Member States generally apply the "loser-pays rule". This rule aims to deter frivolous lawsuits by placing a financial burden on the losing party that is responsible for covering their own legal costs and potentially those of the opposing side as well. This can discourage claimants with weak cases¹⁰⁹ from pursuing litigation as the potential cost of losing may be substantial¹¹⁰.

¹⁰³ An opt-out system results in a higher number of beneficiaries included in collective actions, though actual participation depends on how many claim their share. It's important to distinguish between claimants, who are active participants in court, and potential beneficiaries, who are not. While funders and claimant lawyers may argue that opt-out systems benefit consumers, many beneficiaries often do not claim their share.

¹⁰⁴ Laws on collective actions are currently under discussion in Bulgaria and Spain. In the latest draft of these regulations, both countries had chosen an opt-out system. However, the use of an opt-out approach may change in the final laws to be proposed in the future.

¹⁰⁵ See Banerjee, S. (2022, March 6). Worldwide: Third-Party Funding in International Arbitration, MONDAQ.COM. Available at: <https://www.mondaq.com/india/arbitration--dispute-resolution/1162218/third-partyfunding-in-international-arbitration>

¹⁰⁶ Messina, V. (2019). Third-Party Funding: The Road to Compatibility in International Arbitration. *Brook. J. Int'l L.*, 45, 433.

¹⁰⁷ AmCham EU. (2021). Regulating Third Party Litigation Funding. Available at: https://www.amchameu.eu/system/files/position_papers/tplf_final.pdf

¹⁰⁸ The draft law on collective actions in Bulgaria does not include a systemic requirement to disclose sources of funding. However, this requirement may change in the final law.

¹⁰⁹ Gryphon, M. (2010). Assessing the Effects of a Loser Pays Rule on the American Legal System: An Economic Analysis and Proposal for Reform. *Rutgers JL & Pub. Pol'y*, 8, 567.

¹¹⁰ Veljanovski, C. (2011). Third Party Litigation Funding in Europe. *JL Econ. & Pol'y*, 8, 405.

The degree to which claimants are discouraged from filing nuisance lawsuits will depend on the percentage of the winning party's costs for which the loser is required to pay. The loser pays rule serves as a deterrent against frivolous claims, thus the variable score is 1 for those Member States where it is not applied. This is the case for Austria, Belgium, Czechia, Finland, Latvia, Portugal, Slovakia and also Germany where the amount to be paid to a winning defendant is limited by law to only a negligible amount relative to the total costs incurred.

- **Ad hoc qualified entities:** Ad hoc (or "special purpose") qualified entities are permitted in some but not all of the Member States. They are organisations or bodies that are not permanently designated as qualified entities but they can be authorised to bring a collective action for a specific case on behalf of consumers. Due to their flexibility and relative ease of use, ad hoc entities can have a significant impact on the number of mass claims in a Member State. The score for this variable is 1 for Croatia, Hungary, Netherlands, Portugal, Romania, Slovenia, and Sweden, where such ad hoc qualified entities are permitted to operate.

The scores for each country were based on an analysis of national legislation and reports by academia, law firms and other organisations.¹¹¹

3. Institutional Factors Outside the Legal System

Other factors, outside the legal systems, can also explain the differences in the volume of collective actions between EU countries. For instance, the emergence of an ecosystem of legal firms and financial institutions to pursue these actions increases the likelihood of more cases in the future as the financial rewards attract new entrants into the market. A significant institutional factor is the number of funders in a particular jurisdiction.

- **Number of funders:** litigation funding (especially if it is unregulated or only lightly regulated) supports the growth of mass litigation. Even though TPLF is not as developed as in the US, the UK or Australia, in part because of the safeguards in some EU countries that lead mass litigation to be categorised as a high-risk investment,¹¹² many litigation funders are active in EU markets. Moreover, an increasing number of litigation funders in a particular country indicates that funders believe there will be a growing number of collective actions in the future.

¹¹¹ Hodges, C. (2008). *The reform of class and representative actions in European legal systems: a new framework for collective redress in Europe*. Bloomsbury Publishing. Also see: DWF. *A collective effort: European class action (finally) on the way, or is it?* Available at: <https://dwfgroup.com/en/news-and-insights/insights/2023/3/european-class-action-on-the-way>; also see: Dentons (2022) *Class Action in the EU*. Available at: <https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2022/january/24/class-action-in-the-eu>; JonesDay (2018) *EU Class Actions in the Making*. Available at: <https://www.jonesday.com/en/insights/2018/06/eu-class-actions-in-the-making>; Wolf Theiss (2024) *Representative Actions Directive Tracker*. Available at: <https://www.wolftheiss.com/insights/representative-actions-directive-tracker/>; and Bird and Bird. *Current Collective Action Landscape Map*. Available at: <https://www.twobirds.com/en/trending-topics/consumer-class-actions/current-collective-action-landscape-map> CMS. (2023) *CMS European Class Actions*. Available at: <https://cms.law/en/int/publication/cms-european-class-actions-report-2023>; EJF (2024) *Collective Redress in the EU: Representative Actions Directive (RAD) transposition*. Also see: EJF (2021) *EJF Monitoring Report*. Available at: <https://europeanjusticeforum.org/recent/news/ejf-issues-first-comprehensive-monitoring-report-on-collective-redress-regulation-in-europe/>

¹¹² Mediratta, A. (2021) *The European Union's New Collective Redress Initiative: Implications for the Future of Civil Litigation*. *New York University Journal of International Law and Politics*. Available at: <https://www.nyuilp.org/wp-content/uploads/2021/02/Mediratta-Formatted-1.pdf>

This variable scores 1 if a country has an above-average number of funders. Based on desk research quantifying the number of funders across EU countries, Germany and the Netherlands score 1 in this variable.

Each country's IFML score is calculated as the weighted sum of the above variables. The weights, decided in discussions with legal experts, reflect the perceived impact on the likelihood of collective actions being brought. The weights for each of the variables are the following:

- Pre-existing and widely used mass litigation systems have a weighting of 30 percent.
- Characteristics of the legal system governing collective action have a weighting of 50 percent. The four variables that make up this factor are: (1) the opt-out system, weighted at 20 percent; (2) no requirement to disclose funding sources, weighted at 10 percent; (3) no loser pays principle, weighted at 10 percent; and (4) admission of ad hoc qualified entities, also weighted at 10 percent.
- Institutional factors outside the legal system have a weighting of 20 percent.

The equation used is:

$$IFML_i = (0.3 \times \textit{Popular mass litigation prior to RAD}) + (0.2 \times \textit{Opt out}) \\ + (0.1 \times \textit{No funding disclosure}) + (0.1 \times \textit{No loser pays}) \\ + (0.1 \times \textit{Ad hoc QEs}) + (0.2 \times \textit{Number of funders})$$

The following table presents the results for each EU Member State across each variable. The table includes the score for 22 EU Member States for which information was available. The Netherlands and Portugal top the IFML Index due to strong pre-RAD mass litigation regimes and lack of rules to restrict mass litigation. Countries in the middle such as Germany and France had pre-existing mass litigation systems but they lack certain features such as an opt-out process, which moderates their scores.

Eastern and Central European countries such as Poland, Bulgaria, and Hungary score in the middle or lower range on the index. This is because they lack institutional tools that support mass litigation, such as ad hoc qualified entities or TPLF.¹¹³ At the bottom, countries like Ireland, Sweden, and Italy did not have a popular mass litigation system prior to RAD and they have legal processes that restrict mass litigation, limiting the opportunities for claimant funders and law firms to establish themselves.

A correlation analysis between the scores of the EU Member States and the number of collective action cases collected in our database for the period 2008-2023 (see Chapter 3, Section 3.3) shows a close relationship with the IFML Index. The IFML scores and the number

¹¹³ These countries had a stronger reliance on public enforcement via authorities or public bodies in the wake of the former Soviet Union's culture of state power.

of cases have a correlation of 0.9 which indicate a very strong positive relationship between the index results and the number of collective action cases per country¹¹⁴.

TABLE 7: INDEX OF INSTITUTIONAL FRAMEWORK FOR MASS LITIGATION (IFML) IN THE EU

	Existing collective action processes	Characteristics of the legal system governing mass litigation				Institutional factors outside the legal system	IFML Index (0-1)
	Widely used mass litigation prior to RAD	Opt-out system	No requirement to disclose funding sources	No loser pays principle	Ad hoc qualified entities allows	Number of funders	
<i>Weights</i>	0.3	0.2	0.1	0.1	0.1	0.2	
Netherlands	1	1	1	0	1	1	0.9
Portugal	1	1	0	1	1	0	0.7
Germany	1	0	0	1	0	1	0.6
France	1	0	1	0	0	0	0.4
Poland	1	0	1	0	0	0	0.4
Bulgaria	0	1	1	0	0	0	0.3
Hungary	0	1	0	0	1	0	0.3
Slovenia	0	1	0	0	1	0	0.3
Belgium	0	0	1	1	0	0	0.2
Czechia	0	0	1	1	0	0	0.2
Finland	0	0	1	1	0	0	0.2
Latvia	0	0	1	1	0	0	0.2
Romania	0	0	1	0	1	0	0.2
Slovakia	0	0	1	1	0	0	0.2
Spain	0	1	0	0	0	0	0.2
Austria	0	0	0	1	0	0	0.1
Croatia	0	0	0	0	1	0	0.1
Denmark	0	0	1	0	0	0	0.1
Italy	0	0	1	0	0	0	0.1
Lithuania	0	0	1	0	0	0	0.1
Sweden	0	0	0	0	1	0	0.1
Ireland*	0	0	0	0	0	0	0

*Note: Ireland has the lowest score since it does not qualify for any of the criteria included in the IFML Index. The situation may change in the future if the current limitations on third-party funding are lifted. As the only EU country that has a common law system and broad discovery requirements, Ireland could become an attractive jurisdiction for mass litigation within the EU.

¹¹⁴ This correlation was calculated using 34 data points. Therefore, it should be regarded as a summary statistic, and it should be interpreted with caution.

The hypothesis that having an institutional framework that facilitates mass litigation will lead to a higher number of cases can also be tested by looking at the geographic spread of some collective action cases from the US to the EU. Collective actions are much more common in the US than in the EU. However, as national rules and EU horizontal and sectoral rules continue to facilitate mass litigation (see Chapter 2, Section 2.3.1), a number of collective actions against companies that started in the US have been replicated in the EU.¹¹⁵ It can be assumed that when choosing where to bring their claim in the EU, claimant lawyers will choose the jurisdiction that is most attractive in terms of ease of bringing the claim and the likelihood of winning the case or obtaining a settlement.¹¹⁶

Our database offers a limited number of cases but they are still illustrative, nonetheless. Of the 373 cases, 48 mass action lawsuits are related to cases that were also launched against the same companies in the US. Of those 48 cases, 31 were launched in the Netherlands and Portugal, representing 65 percent of the total. The Netherlands and Portugal are also at the top of the IFML Index meaning that they are the two EU countries whose institutional framework is the most attractive for mass litigation to prosper (see Chapter 3, Section 3.5 for a detailed description of the legal systems that regulate mass litigation in the Netherlands and Portugal).

TABLE 8: NUMBER OF COLLECTIVE ACTION LAWSUITS AGAINST THE SAME COMPANY AS A US CASE

Country	Number of Cases	Percentage of all cases
Belgium	4	8%
France	5	10%
Germany	5	10%
Portugal	17	35%
Netherlands	14	29%
Spain	2	4%
CJEU case	1	2%

Source: ECIPE's database of collective action lawsuits.

¹¹⁵ Lemon Law Experts. Volkswagen Class Action Settlement Update 2022-2023, Available at: <https://lemonlawexperts.com/volkswagen-class-action-settlement-update/>; Wiessner, D., (2024, June 28). Meta must face lawsuit claiming it prefers foreign workers over US citizens. Reuters. Available at: <https://www.reuters.com/legal/meta-must-face-lawsuit-claiming-it-prefers-foreign-workers-over-us-citizens-2024-06-27/>; Top Class Actions. (2022, February 25). TikTok Data Privacy \$92M Class Action Settlement. Available at: <https://topclassactions.com/lawsuit-settlements/closed-settlements/tiktok-data-privacy-92m-class-action-settlement/>

¹¹⁶ American firm Hausfeld has opened operations in several EU member states and has launched a class action claim in the Netherlands on behalf of 13.4 million Google Android users. See: Lexology (2022, October 20) Google hit with Dutch class action Android claim. Available at: <https://www.lexology.com/pro/content/google-hit-with-dutch-class-action-android-claim>

4.2.2 Judicial Efficiency for Litigation (JEL) Index

As we have seen, certain features of a country's institutional framework for mass litigation have an impact on the number of such cases brought there; however, other variables also influence the outcome. A critical factor could be the efficiency of the legal system. An efficient legal system that processes litigation quickly can be advantageous for claimants, especially in an era when bringing cross-border cases is becoming easier and claimants may engage in forum shopping towards jurisdictions that process their cases faster¹¹⁷.

