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Martin Schmidt-Kessel/Christoph Strünck/Malte Kramme (Hrsg.)
Im Namen der Verbraucher? Kollektive Rechtsdurchsetzung in Europa

JWV

Schriften
zu Verbraucherrecht und Verbraucherwissenschaften

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Jenaer Wissenschaftliche Verlagsgesellschaft

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Kollektiver Rechtsschutz in der Verbraucherpolitik

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Public interest litigation in the Netherlands – Recent developments in the collective enforcement of consumer rights

Charlotte Pavillon

Paper presented at the conference "In the name of the consumers? Public interest litigation in Europe" held on October 15-17 2014 at the University of Bayreuth (Forschungsstelle für Verbraucherrecht).

I. Introduction

1. Collective enforcement of consumer rights in the Netherlands

Dutch consumers have at their disposal a whole arsenal of consumer rights, most of them being of European origin. The problem lies in the enforcement of those rights. Individual enforcement alone does not suffice insofar as the costs of proceedings are often higher than the amount at stake. This deters the consumer from invoking his rights. What is more, most consumers are unaware of their rights, despite the many information duties; national courts are therefore obliged to apply European consumer law of their own motion (*ex officio*).[1]

But European and national legislation also provide for collective enforcement and redress mechanisms. In the Netherlands, these mechanisms are implemented in both administrative and civil law. This paper outlines the Dutch mix of collective enforcement mechanisms that applies to consumer issues. It also explores the shortcomings of the existing mechanisms and assesses to what extent recent legal amendments have remedied those drawbacks and insufficiencies. Finally it sheds some light on the future of collective enforcement in the Netherlands and more specifically on the proposed change of law regarding collective compensatory redress (July 2014).

2. PIL and other forms of group litigation

What struck me when I went on to examine the concept of public interest litigation (PIL) a little closer is that the literature on this topic holds diverging definitions of public interest law. There is consensus on the fact that PIL purports to protect the vulnerable segments of society, including consumers, to change policies and practices, and to encourage regulation by using law. There is PIL directed at public authorities and PIL directed at wrongdoers. This, however, is a very broad definition that at first sight encompasses different types of group litigation.

These forms of group litigation differ as regards:

- the size of the group on behalf of which the action is brought (a specific group, a more general group or the public at large) and the identifiability of the group members;

[1] Case C-168/05, Mostaza Claro, [2006] ECR I-10421.

- the obligation to opt-in or to opt-out (the restriction of the action to the members of the group);
- to possibility to claim (punitive) damages;
- the initiator of the action (an individual claimant or a group of claimants, a public or private body representing consumer interests on a structural or ad hoc basis, an attorney).

According to the *Study on the conditions of claims for damages in case of infringement of EC competition rules*, PIL is more specifically '*litigation, usually by a representative organisation, that is not done on behalf of any identified individuals but for the benefit of the public at large. Any damages awarded in the context of such claims are in some way given to the general public. This differs from class actions and collective claims in that the proceedings are brought on behalf of the public at large rather than a group of individuals (either identified or unidentified)*'.[2] The *White Paper Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios* adds that '*if (...) a group consists of the public at large, the alternative resembles a public interest litigation and will typically be a mandatory representative action, under which victims will not have the possibility to opt-out*'.[3]

PIL thus appears to be the broadest type of group litigation as opposed to class, representative or joint actions. It regards collective actions in which the individuals whose interests are involved cannot be identified because of the generality of the interest. PIL goes beyond the individual interests instead of bundling them.[4] Other forms of group litigation allow for some form of identification or demarcation.

In the Netherlands, collective *damages* actions do not exist. Even though such actions might see the light of day soon (section VI), group litigation remains currently confined to public enforcement (section II) and to private injunctive and declaratory collective redress (in combination with the possibility to aggregate damages claims or to reach a mass damages settlement agreement, section III-V).

[2] `http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf`, p. 43. All the websites referred to in this paper were last accessed on 10 November 2014.

[3] `http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf`, p. 271.

[4] Cf. Lidy Wiggers-Rust, *'Collective' actions* (full text only available in Dutch), *WODC Cahiers* 2014-11, p. 11-12.

A striking observation made by the aforementioned study is that '*the level of diversity in the area of group litigation means that any attempt at categorisation looks very much like shoe-horning and is moreover often inadequate due to the non-equivalence of terms in the different Community languages*'.[5] As a result, I will avoid using 'labels' without mentioning the characteristics of each collective enforcement mechanism. For the sake of clarity, I will use the above mentioned criteria and specify which boxes are ticked.

II. Public enforcement of consumer rights in the Netherlands

1. From Consumer Authority to Authority for Consumer and Markets[6]

Public enforcement of consumer rights was introduced by the Dutch government in 2007 with the enactment of the Act on Enforcement of Consumer Protection (*Wet handhaving consumentenbescherming*) and the establishment of the Consumer Authority (CA). The government acknowledged that many traders did not only fail to comply with consumer legislation, but deliberately intended to deprive consumers of their (mandatory) rights.[7] Consumers proved incapable of tackling this behavior by exercising private remedies. What is more, Regulation 2006/2004 required the Member States to set up an instrument in order to deal with *cross-border* infringement on consumer legislation. The Dutch government however considered that consumers should enjoy the same level of protection against purely domestic infringements.

In the meanwhile, the CA has merged with the Competition Authority and the Netherlands Independent Post and Telecommunication Authority (OPTA) into the Authority for Consumer and Markets (ACM)

[5] `http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf`, p. 43.

[6] This section is substantially based on a speech delivered by Anita Vegter, member of the Board of the ACM on 13 November 2013: `http://speech-anita-vegter-consumer-interest-representation-in-the-netherlands.pdf`.

[7] Willem van Boom and Marco Loos, 'Effective enforcement of consumer law in Europe – private public and collective mechanisms', in Willem van Boom and Marco Loos (eds.), *Collective enforcement of consumer law in Europe. Securing compliance in Europe through private group action and public authority intervention* (Groningen: Europa Law Publishing) 2007, p. 233.

on April 1st 2013. Reasons for this merger are budgetary cuts and the need for a holistic and problem-solving approach to consumer issues on the market. Likewise, the Office of Fair Trading in the UK has merged into the Competition and Markets Authority (CMA).

The ACM is not the sole public enforcer of consumer legislation in the Netherlands and operates as a secondary enforcer in fields that fall under the responsibility of a specialised authority, such as the Authority for the Financial Markets (AFM) or the Food and Consumer Product Safety Authority (NVWA). The different public authorities responsible for enforcing consumer legislation collaborate under so-called cooperation protocols (art. 4.3 Consumer Protection Enforcement Act). The ACM is very active in most of the common activities within both the European Consumer Protection and Cooperation Network (CPC) and the International Consumer Protection and Enforcement Network (ICPEN).

The Dutch ACM aims at informing consumers and suppliers about their rights and duties and options for obtaining legal redress. It furthermore enforces consumer law in the event of a collective infringement of the economic interests of all consumers. It goes without saying that a certain infringement will only affect (or threaten to affect) the interests of (an unspecified amount of) consumers who have been confronted (or would have been confronted) with the reprimanded commercial or contractual practice. Most sanctioned practices target the public at large. The group of (potentially) affected consumers is therefore generally quite large. The sanctioning then also serves the public interest by limiting the (potential) economic loss of a great number of consumers and by increasing consumer trust and the smooth functioning of the market. In this respect, the enforcement actions by the ACM are the closest thing to public interest litigation (even though private collective actions that purport to collectively enforce consumer rights *indirectly* serve the public interest as well, section III.1).

