

Legal Seminar 2016: Mass claims in the Netherlands The Good, The Bad & The Ugly

Thursday November 17 2016

Stibbe, Amsterdam



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Collective mass damage claims shaped by new law

“On Wednesday, Minister of Justice Van der Steur introduced a bill in Parliament with new rules for collective redress. The bill seeks to prevent collective damage claims from turning into lengthy and costly legal proceedings, and to avoid possible abuse. It intends to provide more certainty for victims and defendant companies alike.

‘This means that anyone can more easily seek justice’, the VVD member of cabinet says. In government circles there has been widespread concern over the rise of a claim culture that might result in ‘American situations’. However, in light of those affected by the Volkswagen diesel fraud and usurious insurance products, presently the awareness has grown that victims are fully entitled to collective redress.”

(source: Financieel Dagblad 16/11/2016)



Jan-Willem Prakke

Chairman Legal Committee AmCham

Director Corporate Legal – Royal Schiphol Group



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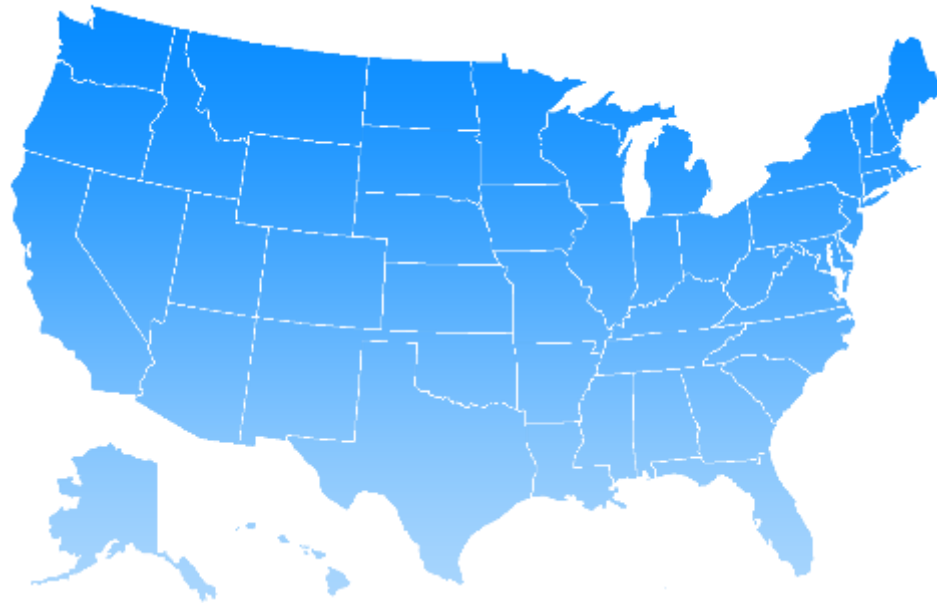


Mass Claims – An Insurance Industry View

Neil Harrison
Global Head Of Claims, Aon Risk Solutions
17 November 2016

The Insurance Industry Context

- Facts, figures & fiction from US
- Direct & indirect costs of mass claims
- Role of insurance & insurers
- Best practices
 - Design of process
 - Selection of insurers
 - Scenario planning



The Direct & Indirect Costs Of Mass Claims

- Direct Costs

- Settlement
- Fees & expenses
- Insurance premiums

- Indirect Costs

- Retained loss costs
- Opportunity cost
- Brand & reputation
- Market value



Role Of Insurance & Insurers

- Today's Insurance Market
 - Traditional and new participants
 - Complex arising risks including cyber
 - Data & analytics driven risk pricing
 - A return to underwriting for profit
 - Pressure on operating costs and margin



Best Practices

- Design of process
 - Pre-event selection of experts and partners
 - Scalable technology & data
 - Unbundled supply & support model
 - Contingent resources
- Selection of insurers
 - Financial security
 - Service commitments
- Scenario planning
 - Don't make it up during the event



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The Development of Class Actions in the EU

Amcham – The Netherlands

Ken Daly, Sidley Austin LLP, Brussels

Access to Justice at home and abroad

- Did the US design its system?
- Europe is on same journey – what lessons will we learn?
- The balance between not enough – and too much – access to justice
- The power of incentives



