

# Class action and data protection risk after *Lloyd v Google*: What next?

BCS Law Specialist Group  
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## This evening's speakers

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## Background – the rise of class actions

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- The number of class actions filed in Europe increased by over 120% between 2018 and 2020.
- Class actions against the technology sector are increasing dramatically, with 15 times the number of claims filed in 2020 as in 2017 (i.e. growth of 1400%).
- Data protection claims grew 11 times (i.e. by 1000%) between 2016 and 2020.

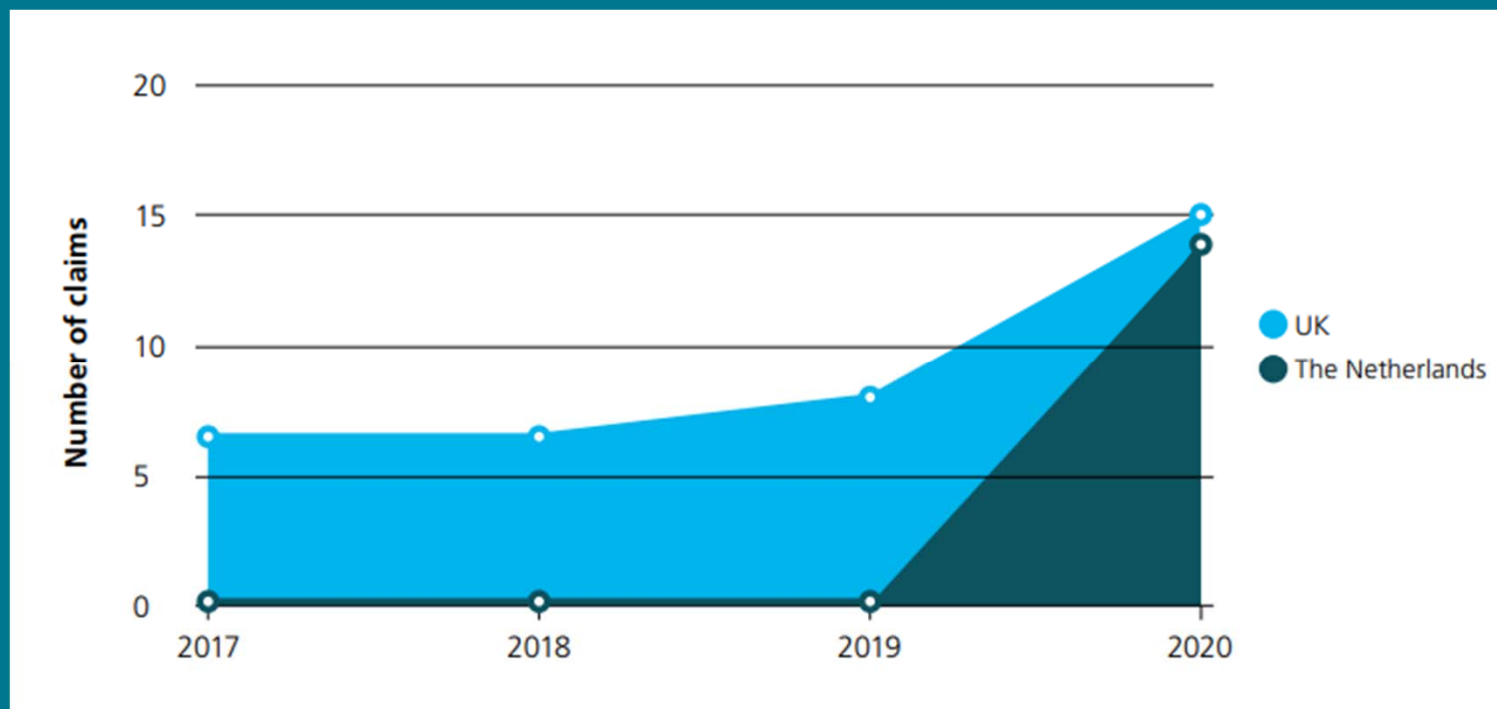


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## Background – the rise of class actions

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### Increase in opt-out claims



# Class action mechanisms in England and Wales

Group Litigation Orders (GLOs)	Representative actions	Collective Proceedings Orders (CPOs)
<ul style="list-style-type: none"><li>• High Court, County Court</li><li>• Any type of claim</li><li>• Opt in</li><li>• Introduced in 1999</li></ul>	<ul style="list-style-type: none"><li>• High Court, County Court</li><li>• Any type of claim</li><li>• Opt out</li><li>• Part of the law since 1870s</li></ul>	<ul style="list-style-type: none"><li>• Competition Appeal Tribunal</li><li>• Breaches of competition law</li><li>• Opt in or opt out</li><li>• Introduced in 2015</li></ul>