The impact of non-compliance with consumer law on the proper functioning of markets and consumer welfare determines the ACM's priorities. The ACM will come into action where the total economic loss (potentially) endured by consumers is the highest, where consumer confidence is most at stake and where market behaviour jeopardises competition and fairness in a particular market.[8] Over the next few years it will focus on the protection of the online consumer, the healthcare consumer and the e-shopper. It will enforce the possibility to switch energy and health insurance providers as it is committed to develop competition in newly liberalised markets, such as the energy market.

[8]Ibid, p. 233-234.

In view of the primacy of private enforcement, the ACM however will only take action if private enforcement remains ineffective. The enforcement of consumer legislation in the Netherlands still bears a predominantly private character. As long as there is no structural violation of collective interests it is up to the individual consumer to act against a breach of his rights. Public enforcement bodies will only intervene where the use of private remedies remains ineffective. This is generally the case where consumers:

- incur no damages (e.g. where the practice only causes annoyance like in the case of spamming). Individual consumers have no incentive to take an action to court. A consumer organisation might opt for an injunctive action but the fact that the Dutch consumer association *Consumentenbond* is quite inactive increases the ACM's scope for action.

- incur only low-value damages and damages are scattered (e.g. the internet speed does not live up to the expectations). The cumulative collective damage represents a considerable interest but the costs of an individual procedure outweigh the amount at stake. Since consumers often are not even aware about the fact that they are suffering damages, the incentive to start proceedings is very low. Consumers moreover are generally unable to organise themselves or to attract the funding necessary to launch a collective action.

The ACM is entitled to impose fines and orders subject to penalty payments. It has the power to request documents, to enter business premises, to seize information in both physical and digital form, and to take statements from employees and managers of companies. The threat of a potential fine enhances the rate of spontaneous compliance (85% of the cases are solved informally). The competence to publish all formal decisions concerning consumer protection – and until now all decisions have been published – also acts as a deterrent for market parties.

Recently, the ACM has imposed a €200,000 fine on KLM Royal Dutch Airlines for incorrect prices displayed on its website. On its website, KLM displayed airfares that did not include the booking costs.[9] *Likewise, Ryanair was imposed a fine of €370,000 in 2013 for four violations of consumer information duties in its online booking system.*[10] *Daisycon was recently imposed a fine of €810,000 for violation of the spam prohibition. The Dutch charity lotteries were fined for unnecessarily annoying consumers.*[11] *In the past a Dutch energy provider was fined up to €1 million for cold-calling practices. And an SMS services provider was imposed a huge fine (€1.2 million) for not informing consumers about the fact they were subscribing to very expensive premium services.*[12]

2. Criticism on the public enforcement of consumer rights and how it has been addressed

Administrative enforcement of consumer law has met with criticism as regards its effectiveness (1) and its alleged disregard for the principle of legality (2).

(1) First the sanctions imposed by the ACM were deemed insufficient. A maximum fine of €78.000 would not discourage big traders from trying to violate consumer legislation. The Act on Enforcement of Consumer Protection has been amended to substantially raise the fines. The ACM is now allowed to issue binding instructions and to impose fines up to €450.000 for all violations of consumer legislation. Up until this amendment, the ACM could only issue fines up to €450.000 in cases concerning unfair commercial practices. The maximum fine that it could impose for all other infringements was €78.000. The ACM has even more recently (through the enactment of the Streamlining Act) been given the power to issue and publish warnings if it suspects a breach of consumer legislation *without actually having formally established this breach*, so as to inform consumers as soon as possible about harmful commercial practices.[13]

A second criticism as regards it effectiveness pertains to the ACM's very selective approach to the enforcement of consumer legislation (i.e. its 'priorities') and the number of infringements being addressed. With regard to the restricted means at its disposal and in view of the current budgetary cuts, a less selective approach is not to be expected.

A third criticism relates to the failure of the Netherlands Authority for the Financial Markets (AFM)'s regulatory oversight in the DSB-Bank-case. The Scheltema Commission has issued a report on the demise of the DSB Bank. One of its conclusions is that the AFM should have pressed the Dutch Central Bank (DNB) to be more pro-active and to intervene in the governance of DSB.[14]

(2) Consumer legislation has been transposed into private law and contains many general clauses like the fairness and misleadingness tests. Originally the Consumer Authority was not allowed to fine a business for breaching a general clause and an infringement of such clauses could only be tackled thanks to the involvement of a civil judge. The public enforcer's autonomous sanctioning powers were restricted to the more detailed provisions. Civil courts were considered to be better equipped to deal with the interest-balancing which is inherent to the application of general clauses. This dual enforcement mechanism was however recently thrown overboard.

This choice has been criticised.[15] The fact that the same open-textured provisions will be interpreted and applied by both civil and administrative courts can increase legal uncertainty and in view of the principle of legality the breach of general clauses

[9] https://www.acm.nl/en/publications/publication/13390/ACM-has-fined-KLM-for-incorrectly-displaying-its-airfares/.

[10] https://www.acm.nl/en/publications/publication/11254/Netherlands-Consumer-Authority-fines-Ryanair/.

[11] https://www.acm.nl/en/publications/publication/13345/ACM-imposes-fine-for-violation-of-the-spam-prohibition/.

[12] https://www.acm.nl/en/publications/publication/7347/Consumer-Authority-again-fines-provider-of-SMS-services/.

[13] Press release of 4 August 2014, available at https://www.acm.nl/en/publications/publication/13190/Rules-of-the-Netherlands-Authority-for-Consumers-and-Markets-have-been-harmonized/.

[14] http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2010/06/29/rapport-van-de-commissie-van-onderzoek-dsb-bank.html.

[15] Charlotte Pavillon, 'Legaliteit en evenredigheid van de sancties op de schending van de open normen uit de Wet oneerlijke handelspraktijken', *Tijdschrift voor Consumentenrecht & handelspraktijken* 2013-2, pp. 63-72.

should not give way to sanctions for they are not clear and ascertainable enough. Be that as it may, the legislator has decided to extend the powers of the ACM, which is now entitled to sanction the breach of general clauses. The ACM no longer has to ask for an injunction with the Court of Appeal in The Hague by means of a special procedure. Interestingly, the removal of the ACM from art. 3:305d Dutch civil code (Cc) also means that the ACM is no longer *able* to obtain injunctive collective redress and thus not entitled to bring a representative action before a civil court.

III. Private collective enforcement of consumer rights: collective actions

1. Injunctive and declaratory collective redress[16]

Collective redress has been available since 1994. Collective redress is however limited to (positive mandatory or prohibitory) injunctions, termination or rescission of contract orders.[17] The collective action can also be used to obtain a declaratory judgment on the liability of the defendant.[18] The court can however not decide on the damage suffered by the individuals on whose behalf the collective action is brought and may not award monetary compensation. Art. 3:305a Cc cannot be used to compel a tortfeasor to compensate.

Only a foundation (*stichting*) or an association (*vereniging*) with full legal capacity that, according to its articles of association, has the intention to protect specific interests is granted a standing to act and may bring to court a legal claim that purports to protect *similar* interests of other persons. The collective action under Dutch private law requires that interests can be bundled.[19] Representativeness is however not a requirement: a collective action does not need to rely on the support of a substantial portion of the interested parties.[20] The interested individuals can generally only be identified in the abstract sense and need not have given explicit authority to the organisation to instigate proceedings on their behalf. The organisation is not obliged to reveal the identity of the individuals on whose behalf it acts and their amount remains unspecified.[21]

The promoted interests may be idealistic. The organisation in question must have the clearly defined statutory aim of promoting the interests concerned and must actually pursue them. Standing to act is often granted to special-purpose foundations. The organisation must also have tried to reach a settlement over its claim through consultations with the defendant. A period of two weeks after the defendant has received a request for such consultations, indicating what is claimed, shall in any event be sufficient to this end.

