

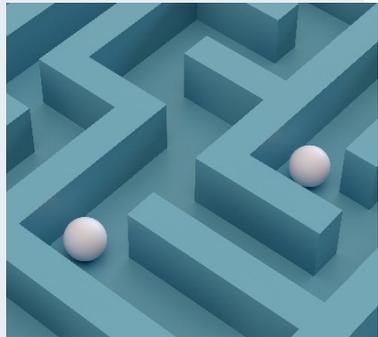
# Class Action risk in the Consumer Products sector

START



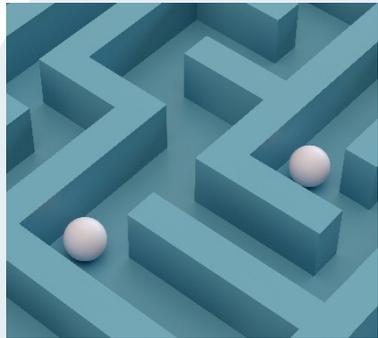


# Today's agenda





# Today's agenda



**The risk environment**

1



**Why is risk increasing?**

2



**Features of class action risk**

3



**Legislative developments**

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**Areas of risk for consumer products**

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**Q&A**

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# The risk environment

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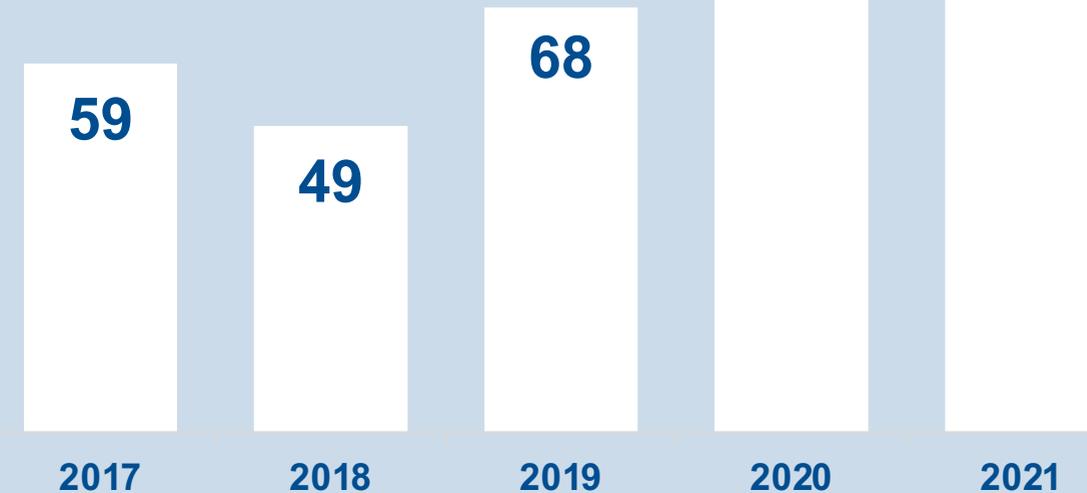


# Increasing class actions in Europe

The CMS European Class Action Report is only report that identifies the total number of claims filed for the past 5 years across Europe.

The number of class actions filed in Europe in 2021 exceeds 2020, at 110 claims. This equates to **growth of over 120%** between 2018 and 2021.