To capture the quality and efficiency of the legal system as a factor that can influence the number of collective actions per country, we developed the Judicial Efficiency for Litigation (JEL) Index. Annex 6 presents the methodology used for the calculation of the Index. The following variables constitute the JEL Index:

- **Number of judges, prosecutors, and lawyers:** these variables, measured per 100,000 inhabitants for ease of cross-country comparison, are to be understood as the basic human capital inputs of a country's legal system. In general, it is assumed that having more workers employed in the legal system contributes to more effective processing of court cases and improves efficiency. This data is provided by the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ – Commission européenne pour l'efficacité de la justice), a judicial body made of experts with the goal of developing tools to improve the efficiency of the justice systems in its Member States.¹¹⁸
- **Budget:** this variable measures the amount of money spent by the government on the judicial system, in euros per inhabitant. The budget can also be interpreted as an input into the legal system that has an impact on its efficiency. If a country invests more in its legal infrastructure (e.g., IT systems, wages to various workers in courts) it should be expected that it will become more effective at processing court cases. The data for this variable comes from CEPEJ.
- **Clearance rate for civil and commercial litigious cases:** this variable quantifies the efficiency of the judicial system in managing its inflow of cases. Measured as a percentage, it is the ratio between the number of resolved and incoming cases. The data for this variable comes from CEPEJ.
- **Cost of contract enforcement:** the World Bank's Enforcing Contracts indicator measures the cost of enforcing contracts as a percentage of the claim value. It considers differences in welfare levels across countries and includes attorney, court, and enforcement fees. Although this variable pertains to contract

¹¹⁷ Dentons. EU 2020/1828 - Class Action Directive. Available at: <https://www.dentons.com/en/services-and-solutions/digital-solutions/all-knowledge-hubs/eu-2020-1828-class-action-directive>

¹¹⁸ CEPEJ. (2023). CEPEJ Indicators on efficiency. Available at: <https://public.tableau.com/app/profile/cepej/viz/EfficiencyEN/Efficiency>

enforcement, it can be used as a proxy for how costly it is to use legal services. Thus, higher costs are assumed to translate into a reduced number of cases.¹¹⁹

Disposition time for civil and commercial litigations: this indicator measures the theoretical time, in days, for a pending case to be resolved in court considering the efficiency of the system. The higher the number of days, the less efficient the legal system and thus less likely that collective actions will be processed expeditiously. The data for this variable comes from CEPEJ.

The following table details the names, units of measurement, impact on the likelihood of collective actions, and source for each of the variables included in the JEL Index.

TABLE 9: VARIABLES FOR THE JEL INDEX

Variable	Unit	Effect on the likelihood of collective action	Source
Number of judges	Per 100,000 inhabitants	Positive	CEPEJ
Number of prosecutors	Per 100,000 inhabitants	Positive	CEPEJ
Number of lawyers	Per 100,000 inhabitants	Positive	CEPEJ
Budget ¹²⁰	Euro per inhabitant	Positive	CEPEJ
Clearance rate	Percentage	Positive	CEPEJ
Cost of contract enforcement	Percentage of claim	Negative	World Bank
Disposition time ¹²¹	Days	Negative	CEPEJ

The ranking of countries based on their JEL Index is presented in Table 10. Countries at the top of this ranking are interpreted as having a legal system that is more likely to attract increases in mass litigation. However, the rankings only provide a relative order between countries and do not imply a proportional difference in judicial efficiency. For example, Luxembourg's JEL Index score is 0.77, which is more than six times higher than Ireland's score of 0.12. However, this does not mean that Luxembourg's judicial system is six times as efficient than Ireland's. The JEL Index provides a relative ranking of countries and highlights differences in tendencies, but it does not imply proportional numerical differences in judicial efficiency or litigation likelihood.

¹¹⁹ World Bank. (2022). Enforcing Contracts. Doing Business. Available at: <https://archive.doingbusiness.org/en/data/exploretopics/enforcing-contracts>

¹²⁰ Unavailable for Poland and Portugal.

¹²¹ Unavailable for Bulgaria.

JEL identifies countries such as Luxembourg, Hungary, Germany and Slovenia as having legal environments that could be conducive to mass litigation, primarily due to the efficiency of their legal systems in handling cases expediently. This efficiency often stems from having a high number of legal professionals and substantial judicial budgets.

Several factors contribute to the lower scores of those countries that are at the bottom of the JEL Index. Here is a breakdown of some key challenges faced by these countries (see Annex 7 for individual variables results and ranking per EU Member State):

- Case backlog and inefficiency: low clearance rates and long disposition times (e.g., in Croatia) suggest a congested legal system. This backlog can lead to delays in resolving cases, discouraging potential claimants due to the prospect of lengthy litigation processes.
- Limited resources: countries with lower budgets allocated to the judicial system (e.g., in Malta, Romania, and Bulgaria) might have fewer resources to invest in technology, infrastructure, and personnel. This can lead to inefficiencies in case management and court administration, further impacting speed and efficiency.
- Access to legal representation: a lower density of lawyers (e.g., in Malta and Luxembourg) might indicate challenges in accessing legal representation, particularly those individuals or groups that are less affluent. This can be a significant barrier to pursuing litigation.
- Uncertainties in contract enforcement: lower scores in enforcing contracts (e.g., in Greece and Italy) could indicate a legal system with a less established track record of effectively upholding contracts. This uncertainty might discourage potential claimants from pursuing litigation, as they might be unsure of obtaining redress even if they win the case.

TABLE 10: INDEX OF JUDICIAL EFFICIENCY FOR LITIGATION (JEL) IN THE EU

Rank	Country	JEL Index (0-1)
1	Luxembourg	0.77
2	Germany	0.56
3	Hungary	0.56
4	Slovenia	0.56
5	Austria	0.51
6	Slovakia	0.50
7	Latvia	0.49
8	Portugal	0.49
9	Lithuania	0.49
10	Poland	0.48
11	Estonia	0.46

Rank	Country	JEL Index (0-1)
12	Netherlands	0.45
13	Romania	0.43
14	Sweden	0.42
15	Denmark	0.41
16	Czech Rep.	0.40
17	Cyprus	0.39
18	Bulgaria	0.38
19	Finland	0.38
20	Croatia	0.38
21	Greece	0.34
22	Italy	0.34
23	Spain	0.33
24	Belgium	0.32
25	Malta	0.30
26	France	0.23
27	Ireland	0.12

Note: Luxembourg stands as an outlier due to the concentration of lawyers and budget per capita.

The JEL Index has obvious limitations. Each of the variables used to produce the Index holds equal weight. However, some variables might be more important than others in relation with mass litigation. For instance, lawyers might prioritise metrics that directly impact their chances of winning, such as clearance rates and disposition times, over factors like budget or lawyer density. In addition, other variables not used in this Index such as access to legal aid or case law precedents can also influence the attractiveness of a legal system for mass litigation. The JEL Index presents a low positive correlation (0.3) with the number of collective action cases gathered in our database¹²².

4.3 Mapping the Likelihood of Collective Action Using IFML and JEL Indices

Figure 11 maps the two indices, IFML and JEL, in each EU country. Both indices are based on current information. However, it must be noted that the rules that regulate mass litigation and the resources that each country dedicates to fund its judicial system change regularly. Moreover, some EU countries are currently in the process of reviewing or amending their rules related to mass litigation (for instance, the Netherlands, France and Spain). As these rules

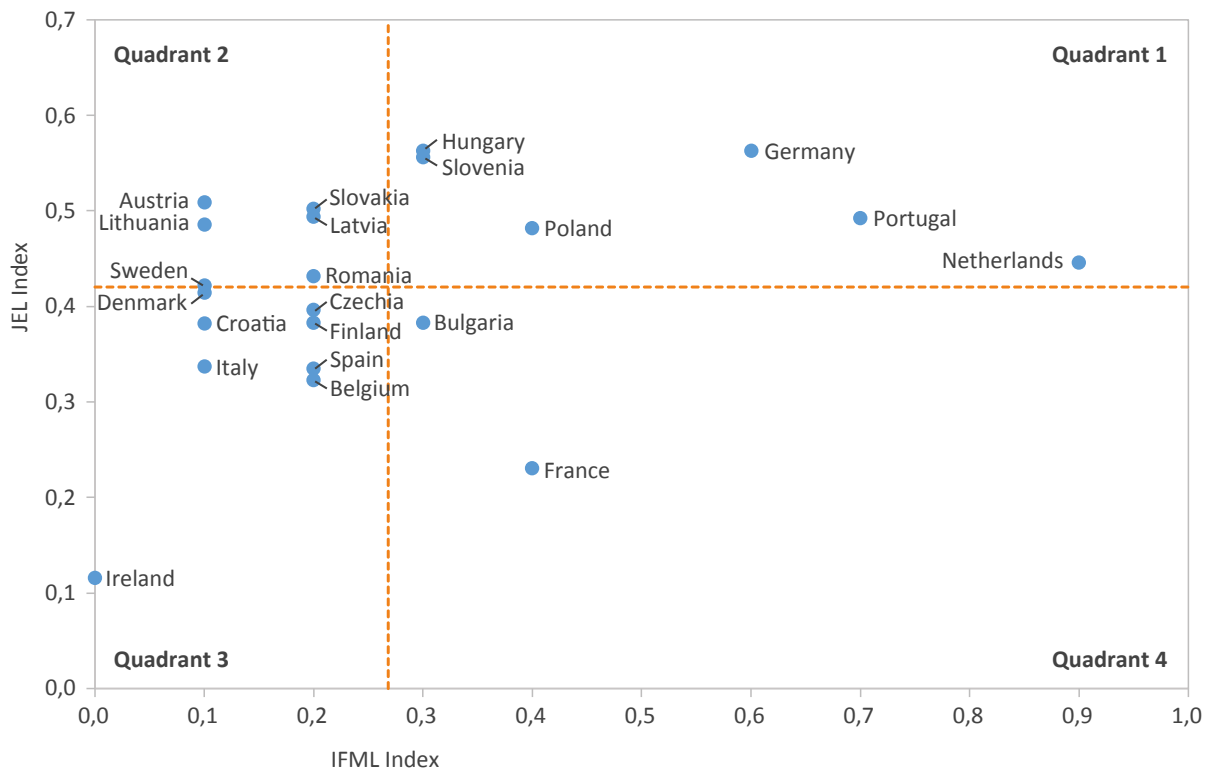
¹²² This correlation was calculated using 42 data points. Therefore, it should be regarded as a summary statistic, and it should be interpreted with caution.

evolve and the efficiency of the legal system changes, the country scores of the two indices shift accordingly.

The analysis hinges on an average split that divides the dataset into two halves. IFML's average value is 0.28. Countries where IFML scores are above 0.28 are classified as having an institutional framework that positively supports further growth in mass litigation, whereas those with scores below 0.28 have an institutional framework that limits growth. Similarly, for JEL, the average value is 0.42. Countries with JEL scores above 0.42 are categorised as having an efficient legal environment, while those that have scores below 0.42 are categorised as having a less efficient legal environment.

By employing this approach, the indices create a four-quadrant framework. Each quadrant represents a combination of an institutional framework and judicial efficiency that allows us to explore how these factors jointly influence the potential for mass litigation to grow across the EU. The four quadrants are described below:

- Quadrant 1 (High JEL, High IFML): countries in this quadrant are more likely to have more mass litigation due to an efficient judicial environment and the presence of an institutional framework that facilitates its growth.
- Quadrant 2 (High JEL, Low IFML): these countries boast efficient legal systems but their institutional frameworks may not support growth in mass litigation.
- Quadrant 3 (Low JEL, Low IFML): countries here are less likely to see significant growth in mass litigation due to both inefficient legal systems and lack of an institutional framework that supports it.
- Quadrant 4 (Low JEL, High IFML): although these countries have an institutional framework that supports mass litigation, inefficiencies in their judicial systems might hold back the anticipated rise in the number of cases.

