Collective action mechanisms – developments in the EU, the Netherlands and the US

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Introduction

Collective action redress mechanisms present a conundrum to governments.[1] Proponents argue that there are advantages to such mechanisms, such as increased efficiency of the legal process and lower costs of litigation. Furthermore, they correctly highlight that a mechanism can allow claimants with small claims to recover their damage, where they would not have individually pursued a claim given the imbalance between the claim and the legal cost of an individual procedure. Opponents, however, argue that class members often receive little or no benefit from class actions, while generating large fees for the attorneys. It is also claimed that collective actions may preclude individuals from litigating their claims separately.

Both sides have a point. When introducing mechanisms, law-makers must find a balance between the wish to provide access to justice and the need to prevent abusive litigation practices. Finding this balance is complicated by the fact that increasingly disputes are cross-border. Thus, the law-makers must not only consider the effects of the mechanism within their own jurisdiction but also what effects it will have on the country's position vis-à-vis other countries. In this note, we will provide a high-level overview on how the balance appears to be developing in the EU and the US, after which we will discuss how the Netherlands is currently struggling to change its collective action system without causing undesired cross-border effects.

The US

In the US, viewed from this side of the Atlantic, there appears to be a move towards limiting the scope of collective action mechanisms. The US Class Action Fairness Act of 2005 already put limits to 'coupon settlements' – under which plaintiffs receive a small benefit, such as a small cheque or a coupon for future services or products from the defendant – and to the attorneys' fee award to class counsel to discourage 'lawyer-driven' litigation. The trend of apparent scepticism about the benefits of class actions also resulted in the US House of Representatives passing the Fairness in Class Action Litigation Act on 9 March 2017. This legislation intends to prohibit federal courts from certifying class actions seeking monetary relief for personal injury or economic loss, unless each proposed class member suffered the same type and scope of injury as the named class representatives. The party seeking to maintain a class action must demonstrate a reliable and administratively feasible mechanism for the court to determine whether putative class members fall within the class definition and for the distribution of any monetary relief directly to a substantial majority of class members. Also, attorney's fees are limited to a reasonable percentage of any payments received by class members.

The EU

Collective action redress problems have also been a matter of concern within the EU. Somewhat contrary to the trend in the US to make collective action less attractive, several EU Member States have been implementing new collective action mechanisms in recent years. The EU Commission has been instrumental in this development. After first viewing collective redress mostly through the prism of consumer protection and competition policy, the Commission took a broader approach with the adoption of a recommendation in 2013 (the 'Recommendation').[2] The Recommendation contains principles which, according to the Commission, should be applicable in relation to violations of rights granted under EU law across all policy fields and in relation to collective redress mechanisms.

The Recommendation was intended to create a benchmark for a European model of collective redress but this has not been achieved. In its report of 25 January 2018, the Commission concluded that the Recommendation fostered debate, but

that there is a 'rather limited follow-up to the Recommendation'.[3] Indeed, the Commission's analysis shows that there remain large differences between the Member States, as well as between the 'benchmark' and the Member States. Importantly, there are still nine Member States that do not provide for collective claim compensation in 'mass harm situations' at all (as defined by the Recommendation). Furthermore, it remains very difficult for affected parties to effectively pursue a claim in various Member States that do have a system in place.

The Netherlands as a forum for collective action

The Netherlands is one of the EU Member States that has taken and is still taking action to develop collective action mechanisms. It can be safely stated that the Netherlands already is an attractive location to litigate. This is due to various reasons.

First of all, the Netherlands is the seat of many multinational corporations and a main port of entrance to continental Europe. Simply due to domicile or residence by the defendant, collective action plaintiff parties can often create jurisdiction for the Dutch courts (eg, see Regulation (EU) No 1215/2012, Article 4). Secondly, the Dutch judiciary is generally considered professional, predictable and fast, making it an attractive venue for both plaintiff and defendant. Thirdly, litigation in the Netherlands is relatively inexpensive, due in part to low rates of compensation for the costs of litigation the losing party must pay in procedures. Fourthly, the Dutch legislator deliberately promotes the Netherlands as a forum for resolving international disputes. A recent example of this is a legislative proposal to create a special chamber at the Amsterdam district court and court of appeals at which parties will have the possibility to litigate – and get a court decision – in the English language.[4] The Dutch government quite explicitly wants to introduce this option to litigate in English to compete with other jurisdictions and to strengthen the position of the Netherlands as an international trade centre.[5]

Formal collective redress mechanisms in the Netherlands

There are currently two formal collective action redress mechanisms in the Netherlands. Firstly, in 1994 the possibility of a representative collective action (Article 3:305a Dutch Civil Code (DCC)) was introduced. This action involves a representative entity, an association or foundation that can initiate legal proceedings on behalf of a group of persons with similar interests against a certain liable party or parties. This action can be the first step towards a settlement but there is an important limitation for the representative collective action: whereas the action can serve to establish the defendant's liability, monetary damages need to be claimed individually by each plaintiff.