Formally the proceedings only lead to a decision between the parties in the procedure. The judgment has *res judicata* effect only between the parties (and/or the claims adjudicated therein). It does not have any *res judicata* effect in respect of the individuals on whose behalf the action was brought. However, the judgment can have consequences for a person whose interests are protected by the legal action. Interestingly, the Dutch Supreme Court has held that a declaratory judgment may serve as a point of departure for new proceedings addressing the same unlawful behavior started by other victims (cf. section III.2):[22] this has for these victims, *de facto* the same effect as *res judicata*. A person whose interests are protected by the legal action may 'opt-out' from the effect of the judgment by simply making clear that he does not want to

[16] This section is substantially based on Ianika Tzankova and Eric Tjong Tjin Tai – with support from Karlijn van Doorn, http://www.collectiveredress.org/collective-redress/reports/thenetherlands/collectiveaction.

[17] Willem van Boom, 'Collective Settlement of Mass Claims in the Netherlands', in Matthias Casper, André Janssen, Petra Pohlmann, Reiner Schulze (eds.), *Auf dem Weg zu einer europäischen Sammelklage?* (Munich: Sellier) 2009, p. 176.

[18] ECLI:NL:GHAMS:2014:496 (Stichting Belverlies).

[19] ECLI:NL:HR:2010:BK5756 (Stichting Baas in Eigen Huis/Plazacasa BV).

[20] ECLI:NL:HR:2010:BK5756 (Stichting Baas in Eigen Huis/Plazacasa BV), § 4.2. The Commission recommendation of June 11th 2013 is stricter as regards the legal standing and more specifically the requirement of representativity: '*In the case of a representative action, the legal standing to bring the representative action should be limited to ad hoc certified entities, designated representative entities that fulfil certain criteria set by law or to public authorities. The representative entity should be required to prove the administrative and financial capacity to be able to represent the interest of claimants in an appropriate manner*' (principle 18): http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013H0396\&from=EN.

[21] An action regarding consumer protection can be initiated by a foreign organisation for protecting consumer interests as intended in art. 4(3) Directive 98/27/EC (art. 3:305c Cc). For an example see ECLI:NL:RBBRE:2008:BD6815.

[22] ECLI:NL:HR:2009:BH2162 (VEB/World Online), § 4.8.2.

be affected by the decision (there are no formal requirements).[23] This does only play a role when individuals do not wish (for example) to have an injunction regarding acts that they approve of.

> *A recent consumer case grounded on article 3:305a Cc is the case opposing The Netherlands State Lottery (Staatsloterij) and the Lottery Loss foundation (Loterijverlies).*[24] *The Hague Court found in the foundation's favor and ruled that the company had misled consumers for a period of up to seven years. The case concerned advertisements by the state lottery between the years 2000 and 2007 which referred to a set number of guaranteed big prize winners for each draw, even though there was no guarantee that the prizes could be won since the majority of the lots had not been sold. Prices were drawn from 21 million lots and only 3 million had been sold. Both parties have appealed to the Dutch Supreme Court which upheld the appellate court judgment on January 30th 2015.*[25] *To be able to collectively claim damages consumers will have to achieve a settlement agreement or to aggregate their claims.*
>
> *Another, less successful, article 3:305a Cc-case, in the sense that most claims were rejected, is the case opposing the Stichting Belverlies to mobile phone operators Telfort and KPN about minute billing.*[26] *In 2008-2010, KPN switched to minute billing in new subscription plans. Its subsidiary Telfort made the same change but applied it to existing subscription plans as well. In the ruling in first instance, the court found that Telfort had insufficiently informed existing customers, but rejected all the other claims from Stichting Belverlies, the group set up by the affected customers. In the latest ruling on appeal, the court took the same decision, as no new information was presented. The court, however, did not rule out the possibility of damages for it considered causation to be established (on an abstract level).*[27] *As a result, the 45 individual complainants who were already customers of Telfort in 2008 may present a case for damages.*

[23] Unless the nature of the judicial decision brings along that it is not possible to exclude this specific person from its effect: ECLI:NL:HR:2010:BK5756 (Stichting Baas in Eigen Huis/Plazacasa BV).

[24] ECLI:NL:GHDHA:2013:CA0587 (Stichting Loterijverlies.nl/Stichting Exploitatie Nederlandse Staatsloterij).

[25] ECLI:NL:HR:2015:178 (Stichting Loterijverlies.nl/Stichting Exploitatie Nederlandse Staatsloterij).

[26] ECLI:NL:RBAMS:2012:BY5353 (Stichting Belverlies/KPN).

It is not clear why in some cases art. 3:305a Cc-proceedings are being instigated by an interest group. One parameter is the readiness of consumers to organise themselves or the emergence of one or more foundations that is/are willing to take the action to court. The availability of funding is another essential parameter. The Dutch consumer association *Consumentenbond* is quite cautious in taking legal action because, among other things, of its limited resources.[28] Well-established consumer organisations are excluded from public support.[29] Most collective actions are started by special purpose foundations. These foundations have a commercial interest in the outcome and are attracted by potential gains. It strikes me that in most proceedings instigated by consumer groups the challenged infringement can indeed result (or has already resulted) in the award of (pecuniary) damages (through the aggregation of claims, a collective settlement or individual follow-on proceedings). The fact that in some cases the damages incurred are of low-value (cf. the state lottery and minute-billing cases) does at first sight not (always) constitute a barrier to a collective initiative.

2. Test cases

A so-called test case is generally meant to clarify the issue of liability and to allow for the identification and decision on the *common issues* of several claims. Under Dutch procedural law, there is no legal provision allowing for a test case with *res judicata* between the parties. A few informal pilot proceedings have however been initiated.[30] A test case

[27] ECLI:NL:GHAMS:2014:496 (Stichting Belverlies/KPN).

[28] These organisations might also be afraid that a suboptimal result would lead to negative publicity and harm their reputation. Their position is even more vulnerable because they must ask for a financial contribution.

[29] And this should remain this way since '*regulatory and semi-regulatory agencies might appear as defendants in collective claims, meaning that the State may face a conflict of interest in determining the funds that are available to the representative entity for the pending claim or for future claims*': European Law Institute, *Draft Statement on Collective Redress and Competition Damages Claims*, p. 21.

[30] ECLI:NL:HR:2009:BH2815; ECLI:NL:HR:2009:BH2811; ECLI:NL:HR:2009:BH2822.

claim is usually based on the general rules of either wrongful act or product liability and brought by a limited number of aggrieved persons, while a representative organisation might coordinate the action and pay related costs.[31]

3. Aggregation of damages claims

A group proceeding that can lead to the award of damages is the voluntary pooling of individual claims, either by assignment of the claim or by giving mandate to a representative organisation (the assignee, often a foundation) that would file the claim on behalf of the individual consumers (the assignors).[32] Aggregation of individual consumers' claims can be viewed as *informal opt-in litigation*.[33] Under Dutch law, this type of proceedings is governed by the general provisions regarding mandate and transfer and applicable to all kinds of claims. The standing to act of the mandated/assigned organisation depends on the standing of the claimants represented. It is for example possible to combine the declaratory judgment obtained on the basis of a collective action (section III.1) with an aggregated claim for damages.

The system has met two criticisms.[34] First, the system is complicated since the foundation must be able '*(if asked for proof) to provide the identity of all specific claimants and claims in order to prove its mandate and/or the transfer of valid claims*'. That means that for each and every individual aggrieved party, an assignment document or a mandate must be prepared and validly signed which, in practice, can be burdensome.[35] The larger the group 'victims', the bumpier this road to damages will be. Aggregation is intricate from a logistical perspective but difficulties arise also insofar as individuals are reticent to reveal their identity to avoid undue pressure. Second, there is a lack of control

[31] Karen Jelsma and Manon Cordewener, 'The Settlement of Mass Claims: A Hot Topic in The Netherlands', *The International Law Quarterly* (2011), p. 13.