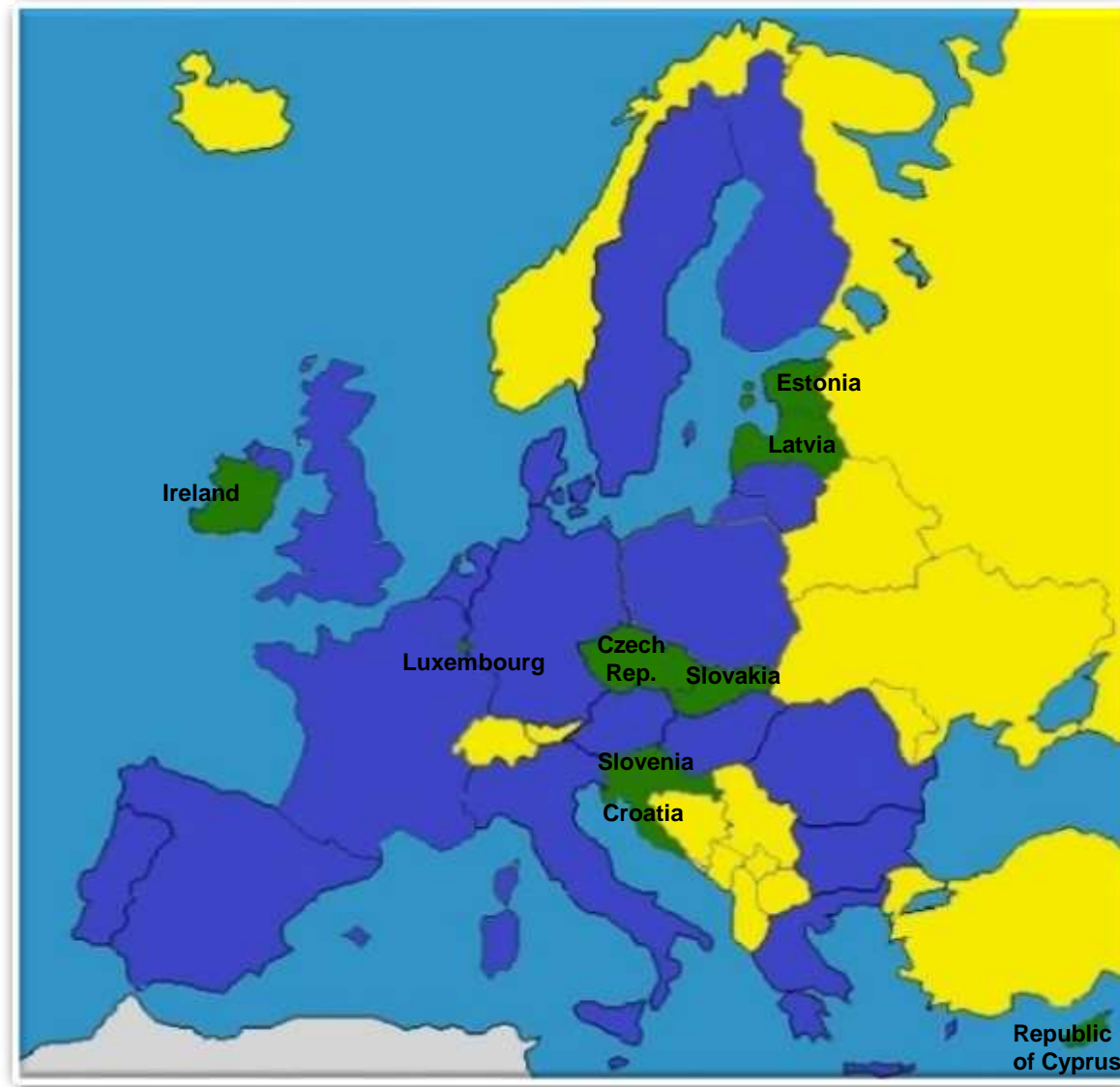
EU Developments

- No EU-wide class action system exists, but is this about to change?
- 2013 European Commission “Recommendation” on Collective Redress
 - calls for all EU member states to adopt a general collective redress mechanism by 2016
 - applicable to all areas of law
- Requires an assessment report by July 26, 2017 of need for further EU action
- EU currently working on assessment



Blue = EU
Yellow = Non EU

EU Countries without collective redress



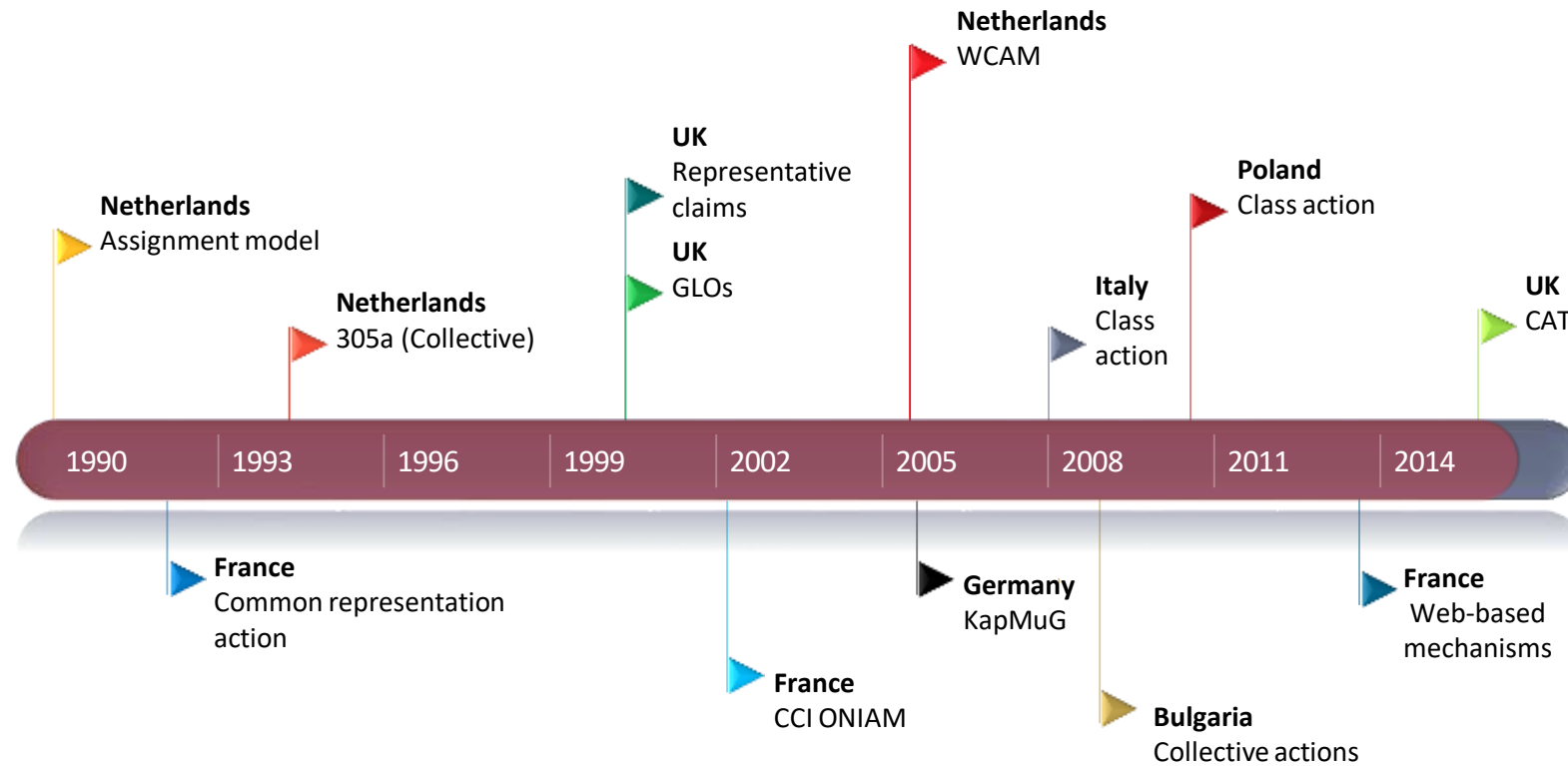
Blue = EU with CR
Green: EU no CR
Yellow = Non EU