FIGURE 11: IFML AND JEL INDICES ACROSS EU MEMBER STATES

Source: ECIPE

The figure indicates that countries like the Netherlands, Portugal and Germany, all located in Quadrant 1 (High JEL, High IFML) might be more exposed to an increase in mass litigation in the future. These countries all have above-average institutional factors that support collective action as well as judicial systems that are relatively efficient, making them attractive venues for increased mass litigation.

Countries positioned in Quadrant 2 (High JEL, Low IFML), such as Austria, Lithuania or Sweden, might be less exposed to an increase in collective actions because, despite their efficient legal systems, they have introduced legal guardrails that have a limiting effect on mass litigation.

Countries that are in Quadrant 3 (Low JEL, Low IFML), such as Ireland, Italy and Spain, have institutional frameworks that are less conducive to collective action coupled with relatively less efficient legal systems. The result suggests that these countries may experience lower volume growth in collective actions.

Finally, the countries positioned in Quadrant 4 (Low JEL, High IFML) such as France and Bulgaria present an interesting case. Even though they have above-average institutional frameworks that facilitate collective action, these factors are counterbalanced by a less efficient judicial system, as reflected by their low scores in the JEL Index.

4.4 Potential Impact of Increased Private Litigation in the EU

4.4.1 A Review of the Empirical Literature

There have been several studies that attempt to estimate the costs of private enforcement on companies operating in the US. These studies provide useful data that illustrate the impact of private enforcement on a variety of indicators such as the costs associated with litigation, compliance and innovation.

A number of studies provide estimates of total private enforcement costs. For instance, a 2013 study by the US Chamber's Institute for Legal Reform estimated the cost of private enforcement¹²³ as a share of GDP for a number of countries based on insurance costs.¹²⁴ The study found that the US incurs very high costs, reaching an estimated 1.6 percent of its GDP in 2011. This study came on the heels of a 2009 survey of Fortune 200 companies by NERA Economic Consulting, that found that litigation costs (including both prosecution and defence) rose dramatically, reaching \$ 140 million in 2008, a 112 percent increase from \$ 66 million in 2000.^{125 126} A number of studies highlight the rising costs for SMEs of mass litigation. For instance, a NERA Economic Consulting study showed that small businesses in the US bore 48 percent of business tort litigation costs in 2021.^{127 128}

Other studies have looked at the impact of private enforcement on innovation in the US. A study by Kempf & Spalt (2020) found that mass litigation in the US adversely impacts highly innovative companies more than less innovative ones. The study reported that within 3 days of being targeted by a collective action lawsuit, the market value of a highly innovative company drops by 2.8 percent.¹²⁹ Importantly, the company's market value did not recover to its prior level even if the lawsuit was subsequently dismissed.

4.4.2 Scenario-Based Analysis: Methodology

Our methodology started with a selection of variables based on the literature review presented above. These variables had to fulfil two conditions: first there had to be similar variables in the EU

¹²³ The costs of private enforcement are proxied as liability costs, which are defined as the cost of claims, whether resolved through litigation or other claims resolution processes. Non-litigation claims resolution includes arbitration, alternative dispute resolution mechanisms and payments resulting from pre-litigation negotiated settlements.

¹²⁴ McKnight, D. L., & Hinton, P. J. (2013) (see note: 8).

¹²⁵ Litigation costs included the total cost of pursuing and defending lawsuits as well as the compensation paid to claimants. McKnight, D. L., & Hinton, P. J. (2011) (see note: 9).

¹²⁶ A 2010 study from the US Chamber Institute for Legal Reform, conducted in collaboration with Lawyers for Civil Justice and the Civil Justice Reform Group, found that there was a 78 percent increase in average annual litigation costs as a percentage of sales from 2000 and 2008. See: US Chamber Institute for Legal Reform. (2010). Litigation Cost Survey of Major Companies. For Presentation to Committee on Rules of Practice and Procedure Judicial Conference of the United States. Available at: https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf;

¹²⁷ McKnight, D. L., & Hinton, P. J. (2011) (see note: 9)

¹²⁸ Another study by the US Chamber Institute for Legal Reform in 2023 found that for every \$1,000 of revenue earned, US SMEs spent \$ 35 on tort litigation costs. See: McKnight, D. L., & Hinton, P. J. (2023). Tort Costs for Small Businesses. US Chamber Institute for Legal Reform.

¹²⁹ Kempf, E., & Spalt, O. (2020). Attracting the sharks: Corporate innovation and securities class action lawsuits. *Management Science*, 69(3), 1805-1834.

to those used in the US studies, and second there had to be reliable statistical data available for them. The variables included are: litigation costs, costs of private enforcement as a share of GDP, and market capitalisation. The next table presents these variables, the corresponding empirical study, the definition of the variable in that study, and an estimation of that impact.

TABLE 11: VARIABLES IMPACTED BY MASS LITIGATION

US Study	Variable	Impact from mass litigation	Estimated impact in the US
McKnight, D. L., & Hinton, P. J. (2011)	Litigation cost (share of claim value)	Increase in cost of litigation	112%
McKnight, D. L., & Hinton, P. J. (2013)	Cost of private enforcement as share of GDP	Cost of private enforcement as share of GDP	1.66%
Kempf, E., & Spalt, O. (2020)	Market value of companies	Drop in market value of innovative companies after the filing of a collective action suit	2.8%

Having identified these variables, the scenarios analysis assumes that if the EU system of private enforcement were to resemble that of the US, the impact on the European economy would be proportional to the effects found in the US studies. It is difficult to say how closely the EU mass litigation regime resembles its US counterpart. Even if legislation has been passed to promote private enforcement by mass litigation, public enforcement still remains the overarching system of enforcement in the EU. In addition, five cost driving features of the US system do not exist so far in the EU, or not to such an extent as in the US.¹³⁰

It will be apparent already that there are important differences between the legal frameworks for collective actions of the EU and the US but also between those of the EU Member States. Chapter 3 reveals several of the differences between the EU Member States. For instance, some Member States have adopted a collective actions process based on the opt-out procedure, rather than opt-in, which moves them closer to the US system. Other EU countries have introduced guardrails that limit the ability of claimants to take cases to court by explicitly designating only certain entities as qualified to bring a collective action and barring most others, such as ad hoc claims vehicles, from doing so.¹³¹

Based on a comparison of the legal and institutional frameworks in the EU and the US and on discussions with legal experts, we define three scenarios which describe how similar the US and EU systems of collective actions can become, and as a result, the proportional effect on costs for the EU.

¹³⁰ There are no punitive damages in the EU, no jury trials for class actions and, in general, no costly pre-trial discovery procedures. The EU adheres in principle to the loser pays rule and largely bans contingency fees for lawyers. However, some of these features may change following the implementation of certain EU laws such as the new Product Liability Directive.

¹³¹ Moreover, nearly all the EU Member States have only in the past 1-2 years implemented RAD in national law. Therefore, there is considerable uncertainty about if and how the EU and US systems of private enforcement may converge.

Low Growth Scenario: assumes that the economic impact of mass litigation growth in the EU will be equivalent to 10 percent of the economic effects observed in empirical studies in the US. Medium Growth Scenario: assumes that the economic impact of mass litigation growth in the EU will be equivalent to 20 percent of the economic effects observed in empirical studies in the US. High Growth Scenario: assumes that the economic impact of mass litigation growth in the EU will be equivalent to 30 percent of the economic effects observed in empirical studies in the US.

Each of the scenarios is applied to the entire EU economy, but not all economic sectors face the same mass litigation risks. Annex 4 highlights 10 sectors where collective actions are more likely. Where the data allows, the three scenarios are calculated both for the entire EU economy and for the 10 sectors most at risk. Thus, each of the three scenarios provides an upper bound figure (based on calculations for the entire economy) and a lower bound figure (based on calculations for the 10 most-at-risk sectors only).

4.4.3 Scenario-Based Analysis: Results

The results of the scenario-based analysis are divided into three kinds of costs: litigation costs, private enforcement costs for businesses, and innovation costs. These costs are shown for the EU as a whole, for each of the Member States, and for the 10 most-at-risk sectors. Annex 5 includes a detailed explanation of the methodology and the calculations behind the results.

Litigation Costs

This variable measures the average of attorney costs, court costs, and enforcement costs as a share of claim value.¹³² It is the same variable used in the JEL Index to measure the cost of contract enforcement.¹³³ The table below shows litigation costs in the EU and Member States for each of the three scenarios (Low, Medium and High Growth).

McKnight and Hinton (2011) found that increasing mass litigation in the US led to a 112 percent rise in litigation costs.¹³⁴ If this figure is applied to the three scenarios for the EU, resulting growth rates estimates are 11, 22, and 34 percent (representing 10, 20, and 30 percent of the 112 percent figure respectively). In 2021, the World Bank estimated that average litigation costs in the EU amounted to 20.3 percent of the claim value. Applying the projected growth rates of 11, 22, and 34 percent to this base, litigation costs could reach 22.6, 24.8, and 27.1 percent of the claim value in the respective scenarios.

¹³² The World Bank's Litigation Cost as a Share of Claim Value indicator measures the cost of enforcing contracts as a percentage of the claim value. Litigation costs include attorney costs, court costs, and enforcement costs as a share of claim value. The indicator focuses specifically on commercial litigation, including class actions and non-class actions.

¹³³ See Section 4.2.2.

¹³⁴ McKnight and Hinton's (2011) estimates pertain to 2009. These estimates are applied to EU litigation costs for 2020. A limitation of this approach is that the share of mass litigation in total litigation costs may have been smaller in the US in 2009 compared to 2020. However, given the growth of mass litigation in the US, this limitation is more likely to result in an underestimation rather than an overestimation of the costs.

TABLE 12: LITIGATION COSTS BASED ON SCENARIO-BASED ANALYSIS (PERCENTAGE, 2020)

Country	Actual	Low Growth Scenario	Medium Growth Scenario	High Growth Scenario
EU	20.3	22.6	24.8	27.1
Austria	20.6	22.9	25.2	27.5
Belgium	18	20.0	22.0	24.0
Bulgaria	18.6	20.7	22.8	24.8
Croatia	15.2	16.9	18.6	20.3
Cyprus	16.4	18.2	20.1	21.9
Czech Republic	33.8	37.6	41.4	45.2
Denmark	23.3	25.9	28.5	31.1
Estonia	17.3	19.2	21.2	23.1
Finland	16.2	18.0	19.8	21.6
France	17.4	19.3	21.3	23.2
Germany	14.4	16.0	17.6	19.2
Greece	22.4	24.9	27.4	29.9
Hungary	15	16.7	18.4	20.0
Ireland	26.9	29.9	32.9	35.9
Italy	27.6	30.7	33.8	36.9
Latvia	23.1	25.7	28.3	30.9
Lithuania	23.6	26.2	28.9	31.5
Luxembourg	9.7	10.8	11.9	13.0
Malta	21.5	23.9	26.3	28.7
Netherlands	23.9	26.6	29.3	31.9
Poland	19.4	21.6	23.7	25.9
Portugal	17.2	19.1	21.1	23.0
Romania	25.8	28.7	31.6	34.5
Slovakia	20.5	22.8	25.1	27.4
Slovenia	12.7	14.1	15.5	17.0
Spain	17.2	19.1	21.1	23.0
Sweden	30.4	33.8	37.2	40.6

Source: ECIPE's calculations based on World Bank, Doing Business in Europe (2020).

Figure 11 of the previous section provides additional context that helps us interpret the results of the modelling. Scenario 1 (Low Growth Scenario) is most likely to apply for those Member

States that fall in Quadrant 3 (Low JEL-Low IFML) such as Ireland, Italy and Spain. For countries in Quadrants 2 and 4 (the low JEL-high IFML and high JEL-low IFML), Scenario 2 (Medium Growth Scenario) is most likely to be applicable. Finally, the High Growth Scenario 3 is likely to apply to the Member States in Quadrant 1 (high JEL-high IFML), which includes the Netherlands, Germany and Portugal.