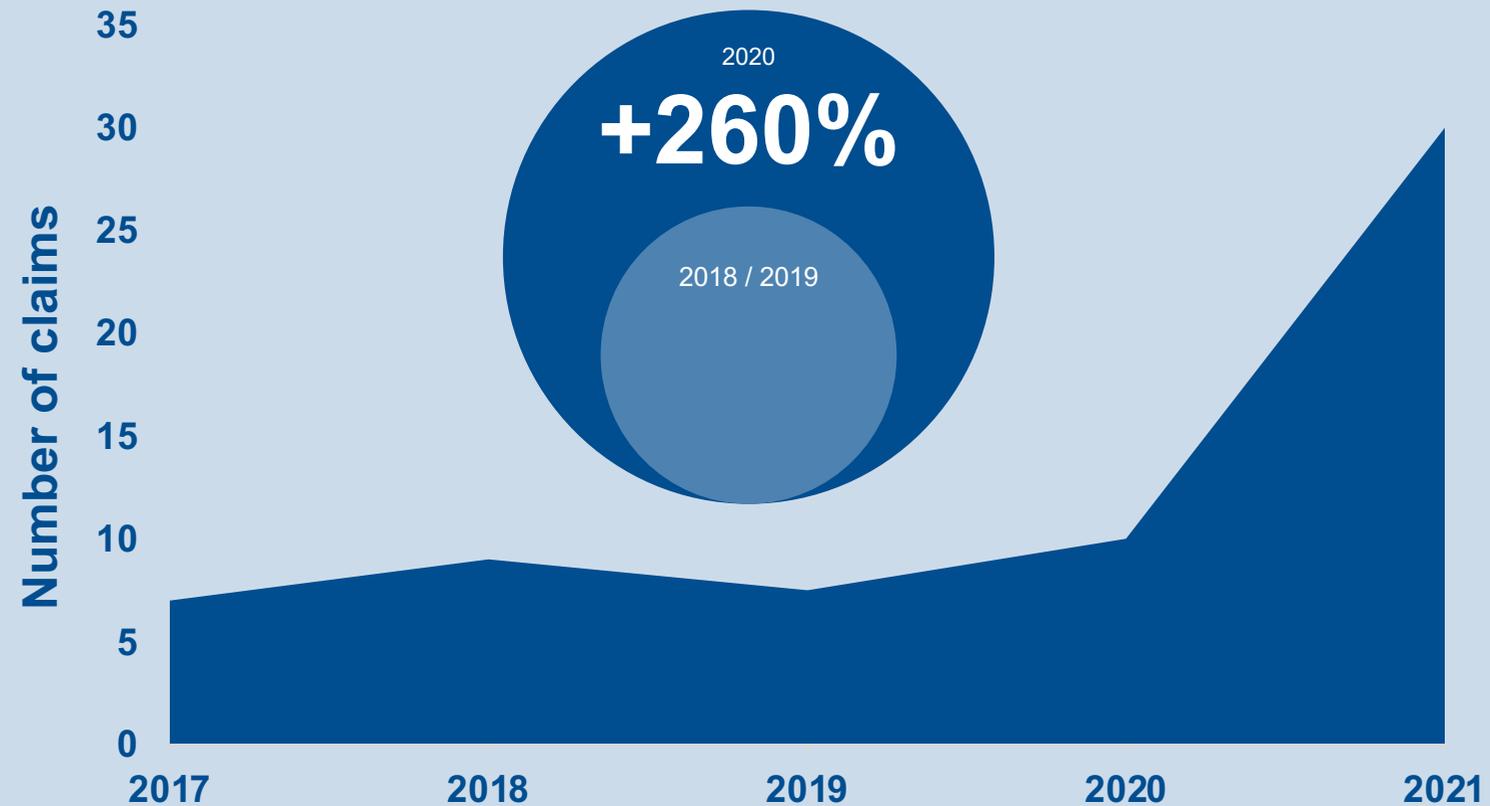
## Total number of claims filed in Europe





# Class actions against the consumer sector (Europe)

Class actions against the consumer sector across Europe have increased with almost 3 times the number of claims filed in 2020 as in 2018 (i.e. growth of 260%). This is being driven by claims in the UK, Germany, the Netherlands and Spain.





# Why is risk increasing?

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# Drivers for increased risk

1

2

3



## New procedures

Representative  
Actions Directive

National  
procedures



# Drivers for increased risk

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1

2

3



New claimant  
law firms



# Drivers for increased risk

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1

2

3



More litigation funders



# Features of class actions risk

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# Class actions are different

- » Move from opt-in to opt-out system is a radical shift
- » Higher quantum
- » No need to “book build” and so claims can be brought more quickly

1

The power of  
“opt-out”

The defendant  
“re-lives” the event

2

High profile

BUSINESS

## German class action lawsuit over VW emissions begins

Four years after Volkswagen's Dieselgate scandal broke, more than 400,000 Germans are part of fresh legal action against the carmaker. But some lawyers warn against joining Germany's first-ever class action lawsuit.



## Apple hit with another European class action over throttled iPhones

Natasha Lomas @natasha\_lomas / 2:53 PM GMT+1 • January 25, 2021



## BT faces £600m lawsuit over 'overcharging'

By Mary-Ann Russon  
Business reporter, BBC News

18 January



## Banks face fresh collective action over forex manipulation

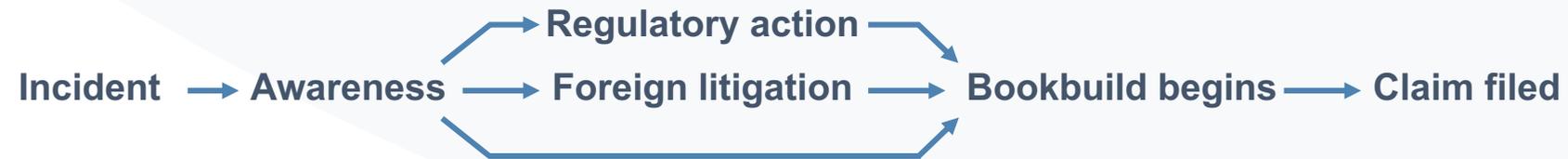
Specialist litigation firm Hausfeld latest to launch suit on behalf of investors