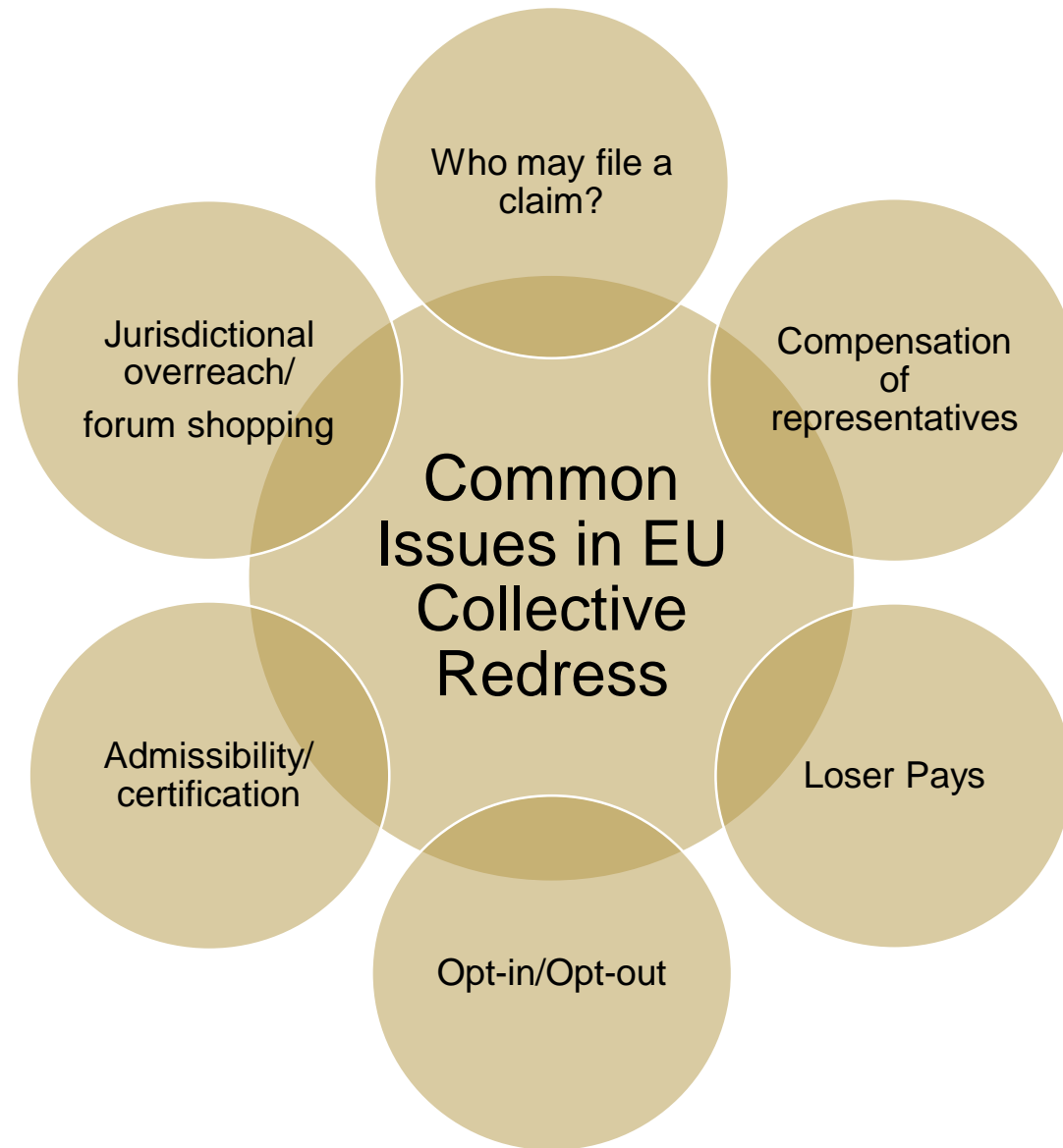
EU Countries with collective redress

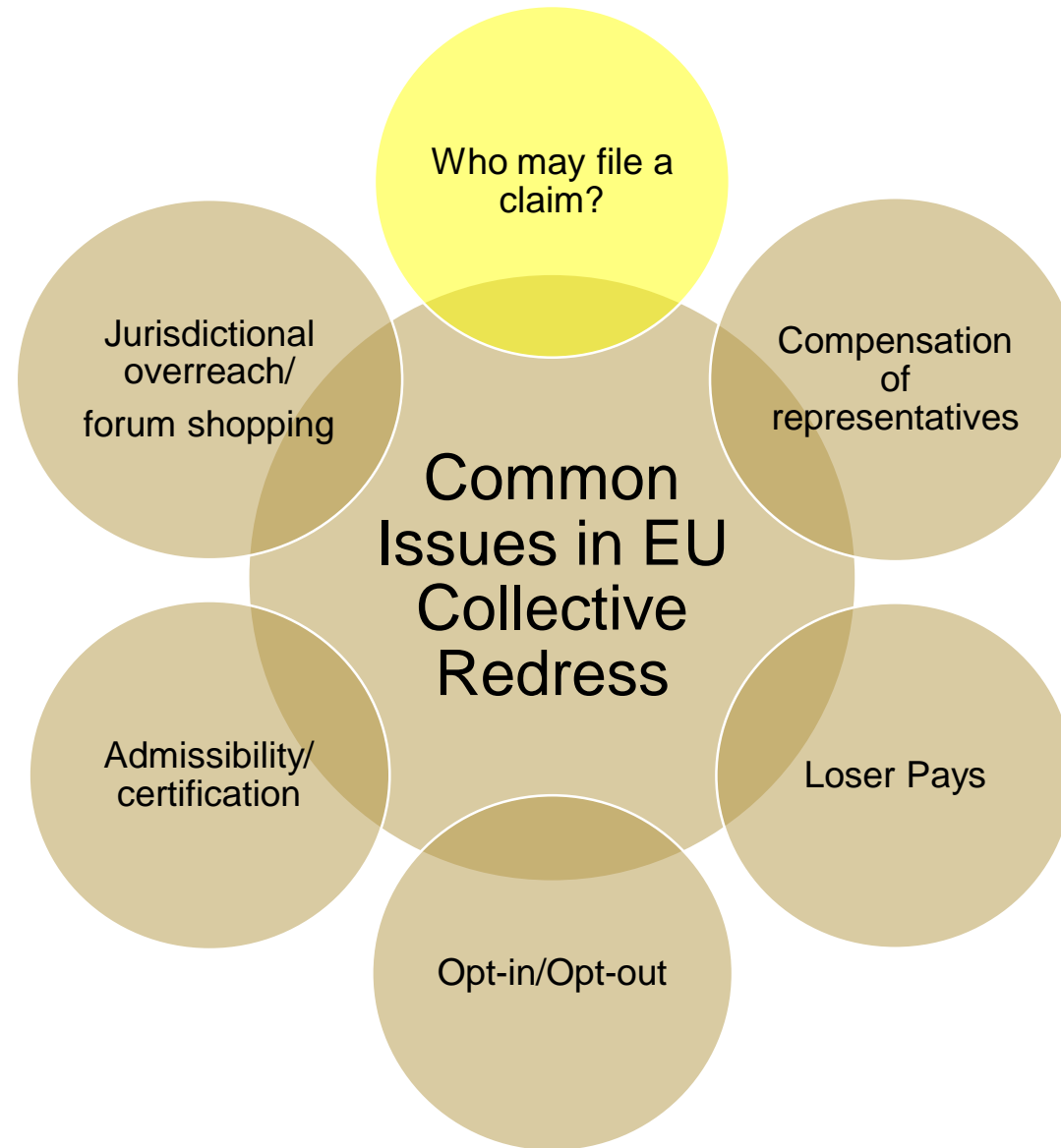


Red = EU with CR
Blue = EU no CR