*Lloyd v Google*

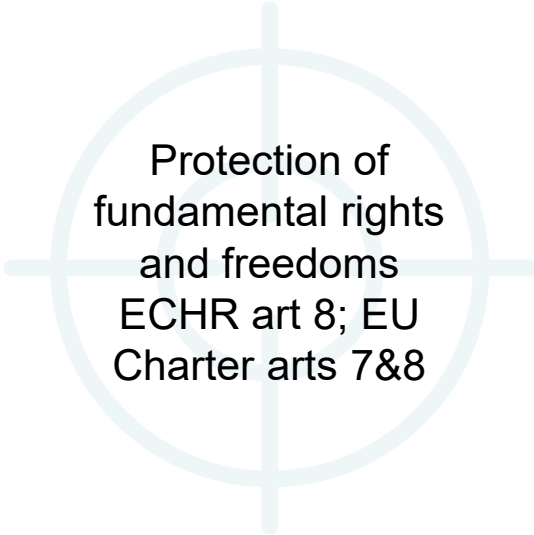
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## Background – data protection claims

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### Any breach of the GDPR

- Legislation: DPA 1998, DPA 2018/GDPR
- Duties on data controllers and processors to comply with certain requirements in relation to “personal data” (i.e. data relating to an identifiable individual)
- Confers rights on individuals, including:
  - To be informed about when and how their personal data is being used
  - To access their personal data (DSARs)
  - To restrict the processing of their personal data
  - To claim compensation for contraventions
- Broad ambit and (some) extraterritorial reach



Protection of  
fundamental rights  
and freedoms  
ECHR art 8; EU  
Charter arts 7&8

## ***Lloyd v Google – the facts***



“Safari workaround” - browser cookie known as the DoubleClick Ad cookie which could be activated on iPhones using Safari without users’ knowledge or consent when they visited certain websites.

Google allegedly used the cookie to collect information covertly about users’ internet activity for use when selling advertising.

Lloyd used the “representative action” mechanism

- 4.4 million people
- £3.3 billion in damages (£750 per claimant)



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## *Lloyd v Google* – the claim

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Lloyd's claim was based on Section 13 of the Data Protection Act 1998, which provides:

- (1) An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage.*
- (2) An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that distress if –*
  - (a) the individual also suffers damage by reason of the contravention, or*
  - (b) the contravention relates to the processing of personal data for the special purposes.*



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# Lloyd v Google – the claim

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Lloyd sought to bring a representative action under CPR rule 19.6:

(1) *Where more than one person has the same interest in a claim –*

*(a) the claim may be begun; or*

*(b) the court may order that the claim be continued,*

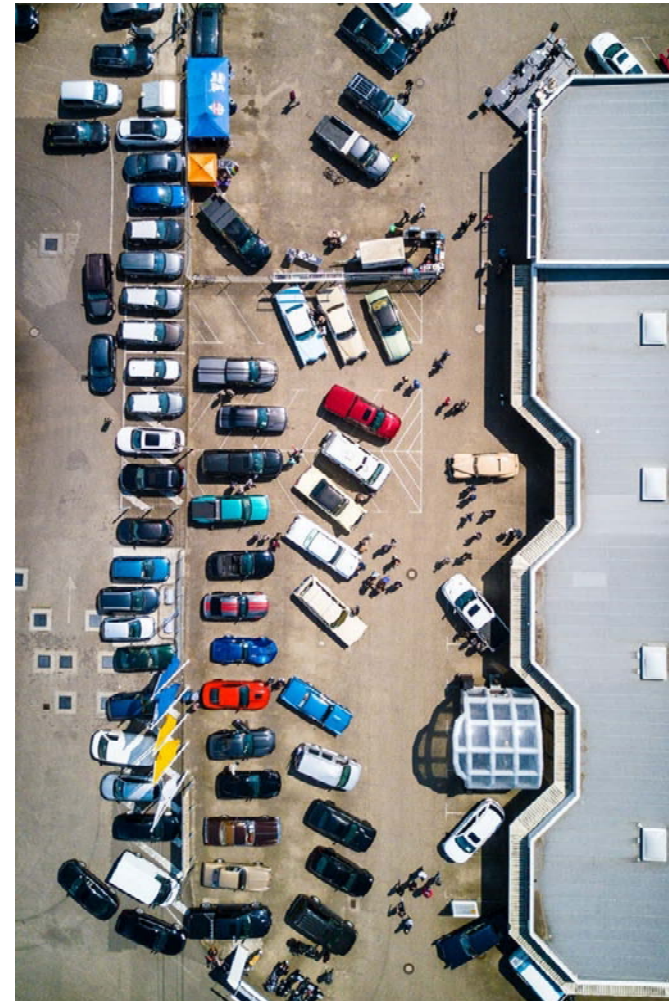
*by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.*

...