Secondly, in 2005 the Dutch Act on the Collective Settlement of Mass Damages (WCAM) was enacted. The WCAM allows parties to a collective settlement to file a request with the Amsterdam court of appeals to declare a collective settlement generally binding. A collective settlement under the WCAM is a settlement of mass damages, negotiated between on the one hand foundations and/or associations that defend the common interest of a group of claimants and on the other hand the party held liable to compensate the group for the damages. A key characteristic of the WCAM is that it provides for an opt-out system. The WCAM obtained some notoriety and indeed cemented the Netherlands as one of the key collective action forums after the Amsterdam court of appeal appeared willing to deem itself competent and declare a settlement generally binding, even though the subject of dispute had only limited connection to the Dutch jurisdiction. For example, the Amsterdam court of appeal was willing to do this in the so called *Converium* case, involving a Swiss based reinsurance company, with listings on a Swiss index and American depository receipts at the NYSE, only 200 of the 12,000 non-US parties were domiciled in or residents of the Netherlands.[6]

Potential changes

The Dutch legislator is currently considering material changes to the aforementioned system. This is not inspired by the Recommendation but rather by a motion adopted by parliament.[7] After several failed pre-draft attempts, draft legislation was introduced to the Dutch parliament on 16 November 2016. The key elements of the draft include: (i) the removal of the prohibition for representative entities to claim monetary damages in collective actions;

(ii) the introduction of stricter admissibility requirements for representative entities (eg, governance, funding and representation requirements); (iii) the appointment of an exclusive representative for all claimants (in case of various representative parties); (iv) an opt out at the beginning of the procedure for members of the class; (v) a binding decision on all parties that did not opt-out; and (vi) a 'scope rule' that serves to ensure that the collective action is sufficiently closely connected with the Dutch jurisdiction.

The legislative proposal has (yet again) been subject to significant criticism, which has led to important amendments to the draft on 12 January 2018. Of particular interest from a cross-border perspective is that the Dutch government further enhanced the 'scope rule'. Rather than an opt-out, the legislature is now pushing an opt-in system with respect to class members who are domiciled or reside outside of the Netherlands. With this, the Dutch government is moving more in line with recent Belgian and UK collective action legislation. The amendment thus serves to prevent Dutch collective action redress mechanisms from being used in cases which have a limited connection with the Dutch legal sphere. The concern is that in the absence of a proper scope rule, companies could be exposed to collective action of plaintiffs worldwide, even where little connection with the Netherlands exists. This could diminish the attractiveness of the Netherlands as a domicile for international business.

The relative value of the formal collective action mechanisms

The importance of the described possible amendments to the existing collective action mechanisms should not be overstated. Dutch law offers effective opportunities to file collective or bundled claims without making use of the redress mechanisms mentioned above. One commonly used method is to assign claims to a special purpose litigation vehicle. In two recent judgments in the air cargo cartel follow-on cases, the Amsterdam district court held that the assignment by individually injured parties of claims to a claim vehicle is in principle valid under Dutch law.[8] This option may not always be attractive, because although the claims may be filed as bundled, each individual assigned claim must be considered under the law applicable to that particular claim and each individual claim remains subject to the defences the defendant may raise in relation to the assignor of the claim. Therefore, the assignment of claims to a claim vehicle may mainly be attractive if a relatively small group of injured parties is involved or if the same law applies to most of the assigned claims.

Finally, more relevant for the future development of collective action in the Netherlands – and indeed in the EU – will be how the relevant EU Member States are going to deal with third-party funding. In our practice, we are increasingly confronted with situations where a third-party funds collective or individual claims, either as a loan or in exchange for a share in the proceeds. We expect this practice to increase in the next few years, not gradually but exponentially. In the Netherlands, third party-funding is in essence not regulated as of yet, although it may not be excluded that in practice the third-party funder may find that the way in which it funds a litigation can affect whether the claim is admissible or whether a settlement is enforceable.

Notes

1 With collective redress mechanisms, we refer to the so-called class action, a lawsuit where one of the parties is a group of people who are represented collectively by a member of that group, as well as other group actions.
2 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violation of rights granted under Union law, OJ L 201, 25.7.2013.
3 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, COM (2018) 40 final, 25 January 2018.
4 We note that Dutch courts already may allow parties to provide exhibits in the English language and often allow parties to fully or partially conduct hearings in English. Moreover, the Rotterdam district court has a pilot which allows for certain cases – maritime, transportation and international trade cases – to be conducted in the English language. The decisions by courts are still versed in the Dutch language however. The draft legislation will allow the courts to provide binding decisions in the English language.
5 *Parliamentary documents II*, 2016/17 34761, no 3, pp 2–3. At the time of writing of this note, the House of Representatives adopted the draft, sending it to Dutch Senate (on 8 March 2018). We expect the legislation to be adopted.
6 Amsterdam court of appeals, 17 January 2012, ECLI:NL:GHAMS:2010:BO3908.
7 *Parliamentary documents II*, 2011/12, 33000 XIII, no 14.
8 Amsterdam district court, 2 August 2017, ECLI:NL:RBAMS:2017:5512 and Amsterdam district court, 13 September 2017, ECLI:NL:RBAMS:2017:6607. In the interest of proper disclosure, the writers note that they are involved as legal counsel to one of the parties in the air cargo cartel cases.