Yellow = Non EU

Collective redress mechanisms in the EU – not a new phenomenon



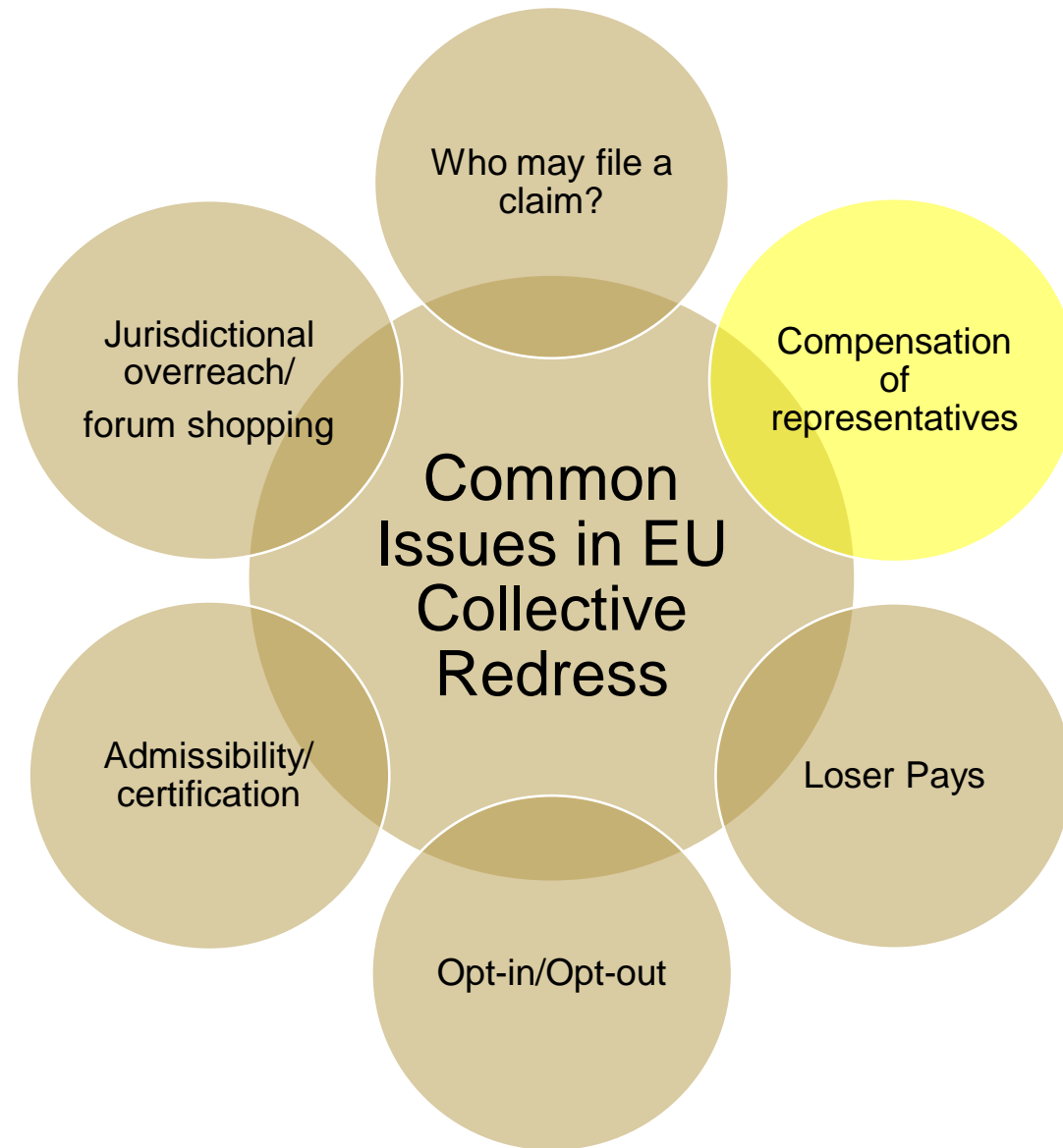




Issues Examined - Who May File a Claim?