(4) *Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule –*

*(a) is binding on all persons represented in the claim; but*

*(b) may only be enforced by or against a person who is not a party to the claim with the permission of the court.*



# *Lloyd v Google* – the claim

Lloyd filed a claim seeking damages for 'loss of control' of data

- Without proof of financial loss
- Without proof of suffering distress

# ***Lloyd v Google* – the claim**

## ***Vidal-Hall v Google Inc* [2014] (Safari workaround case)**

Court of Appeal upheld claim for damages for distress (without financial loss) that Google's breach of the DPA 1998 caused the claimants.

## ***Gulati v MGN Ltd* [2015] (phone hacking case)**

Court of Appeal upheld claim for damages for "loss of control of data" that was of real value to the claimants caused by MGN's misuse of private information (MPI) which involved mobile voice-message interception.

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# The High Court's decision

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## **Damages for loss of control of data**

Lloyd had not demonstrated that any actual damages within the meaning of the legislation had been suffered.

Lloyd had claimed that damage had arisen:

1. For infringement of data protection rights;
2. For the commission of the wrong itself; and
3. As a result of claimants' loss of control over their personal data.

Warby J held that the first two were merely descriptions of Google's tort not damage or distress within the meaning of DPA s 13

Warby J distinguished between data protection claims and claims for MPI like *Gulati*.





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# The High Court's decision

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## **Representative actions**

Claim was not suitable to be brought as a representative action because the “same interest” test was not met.

Under CPR 19.6(1), a representative claimant may bring a claim on behalf of a class of others where they all have the "same interest".

Proposed class did not meet this test:

- Claimants would inevitably have suffered different levels of damage, including no damage at all.
- Concerns about class definition – how to work out whether a given iPhone user had the relevant cookie installed on their device at the time in which the Safari workaround was in operation.



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# The Court of Appeal's decision

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**Overturned the High Court's decision ...**

## British Airways Customers Given Go-Ahead to Join Class-Action Lawsuit



### Data protection

Hotel group Marriott faces London lawsuit over huge data breach

Journalist files collective action on behalf of Starwood customers whose details were exposed



26 MAY 2020 NEWS

Lawyers Aim £18bn Class Action Suit at easyJet

**UK privacy 'class action' complaint against Google gets unblocked**



## Forbes

**Oracle And Salesforce Hit With \$10 Billion GDPR Class-Action Lawsuit**



**YouTube Facing \$3 Billion Class Action Suit In The U.K. Alleging Collection Of Underage User Data**



# The Supreme Court's unanimous decision



## Damages for loss of control of data

- Damages for “loss of control” unavailable for s 13 of the DPA
- Clear reading of the statute – contravention of the DPA is not equivalent to damage
- No reason why law on damages for MPI (an English domestic law tort) should inform the proper interpretation of “damage” under the DPA (a statute implementing an EU directive)



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# The Supreme Court's unanimous decision

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## Representative actions (1)

### "Same interest" test relaxed

- Previous view: *Markt & Co v Knight Steamship* [1910] 2 KB 1021 requires "class members to show that issues of fact and law were ***identical*** between them." (Mulheron, *The Class Action in Common Law Legal Systems*, 2004)
- Supreme Court's view: "I do not think, however, that [Markt] should be understood in this way." (Para 43)

### Absence of conflicts

"So long as advancing the case of class members affected by the issue would not prejudice the position of others, there is no reason in principle why all should not be represented by the same person." (Para 72)

### Divergent interests

"Even where [there are divergent interests] any procedural objections could be overcome by bringing two (or more) representative claims... and combining them in the same action." (Para 74)

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# The Supreme Court's unanimous decision

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## Representative actions (2)

Can the representative action mechanism be used to recover damages?

*“[what] limits the scope for claiming damages in representative proceedings is the compensatory principle on which damages for a civil wrong are awarded” (Para 80)*

Compare CPOs, where the Tribunal can award “aggregate damages”.

