Come senators, congressmen, please heed the call
Don't stand in the doorway, don't block up the hall
For he that gets hurt will be he who has stalled

The battle outside ragin'
Will soon shake your windows and rattle your walls

For the times they are a-changin'

-BOB DYLAN-
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I. The State of the Play of Class Action models (in the EU)

II. Outlook & potential Trends

III. Case Study – “The Diesel family”

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Level the playing field .... the options at hand

1. Court based Collective Action (The EU way) CR = CA?
2. Regulatory Redress (sectoral, generic consumer enforcement)
3. Consumer Ombudsmen (ADR bodies)
4. A combination of the above

Evaluation criteria

1. Speed of identification of a claims cluster
2. Ease of identifying, contacting refunding consumers
3. Cost for consumers
4. Duration
5. Delivery of full compensation
6. Long term outcome: Deterrence
Consumer Trust IN CR Mechanisms

Consumer trust in the effectiveness of redress mechanisms, EU-28, 2016 (% of consumers who ‘strongly agree’ or ‘agree’)

- % of consumers who think it is easy to settle disputes with retailers through out of court body (i.e. arbitration, mediation): 52%
- % of consumers who think it is easy to settle disputes courts: 41.5%

Source: EU Consumer Conditions Scoreboard 2017 Edition
Enforcement of consumer and product safety legislation, country results, 2016 (% of retailers who ‘agree’ or ‘strongly agree’)

Evaluating Statements
- Public authorities actively monitor and ensure compliance with ps legislation
- ...with consumer legislation
- NGO/Self regulatory bodies, actively monitor/ensure compliance
- Media reports regularly on business failures to comply with standards

Source: EU Consumer Conditions Scoreboard 2017 Edition
The 2013 EC Recommendation

« Non binding » EC recommendation addressed to all EU Member States to adopt within 2 years mechanisms for collective redress with the following features:

- **Standing:** Representative claims limited to non-profit making entities
- **Certification:** Courts shall verify earliest possible if conditions for CR are not met
- **Information:** Introduction of national public registry of CR
- **Loser pays principle:** Loosing party should reimburse the winner for its legal costs
- **Third party litigation funding:** Claimants should be required to disclose the source of their fundings, no contingency fee arrangements
- **Opt-in:** Claimant Group formed with expressed consent
- **Prohibition of punitive damages:** Mere compensatory nature of claims
The 2018 EC Implementation Report

Key Findings and remarks:

- Recommendation made a valuable contribution to discussions re CR but:
  
  «Practical impact falls short of expectations»

- Inequalities and differences of CR mechanisms across the EU
  
  «9 Member States without any CR mechanism in place»

- Some CR systems in place appear inefficient:
  
  «rigid national legislation, lengthy nature of procedures, cost/benefit ratio not conviencing»

- Further development of EC/EU CR actions might come with some risks of
  
  «Forum shopping (double compensation, conflicting decisions), contingency & performance fees, fueled unregulated 3rd party finance»

Additional steps on EC Level necessary.
See case study
Variations of Collective Redress Mechanism in the EU
(Extract)

- Common Representative Action (6 since 2013)
- Web-based Actions (66 strong increase)
- Consumer Class Actions (9 since 2014)
- Class Actions for Health (1 since introduction in 2016)
- Representative Proceedings (?)
- Group Litigation Orders (GLO) (100 since 2000)
- Competition Appeals Tribunal (CAT) (2 since 2015)
- Assignment Model (no data, but frequently used)
- WCAM (no data)
- KapMuG (41 since 2005)
Recent & notable Class Actions in the EU (I)

1. **RBS – Settlement of Shareholder Action - UK (Dec 2016)**
   - Group Litigation Order (GLO) – misrepresentation prospectus
   - 4 bn GBP claimed – 90 mn legal fees for RBS alone
   - Litigation funding involved
   - US Law firm – Quinn Emanuel involved (lead) – new offices in EU founded thereafter

   - Grand total of settlement 1.204 bn EURO
   - Signal that NL becomes the favoured platform for CA/CR Cases
   - Wide liberal view on jurisdiction of Amsterdam court
   - First EU stand alone settlement (no pre-trial of US securities class action)
   - US action dismissed due to lack of jurisdiction
Recent & notable Class Actions in the EU (II)