- Insufficient safeguards exist
- Opportunities for profit-seekers to file or arrange claims
- Recommendation proposed very limited standing
- Reality very different:
 - In Netherlands, claims foundations or claims vehicles
 - In France, internet-based entrepreneurs
 - In UK, third party funders behind claims (e.g. MasterCard)

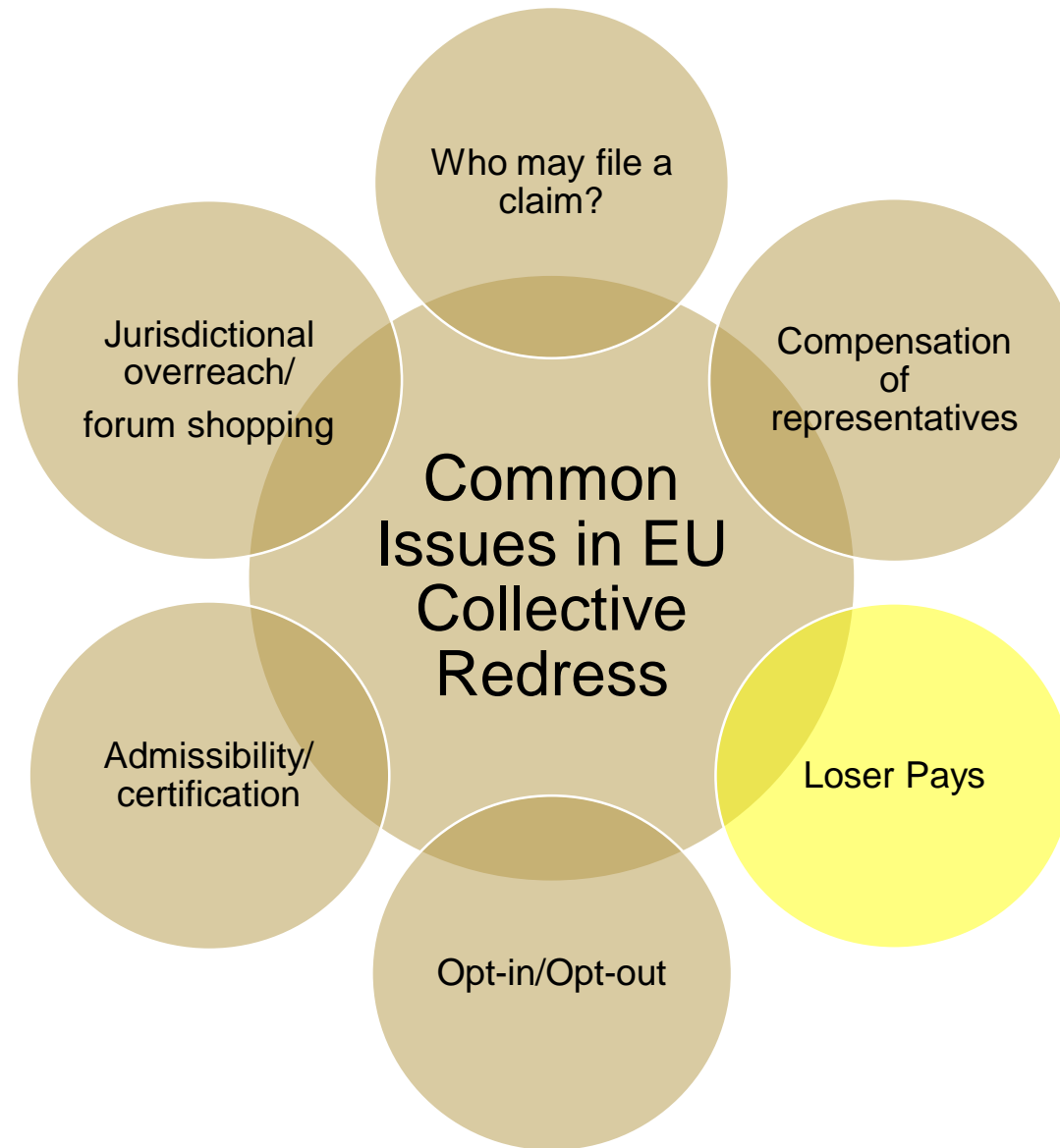




Issues Examined - Compensation of Representatives

- Significant “third party funder” presence in UK, Netherlands and France
- Recommendation proposed disclosure, conflict rules, rules on participation in decisions
- Reality: no member state has rules:
 - Limiting third party funder participation
 - Addressing conflicts
 - Requiring disclosure
 - Limiting influence