Lloyd tried to overcome this difficulty by:

- Claiming for “loss of control of data” damages
- Arguing for a “lowest common denominator” approach



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# The Supreme Court's unanimous decision

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## Representative actions (3)

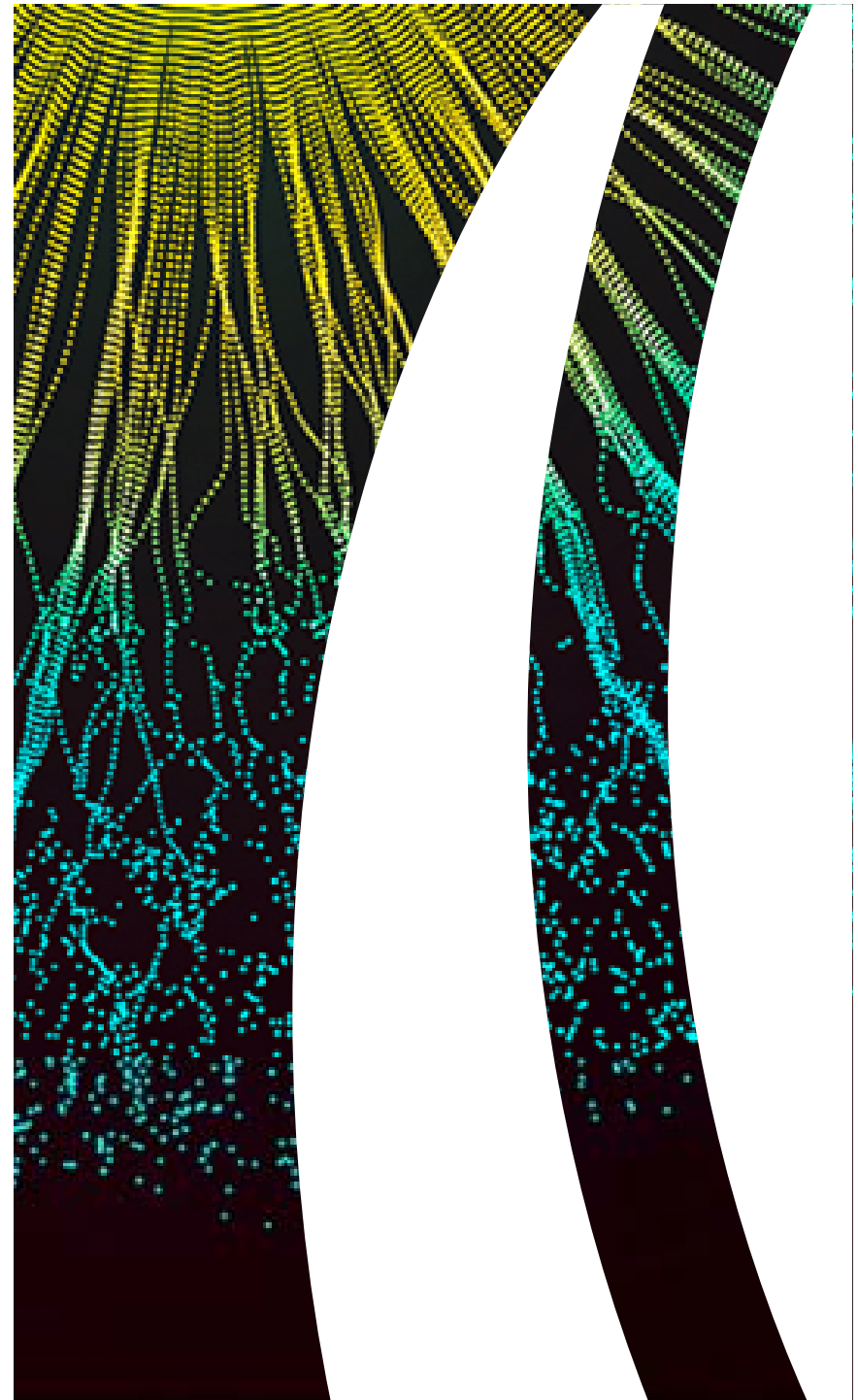
The Supreme Court rejected Lloyd's claim but signposted the following:

- Common proof: *"There is no reason why damages or other monetary remedies cannot be claimed in a representative action if the entitlement can be calculated on a basis that is common to all members of the class."* (Para 82)
- LCD approach potentially viable: *"We are prepared to assume... that as a matter of discretion the court could – if satisfied that the persons represented would not be prejudiced and with suitable arrangements in place enabling them to opt out of the proceedings if they chose – allow a representative claim to be pursued for only a part of the compensation that could potentially be claimed by any given individual."* (Para 147)