Private Enforcement Costs for Businesses

Table 13 estimates the cost of private enforcement as a share of EU and Member State GDP. It builds on the empirical estimates of McKnight, D. L., & Hinton, P. J. (2013) that found that in 2011 the overall cost of private enforcement in the US as a share of GDP was 1.66 percent. 10, 20 and 30 percent of 1.66 is equal to 0.17, 0.33, and 0.5 percent.¹³⁵ In 2023, the EU GDP amounted to €16.9 trillion. Thus, for each of the three scenarios the cost of private enforcement in the EU would be 0.17, 0.33 and 0.5 percent of the EU's GDP and this would be equal to €28.3 billion, €56.5 billion, and €84.8 billion respectively.

The table below also shows the cost of private enforcement in the 10 most-at-risk sectors, as identified in Annex 4. As before, the EU Member States with a high IFML and a high JEL indices such as the Netherlands, Germany, and Portugal are more likely to experience an increase in total costs of private enforcement in line with the High Growth Scenario. Conversely, countries with low IFML and low JEL indices are more likely to see an increase in total costs of private enforcement in line with the Low Growth Scenario.

TABLE 13: COST OF PRIVATE ENFORCEMENT AS A SHARE OF GDP AND AS A SHARE OF SECTOR VALUE-ADDED BASED ON SCENARIO-BASED ANALYSIS (EURO, BILLION)

	All economy (upper bound, 2023)			10 most-at-risk sectors (see Annex 4) (lower bound, 2021)		
	Low Growth Scenario	Medium Growth Scenario	High Growth Scenario	Low Growth Scenario	Medium Growth Scenario	High Growth Scenario
EU	28.28	56.55	84.83	2.20	4.39	6.59
Austria	0.79	1.59	2.38	0.05	0.10	0.15
Belgium	0.97	1.94	2.91	0.10	0.19	0.29
Bulgaria	0.16	0.31	0.47	0.02	0.03	0.05
Croatia	0.13	0.25	0.38	0.011	0.02	0.03
Cyprus	0.05	0.10	0.15	0.005	0.010	0.015
Czech Republic	0.53	1.05	1.58	0.03	0.06	0.09
Denmark	0.62	1.25	1.87	0.06	0.11	0.17

¹³⁵ McKnight and Hinton's (2013) estimates pertain to 2011. These estimates are applied in each of the scenarios to EU GDP figures for 2023, which presents a limitation since the cost of private enforcement for businesses in the US in 2011 may differ from those in 2023. A more recent report by the US Chamber Institute for Legal Reform estimated the cost of the US tort system to be equivalent to 2.1 percent of US GDP.

	All economy (upper bound, 2023)			10 most-at-risk sectors (see Annex 4) (lower bound, 2021)		
	Low Growth Scenario	Medium Growth Scenario	High Growth Scenario	Low Growth Scenario	Medium Growth Scenario	High Growth Scenario
Estonia	0.06	0.13	0.19	0.007	0.013	0.020
Finland	0.46	0.91	1.37	0.03	0.07	0.10
France	4.68	9.37	14.05	0.35	0.69	1.04
Germany	6.84	13.69	20.53	0.66	1.33	1.99
Greece	0.37	0.73	1.10	0.02	0.04	0.06
Hungary	0.33	0.65	0.98	0.03	0.05	0.08
Ireland	0.85	1.69	2.54	0.09	0.18	0.26
Italy	3.46	6.92	10.38	0.12	0.24	0.35
Latvia	0.07	0.13	0.20	0.003	0.007	0.010
Lithuania	0.12	0.24	0.36	0.007	0.013	0.020
Luxembourg	0.13	0.26	0.39	0.02	0.04	0.06
Malta	0.03	0.06	0.09	0.005	0.010	0.015
Netherlands	1.77	3.55	5.32	0.49	0.98	1.47
Poland	1.25	2.49	3.74	0.07	0.14	0.21
Portugal	0.44	0.88	1.32	0.03	0.06	0.09
Romania	0.54	1.08	1.62	0.03	0.05	0.08
Slovakia	0.20	0.41	0.61	0.01	0.02	0.03
Slovenia	0.10	0.21	0.31	0.007	0.014	0.021
Spain	2.43	4.85	7.28	0.14	0.29	0.43
Sweden	0.90	1.80	2.69	0.15	0.30	0.45

Source: ECIPE's calculations based on Eurostat GDP and main components (output, expenditure and income) and Eurostat Enterprises by detailed NACE Rev.2 activity and special aggregates.

Innovation

As described in the literature review, Kempf & Spalt (2020) identified a 2.8 percent negative impact of collective action lawsuits on highly innovative companies. The study found that such lawsuits disproportionately target successful innovators. They also have a direct and long-term negative effect on the companies' market valuations which can negatively impact their levels of innovation.

The EU publishes an annual report¹³⁶ identifying the top 1,000 Research and Development (R&D) investors within the bloc, which are considered the most innovative companies in the EU. The report includes market capitalisation data for 571 of the 1,000 companies. We applied 10, 20, and 30 percent of Kempf & Spalt's 2.8 percent finding to the aggregate market capitalisation of the EU's most innovative companies to produce estimates for the Low, Medium and High Growth Scenarios respectively. The results are shown in Table 14. For the EU as a whole and across all sectors (the upper bound figure), the impact on the market capitalisation of those top 571 companies would reach €15.5 billion, €31.0 billion, and €46.5 billion respectively per scenario. If we consider only the sectors that are most exposed to mass litigation (the lower bound figure), the impact would be €4.8 billion, €9.7 billion, and €14.5 billion respectively per scenario.¹³⁷

TABLE 14: IMPACT ON MARKET CAPITALISATION FOR THE TOP 571 EU R&D INVESTORS BASED ON SCENARIO-BASED ANALYSIS (EURO, BILLIONS)

	All economy (upper bound, 2022)			10 most-at-risk sectors (see Annex 4) (lower bound, 2022)		
	Low Growth Scenario	Medium Growth Scenario	High Growth Scenario	Low Growth Scenario	Medium Growth Scenario	High Growth Scenario
EU	15.50	31.01	46.51	4.84	9.68	14.53
Austria	0.17	0.34	0.50	0.01	0.01	0.02
Belgium	0.49	0.99	1.48	0.14	0.27	0.41
Czechia	0.06	0.12	0.18			
Denmark	1.04	2.08	3.12	0.80	1.59	2.39
Finland	0.50	1.00	1.51	0.04	0.07	0.11
France	3.62	7.25	10.87	1.09	2.18	3.27
Germany	3.45	6.91	10.36	1.26	2.52	3.78
Greece	0.01	0.02	0.04	0.00	0.00	0.00
Hungary	0.01	0.02	0.03	0.01	0.02	0.03
Ireland	1.57	3.14	4.70	0.42	0.84	1.26
Italy	0.79	1.58	2.36	0.20	0.40	0.61
Luxembourg	0.25	0.49	0.74	0.08	0.17	0.25
Malta	0.01	0.01	0.02			
Netherlands	1.88	3.75	5.63	0.40	0.79	1.19
Poland	0.01	0.02	0.03	0.00	0.01	0.01

¹³⁶ Nindl, E., Confraria, H., Rentocchini, F., Napolitano, L., Georgakaki, A., Ince, E., Fako, P., Tuebke, A., Gavigan, J., Hernandez Guevara, H., Pinero Mira, P., Rueda Cantuche, J., Banacloche Sanchez, S., De Prato, G. and Calza, E., The 2023 EU Industrial R&D Investment Scoreboard, Publications Office of the European Union, Luxembourg, 2023, doi:10.2760/506189, JRC135576

¹³⁷ The EU's Product Liability Directive, which facilitates mass litigation, also discourages innovation due to the potential liability risks and associated costs firms face when introducing novel products into the market. See Bauer, M., & Sisto, E. (2023). Increasing systemic legal risks in the EU: The economic impacts of changes to the EU's product liability legislation. Report, ECIPE, Brussels, occ. paper 03/2023, p 62

	All economy (upper bound, 2022)			10 most-at-risk sectors (see Annex 4) (lower bound, 2022)		
	Low Growth Scenario	Medium Growth Scenario	High Growth Scenario	Low Growth Scenario	Medium Growth Scenario	High Growth Scenario
Portugal	0.05	0.11	0.16			
Slovenia	0.01	0.02	0.03	0.01	0.02	0.03
Spain	0.68	1.35	2.03	0.22	0.44	0.66
Sweden	0.91	1.82	2.73	0.17	0.34	0.52

Note: Due to data limitation the EU countries included in market capitalisation were Austria; Belgium; Czech Republic; Denmark; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Luxembourg; Malta; Netherlands; Poland; Portugal; Slovenia; Spain; and Sweden. It was not possible to produce figures for Bulgaria, Croatia, Cyprus, Estonia, Latvia, Lithuania, Romania or Slovakia because they did not have enough companies within the top 1,000 R&D investors. Source: ECIPE's calculations based on European Commission (2023). The 2023 EU Industrial R&D Investment Scoreboard.

Directly applying Kempf & Spalt's 2.8 percent reduction in market capitalisation may be seen as speculative; however, the resulting scenarios are illustrative for countries like the Netherlands. This country is known for its well-functioning legal system and a relatively favourable framework for mass litigation as indicated by its high IFML and JEL scores. The scenarios show that investors in Dutch innovative companies may incur significant financial losses as a result of mass litigation. Even if mass litigation only increases in the economic areas that are more at risk of being targeted by collective actions, the impact on the market capitalisation of Dutch companies could still reach €1.19 billion.

4.5 Conclusion

This Chapter established a ranking system for EU Member States in terms of their attractiveness to increased collective action based on the IFML and JEL indices. We also explored the potential economic consequences of an increase in mass litigation in the EU based on the experience in the US. The goal of this Chapter was to answer the following questions:

Which EU countries have an institutional framework that makes it easier to start collective actions? Does the efficiency of the judicial system make a country more attractive for law firms and third-party funders seeking to bring collective actions? How do these factors – the institutional framework and the efficiency of the judicial system – contribute to the likelihood that a collective action will be filed in a particular country?

Two aspects were identified as factors that influence the likelihood of collective action in the EU: the institutional frameworks that facilitate mass litigation and the judicial efficiency of each Member State's legal system. We used two indices to capture these factors.

The Institutional Framework for Mass Litigation (IFML) Index is defined as follows:

- existing collective action processes,
- characteristics of the legal system that regulates mass litigation, and
- institutional factors outside the legal system.

The first parameter in the IFML Index includes those countries that already had a legal system for mass litigation in place prior to RAD as well as an above-average number of collective action cases. The second parameter in the IFML Index includes four features of the legal system that facilitate mass litigation:

- use of the opt-out process,
- no transparency requirements to ensure disclosure of funding sources,
- no loser pays principle, and
- ad hoc qualified entities permitted.

The IFML's third parameter covers the organisations that support mass litigation. It measures the number of countries that have an above-average number of third-party funders providing financial backing to claimants.

The IFML Index places the Netherlands, Portugal and Germany at the top of its ranking. There is a strong correlation (0.9) between the IFML Index scores and the number of collective actions (see Chapter 3), indicating that the volume of cases brought is closely correlated to the way the institutional framework governing mass litigation is set up.

The Judicial Efficiency for Litigation (JEL) Index is defined using the following criteria:

- the number of judges, prosecutors, and lawyers,
- the amount of money spent by the government on the judicial system,
- the clearance rate for civil and commercial litigious cases,
- the cost of contract enforcement, and
- the disposition time for civil and commercial litigation.

The rationale for producing the JEL Index is that new EU laws create the potential for more cross-border cases and forum shopping by claimants. Those jurisdictions that process court cases most efficiently may be more attractive for claimants seeking to launch a collective action. Luxembourg, Germany, Hungary, Slovenia, and Austria are positioned at the top of the JEL Index. However, as of today, the JEL Index has a low positive correlation (0.3) with the number of collective action cases in the database.

The IFML and the JEL indices can be combined and each EU country placed in a quadrant framework according to the result. This analysis shows that the Netherlands, Portugal and Germany might be particularly exposed to an increase in mass litigation in the future since they have a relatively efficient legal environment as well as rules and institutions that support this type of litigation.

What could be the impact of an increase in the number of collective actions on the EU economy? Which EU Member States could be impacted the most? How could an increase in collective actions impact economic variables such as business costs and innovation?