[32] ECLI:NL:GHAMS:2008:BF0810 (Stichting spirit).

[33] Willem van Boom, 'Recente ontwikkelingen in de collectieve private handhaving', in Marco Loos and Willem van Boom, *Handhaving van het consumentenrecht* (preadviezen Vereniging voor Burgerlijk Recht 2009) (Deventer: Kluwer) 2010, § 3.1.

[34] Ianika Tzankova and Eric Tjong Tjin Tai – with support from Karlijn van Doorn, http://www.collectiveredress.org/collective-redress/reports/thenetherlands/mandate.

[35] Karen Jelsma and Manon Cordewener, 'The Settlement of Mass Claims: A Hot Topic in The Netherlands', *The International Law Quarterly* (2011), p. 13.

on foundations acting as assignee.[36] People behind those foundations might put their own interests before the interests of the claimants.

4. The absence of a collective compensatory redress mechanism

The objective nature of collective redress accounts for the impossibility under Dutch law to claim damages (art. 3:305a(3) Cc). A group damages claim is deemed problematic given all of the different individual circumstances of the aggrieved parties involved.[37] The merits of such a claim depend on the circumstances surrounding each claimant. A court will not always be able or willing to abstract from these circumstances when establishing tortious behavior vis-à-vis consumers, a vitiated consent or causation between the alleged harm and the alleged unlawful conduct by the professional.[38] Other issues that should be assessed on an individual level are the period of limitation, the extent of the damages, contributory fault or the obligation to limit damages.

That being said, collective actions have been successful in obtaining declaratory relief as to certain facts and issues of (tortious) liability on a collective basis. The breach of a special duty of care was for example established in an art. 3:305a Cc-procedure even although the concrete facts underlying the aggregated claims differed.[39] Under Dutch law declaratory or injunctive relief can easily be obtained and courts appear to be willing to assess wrongfulness on an abstract level. A court however has never ruled that a defendant is legally liable to compensate these individuals.[40]

Difficulties thus arise when it comes to the collective award of damages. The voluntary assignment of claims (an informal opt-in model)

[36] Cf. Willem van Boom, 'Recente ontwikkelingen in de collectieve private handhaving', in Marco Loos and Willem van Boom, *Handhaving van het consumentenrecht (preadviezen Vereniging voor Burgerlijk Recht 2009)* (Deventer: Kluwer) 2010, p. 167 ff.

[37] Willem van Boom, 'Collective Interests, 'Prêt à Porter' Justice?', *Erasmus Law Review*, Vol. 1(2), (2008), p. 1-4. The same goes for the rescission of multiple contracts on the basis of unconscionability, mistake, or misrepresentation.

[38] ECLI:NL:GHAMS:2008:BF0810 (Stichting spirit): the foundation was the assignee/transferee (*cessionaris*).

[39] ECLI:NL:HR:2009:BH2822 (SprintPlan).

[40] Willem van Boom, 'Collective Settlement of Mass Claims in the Netherlands', in Matthias Casper, André Janssen, Petra Pohlmann, Reiner Schulze (eds.), *Auf dem Weg zu einer europäischen Sammelklage?* (Munich: Sellier) 2009, p. 176.

does not appear to be a full-fledged alternative for the missing collective compensatory redress mechanism (section III.3). The art. 3:305a Cc action therefore generally paves the way to a voluntary settlement. Once liability is established, the foundation moves to settle claims under the Dutch Act on Collective Settlement of Mass Damages Claims (WCAM). The WCAM marks the first notable legislative attempt at designing an effective collective consumer compensation procedure based on an opt-out model. A defendant is likely to take their seat around a negotiating table if:

- individual victims are likely to individually prove damage and causation;
- individual victims will in fact pursue their individual claims;
- the benefits to the tortfeasor of negotiating individual settlement outweigh the costs.[41]

IV. A Dutch particularity: the binding collective settlement of mass damages claims[42]

1. A collective agreement binding on all interested persons

Collective compensatory redress prevents a multitude of individual claims exerting undue pressure on court efficiency. Member states are invited in the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law of June 11th 2013[43] to include an opt-in model with group members having to be identified before a claim is brought. There is no such mechanism in Dutch law. Dutch law however provides for an opt-out mechanism that makes collective settlements binding on all interested parties. This mechanism was created by the Dutch Act on Collective Settlement of Mass Damages Claims (WCAM) which came

[41] Ibid, p. 177.

[42] Bart Krans, 'The Dutch Act on Collective Settlement of Mass Damages', 27 *Pac. McGeorge Global Bus. & Dev. L.J.* (2014), p. 281-301.

[43] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2013_201_R_NS0013.

into force on 27 July 2005. Although it was drafted to address mass personal injury claims, the Act has been more successful in settling mass claims based on securities litigation.[44]

A WCAM proceeding is, unlike the US class action, not initiated by a lead plaintiff, i.e. 'a single representative claimant assisted by a class counsel operating on a contingency fee basis'.[45] It is based on the voluntary cooperation between parties. Although the WCAM allows for the settlement of mass claims, it provides no authority to bring claims on behalf of a group. The settlement agreement must be concluded between one or more potentially liable parties, and one or more foundations or associations representing one or more groups having suffered damage.[46] It is based on damages scheduling and includes the right to claim damages from the liable party or maybe the setup of a compensation fund. The fund administrator/trustee will generally also sign the contract. During the negotiations some of the questions that normally need individual answers are being objectified. Questions concerning loss estimations, the nature and extent of damage and causation will be dealt with collectively.

The WCAM provides the parties to an amiable settlement agreement with the possibility of jointly requesting – i.e. filing a petition to – the Amsterdam Court of Appeal to declare their settlement agreement binding on all interested parties (except those that opt-out). The petition initiating this application must be filed by *both* the legal entity representing the victims *and* the parties that are held liable[47] and/or will provide compensation.[48] The proceedings before the court will not

[44] Willem van Boom, 'Collective Settlement of Mass Claims in the Netherlands', in Matthias Casper, André Janssen, Petra Pohlmann, Reiner Schulze (eds.), *Auf dem Weg zu einer europäischen Sammelklage?* (Munich: Sellier) 2009, p. 178.

[45] ELI, Draft Statement, p. 20.

[46] Default on the agreement has to be addressed by normal rules of contract.

[47] Judgment on liability and WCAM are complementary but a 3:305a procedure will not necessarily precede a settlement: Willem H. Van Boom, 'Recente ontwikkelingen in de collectieve private handhaving', in Marco Loos and Willem van Boom, *Handhaving van het consumentenrecht (preadviezen Vereniging voor Burgerlijk Recht 2009)* (Deventer: Kluwer) 2010, p. 164. Furthermore, the agreement may include an admission of fault. The settlement itself does not constitute an admission of fault.

[48] Remedies include, primarily, monetary damages, but may include also other obligations that require specific performance, as these are considered to be compensation of damage in kind. Claims however need not concern compensation but may for example also relate to other rights or remedies like a reduction in debts to the bank or other kinds of consequences, such as declaring contracts

deal with the event or events that caused damages and are referred to in the contract. It will only focus on the settlement agreement. No previous judgment on the liability of the 'defendant' is required, although it is easier to clarify the issue of liability first, for example with a test case, before negotiating the settlement.