3. The Truck Cartel – about to emerge – multiple jurisdictions

- MAN/Volvo/Renault/Daimler/IVECO/DAF EU Price fixing fine 2.9bn €
- Multiple association claim losses and market CA/CR options
- Litigation funder Benthem announced in 2016 funding of 100bn € action
- Status 2017 GER alone: 3 Association filed actions worth 800m €
- Internet platform “financialright claims” US law firm “Hausfeld” involved, Burford Capital is funding the efforts, limitation period (2018?), 33% quota litis (=266mn € fees, 534 mn € compensation)

4. Volkswagen (extract only)- $15.3 bn settlement in the US

- NL: 2015 Shareholder action, backed by US Plaintiff firm Berstein
- FR: web based actions initiated and open for registration. No win, no fee policy.
- AT: Limitation issues pressed governing party to allow CA procedure by consumer association
The concept of “consumer” & lack of jurisdiction over assigned claims – The world after “Schrems vs. Facebook”
CJEU 25 January 2018 – C-498/16

Q1) Does a consumer loose his/her status of a “consumer” when he collects assigned claims of numerous consumers for the purpose of enforcement?

A1) No. CJEU seeks to promote the right of consumers to organise themselves in order to safeguard their interests.

Q2) Does the right of a consumer to bring a claim in the consumer’s home jurisdiction extend to claims which have been assigned to him?

A2) No. A consumer right to choose their home court is a personal right conferred to the individual. The personal right cannot extend so as to create a forum for assigned claims. The jurisdiction of consumers must be predictable.

Relevance: Bundling of consumer claims by assignment is not possible in the consumer jurisdiction acc. to regulation 44/2201. If the CJEU would have decided the other way, a EU wide CA could have been brought in a MS of the domicile of a single consumer.
II. Outlook & potential Trends

• CR Mechanisms are increasingly introduced. Number of different systems and absolute number of CR cases are increasing in the EU. (Why regulate?)

• No import of U.S. system defects into the EU (but lowering safeguards necessary? Example France, UK (page 20)) – Are these markets mature enough?

• Appearance of more US plaintiffs CA law firms looking for profit margin in some countries (NL, UK, GER foremost) indicate expectations of similarities by fact (not necessarily by law) – Have you come across, do you share the observation?

• Relevance of EC Recommendation is questionable. Introduction of new systems because of the initiative is doubtful. No member state fulfils all recommendations (More/Other EC regulation? – see case study)

• CA mechanisms are becoming a speculative, untethered, high yield investment opportunity in an anaemic market environment – Blessing or curse?
In September 2017 in his State of the Union, EC President Juncker said

- that he was “shocked when consumers are knowingly and deliberately misled”.
- “In response to mass-harm cases, such as the 2015 "Dieselgate" scandal or the massive 2017 flights cancellation affecting hundreds of thousands of consumers across the EU, the New Deal for Consumer is aimed at ensuring cheaper and more effective means to stop and remedy breaches harming multiple EU consumers simultaneously.”

EU Commissioner Jourova 2016 referring to the Diesel scandal:

“We as the Commission, cannot behave as though nothing had happened. I would propose to add redress powers on to the injunction powers exercised by approved bodies”
Proposal of alternative ways for CR mechanisms

The requirement for independence & availability

Discover → Out of Court Procedure → Escalation → Litigation in Court

Harmonization: If, where, how in the process?

Out of court Options
- voluntary/private
- public
  - Mediation
  - ADR
  - ODR
  - Ombudsman

Categories of Dispute Resolution
Harmonisation Level?

Qualified Entities
- Model Case Procedure
- Primary Safe-guards

Enforcement

Safeguards
- Reputational Risk – Blame & Shame
III. Case Study “The Diesel Family”

Family Diesel bought a nice new BLUE Tec Volkswagen “Model Green” in 2014 from their local distributor, who claims to be a “fair trade” car dealer. The dealer without a reasonable doubt is fair, not for the Diesel family though, as an US Agency reveals in 2015 that a “defeat device” modified emissions of about 11 mn cars globally, one of which is the Diesel’s family “Model Green”.

_In a press conference Willie Diesel turns to you, the High EU Commissioner mandated by your Member State, to explain what the next steps will be in your/his jurisdiction to help him compensate his losses._

_Give it a shot... The press stares at your lips, ready to twitter!_
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