Several studies have estimated the impact of collective action on the US economy. These estimates provided us with the basis for assessing the potential effects of having more collective actions in the EU. However, it is difficult to say how closely the EU system of mass litigation resembles its US counterpart. Due to this uncertainty, a scenario-based analysis has been used to better capture the range of outcomes. The study presents three scenarios (Low, Medium and High Growth Scenarios) which assume that, as the number of collective actions in the EU increases, the economic effects of mass litigation as identified in empirical studies in the US can be applied proportionally to the EU economy.

Based on these studies, we can show that the impact of a growing number of collective actions on the EU economy could be significant. If the economic effects of mass litigation in the EU are equivalent to either 10 percent, 20 percent, or 30 percent of the estimates found in the US, the private enforcement costs for businesses could range from €28.3 billion (Low Growth Scenario), €56.5 billion (Medium Growth Scenario) to €84.8 billion (High Growth Scenario). If the same scenarios are applied to litigation costs as a share of claim value, litigation costs could rise from the current figure of 20.3 percent to 22.6 percent (Low Growth Scenario), 24.8 percent (Medium Growth Scenario) or 27.1 percent (High Growth Scenario) of the claim value respectively. For the EU's most innovative companies, their market capitalisation could fall by a total of €15.5 billion (Low Growth Scenario), €31.0 billion (Medium Growth Scenario), or €46.5 billion (High Growth Scenario).

These effects can be broken down by Member State. The quadrants mentioned earlier (see in Section 4.3, Figure 11) provide an additional layer that helps us to interpret the results of the economic modelling. The outcomes of the High Growth Scenario might be more likely for EU countries such as the Netherlands, Portugal and Germany in Quadrant 1 (High JEL-High IFML scores) as they have relatively efficient legal environments and rules and institutions that facilitate further growth of mass litigation. The Low and Medium Growth Scenarios might be more applicable for the Member States that are in the other three quadrants.

5. GENERAL CONCLUSIONS

The number of collective actions within the EU is steadily increasing. Our database presented in Chapter 3 shows a marked acceleration in the number of cases since 2020. The trend reached a peak in 2021, but the number of cases remained high in 2022 and 2023. This growth will have economic consequences. As explained in Chapter 2, enforcing regulations through mass litigation in court has costs attached to it, also in the form of more expensive insurance premiums taken out by businesses in order to cover increased potential litigation costs.

Facilitating access to justice through collective actions is not a cost-free option. Consumers eventually retain only part of a larger award that may be won. However, compared with alternative and more efficient systems of making consumers whole, the transfer of resources especially by

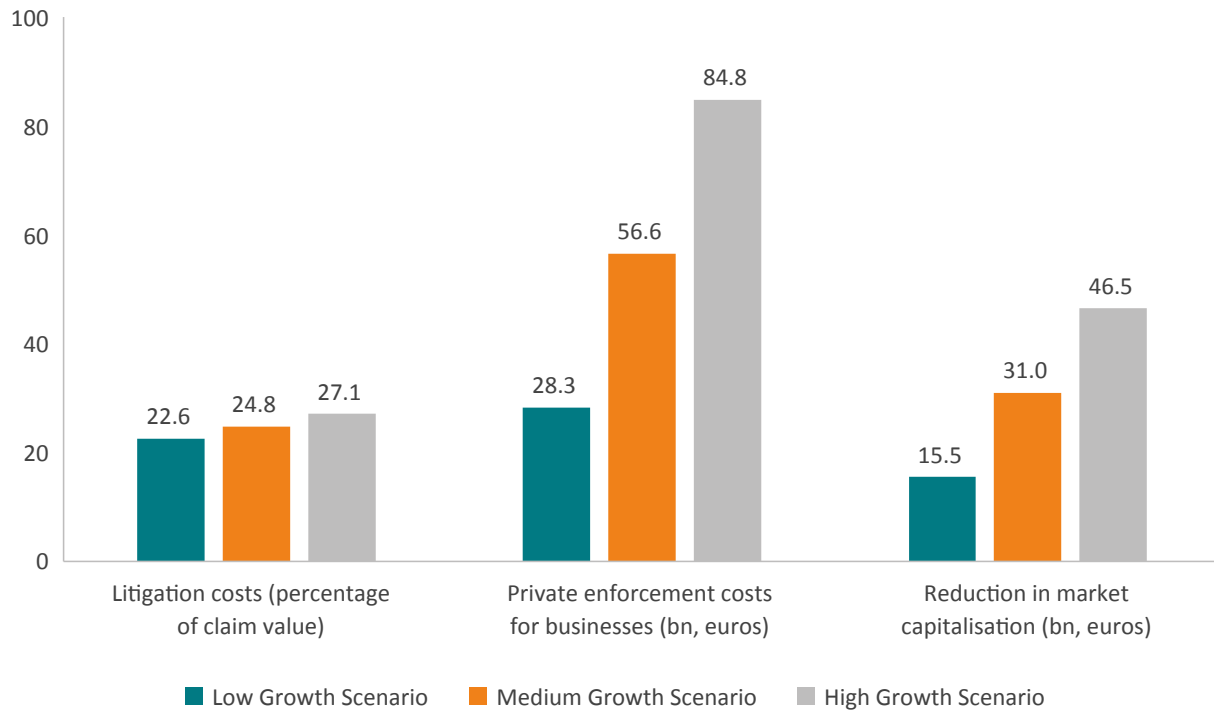
third-party funded collective actions from consumers as a group to a few relatively well-off funders and lawyers has further negative knock-on effects on society because companies that are concerned about being the target of collective actions may redirect resources away from R&D towards safer, less innovative activities. For example, insurance premiums to cover litigation costs for innovative companies are frequently higher than for non-innovative companies because there is greater uncertainty regarding the potential risks and side effects of their products.¹³⁸ These increased costs can discourage companies from investing in the development of new products,¹³⁹ thus impacting private sector spending on R&D.

As explained in our report, many of these costs for the US economy have been identified and quantified in economic literature; however, a comparable empirical analysis has not yet been done for the EU. Our scenario-based analysis, grounded in the US literature, provides the basis for assessing the potential impact of such litigation on the EU economy. Chapter 4 outlines three scenarios – Low, Medium and High Growth Scenarios – that are grounded on the idea that if the number of collective actions in the EU continues to rise, the economic effects for the EU could be proportionate to the economic effects found for the US economy. These three scenarios quantify the potential impact in the EU of increased mass litigation on overall litigation costs, on private enforcement costs for businesses and on the market capitalisation of its most innovative companies.

The next figure shows that the economic consequences of growing mass litigation in the EU may be substantial. EU litigation costs, as a percentage of the claim value, could rise from 20.3 to 22.6, 24.8 and 27.1 percent depending on the Growth Scenario. The cost of private enforcement could be as high as €28.3 billion, €56.5 billion, and €84.8 billion; and the negative impact on the market capitalisation of the EU's most innovative companies could reach €15.5 billion, €31.0 billion or €46.5 billion, depending on the Scenario applied.

¹³⁸ Errors and Omissions (E&O) insurance varies across the industry. For instance, IT businesses often pay double what an accounting company pays for insurance. See: McKenna, M. (2024, September 20). Understanding Factors Impacting E&O Costs. Founder Shield. Available at: <https://foundersshield.com/blog/eo-costs/> ; also see: Lin, P., & Zhang, T. (2022). Product liability, multidimensional R&D and innovation. *Journal of Economics*, 1-21.

¹³⁹ See: Galasso, A., & Luo, H. (2022). When does product liability risk chill innovation? Evidence from medical implants. *American Economic Journal: Economic Policy*, 14(2), 366-401. The paper specifically outlines the liability risk faced by US suppliers of polymers to manufacture medical implants, and it underlines that liability risk may negatively affect innovation incentives.

FIGURE 12: ECONOMIC EFFECTS OF COLLECTIVE ACTIONS IN THE EU

Source: ECIPE.

The costs of the three scenarios will not be the same for all Member States. The quantitative analysis presented in the IFML Index reveals a strong association between the total number of collective action cases and the institutional framework that governs them. In this context, EU countries can take steps to mitigate the negative economic effects of increased mass litigation. Based on the IFML Index, EU Member States can:

- amend class participation rules by adopting an opt-in process instead of opt-out to prevent exaggerated claims,
- adopt or reinforce existing transparency rules to ensure disclosure of funding sources,
- ensure that the loser pays principle is reinforced and consistently applied,
- apply stricter criteria for forming a qualified entity to file collective action cases,
- exclude ad hoc entities and private persons as claimants, and
- mitigate the negative economic effects of private third-party funders in collective actions to ensure a larger share of the defendant's payments reaches consumers.

There are significant economic benefits from having these guardrails in place to deter frivolous collective actions and to encourage the use of Ombuds Bodies instead of court-based litigation. Preventing a shift to the High Growth Scenario and ensuring that the shift is to the Low Growth Scenario instead would have significant benefits. The differences between the High and the Low Growth Scenarios result in a 20 percent reduction in litigation costs, reduction in costs for businesses of €56.5 billion, and cutting the possible decline in the market capitalisation of innovative companies in the EU by €31 billion.

The EU and the Member States should consider carefully the implications of the economic modelling presented in Chapter 4 as they develop their institutional frameworks for governing mass litigation. Additionally, encouraging the use of court-based mass litigation to regulate the economy will introduce a significant new layer of risk and costs on top of the existing compliance burden of the EU's already stringently applied public enforcement regime. The increased compliance costs and the potential negative consequences for innovation will adversely impact the EU's competitiveness and place European companies at a competitive disadvantage as compared to their peers in other countries.

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ANNEX 1: RAD PROVISIONS OF UNION LAWS (ANNEX 1 OF RAD)

1. Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210, 7.8.1985, p. 29) – **Product Liability Directive 85/374/EC**
2. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29) – **Unfair Contract Terms Directive 93/13/EEC**
3. Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in respect of the carriage of passengers and their baggage by air (OJ L 285, 17.10.1997, p. 1) – **Air Carrier Liability Directive 2027/97/EC**
4. Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (OJ L 80, 18.3.1998, p. 27) – **Omnibus Directive 98/6/EC**
5. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12) – **Consumer Sales and Guarantee Directive 1999/44/EC**
6. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178, 17.7.2000, p. 1): Articles 5-7, 10 and 11 – **Directive on Electronic Commerce 2000/31/EC**
7. Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ L 311, 28.11.2001, p. 67): Articles 86-90, 98 and 100
8. Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (OJ L 11, 15.1.2002, p. 4): Articles 3 and 5 – **General Product Safety Directive 2001/95/EC**
9. Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (OJ L 108, 24.4.2002, p. 51): Article 10 and Chapter IV – **Universal Service Directive 2002/22/EC**
10. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ L 201, 31.7.2002, p. 37): Articles 4-8 and 13 – **Directive on privacy and electronic communications 2002/58/EC**
11. Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ L 271, 9.10.2002, p. 16)
12. Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ L 31, 1.2.2002, p. 1) – **General Food Law Regulation 178/2002/EC**

13. Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46, 17.2.2004, p. 1)
14. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ L 149, 11.6.2005, p. 22) – **Unfair Commercial Practices Directive 2009/29/EC**
15. Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJ L 376, 27.12.2006, p. 21) – **Misleading and Comparative Advertising 2006/114/EC**
16. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36): Articles 20 and 22 – **Directive on Services in the Internal Market 2006/123/EC**
17. Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (OJ L 204, 26.7.2006, p. 1) – **Rights of disabled persons and persons with reduced mobility when travelling by air 1107/2006/EC**
18. Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ L 315, 3.12.2007, p. 14) – **Rail Passenger Rights Regulation 1371/2007/EC**
19. Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p. 66) – **Consumer Credit Directive 2008/48/EC**
20. Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (OJ L 33, 3.2.2009, p. 10) – **Protection of Consumers in Respect of Certain Aspects of Timeshare, Long-term Holiday Product, Resale and Exchange Contracts 2008/122/EC**
21. Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293, 31.10.2008, p. 3): Article 23 – **Common Rules for the Operation of Air Services Regulation 1008/2008/EC**
22. Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006 (OJ L 353, 31.12.2008, p. 1): Articles 1-35 – **CLP Regulation 1272/2008/EC**
23. Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).
24. **Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity** and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55): Article 3 and Annex I