> *The Dexia-case concerned financial damages suffered by individuals as a result of allegedly misleading information provided by Dexia Bank regarding certain of its financial products. The Shell-case concerned financial damages allegedly suffered by Shell shareholders as a result of misleading information by Shell in relation to certain of its oil and gas reserves in 2004. Shareholders experienced a significant drop in share value when it was discovered that Shell had artificially inflated oil reserve statements in its past annual accounts. Shell seemed to agree that reaching a European settlement rather than pursuing the American class action would be beneficial to all (European) parties involved such as the Dutch pension funds and the Dutch Shareholders Association.*

2. An opt-out model

If a collective settlement is agreed upon by both parties, the Amsterdam Court of Appeal can make that settlement binding in relation to the entire group of victims under the WCAM. After court approval, the settlement agreement will bind all harmed parties falling within the scope of the settlement agreement and included in the terms of the settlement as persons potentially eligible for compensation, whether known or unknown and whether residing in The Netherlands or abroad.[49]

Those persons can use their right to opt-out from a collective settlement if they prefer not to be bound by it. The period within which a *written* opt-out declaration has to be made is determined by the Court, but lasts at least three months. The settlement must specify for which

null and void (e.g. ECLI:NL:GHAMS:2007:AZ7033 (Dexia)). '*It is not possible to obtain the remedies that only a court can provide (such as a declaratory judgment, injunction, non-compliance penalty set by the court), although the contractual obligations may amount to the same*': Ianika Tzankova and Eric Tjong Tjin Tai – with support from Karlijn van Doorn, `http://www.collectiveredress.org/collective-redress/reports/thenetherlands/thecollectivesettlement`.

[49] Cf. ECLI:NL:GHAMS:2012:BV1026 (Converium).

claimants the settlement holds and the grounds for the claim. The court who subsequently decides on the case of those who have opted-out may deviate from the settlement.[50]

Notification of the persons on whose behalf the settlement was concluded is therefore of paramount importance '*both at the litigation stage, where the aim is to obtain a binding declaration, as well as after the binding declaration has been issued. The binding effect of a settlement agreement is only regarded as acceptable if the interested persons have been properly notified at both stages, and thus have had an opportunity to object and to opt-out so they can pursue their own individual claims in court*'.[51]

3. The assessment by the Amsterdam Court of Appeal

a) The representativity-test

Before granting the application, the Court will test, among other things, the representativity of the foundation(s) and association(s) representing the interested persons. The interest of the group that the organisation is seeking to protect must be covered by its articles of association. This test goes further than the admissibility test in 3:305a-proceedings (cf. section III.1), which is justified insofar as those actions do have limited repercussions on the rights of individuals to pursue their claims.[52]

Under the WCAM the court has to materially assess whether the representing entity has a non-profit making character, whether its articles of association allow the action to be instigated and whether the interests of the group member are sufficiently and adequately protected. The request will be denied if the representative organisation or organisations *together* are not sufficiently *representative* of the whole group. The assessment does however not entail any formal 'certification'. Informal requirements such as a certain board composition and

[50] Ianika Tzankova and Eric Tjong Tjin Tai – with support from Karlijn van Doorn, `http://www.collectiveredress.org/collective-redress/reports/thenetherlands/thecollectivesettlement` with reference to ECLI:NL:HR:2009:BH2815; ECLI:NL:HR:2009:BH2811; ECLI:NL:HR:2009:BH2822 (deviation from the Dexia-settlement).

[51] Ruud Hermans and Jan de Bie Leuveling Tjeenk, 'International Class Action Settlements in the Netherlands since Converium', *The International Comparative Legal Guide to: Class & Group Actions 2013*, p. 5 (§ 8).

[52] ELI, Draft Statement, p. 19 (fn. 23).

a financial accounting system have been laid down in a non-binding 'claimcode'.[53]

b) The reasonableness-test

The judicial review of the settlement agreement also includes a reasonableness-test. The Amsterdam Court of Appeal decides whether the amount of compensation awarded in the settlement agreement is *reasonable*.[54] The reasonableness-test takes into consideration, among other things, the extent of the damage, the simplicity and speed with which the compensation can be obtained (the expected strength of the claim in court) and the possible causes of the damage.[55] Settlement agreements may differentiate between different categories of harmed parties on the basis of these criteria.[56]

In practice, the reasonableness-test boils down to a marginal assessment for it only recapitulates the arguments laid down in the agreement without substantively reflecting on them.[57] The Court for example remains hesitant about ruling that a group of parties was wrongly included in, or excluded from the terms of the settlement.[58] It does not so much test whether such limitation is reasonable but whether it is not 'incomprehensible'. Yet, it is not deemed unreasonable that a settlement does not grant full compensation of the damages as originally claimed by the harmed parties because of inequalities in the bargaining positions of the parties involved.[59] The Court also held that the absence of a hardship clause (that would allow a more individual approach towards victims than provided for by the settlement agreement) in the settlement agreement did not make it unreasonable.[60]

[53] http://www.consumentenbond.nl/over/wie_zijn_we/claimcode/.

[54] Ruud Hermans and Jan de Bie Leuveling Tjeenk, 'International Class Action Settlements in the Netherlands since Converium', *The International Comparative Legal Guide to: Class & Group Actions 2013*, p. 8 ff.

[55] In ECLI:NL:GHAMS:2012:BV1026 (Converium), the Court ruled that all circumstances are relevant, including those circumstances which occurred after the determination of the amount of compensation or after the conclusion of the settlement (§ 6.2).

[56] Ruud Hermans and Jan de Bie Leuveling Tjeenk, 'International Class Action Settlements in the Netherlands since Converium', *The International Comparative Legal Guide to: Class & Group Actions 2013*, p. 9. Since the WCAM allows that the strength of the claim in court is taken into account in fixing the amount of compensation (see the Shell decision ECLI:NL:RBDHA:2013:BY9850 and the Dexia decision ECLI:NL:GHAMS:2007:AZ7033) the Court will have to assess the reasonableness of the settlement partly by having regard to several foreign laws: '*one can imagine international cases in which the settlement agreement differentiates between parties residing in different countries, on the basis that their claims have a different value under the laws that apply in each of their cases*'.

[57] Carla Klaassen, 'De rol van de (gewijzigde) WCAM bij de collectieve afwikkeling van massaschade 'en nog wat van die dingen', *Ars Aequi* (2013), p. 633 (§ 4.1). Some scholars however disagree with this (dominant) opinion and attribute the assessment of the fairness of the agreed compensation a more extensive nature. See Bart Krans, 'The Dutch Act on Collective Settlement of Mass Damages', 27 *Pac. McGeorge Global Bus. & Dev. L.J.* (2014), p. 293 (fn. 153).

V. The up- and downside of the WCAM and the need for amendments

The WCAM-solution paradoxically remains unsatisfactory. Its success has had its drawbacks (section IV.4) and should not be overestimated. It will become apparent that there is room for improvement (section IV.5). In the next sections I will elaborate on the shortcomings of the WCAM and on the extent to which the draft bill 'Amendments to the Civil Code, the Code of Civil Procedure and the Bankruptcy Act to further facilitate the collective settlement of mass claims'[61] of July 2013 has remedied them.

1. The WCAM: victim of its own success?

In the 2008 *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union* one of the most positive experiences from a consumer law perspective was reported from the Netherlands.[62] The Dutch mechanism is an exception insofar as it provides a significantly higher direct benefit to affected consumers. Data

[58] Ruud Hermans and Jan de Bie Leuveling Tjeenk, 'International Class Action Settlements in the Netherlands since Converium', *The International Comparative Legal Guide to: Class & Group Actions 2013*, p. 8-9.

[59] ECLI:NL:GHAMS:2007:AZ7033 (Dexia), § 6.6. The legal strength of the parties' positions and their perceived interest in having the matter resolved out of court may diverge.

[60] ECLI:NL:GHAMS:2006:AX6440, § 5.23.

[61] Amendment of the WCAM minor improvements (Act of 26 June 2013), *Staatsblad* 2013, 255, entered into force 1 July 2013, *Staatsblad* 2013, 256.