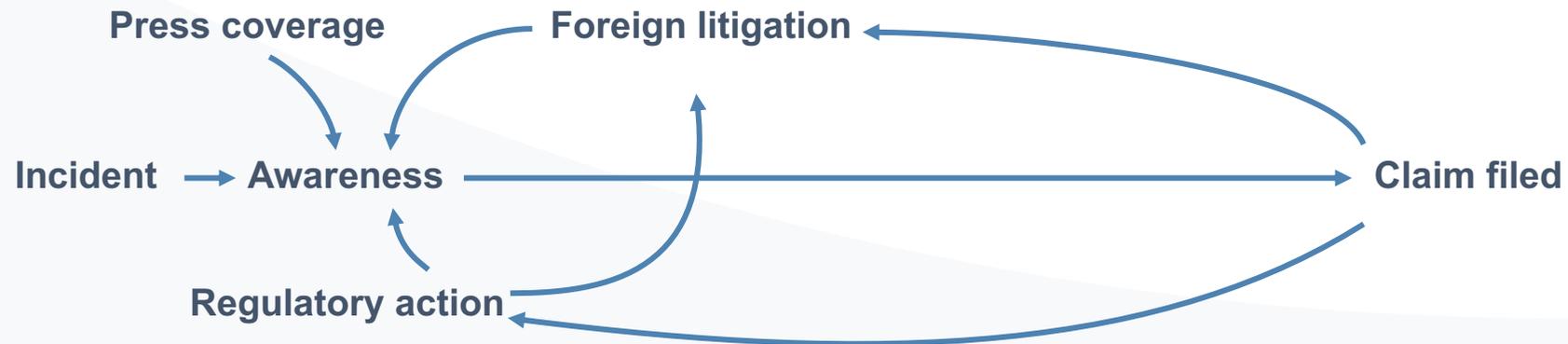
# Opt-out mechanisms change dynamics

## Traditional risk pathway is linear



## Rush to the courthouse

- No-need to bookbuild
- Concern over carriage disputes





# Key features in Class Actions

<b>Opt-in vs Opt-out</b>	<b>Adverse costs rules</b>	<b>Destination of unclaimed sums</b>	<b>Criteria for certification / standard to be applied</b>
Opt-out mechanisms are highly effective in aggregating low individualized losses	Discourage unmeritorious / nuisance claims	Returned to defendant or not?	Important measure for early dispensation of inappropriate claims
<b>Punitive / exemplary / treble damages</b>	<b>Locus / standing</b>	<b>Role of funders</b>	<b>Availability of contingency fees</b>
Compensatory or punitive function?	Restricted to public / consumer bodies, through to full privatisation	Resource intensive claims, <b>but</b> who stands to benefit?	Retain objectivity of legal advisors?





# Book-building

## Bookbuilds Key factors

### Claimant law firm / funder

- » Merits
- » Perceived settlement appetite
- » **Size of group**
- » **Per capita damages**
- » Barriers to contacting group members
- » Regulatory action/judgments

### Group Members

- » Reward
- » Sense of “fairness”
- » Company statements
- » Risk





# Legislative developments

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# Representative Actions Directive

- » Came into force in December 2020
- » Requires MSs to have “minimum procedural standards” for collective redress for consumer claims
- » Opt-in device must be available; MSs can permit opt-out device
- » Claims will be brought by Qualified Entities
- » Categories of available claims include:
  - Unfair terms in consumer contracts (93/13/EEC)
  - Product liability directive (85/374/EEC)
  - GDPR (2016/679)
- » MSs have 24 months to adjust domestic law; then 6 months to bring into force





### Luxembourg

Luxembourg is presently considering legislation (Bill 7650) that will change domestic procedure and ensure compliance with the Representative Action Directive

### France

Since the introduction of class actions in France in 2014, fewer than 30 claims have been filed. The 2022 Sonofi judgment may encourage new claims

### Spain

The introduction in the Spanish Civil Procedural Act for class actions initially went unnoticed. However, in recent years, the number of class actions has increased considerably

### Portugal

In the past 2 years, Portugal has experienced a wave of class actions, mostly characterised by multi-million Euros claims and by the presence of third-party funders. These class actions have been submitted as follow-on damage claims due to the infringement of competition rules, product liability claims and consumers' rights claims



### Poland

Class actions in Poland operate on an opt-in model. These are a popular means of collective redress for consumer claims against financial institutions, especially banks and insurance companies. We predict increasing numbers of claims in the years ahead albeit not a dramatic increase

### Austria

There is no formal class action system in Austria, but individuals can assign their claims to an association. These claims are often financed by third party litigation funders

### Slovenia

Slovenia adopted systematic regulation of class actions in 2017. To date, the number of claims has been low but 2022 saw a large claim against Apple and we expect an increasing number of claims in the coming years

### Italy

On 19 May 2021, Italy introduced a new class action mechanism. Traditionally, Italy has viewed class actions negatively but perceptions are changing





# Areas of risk for consumer products

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# Areas of risk

## Data protection



- » Data breaches: consumer and employee data
- » Data misuse claims

## Antitrust



- » Anticompetitive arrangements
- » Abuse of dominance

## Supply chain risk



- » ESG / foreign torts
- » Product liability

## Future risks



- Health**
  - » High fat, salt and sugar
  - » New tobacco
- Inaccurate information**
  - » Health
  - » Greenwashing
  - » Securities litigation (not so new)





# Questions

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