# What next?

## **Data protection claims**

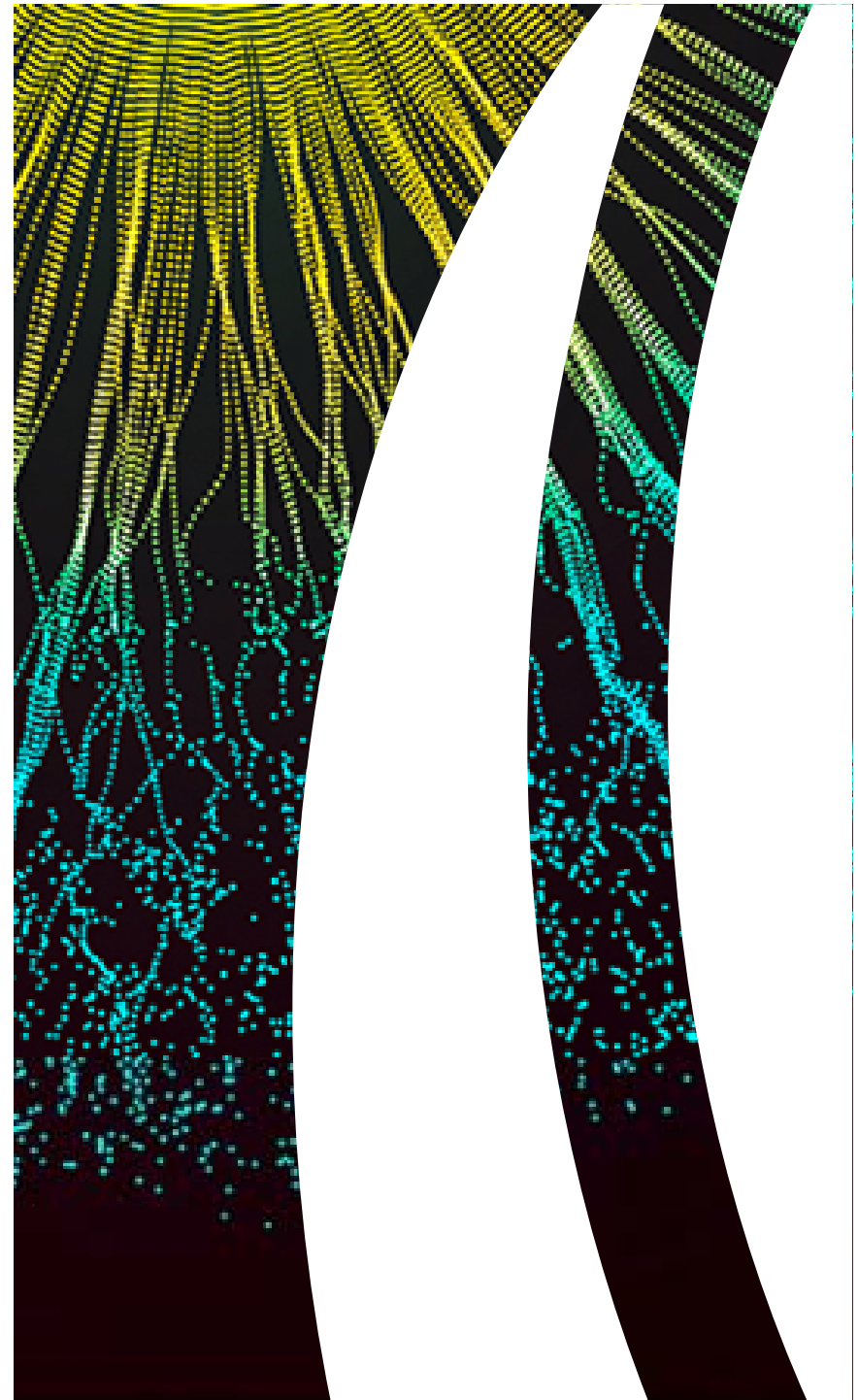
- Position unresolved on GDPR
- Common proof
  - Distress
  - Material damage
  - MPI
- Bifurcated proceedings
- Introduction of a data protection-specific class action mechanism like CPOs?



# What next?

## Other class actions

- Significant relaxation of the “same interest” test
- No difference to opt-in GLOs, although emphasis on proving losses
- Focus on cases suitable for “common proof”
  - Where is individual proof scaleable?
  - Where is common proof in the hands of the defendant?
  - Consumer products/antitrust
- Bifurcated proceedings



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# What next?

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Good news ...

on data protection risk from the perspective of businesses

Bad news ...

on class action risk





# Questions



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