[62] http://ec.europa.eu/consumers/archive/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf, p. 9, 117 ff.

from the Netherlands was systematically excluded from the analysis because it was considered as an outlier. The WCAM has allowed for a '*swift settlement of mass securities claims*' and appears to ensure an efficient resolution of mass damage claims.[63] A few major cases involving major companies such as Shell and Dexia were settled in the Netherlands for significant amounts.

a) The proliferation of foundations

The success of the WCAM however led to a proliferation of foundations: after the bankruptcy of DSB Bank in October 2009 approximately 12 foundations were established. The Dutch jurisdiction is quite permissive as regards interest group standing.[64] WCAM negotiations and procedures are often started by special purpose foundations. It has been suggested that some ad hoc foundations may actually not provide proper service for their clients, even if they are representative.[65] Some foundations are guilty of 'entrepreneurial lawyering' and responsible for the creating of a 'market for lemons' as described by the economist Akerlof in 'The Market for Lemons: Quality Uncertainty and the Market Mechanism'. Participating consumers will not recognise more expensive services as better ones.

The regulation of the quality of representative organisations is therefore crucial for the private collective enforcement of consumer rights. Such regulation could entail better information for consumers and stricter requirements for market access.[66] The Dutch legislator chose

[63]Tomas Arons and Willem van Boom, 'Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands', *European Business Law Review* (2010), p. 857 ff.

[64]Willem van Boom and Marco Loos, 'Effective enforcement of consumer law in Europe – private public and collective mechanims', in Willem van Boom and Marco Loos (eds.), *Collective enforcement of consumer law in Europe. Securing compliance in Europe through private group action and public authority intervention* (Groningen: Europa Law Publishing) 2007, p. 247.

[65]Cf Willem van Boom, 'Recente ontwikkelingen in de collectieve private handhaving', in Marco Loos and Willem van Boom, *Handhaving van het consumentenrecht (preadviezen Vereniging voor Burgerlijk Recht 2009)* (Deventer: Kluwer) 2010, p. 168-169.

[66]Ibid, p. 171. Van Boom suggested that an individual, a supervisory authority or a new organisation (all outsiders) could ask for a reasonableness-test (at the cost of the settling parties). He reckoned that this suggestion would however most likely collide with the rule that no one has an action without 'sufficient interest' (art. 3:303 Cc).

to tighten the standing requirements. The amendment to the WCAM contains additional quality requirements for interest groups that stand up for victims. In assessing whether the interests are safeguarded, courts must pay adequate attention to the extent to which the parties ultimately benefit from the collective action if it is assigned and to the question whether the organisation has sufficient knowledge and skills to perform the procedure (past performances, number of members, other activities deployed by the organisation to help and assist its members such as gaining media attention). Organisations should also abide by the code of conduct established in 2011 (the claimcode): the three pillars of the claimcode are (a) the promotion of collective interests, non-profit, (b) an independent board without interest, and (c) transparency about the income of the foundation.

A drawback of these stricter rules might be that fewer actions are started, especially in view of the limited preparedness of established consumer organisations to get involved in collective procedures (section III.1).

b) The Netherlands as 'favored venue'[67]

The WCAM procedure is available in cross-border cases, as long as the representative organisations are also sufficiently representative for foreign claimants.[68] In Shell the court assumed jurisdiction with regard to all interested parties, regardless of their domicile. In the interim (and provisional) decision in Converium the court did not even require that any of the potentially liable entities was established in the Netherlands.[69] The WCAM can thus be used in cases where a majority of claimants is not Dutch and where the liable party has no ties to the

[67]Ianika Tzankova and Eric Tjong Tjin Tai – with support from Karlijn van Doorn, `http://www.collectiveredress.org/collective-redress/reports/thenetherlands/thecollectivesettlement`; Tomas Arons and Willem van Boom, 'Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands', *European Business Law Review* (2010), p. 857 ff.

[68]ECLI:NL:RBDHA:2013:BY9850 (Shell).

[69]In ECLI:NL:GHAMS:2012:BV1026 (Converium), the Court assumed jurisdiction and declared an international collective settlement binding in a case where none of the two potentially liable parties was Dutch (they were both Swiss), and where only a limited number of the potential claimants were domiciled in the Netherlands.

Netherlands, as long as the Court of Appeal is competent to decide all claims under the settlement.[70]

In Converium, the court however also considered that *some* connection with the Netherlands was required, namely one or more interested persons should be domiciled in the Netherlands and one or more petitioners should be Dutch entities.[71] In large international cases, since there will often be one or more interested persons who are domiciled in the Netherlands, this requirement will easily be met. Foreign individuals in such a case must be notified of the proceedings, given the requirements of art. 6 ECHR.[72] WCAM proceedings are very useful in reaching binding settlements in cross-border cases which, in view of the successes booked may lead to 'class settlement tourism' and forum-shopping.[73]

There has been criticism on the fact that a Dutch court may bind a large number of parties *abroad* without their explicit consent (that is, except if the parties enter the proceedings or send an opt-out declaration in time),[74] even if the national legal system of the claimant and/or liable party does not allow for a loss of claim without an individual court procedure.[75] Because of the pressure on the Dutch judiciary and in view of this criticism, the emergence of Dutch courts as a forum in which parties can settle cross-border mass claims should be restrained.

c) Funding issues and (possible) freeriding

From the perspective of the consumers and the *Consumentenbond*, the funding in the Dexia-case was successful, and this success can be

[70] Ianika Tzankova and Eric Tjong Tjin Tai – with support from Karlijn van Doorn, http://www.collectiveredress.org/collective-redress/reports/thenetherlands/thecollectivesettlement.

[71] Ruud Hermans and Jan de Bie Leuveling Tjeenk, 'International Class Action Settlements in the Netherlands since Converium', *The International Comparative Legal Guide to: Class & Group Actions 2013*, p. 10 (§ 40).

[72] ECLI:NL:GHAMS:2012:BV1026 (Converium).

[73] Carla Klaassen, 'De rol van de (gewijzigde) WCAM bij de collectieve afwikkeling van massaschade 'en nog wat van die dingen', *Ars Aequi* (2013), p. 637. See also Astrid Stadler, 'The Commission's Recommendation on common principles of collective redress and private international law issues', *Nederlands Internationaal Privaatrecht*, Vol. 4 (2013), p. 485.

[74] ECLI:NL:GHAMS:2012:BV1026 (Converium).

[75] Ianika Tzankova and Eric Tjong Tjin Tai – with support from Karlijn van Doorn, http://www.collectiveredress.org/collective-redress/reports/thenetherlands/thecollectivesettlement.

explained by the fact that many consumers have been willing to contribute to the litigation fund, and to the collective resolution of the matter. The question arises whether the Dexia-success will repeat itself.[76] Consumers might think they will benefit from the initiated actions anyway and become 'freeriders'.

Legal aid, legal expense insurance and third party funding were all used in the Dexia-case. Third party litigation funding (TPF)[77] is underdeveloped in the Netherlands. It is criticised for having a potentially negative impact on how the consumers' interests are being defended but the first two types of funding are not always available. The question however is whether a mass consumer damages case is 'interesting enough' for TPF.

2. The remaining shortcomings: where the WCAM fails

a) Success is relative: no settlements of mass low-value damages

The success of the WCAM lies in the number of claimants and overall amount of damages awarded. Damages have however only been awarded in a few cases. In view of the diversity of unfair or unlawful commercial practices and the high number of (mostly low-value) damage cases, the relative share of the WCAM in the enforcement of consumer rights remains relatively small. The Dexia consumer securities lease case was the only 'consumer' case: this case pertained to financial damages suffered by individuals as a result of allegedly misleading information provided by Dexia Bank regarding certain of its financial products.[78]

Only seven applications have been brought to the court since the WCAM's inception. Why is that? The first reason appears to be that there are not many claims involving a significant number of individuals. Second, not all claims involving a significant number of individuals need to recourse to the specific WCAM procedure. Some can be settled with a common settlement agreement (in particular when not too many

[76] Ianika Tzankova, 'Funding of Mass Disputes: Lessons from the Netherlands', 8 *J.L. Econ. & Pol'y* (2012), p. 589.