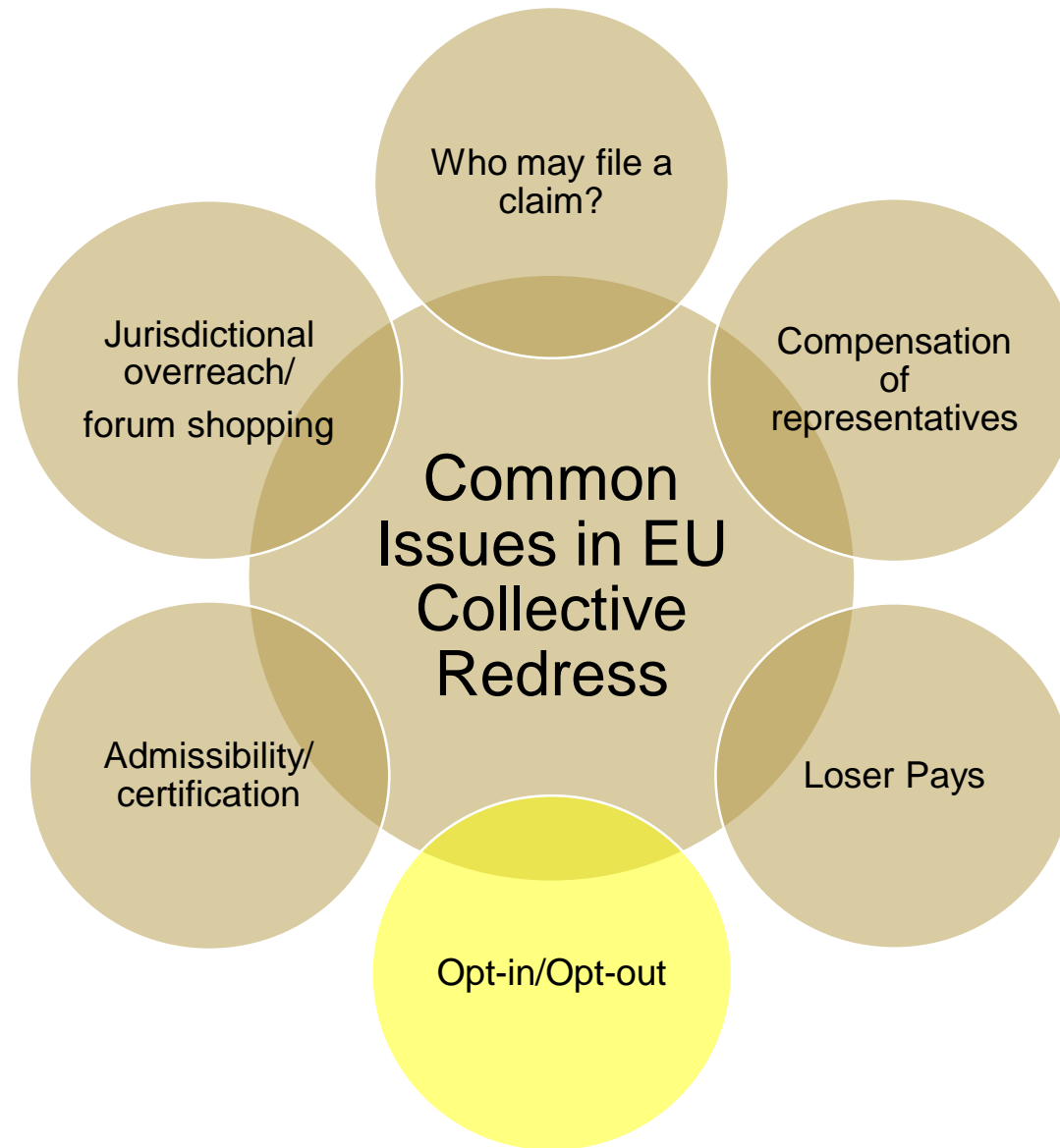




Issues Examined - “Loser Pays”:

- Recommendation strongly endorses “loser pays”
- Exists—to some extent—in all of the jurisdictions surveyed
- However, application weakening:
 - applies to court costs—not actual costs.
 - growth of third party funding reduces disincentive effect
 - Principle not being applied evenly in practice – mainly works against corporate defendants

