



COLLECTIVE ACTION MECHANISMS

DEVELOPMENTS IN THE EU AND THE NETHERLANDS

BE UNSTOPPABLE

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Collective action redress mechanisms present a conundrum to governments¹. 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, after which we will discuss how the Netherlands is currently struggling to change its collective action system without causing undesired cross-border effects.

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.



The EU

Collective action redress problems have been a matter of concern within the EU. Somewhat contrary to what seems 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 protection² and competition policy, the Commission took a broader approach with the adoption of a recommendation in 2013 (the 'Recommendation')³. 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'⁴. 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.

As a result, on 11 April 2018 the European Commission published a proposal (the 'Proposal')⁵ for a new directive on representative actions for the protection of the collective interests of consumers. Currently (further to Directive 2009/22/EC) organizations or independent public bodies can bring actions in the name of consumers in courts or before administrative authorities to stop

infringements of consumer legislation. According to the Proposal, they would be able to demand compensation for consumers as well. The European Parliament adopted its first-reading position on 26 March 2019. It added safeguards to protect companies against abusive litigation, and deleted a precondition that consumers should wait for a final injunction order establishing the existence of an infringement before being allowed to demand compensation. Now that the election to the European Parliament has concluded, the Council of the European Union next will consider the Proposal and Parliament's Position.

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 the launch on 1 January 2019 of the Netherlands Commercial Court and the Netherlands Commercial Court of Appeal (NCC and NCCA). The NCC is part of the Amsterdam District Court and the NCCA is part of the Amsterdam Court of Appeal. The NCC(A) allows for the proceedings to

² Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests.

³ 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.

⁴ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, COM (2018) 40 final, 25 January 2018.

⁵ Proposal for a Directive of the European Parliament and the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC.

be conducted in English, including the procedural documents, the hearings and the judgment. With its own rules of procedure, the NCC(A) combines the professionalism and efficiency of the Dutch court system with a flexible focus on global best practices as the NCC rules of procedure are based on the rules of procedure that are used in other commercial courts and arbitration institutions. The NCC(A) was introduced to compete with other jurisdictions and to strengthen the position of the Netherlands as an international trade centre⁶.

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) 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 Netherlands⁷.

Coming changes

On 19 March 2019, the Dutch Senate adopted the Act on collective damages in class actions (WAMCA), which will make it easier to litigate mass damages through the Dutch courts. The key elements of the WAMCA 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) the opposite goes for non-Dutch residents: those persons can voluntarily consent to their interests having been represented by the class action (i.e. opt-in, alternatively the court can order that the opt out system applies to a precisely specified group of non-Dutch residents anyhow); (vi) a binding decision on all parties that did not opt-out (or in case of non-Dutch residents, opt-in); and (vii) a 'scope rule' that serves to ensure that the collective action is sufficiently closely connected with the Dutch jurisdiction.

A sufficient close connection with the Dutch jurisdiction will exist if (i) the majority of the persons on behalf of whom the class action is initiated are Dutch residents, (ii) the defendant resides in the Netherlands, or (iii) the events on which the class action is based occurred in the Netherlands. This 'scope rule' 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 new provisions will apply to class actions relating to event(s) on or after 15 November 2016 that are brought after the WAMCA has taken effect. This has yet to be determined and will likely be later this year.

⁶For more information, see: <https://www.rechtspraak.nl/English/NCC/Pages/default.aspx>

⁷Amsterdam court of appeals, 17 January 2012, ECLI:NL:GHAMS:2010:BO3908



The relative value of the formal collective action mechanisms

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. The last couple of years the Netherlands has increasingly seen cases where a third-party funds collective or individual claims, either as a loan or in exchange for a share in the proceeds. However, the requirement introduced by article 3:305a Dutch Civil Code as amended by the WAMCA that a representative entity has to show not only that it has sufficient resources to bear the costs of instituting a legal action but also that it has sufficient control of their handling of the case, means that courts may ask for any litigation funding contract to be disclosed. It may also mean that the court will test the contents of such contracts. If there is insufficient control, the case will not be heard. This means that funders may be deterred from financing these group actions: if they cannot control the claim vehicle's strategic choices but may only pay for the consequences, their investment may be jeopardized.

The importance of the described 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 law⁸. 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.

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.

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