25. **Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC** (OJ L 211, 14.8.2009, p. 94): Article 3 and Annex I.
26. Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ L 267, 10.10.2009, p. 7).
27. Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products (OJ L 285, 31.10.2009, p. 10): Article 14 and Annex I – **Framework for the setting of Ecodesign Requirements for Energy-Related Products 2009/125/EC**
28. Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (**Solvency II**) (OJ L 335, 17.12.2009, p. 1): Articles 183-186
29. Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents (OJ L 131, 28.5.2009, p. 24) – **Liability of Carriers of Passengers by Sea in the Event of Accidents Regulation 392/2009/EC**
30. Regulation (EC) No 924/2009 of the European Parliament and of the Council of 16 September 2009 on **cross-border payments in the Community** and repealing Regulation (EC) No 2560/2001 (OJ L 266, 9.10.2009, p. 11).
31. Regulation (EC) No 1222/2009 of the European Parliament and of the Council of 25 November 2009 on the labelling of tyres with respect to fuel efficiency and other essential parameters (OJ L 342, 22.12.2009, p. 46): Articles 4-6 – **Labelling of tyres with respect to fuel efficiency and other essential parameters Regulation 1222/2009/EC**
32. Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products (OJ L 342, 22.12.2009, p. 59): Articles 3-8 and 1921.
33. Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (**Audiovisual Media Services Directive**) (OJ L 95, 15.4.2010, p. 1): Articles 9-11, 19-26 and 28b
34. Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel (OJ L 27, 30.1.2010, p. 1): Articles 9-10 – **EU Ecolabel Regulation 66/2010/EC**
35. Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (OJ L 334, 17.12.2010, p. 1).
36. Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1) – **Regulation for assessing the application and the scope of Directive 2011/61/EU on Alternative Investment Fund Managers Directive 2011/61/EU**

37. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64) – **Application of Directive 2011/83/EU on Consumer Rights**
38. Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (OJ L 55, 28.2.2011, p. 1) – **Rights Of Passengers in Bus and Coach Transport Regulation 181/2011/EC**
39. Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 (OJ L 304, 22.11.2011, p. 18) – **Provision Of Food Information to Consumers Regulation 1169/2011/EU**
40. Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ L 315, 14.11.2012, p. 1): Articles 9-11a – **Energy Efficiency Directive 2012/27/EU**
41. Regulation (EU) No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009 (OJ L 94, 30.3.2012, p. 22) – Technical and business requirements for credit transfers and direct debits in euro regulation 260/2012/EU
42. Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (OJ L 172, 30.6.2012, p. 10) – **Roaming on Public Mobile Communications Networks within the Union Regulation 531/2012/EU**
43. Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (OJ L 165, 18.6.2013, p. 63): Article 13 – **ADR Regulation 2013/11/EU**
44. Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) (OJ L 165, 18.6.2013, p. 1): Article 14 – **Regulation on consumer ODR EU 524/2013**
45. Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34).
46. Directive 2014/31/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of non-automatic weighing instruments (OJ L 96, 29.3.2014, p. 107).

47. Directive 2014/35/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of electrical equipment designed for use within certain voltage limits (OJ L 96, 29.3.2014, p. 357) – **Low Voltage Directive 2014/35/EU**
48. Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on **markets in financial instruments** and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349): Articles 23-29
49. Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (OJ L 257, 28.8.2014, p. 214).
50. Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (**PRIIPs**) (OJ L 352, 9.12.2014, p. 1)
51. Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p. 98) – **European long term investments fund**
52. Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and retail charges for regulated intra-EU communications and amending Directive 2002/22/EC and Regulation (EU) No 531/2012 (OJ L 310, 26.11.2015, p. 1).
53. Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJ L 326, 11.12.2015, p. 1) – **Package Travel And Linked Travel Arrangements Directive 2015/2302/EU**
54. Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35).
55. Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (OJ L 26, 2.2.2016, p. 19): Articles 17-24 and 28-30 – **Insurance Distribution Directive 2016/97/EU**
56. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (**General Data Protection Regulation**) (OJ L 119, 4.5.2016, p. 1).
57. Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC (OJ L 117, 5.5.2017, p. 1): Chapter II – **Medical Devices Regulation 2017/745/EU**
58. Regulation (EU) 2017/746 of the European Parliament and of the Council of 5 April 2017 on in vitro diagnostic medical devices and repealing Directive 98/79/EC and Commission Decision 2010/227/EU (OJ L 117, 5.5.2017, p. 176): Chapter II.

59. Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market (OJ L 168, 30.6.2017, p. 1) – **Portability Regulation 2017/1128/EU**
60. Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (OJ L 168, 30.6.2017, p. 12)
61. Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds (OJ L 169, 30.6.2017, p. 8) – **Money market funds regulation 2017/1131/EU**
62. Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU (OJ L 198, 28.7.2017, p. 1): Articles 3-6 – **Framework for Energy Labelling Regulation 2017/1369/EU**
63. Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (OJ L 60 I, 2.3.2018, p. 1): Articles 3-5.
64. Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ L 321, 17.12.2018, p. 36): Articles 88 and 98-116 and Annexes VI and VIII – **European Electronic Communications Code Directive 2018/1972/EU**
65. Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (OJ L 136, 22.5.2019, p. 1) – **Aspects concerning contracts for the supply of digital content and digital services Directive 2019/770/EU**
66. Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ L 136, 22.5.2019, p. 28).

Regulations that Have Provisions for Collective Actions Not Included in RAD Annex 1

67. Regulation (EU) 2022/1925 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828: Article 42- **Digital Markets Act 2022/1925/EU**
68. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC: Article 80 – **General Data Protection Regulation 2016/679/EU**

ANNEX 2: DATA SOURCES OF THE STUDY'S DATABASE

TABLE 1: LEGAL SOURCES FOR ECIPE'S COLLECTIVE ACTION LAWSUIT DATABASE

Title	Year	Website Link
CMS European Class Actions Report	2023	https://cms.law/en/media/international/files/publications/publications/european-class-action-report-2023?v=1
DWF Consumer Trends	2024	https://dwfgroup.com/en/news-and-insights/insights/2024/1/ct24-the-future-of-class-action-funding
In-house Current legal Developments	2021	https://inhouse-legal.eu/current-development/european-class-actions-expected-to-rise-as-opt-outs-become-more-popular/
JD Supra Class Actions Filings on the Rise of Europe	2023	https://www.jdsupra.com/legalnews/class-action-filings-on-the-rise-in-1355797/
BIICL	ND	https://www.collectiveredress.org/national-reports
Consumer Association Website		
Name	Country	Website
Euroconsumers	Belgium, Italy, Portugal and Spain	https://www.euroconsumers.org/local-organisations/
Citizens' Voices	Portugal	https://citizensvoice.eu/
Ius Omnibus	Portugal	https://iusomnibus.eu/
Testachats	Belgium	https://www.test-achats.be/
Altroconsumo	Italy	https://www.altroconsumo.it/
OCU	Spain	https://www.euroconsumers.org/local-organisations/ocu-org/ (Original website does not function)
Deco Proteste	Portugal	https://www.deco.proteste.pt/

TABLE 2: MEMBER STATES' COLLECTIVE ACTION LAWSUIT PUBLIC REGISTRIES

France	Observatoire Des Actions De Groupe	https://observatoireactionsdegroupe.com/registre/registre-france/
Germany	Bundesamt für Justiz Verbandsklagenregister	https://www.bundesjustizamt.de/DE/Themen/Verbraucherrechte/VerbandsklageregisterMusterfeststellungsklagenregister/Verbandsklagenregister/Verbandsklagenregister_node.html
Italy	Azioni di Classe	https://servizipst.giustizia.it/PST/it/pst_2_16.wp?d-8032343-p=4# ;
Netherlands	De Rechtspraak	https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2023:14036
Poland	Wykaz postępowań grupowych	https://www.gov.pl/web/sprawiedliwosc/wykaz-postepowan-grupowych
Slovenia	Kolektivne tožbe	https://www.sodisce.si/sodni_postopki/kolektivne_tozbe/

ANNEX 3: DESCRIPTION OF THE DATABASE

Our database includes 373 cases, from 23 Member States, between 1969 to 2024, and across the following three dimensions:

- Case details: case name, country, year of start/end of case, claim descriptions, number of intended beneficiaries/affected persons, claimant or claiming representative entity, financing details, court decisions and/or settlements and estimated compensation paid out to beneficiaries.
- Defendant company information: company size, economic area, and whether the case involves an innovative product.
- Regulatory context: regulation on which the lawsuit is based.

The database gathers cases from two main sources. The first source are public registries. Article 35 of the European Commission Recommendation 2013/396/EU requested Member States to establish national registries for collective injunctions and redress actions. Some countries (Austria, Germany, Italy, Netherlands, Poland, Portugal and Slovenia) have already implemented these registries. However, many other countries have not set up the registries yet, although they will soon have to since it is required by the Representative Actions Directive (RAD) for Actions based on procedures resulting from the transposition of the RAD into national laws. The second source were case repositories in law firms, law associations and consumers associations' websites.

Our data collection exercise suffers from certain shortcomings. First, national registries contain collective actions from 2020 onwards. Second, law firm and law associations websites tend to publish cases that are popular or have had a bigger impacts on companies which introduces a bias. Thirdly, sometimes, information on cases from consumer association websites was incomplete or not updated. For instance, information on the cases sometimes lacked updates or information on judgements or appeals was absent.

As a result, our database contains important limitations. The most important limitation is the limited sample size. Secondly, even though information for some variables has been collected for most cases, for other variables the number of missing cases is significant. The following table details the number of recorded and missing observations for each variable.

TABLE 1: NUMBER OF VARIABLES, COMPLETE AND MISSING OBSERVATIONS

	Complete observations		Missing observations	
	N	%	N	%
Case name	373	100%	0	0%
Country	373	100%	0	0%
Year (case filed)	354	95%	19	5%
Full description of the claim	251	67%	122	33%
Number of intended beneficiaries	123	33%	250	67%
Representation of litigants	132	35%	241	65%
Financing of litigation	56	15%	317	85%
Court decision	203	54%	170	46%
Compensation	26	7%	347	93%
Company size	146	39%	227	61%
Economic area	283	76%	90	24%
Innovation related	197	53%	176	47%
Associated regulation	132	35%	241	65%

The most significant gaps are in the financial data, including amounts of litigation funding and amounts of compensation awarded, and the costs of legal representation. This limits the database's ability to evaluate the financial aspects of collective actions, such as potential damages, legal fees, and the financial risks borne by both claimants and defendants, as well as by funders. Additionally, information on company size, involvement with innovative products, and the associated regulations is also missing for a considerable number of cases. On the other hand, most cases present information on the country, year, economic area, and a description of the claim that provide the necessary qualitative information to contextualise the case.

ANNEX 4: RELEVANCE OF PRIVATE ENFORCEMENT ACROSS ECONOMIC AREAS

The variability in the likelihood of mass litigation does not only happen across EU countries but also across economic areas. Based on the analysis undertaken in Chapter 3, this Annex matches the economic areas where mass litigation is more likely to arise with their corresponding statistical classification. This exercise allows us to retrieve relevant economic data to construct scenarios associated with the potential increase in private enforcement within the EU (see Chapter 4, Section 4.4 and Annex 5).

Certain industries are more exposed to mass litigation due to the nature of their activities¹⁴⁰. The following table identifies ten critical sectors at the 2-digit level of the NACE Rev. 2 – a statistical classification of economic activities used by Eurostat and other statistical authorities around the world – that are aligned with the economic areas identified in Chapter 3.

TABLE 1: AT-RISK-SECTORS (NACE REV. 2)

Economic areas from Chapter 3	NACE Code	Industry Name	Explanation for Heightened Risk
Environmental, Social, and Governance (ESG)	19	Manufacture of coke and refined petroleum products	Environmental concerns and product liability related to spills or defective products can lead to litigation.
Environmental, Social, and Governance (ESG)	05-07	Mining and extraction	Environmental damage and safety hazards are common concerns in these sectors.
Environmental, Social, and Governance (ESG)	20	Manufacture of chemicals and chemical products	Potential for product liability due to harmful substances and strict regulations regarding safe handling.
Healthcare and pharmaceuticals	21	Manufacture of basic pharmaceutical products and pharmaceutical preparations	Stringent safety regulations and potential for severe health consequences from defective drugs lead to high litigation risk.
Healthcare and pharmaceuticals	32.5	Manufacture of medical and dental instruments and supplies	Similar to pharmaceuticals, product liability concerns are paramount due to potential patient harm from faulty equipment.
Healthcare and pharmaceuticals	26.6	Manufacture of irradiation, electromedical and electrotherapeutic equipment	Safety failures in medical devices can have serious consequences, leading to litigation.
Data privacy and digital services	62	Computer programming, consultancy and related services	Data security breaches and privacy violations are major concerns, especially for companies handling sensitive information.