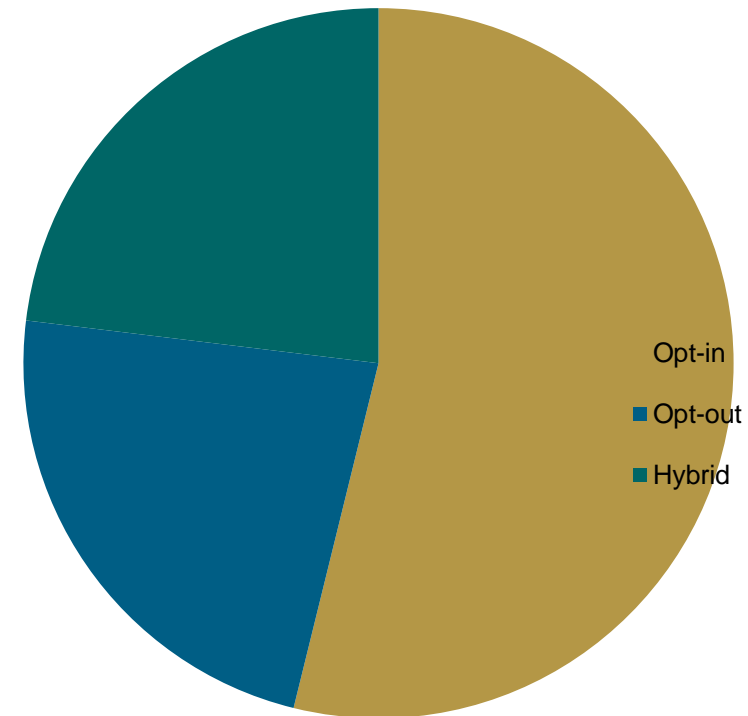


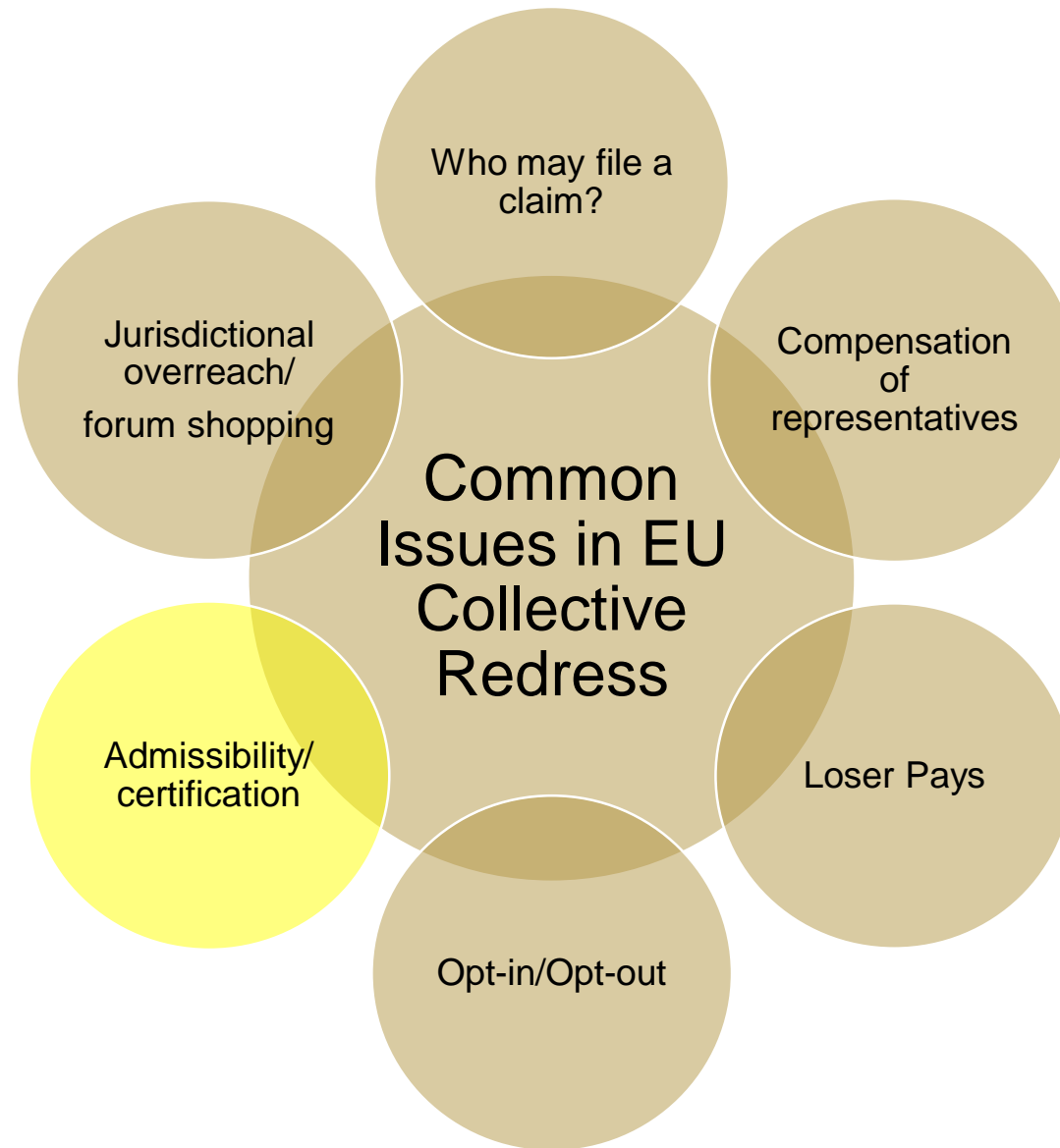


Issues Examined - Opt-In/Opt-Out

- Increasing use of opt-out or hybrids
- Recommendation strongly in favor of opt-in.
- Opt-out inherently more prone to abuse