[77] A third party pays the costs of litigation and in return, if the case succeeds, receives a percentage of the proceeds: Ianika Tzankova, 'Funding of Mass Disputes: Lessons from the Netherlands', 8 *J.L. Econ. & Pol'y* (2012), p. 556-557.

[78] The Vie d'Or-case regarding financial loss allegedly suffered by life insurance policy holders as a consequence of the bankruptcy of a life insurance company did not pertain to consumer law.

individuals are involved).[79] Therefore not all settlements are subjected to a WCAM proceeding.[80] Furthermore, the WCAM only applies where a settlement has been reached with a representative party, and this is a further barrier (section V.2.b)).

Many (I would even dare say most) breaches of consumer protection laws lead to dispersed trifle losses where the possible benefits of claiming are outweighed by the transactional cost of pursuing a complaint and trying to reach a settlement. The WCAM has never been used in real large-scale low-value damage cases where diffuse consumer interests are involved. The incentive for consumers to organise themselves is low and if special purpose vehicles see the light of day, consumers might not be willing to contribute to their funding in view of the low value of their claim and because they expect others will 'pay' (section V.1.c)). The risk of freeriding is reinforced by the small value of the damages. There are, however, a few examples of collective redress actions based on art. 3:305a Cc that relate to what can be seen as low-value damages (cf. the state lottery and minute-billing cases).

b) The reluctance to negotiate

The low success rate of the WCAM in consumer cases also lies in the reluctance of major companies to recognise their liability and to negotiate compensation without a threat of litigation. One of the shortcomings of the WCAM is its voluntary nature. Potential liable parties are not always willing to negotiate a collective settlement agreement. If one of the parties denies liability or disagrees on key legal issues, it is difficult to reach a settlement.

The readiness to negotiate may increase if both parties know as early as possible what their chances are in the process. To this end, preliminary referrals to the Dutch Supreme Court are now possible (since July 2012). Another way to increase the preparedness to negotiate is the pre-procedural hearing that has been introduced by the amendment of the WCAM. If a person held liable under an article 3:305a Cc-procedure refuses to enter into negotiations about a mass damages claim, Dutch law provides for a mechanism to force that person to appear before the court in a so-called pre-hearing. Where parties do not manage to come to an agreement, one or more of the parties may request that the competent court holds a pre-trial meeting. The purpose of such a hearing is to support the parties in their negotiations, for example by assisting in the formulation of the settlement agreement or encouraging the appointment of an expert in a particular field. The (supporting) role of the courts in making the agreement binding is considerably increased.

However, no mechanism exists under Dutch law to force a person held liable to actual collective redress of a mass damages claim. There is still no possibility for interest groups to bring claims for damage compensation on behalf of consumers. In the event that the (potentially) liable parties do not consent to a collective settlement or fail to achieve such a settlement there is no 'stick' at hand. The WCAM-solution remains restricted to cases where parties were able to achieve a settlement. Thus, in large-scale low-value cases where individuals would not sue in court, a settlement may not be reached.

c) A suboptimal compensation: the many opt-outs in the Dexia-case

If the parties are willing and able to reach a settlement agreement, the result might not be optimal for the harmed consumers. A settlement will normally not result in full compensation of the losses as originally presented by the claiming parties. In fact, settlements, as in the Dutch system, always represent a compromise between the parties so that the payable amount is generally less than full compensation.

The Dutch country study has revealed that in the Dexia-case some of the individual claimants who have opted out from the settlement (and have continued individual litigation) are most likely to obtain better compensation than those victims who have decided not to opt-out. The settlement was criticised for being unfavorable for consumers with spouses who were not aware of the contracts.[81] More than 20,000 consumers opted out from the collective settlement (leading to the above-mentioned test-cases in order to obtain some guidance as to how to resolve those cases out of court). The settlement reached by the *Con-*

[79] Ianika Tzankova and Eric Tjong Tjin Tai – with support from Karlijn van Doorn, http://www.collectiveredress.org/collective-redress/reports/thenetherlands/thecollectivesettlement.

[80] Willem van Boom, 'Recente ontwikkelingen in de collectieve private handhaving', in Marco Loos and Willem van Boom, *Handhaving van het consumentenrecht (preadviezen Vereniging voor Burgerlijk Recht 2009)* (Deventer: Kluwer) 2010, p. 170-171.

[81] Ianika Tzankova, 'Funding of Mass Disputes: Lessons from the Netherlands', 8 *J.L. Econ. & Pol'y* (2012), p. 578.

sumentenbond was criticised for not being optimal and it has become quite cautious in taking the lead in subsequent actions. It might not be willing to act in the future.[82] Special purpose vehicles will have to see the light of day.

3. Conclusion

The amendments to the WCAM have only partially solved the problem of 'the market for lemons' and that of the missing 'stick'. Nonetheless, many problems still need to be addressed. These amendments however are only the first step in a two-step reform of the Dutch collective redress mechanism giving effect to the '*motie Dijksma*'.[83] The second step consists in the introduction of collective compensatory redress for mass damages.

VI. The future of collective redress in the Netherlands? The (preliminary) draft bill mass damages claims [84]

1. A solution for problems left open by the WCAM amendment

The Commission Recommendation encourages Member States to move forward with class action legislation.[85] A consultation has taken place this summer regarding a draft proposal that amends Dutch law to allow representative actions for damages. It may look as if the Dutch legislator follows the European Recommendation. This draft bill however results from the '*motie Dijksma*' which preceded the European recommendation and goes back to 2011. The need for a compensatory redress mechanism was widely felt in the Netherlands but so was the

[82] Ianika Tzankova, 'Funding of Mass Disputes: Lessons from the Netherlands', 8 *J.L. Econ. & Pol'y* (2012), p. 577. See also: Ianika Tzankova, 'Resolving Mass Claim Disputes in Europe: Lessons from the Netherlands', *IADC Newsletter*, February 2013.

[83] An MP, Mrs. Dijksma has urged the government to amend the law in 2011.

[84] This paragraph is largely based on the Explanatory memorandum that has been accessible online since July 7 2014: `https://www.internetconsultatie.nl/motiedijksma`.

[85] For now the Commission has decided not to introduce legislation on collective redress.

concern about the negative consequences to which the existence of such a mechanism might lead. Therefore, the draft bill presented in this consultation tries to strike a balance between a better access to justice in a mass damages claim and the protection of the justified interests of persons held liable. It aims at enhancing the efficient and effective redress of mass damages claims and at preventing meritless or unfounded claims at the same time.

a) A 'stick'

First, this new bill provides the aggrieved parties with the desired 'stick' to, if so needed obtain compensation by a court ruling. This new procedure can be used in cases where the parties are reticent (consumers) or reluctant (businesses) to join a collective settlement or not able to achieve a settlement. It introduces a threat of litigation to create an incentive to settle.

b) A scope rule

Second the draft bill aims at preventing procedures that are not sufficiently connected to the Netherlands. A new scope rule that purports to avoid forum shopping will be introduced. The Dutch court is competent if at least one of the following conditions is fulfilled:

a. those against whom the action is directed are domiciled in the Netherlands;

b. the majority of the people for the protection of whose interests the action is instigated, has its habitual residence in the Netherlands;

c. the event or events to which the claim relates, have taken place in the Netherlands.

This new scope rule is stricter. The requirement will not necessarily be met if the foundation or association representing the interested persons is a Dutch entity as is now the case.

c) Even stricter standing requirements

Third, the draft proposal aims at further increasing the legitimacy, transparency and accountability of representative organisations in order to prevent a 'market for lemons' and to counter the risk of abusive

litigation. When it comes to claiming damages, consumers must be certain that their interests are effectively being warranted by a representative organisation and professional parties must be protected against frivolous claims by claims vehicles.