¹⁴⁰ Norton Rose Fulbright. 2023 Annual Litigation Survey. Available at: <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/2023-litigation-trends-survey.pdf?revision=4c17816f-a4fb-401f-8960-b00efe391f22&revision=5249784330027387904>.

Economic areas from Chapter 3	NACE Code	Industry Name	Explanation for Heightened Risk
Data privacy and digital services	63	Information service activities	Similar to sector 62, data privacy and security issues are central to litigation risk.
Banking and finance	64	Financial services activities	Misleading investment advice, market manipulation, and financial product failures can all trigger litigation.
Insurance	65	Insurance, reinsurance and pension funding	Disputes can arise from unfair pricing practices, claim denials, or insurer insolvency.

ANNEX 5: SCENARIO-BASED ANALYSIS – METHODOLOGY

The methodology uses three scenarios to assess the impact of private enforcement in the EU. The scenarios depict three possibilities regarding the scale of private enforcement of regulation in the EU compared to the US.

TABLE 1: SCENARIOS FOR ECONOMIC MODELLING

Scenario	Proportion of the effects in the US economy found in empirical studies to be applied to the EU economy
Low Growth Scenario	10 percent
Medium Growth Scenario	20 percent
High Growth Scenario	30 percent

The scenarios provide an avenue to investigate the impact of private enforcement on the EU economy based on empirical studies carried out on the US economy. To assess the impact on the EU economy, a number of economic variables are chosen for which the impact of mass litigation in the US is available.

The impact of mass litigation in the EU is estimated for two kinds of variables. One is growth rates and the other is level estimates. Both use slightly different formulas to estimate the impact for the EU as illustrated below:

Growth Rate Estimates

Empirical literature on private enforcement in the US provides us with data related to the increase/decrease in a particular variable due to private enforcement. The US value is, therefore, a percentage increase or decrease. In order to estimate the increase/decrease of the same variable for the EU as a result of mass litigation, we employ the scenarios analysis.

For the three scenarios, we assume that the increase/decrease of the variable in the EU is 10 percent, 20 percent, and 30 percent of the increase/decrease in the US. Assuming that because of mass litigation, variable **Y** has increased by **X** percent in the US, then, in the Low Growth Scenario, because of mass litigation in the EU, **Y** would increase by 10 percent of **X**. Or mathematically,

$$\Delta Y\%_{(EU) (low)} = \frac{10}{100} \times X$$

Similarly, for the Medium Growth Scenario,

$$\Delta Y\%_{(EU) (medium)} = \frac{20}{100} \times X$$

And for the High Growth Scenario,

$$\Delta Y\%_{(EU) (high)} = \frac{30}{100} \times X$$

EU data also provides us with the value of Y in the EU. Using this, we estimate the new increased value of the Y in the EU for the three scenarios because of mass litigation in the EU. For example, in the Low Growth Scenario, the increased value of Y would be:

$$Y_{(EU \text{ new})(low)} = \left(\frac{\frac{10}{100} \times X}{100} \times Y_{(EU)} \right) + Y_{(EU)}$$

Similarly, for the Medium Growth Scenario,

$$Y_{(EU \text{ new})(medium)} = \left(\frac{\frac{20}{100} \times X}{100} \times Y_{(EU)} \right) + Y_{(EU)}$$

And for the High Growth Scenario,

$$Y_{(EU \text{ new})(high)} = \left(\frac{\frac{30}{100} \times X}{100} \times Y_{(EU)} \right) + Y_{(EU)}$$

As an illustrative example, consider litigation costs. Empirical literature provides us with the impact of private enforcement on litigation costs in the US. Collective actions are associated with a 112 percent increase in litigation costs or $X = 112\%$. The increase in litigation costs (Y) in the EU based on the three scenarios will be as follows:

Low Growth Scenario,

$$\Delta Y\%_{(EU) (high)} = \frac{30}{100} \times 112 = 33.6\%$$

Medium Growth Scenario,

$$\Delta Y\%_{(EU)(low)} = \frac{10}{100} \times 112 = 11.2\%$$

High Growth Scenario,

$$\Delta Y\%_{(EU)(medium)} = \frac{20}{100} \times 112 = 22.4\%$$

We also have the value of litigation costs in the EU which was 20.3 percent of the claim value. Or, $Y_{(EU)} = 20.3$. Plugging this value into the formula to estimate the new value of litigation costs in the EU as a result of mass litigation gives us the following results:

Low Growth Scenario,

$$Y_{(EU\ new)(low)} = \left(\frac{\frac{10}{100} \times 112}{100} \times 20.3 \right) + 20.3 = 22.6$$

Medium Growth Scenario,

$$Y_{(EU\ new)(medium)} = \left(\frac{\frac{20}{100} \times 112}{100} \times 20.3 \right) + 20.3 = 24.8$$

High Growth Scenario,

$$Y_{(EU\ new)(high)} = \left(\frac{\frac{30}{100} \times 112}{100} \times 20.3 \right) + 20.3 = 27.1$$

Or, applying the scenario-based analysis, litigation costs in the EU increased by 11, 22, and 34 percent due to mass litigation. As a percentage of the claim value, litigation costs could increase by 22.6, 24.8 and 27.1 percent.

Level Estimates

Empirical literature on private enforcement in the US provides us with data on the cost of mass litigation as a share of an economic variable in the US. The US value (**X**) is, therefore, a percentage share of an economic variable **Y**. In order to estimate the cost of mass litigation as a share of the same variable for the EU, we employ the scenarios analysis.

For the three scenarios, we assume that the cost of mass litigation as a share of in the EU is 10 percent, 20 percent, and 30 percent of the share in the US (X). Or, for instance, in the Low Growth Scenario, cost of mass litigation as a share of would be 10 percent of the share in the US (X). Or mathematically,

$$\text{cost of mass litigation as a share of } Y_{(EU)(low)} = \frac{10}{100} \times X$$

Similarly, for the Medium Growth Scenario,

$$\text{cost of mass litigation as a share of } Y_{(EU)(medium)} = \frac{20}{100} \times X$$

And for the High Growth Scenario,

$$\text{cost of mass litigation as a share of } Y_{(EU)(high)} = \frac{30}{100} \times X$$

EU data also provides us with the value of Y in the EU. Using this, we estimate the actual cost of mass litigation in the EU. For example, in the Low Growth Scenario, the actual cost of mass litigation would be:

$$\text{Cost of mass litigation}_{(EU)(low)} = \left(\frac{\frac{10}{100} \times X}{100} \times Y_{(EU)} \right)$$

Similarly, for the Medium Growth Scenario,

$$\text{Cost of mass litigation}_{(EU)(low)} = \left(\frac{\frac{20}{100} \times X}{100} \times Y_{(EU)} \right)$$

And for the High Growth Scenario,

$$\text{Cost of mass litigation}_{(EU)(low)} = \left(\frac{\frac{30}{100} \times X}{100} \times Y_{(EU)} \right)$$

As an illustrative example, consider the cost of private enforcement as a share of GDP (Y). Empirical literature provides us with the value of cost of private enforcement as a share of the US GDP, which is 1.66 percent, or $X = 1.66\%$. The cost of mass litigation as a share of the EU GDP in the three scenarios will then be 10 percent, 20 percent, and 30 percent of 1.66. Or mathematically,

Low Growth Scenario,

$$\text{cost of mass litigation as a share of } Y_{(EU)(low)} = \frac{10}{100} \times 1.66$$

Medium Growth Scenario,

$$\text{cost of mass litigation as a share of } Y_{(EU)(medium)} = \frac{20}{100} \times 1.66$$

High Growth Scenario,

$$\text{cost of mass litigation as a share of } Y_{(EU)(high)} = \frac{30}{100} \times 1.66$$

We also have the value of EU GDP which was € 16.9 trillion. Or, $Y_{(EU)} = \text{€ } 16.9 \text{ trillion}$. Plugging this value into the formula to estimate the actual cost of mass litigation in the EU gives us the following results:

Low Growth Scenario,

$$\text{Cost of mass litigation}_{(EU)(low)} = \left(\frac{\frac{10}{100} \times 1.66}{100} \times 16.9 \right) = \text{€ } 0.028 \text{ trillion}$$

Medium Growth Scenario,

$$\text{Cost of mass litigation}_{(EU)(medium)} = \left(\frac{\frac{20}{100} \times 1.66}{100} \times 16.9 \right) = \text{€ } 0.056 \text{ trillion}$$

High Growth Scenario,

$$\text{Cost of mass litigation}_{(EU)(high)} = \left(\frac{\frac{30}{100} \times 1.66}{100} \times 16.9 \right) = \text{€ } 0.084 \text{ trillion}$$

Or, based on the scenario-based analysis, the cost of private enforcement in the EU is 0.17, 0.33 and 0.5 percent of the EU GDP respectively. This is equal to €28.1 billion, €56.1 billion, and €84.2 billion.

Data sources

US Values

US values for the scenarios analysis were collected from empirical literature on the impact of mass litigation on economic variables in the US. The table below provides the source, modifications, and the final numbers used in the analysis for the US.

TABLE 2: US DATA SOURCES

Variable	US estimate from literature	Modification	Final US value	Source
Cost of private enforcement as share of GDP	US liability costs as a fraction of the GDP was 1.66 %	Using 1.66% as the cost of mass litigation as a share of the US GDP	1.66 %	McKnight, D. L., & Hinton, P. J. (2013)
Increase in cost of litigation	For the 20 companies that participated in the survey, average outside litigation costs were \$140 million in 2008, an increase of 112% from \$66 million in 2000.	Using 112% as the increase in litigation costs over time	112%	McKnight, D. L., & Hinton, P. J. (2011)
Cost on innovation	Drop in market value of innovative companies in the short term after the filing of a class action suit was 2.8%	Using 2.8% as the decrease in market value of innovative companies due to mass litigation.	2.8%	Kempf, E., & Spalt, O. (2020)

EU Values

EU values for the scenario-based analysis were collected from international databases as well as Eurostat data. Data was collected for the entire EU27. Sector-wise data was collected through Eurostat. The exact sources of the EU values used in the analysis can be found in the table below.

TABLE 3: EU DATA SOURCES

Variable	Countries	Sectors	Source
GDP	EU27	All	Eurostat 2023: GDP and main components (output, expenditure and income)
Sector Value Addition	EU27	At-risk sectors	Eurostat 2023: Enterprises by detailed NACE Rev.2 activity and special aggregates
Litigation costs	EU27 (average of the 27 EU Member States)	All	World Bank: Doing Business in Europe 2020
Market value of innovative companies	EU27	All At-risk sectors	EU JRC: The 2023 EU Industrial R&D Investment Scoreboard

ANNEX 6: BUILDING THE JUDICIAL EFFICIENCY FOR LITIGATION (JEL) INDEX

The JEL Index contains the seven variables described in Chapter 4 Section 4.2.2 and each variable is assigned equal weight. Since these variables are expressed in different units, a standardisation process is essential. This process involves the min-max method, transforming each variable into a scale bounded between 0 and 1. The formula used is:

$$y_i = \left(\frac{X_i - X_{min}}{X_{max} - X_{min}} \right)$$

Where y_i is the resulting transformed variable for country i , X_i the original value, X_{max} the maximum value, and X_{min} is the minimum observed value. It is important to highlight that this transformation maintains the relative ranking of the countries for any given variable. For variables that negatively impact the conduciveness of the legal environment, such as disposition time and cost of contract enforcement, the transformation uses the formula:

$$y_i = 1 - \left(\frac{X_i - X_{min}}{X_{max} - X_{min}} \right)$$

Each country's index score is calculated as the weighted sum of these transformed variables. The equation used is:

$$Index_i = \frac{1}{n} \sum_j y_j$$

In this formula, y represents the transformed variables, adjusted to reflect their predicted positive or negative effects as outlined in Table 9, and n is the total number of variables, currently set at seven, all equally weighted.