Of 12 systems surveyed, variety of "Opt-in", "opt-out" and hybrid mechanisms

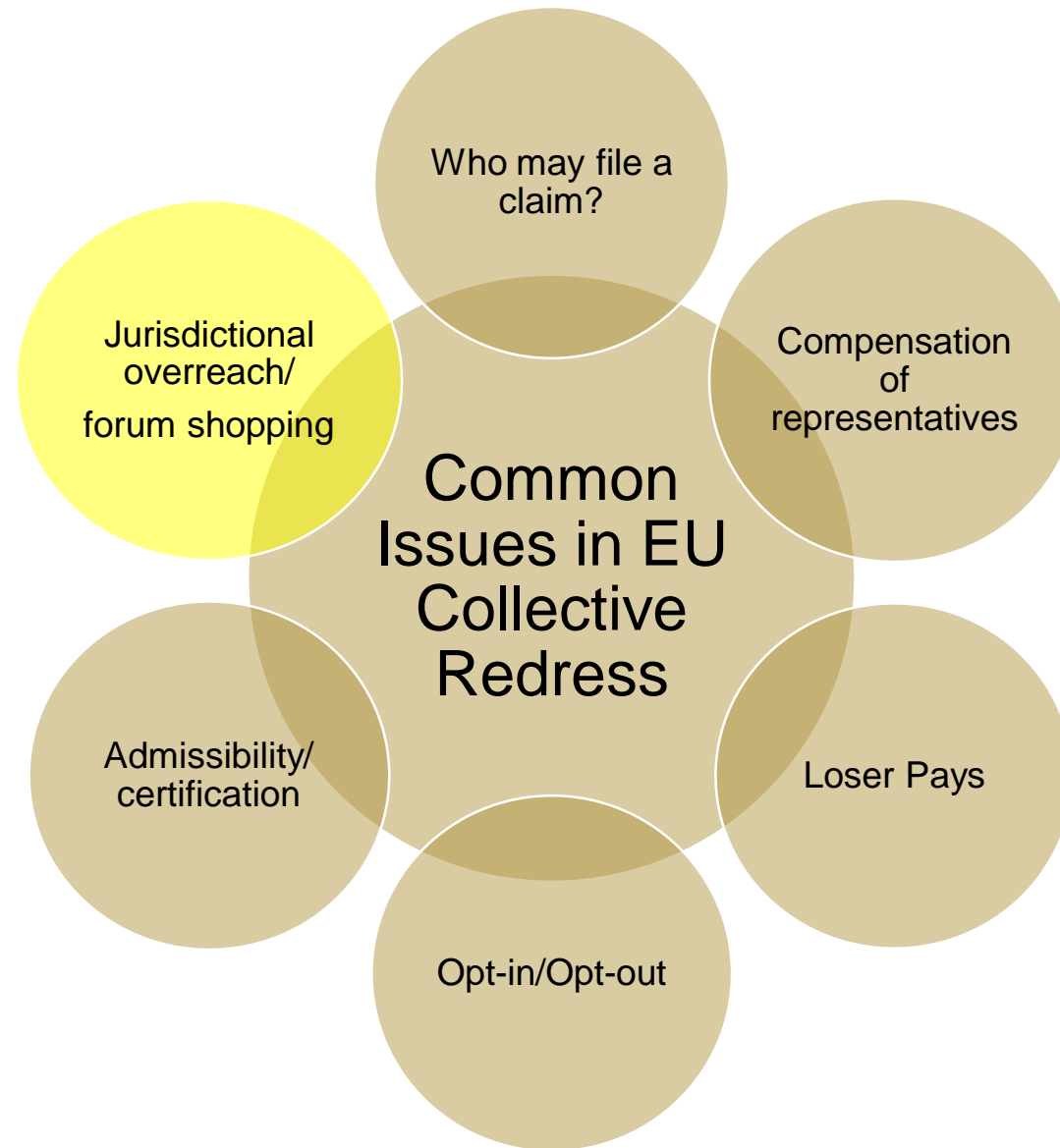




Issues Examined - Admissibility and Certification Standards

- Insufficient mechanisms to filter out unmeritorious claims at an early stage.
- Risk of “blackmail settlements”
- Recommendation strongly in favor of early verification
- In EU:
 - Some systems require plaintiffs to seek permission to file
 - In others, no automatic review, but a motion possible
 - In some simply no admissibility/certification possibility at all.





Issues Examined - Jurisdictional Over-Reach/Forum Shopping

- Potential to launch claims wherever the opportunity is greatest
- Very different rules in different member states
- Some member states seem to over-reach
 - **UK** - English “anchor defendant” theory
 - In **Dutch** WCAM procedure, global jurisdiction asserted



Conclusions



Desirable Collective Redress Safeguards

Stringent Class
Certification
Standards

“Loser Pays”

Opt-In

Rigorous Standing
Requirements

Mandating Closure
for Defendants

Prohibition/limitations
on Third Party
Litigation Funding

Ban on Punitive
Damages

Limit Jurisdictional
Overreach/Forum
Shopping

Desirable TPLF Safeguards

Licensing Through a
Government Agency

Capital Adequacy

Claimants, Not
Funders, Must
Control Cases

Funder to Act in Best
Interest of Claimants

Ban on Law Firms
Owning Funders and
Vice Versa

Costs Liability

Transparency

Limits on Recovery

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Mass Claims and Mass Settlements in the Netherlands

Jan de Bie Leuveling Tjeenk

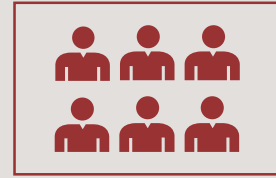


Different types of mass claims and mass settlements

Collective actions

based on DCC 3:305a

-no monetary damage award possible



Foundation representing
interests of claimants



Judgement on liability



Possible
settlement

Collective opt-out settlements



Settlement



Judgement



Settlement declared
binding (unless opt-out)

Collective opt-in settlements

Large numbers of individual
cases



Judgements



Possible
settlement

Jurisdiction of Dutch courts

District Court Amsterdam re VEB v. BP

- No jurisdiction Dutch courts to hear collective action against BP

Types of Settlements

WCAM settlements

- Opt-out settlement between defendant(s) and one or more representative foundations
- Aim: to provide finality (with the exception of class members who opt out)

I. DES

II. Dexia

III. Vie d'Or

IV. Vedior

V. Shell

VI. Converium

VII. DES II

VIII. DSB Bank



Types of Settlements

Collective settlements outside of the WCAM

- Settlement between defendants and one or more representative foundations
- 2 varieties
 - Opt-in settlement for all class members
 - Opt-in settlement solely for members of claim vehicle
- Individual settlements



Proposed Legislation

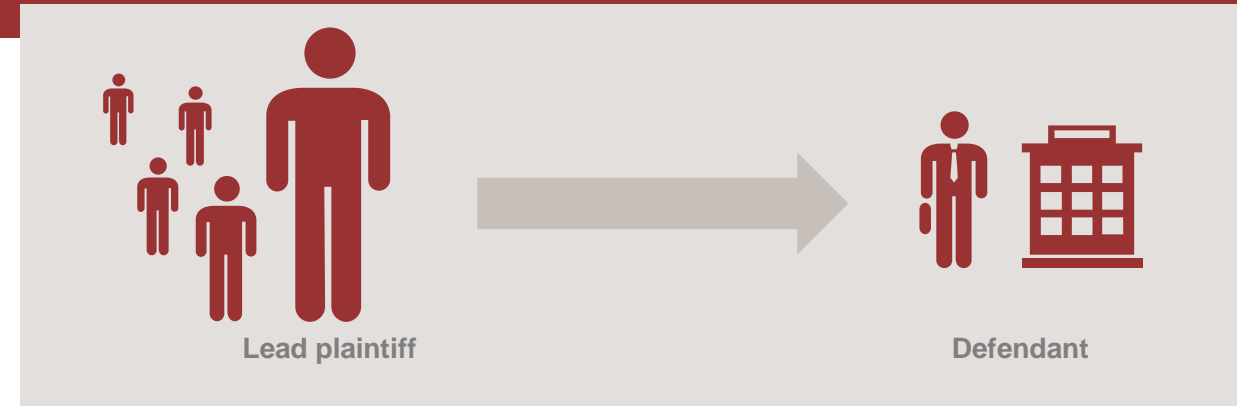
16 November 2016 Proposal for a collective damages action published

Goal: to facilitate collective redress in the form of a monetary award and/or non-monetary sanctions

- The draft proposal aims to reach a balance between the interests of aggrieved parties and the interest of the defendant to be protected against unfounded collective actions
- Scope: limited to cases that are substantively connected to the Netherlands
- Judgment in the collective action is binding on all interested parties, unless opt-out

Proposed legislation continued

- Lead plaintiff



- Court approval of class settlement along the lines of WCAM (but no opt-out after approval)
- All collective actions concentrated in the Courts of Amsterdam

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Thank you



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