ANNEX 7: VALUE AND RANKING OF EU MEMBER STATES ACROSS THE INDIVIDUAL VARIABLES OF THE JUDICIAL EFFICIENCY FOR LITIGATION (JEL) INDEX

	Number of judges (per 100,000 inhabitant)	Number of prosecutors (per 100,000 inhabitant)	Number of lawyers (per 100,000 inhabitant)	Budget (euro per inhabitant)	Clearance rate (%)	Cost of contract enforcement (% of claims)	Disposition time (days)
Luxembourg	36.1 (3)	9.8 (14)	485.2 (1)	176.7 (1)	0.93 (19)	9.7 (27)	161 (16)
Germany	25 (12)	7.5 (17)	199.2 (10)	140.7 (2)	0.98 (13)	14.4 (25)	237 (11)
Hungary	28.2 (8)	19 (4)	131.1 (13)	55.3 (19)	1 (6)	15 (24)	165 (15)
Slovenia	41.5 (1)	9.8 (14)	87 (21)	100 (6)	1.01 (5)	12.7 (26)	350 (6)
Austria	29 (7)	4.5 (23)	75.08 (24)	138 (3)	1 (6)	20.6 (12)	156 (18)
Slovakia	23.9 (14)	16.9 (5)	114.77 (17)	71.55 (13)	1 (6)	20.5 (13)	204 (12)
Latvia	29.1 (6)	24.4 (1)	72.36 (26)	56.49 (18)	0.96 (16)	23.1 (9)	239 (10)
Portugal	19.4 (16)	13.8 (9)	321.6 (6)	- -	0.98 (13)	17.2 (19)	280 (9)
Lithuania	26.5 (10)	23 (2)	80.62 (23)	47.45 (23)	0.94 (17)	23.6 (7)	117 (22)
Poland	25.2 (11)	15.3 (7)	150 (12)	- -	1.05 (2)	19.4 (14)	317 (7)
Estonia	17.6 (17)	12.7 (10)	82.44 (22)	53.56 (21)	1 (6)	17.3 (18)	135 (20)
Netherlands	14.9 (18)	5.4 (21)	102.8 (20)	125.3 (5)	1 (6)	23.9 (6)	127 (21)
Romania	24 (13)	12.7 (10)	122.1 (14)	49.58 (22)	1 (6)	25.8 (5)	168 (14)
Sweden	11.6 (22)	10.1 (13)	60.3 (27)	127.7 (4)	1.03 (4)	30.4 (2)	161 (16)
Denmark	6.6 (26)	- -	117.6 (16)	92.35 (7)	1.11 (1)	23.3 (8)	190 (13)
Czech Rep.	28.1 (9)	11.4 (12)	114.6 (18)	64.5 (14)	0.98 (13)	33.8 (1)	156 (18)
Cyprus	14.1 (19)	15.3 (7)	476.9 (2)	63.51 (16)	- -	16.4 (21)	- -
Bulgaria	31.6 (5)	22 (3)	201.9 (9)	54.1 (20)	- -	18.6 (15)	- -
Finland	19.5 (15)	7 (19)	73.86 (25)	79.11 (11)	0.94 (17)	16.2 (22)	300 (8)
Croatia	40.7 (2)	15.4 (6)	119.8 (15)	64.3 (15)	0.85 (23)	15.2 (23)	655 (2)
Greece	36 (4)	7 (19)	416.1 (3)	42.23 (24)	- -	22.4 (10)	- -
Italy	11.9 (21)	3.8 (24)	398.2 (4)	82.2 (10)	1.04 (3)	27.6 (3)	674 (1)
Spain	11.2 (23)	5.4 (21)	303.6 (7)	87.9 (8)	0.86 (22)	17.2 (19)	468 (5)
Belgium	13.2 (20)	7.6 (16)	163.8 (11)	87 (9)	0.99 (12)	18 (16)	- -
Malta	8.2 (25)	7.4 (18)	342.4 (5)	62.98 (17)	0.91 (21)	21.5 (11)	550 (4)
France	11.2 (23)	3.2 (25)	104 (19)	72.5 (12)	0.93 (19)	17.4 (17)	637 (3)
Ireland	3.3 (27)	2.6 (26)	282.4 (8)	- -	0.6 (24)	26.9 (4)	- -

ANNEX 8: DESCRIPTION OF THE IFML VARIABLE “WIDELY USED MASS LITIGATION PRIOR TO RAD”

This variable scores 1 if a country had a system of collective action prior to RAD and the number of collective action cases between 2008 and 2023 was above the average.

Based on a report by European Commission¹⁴¹, the EU countries with a system of collective action or a similar mechanism prior to RAD are the following:

- Austria, Belgium, Bulgaria, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Malta, Netherlands, Poland, Portugal, Romania, Spain, and Sweden.

The total number of collective action cases recorded in the database between 2008 and 2023 is presented in "Table 2: Total number of collective action lawsuits in the database per EU Member States and per 1 million population (2008-2023) and (2020-2023)".

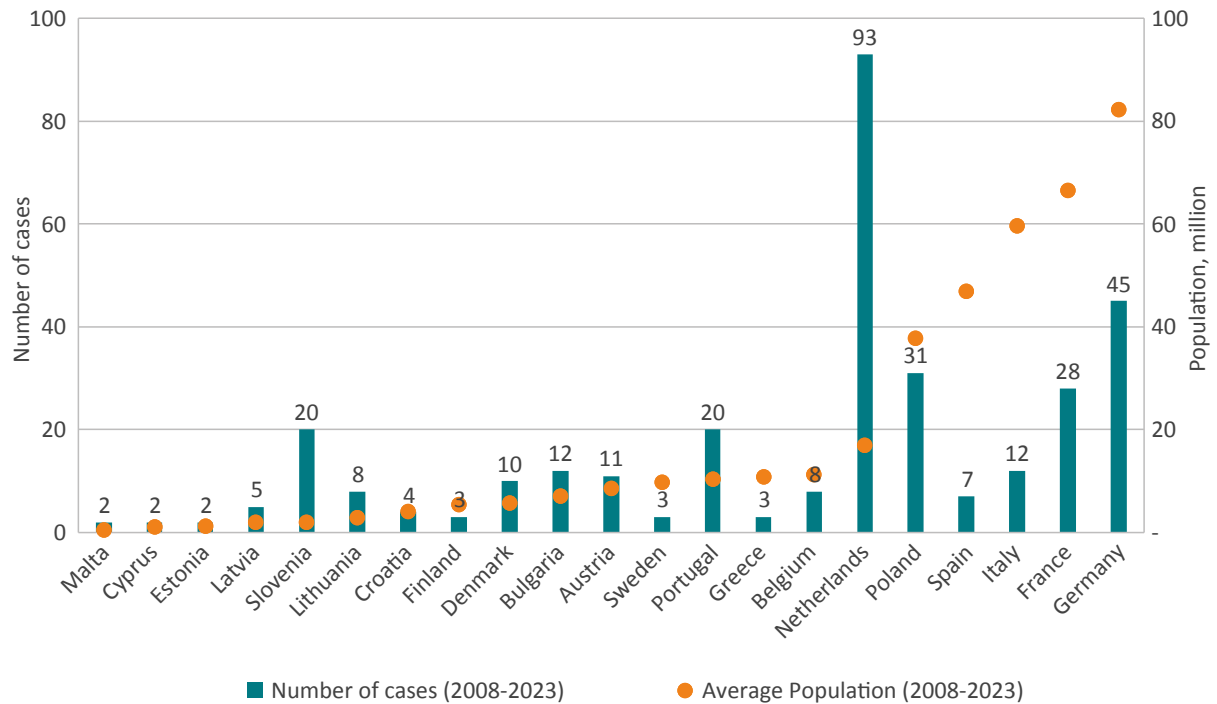
The average number of cases between 2008 and 2023 was 16. France, Germany, the Netherlands, Poland, Portugal and Slovenia have more than 16 cases. However, because the European Commission report of 2018 did not include Slovenia among the EU countries with a system of collective action or a similar mechanism prior to RAD, only France, Germany, the Netherlands, Poland, and Portugal meet the two criteria and score 1 in this variable.

The database only includes data for 21 EU Member States which represents a limitation when calculating this variable since Czech Republic, Hungary, Ireland, Luxembourg, Romania, and Slovakia were not included when calculating this variable. However, Czech Republic, Ireland, and Luxembourg did not meet the first criterion (having a system of collective action or a similar mechanism prior to RAD) therefore only Hungary, Romania, and Slovakia were not considered for the calculation of this variable.

¹⁴¹ European Commission (2018). COM(2018)40 final, p. 3. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0040>

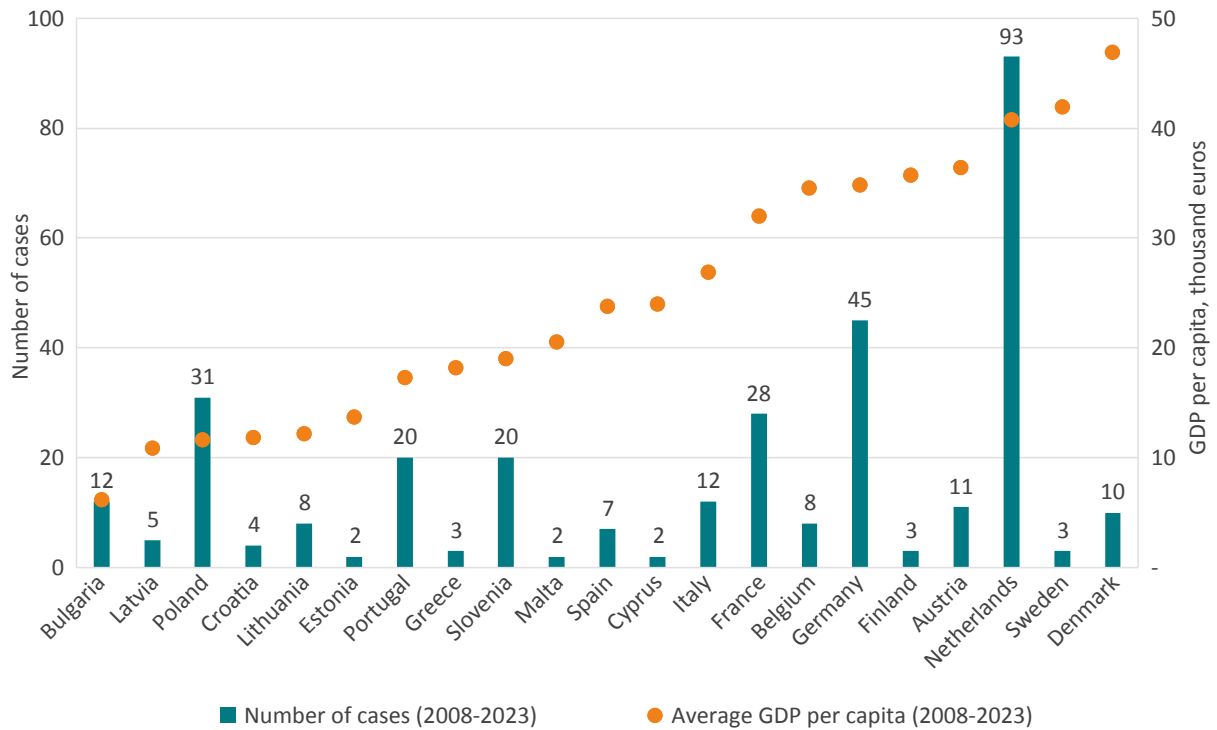
ANNEX 9: NUMBER OF COLLECTIVE ACTION LAWSUITS, AVERAGE POPULATION, AND AVERAGE GDP PER CAPITA ACROSS EU MEMBER STATES

FIGURE 1: NUMBER OF COLLECTIVE ACTION LAWSUITS (2008-2023) IN THE DATABASE AND AVERAGE POPULATION (2008-2023) ACROSS EU MEMBER STATES



Source: ECIPE's database of collective action lawsuits; World Bank (Population, total)

FIGURE 2: NUMBER OF COLLECTIVE ACTION LAWSUITS (2008-2023) IN THE DATABASE AND AVERAGE GDP PER CAPITA (2008-2023) ACROSS EU MEMBER STATES



Source: ECIPE's database of collective action lawsuits; Eurostat (Real GDP per capita)