The standing requirements have again been tightened (section V.1.a)). There is no separate representativeness-requirement (other than in the WCAM application proceeding) but this requirement is embodied in the second paragraph of art. 3:305a Cc. Art. 3:305a(5) Cc contains five new legal standing requirements partly inspired by Rule 23 of the US federal rules of civil procedure (e.g. the fair and adequate representation-rule (g)(4), the predominance- and superiority- (b)(3)[86] and the numerosity-requirement (a)(1)[87], (b)(3)).[88]

2. A five stage procedure

The draft proposal contains a five-stage procedure for a collective damages action before the Dutch district court. The draft proposal concentrates the know-how within one court. It is not clear yet which court will be the competent court on collective damages claims. The procedure is applicable to all kinds of claims, not only claims based on consumer or competition law.

a) The first stage – the admissibility test

The first step entails an admissibility test. Legal entities can start a collective damages action on behalf of a group of persons as long as they fulfill certain specific requirements (section VI.1.c)). The requirements relate to the expertise regarding the claim, adequate representation and the safeguarding of the interests of the persons on whose behalf the action is brought. The legislator did not opt for designation or certification of representative entities (cf. the Commission Recommendation, nr. 6).

The group of persons on whose behalf the entity brings the action must be of a size justifying the use of the collective damages action. It however is unclear which size would justify the use of a collective

[86] *'the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy'.*

[87] *'the class is so numerous that joinder of all members is impracticable'.*

[88] Explanatory Memorandum, p. 20-21.

damages action. Another requirement is that those persons must not have other efficient and effective means to get redress. Presumably, the individual enforcement of consumer rights will not readily be deemed efficient or effective. What is more, the representative entity must have tried to obtain redress from the person held liable amicably. A period of two weeks after the defendant has received a request for such consultations, indicating what is claimed, will not necessarily be deemed sufficient to this end. The entity, however, is still not obliged to reveal the identity of the individuals on whose behalf it acts.

b) The second stage – a declaratory judgment

If the court is satisfied that all the above-mentioned requirements have been met, the court will give its judgment on the liability of the defendant. This judgment basically boils down to an art. 3:305a Cc-judgment (section III.1). A court will more specifically tackle those legal issues on which the parties disagree (this would have become clear during the amicable negotiations preceding the court action). The legal debate on damages and the collective redress thereof is only allowed if the court finds that the defendant can be held liable.

c) The third stage – the hearing of the parties at request of one or both parties

Third there is a hearing of the parties in which the court tries to help them to reach a collective settlement of the mass damages claim. A settlement remains the goal of this procedure. If the parties succeed, they may choose to ask the Amsterdam Court of Appeal to declare this settlement binding in relation to the entire group of harmed persons. Up until this stage the procedure does not intrinsically differ from the WCAM-procedure.

During stage three, the court may seize the opportunity to discuss and decide on the legal points which prevent the parties from reaching a settlement and how to solve those (in addition to his ruling in the second stage). In fact parties will have to try to settle under the court's auspices. The court may refer the parties to mediation if it thinks this might help them to reach a collective settlement of the mass damages claim.

d) The fourth stage – the submission of a proposal by the parties

If at this stage no collective settlement has been reached, the court may invite the parties to submit a proposal for a collective settlement of the mass damages claim. Parties will however only be invited to do so insofar as they are really committed. Each party may submit its own proposal and each proposal must be based on damage-scheduling and should, where possible, start from the consensus the parties have reached at the previous stages of the procedure. The court may (once again) refer the parties to mediation to discuss any divergences in their respective proposals in order for the parties to reach a collective settlement.

e) The fifth stage – the establishment of a scheme for collective redress by the court (an ultimum remedium)

If mediation fails or if the court has decided not to refer to mediation (because it does not deem this useful) the court may establish a scheme for collective redress of the mass damages claim. The court will preferably base its scheme on the damage-scheduling proposals produced and submitted by the parties. An expert may be appointed to advise on the damage-scheduling.

In order to warrant that the scheme to be established by the court is an effective mechanism to solve the mass damages claim, the court may order the parties to ask the persons belonging to the group of persons for whom the scheme is to be established, to submit a statement of participation (opt-in) to the court before the scheme is established. If the court finds that the number of participants is too small to justify the establishment of a scheme, it may refrain from establishing one. A court will only in extreme cases decide on proposals from the parties to collectively settle similar claims. No appeal can be lodged against the scheme established by the court.

The scheme as established by the court can be declared binding upon a WCAM-application (leading to an opt-out mechanism). The parties must inform the court of any collective settlement reached and of their intention to submit an application to the Amsterdam Court of Appeal under the WCAM. If the parties waive this possibility, the court will order the parties to announce the collective settlement in a suitable way in order for victims to opt-in.

3. Critical appraisal of the draft proposal

Does the draft bill manage to address the complexity of collective compensatory redress and the different interests involved? Not surprisingly, the Dutch Association of Listed Companies, the US Chamber Institute for Legal Reform (ILR), the Confederation of Netherlands Industry and Employers all reacted negatively to the draft bill. The majority of respondents however gave a more nuanced view of the proposal. They do not reject the idea of a collective damages action but see much room for improvement. Only a handful is largely positive. Most respondents to the consultation have put forward constructive criticisms.[89] In the next section I will elaborate on these critical remarks and assess whether the draft bill acknowledges the problems that were left open by the 2013 amendment of the WCAM. The source of the remarks will be mentioned between brackets.

a) Enough is as good as a feast

Firstly the procedure is likely to have the opposite to the desired effect of preventing blackmail settlements and encouraging consumer claims (cf. Council for the Judiciary). At the core of this criticism is the length of the procedure that is considered opaque and labour-intensive. Many respondents predict that the costs of the procedure will spiral out of control.[90]

The procedure contains many duplications and redundancies. Doubts have for example been cast on:

- the added value in the first stage of some of the new (sometimes overlapping) standing requirements in view of the recent addition of quality requirements by the amendment to the WCAM (cf. Dutch Association for the Judiciary, section V.1.a)).[91] Standing requirements are of paramount importance and their added value should be stressed but in view of the amount and vagueness of the new requirements (cf. the Council for the Judiciary, the Dutch Shareholders Association and the Foundation for the Settlement of Collective Damages) this full quality assessment is expected

[89] https://www.internetconsultatie.nl/motiedijksma/reacties.

[90] These costs are soared by the choice for a 'petition'-procedure (cf. the Council for the Judiciary).

[91] Explanatory Memorandum, p. 20.

to be laborious and unworkable. A more fundamental question is whether it is for a court to assess the quality of representative organisations and the way they are financed.[92] A system of designation/certification might be recommended.

- the added value of the court ruling in the second stage where parties have already walked down the path of art. 3:305a Cc (and obtained a declaratory judgment, section 3.1)[93] and the added value of the third stage addition to the ruling in the second stage insofar as the court would still not be able to decide on contentious individual issues such as the nature and extent of damage and causation (cf. the Defence council).

- the added value of the fourth stage in view of the third stage (cf. *Consumentenbond* and the Dutch Shareholders Association even suggest stage 3 and 4 should be skipped if parties are unwilling to cooperate). I do not think both stages should then be left aside but I am definitely not convinced that a mediator is a solution at this stage if its interference has not been meaningful before. Mediation is moreover quite expensive and must never be an obligation in view of art. 6 ECHR. Showing enough commitment and time spent on mutual consultations are already part of the standing requirements.[94] More in general: the court can exert a lot of pressure on the parties to force them to deliberate and negotiate. The whole draft bill is very typical of the Dutch Polder Model – the Dutch version of consensus-based economic and social policy making.

b) Opt-in and/or opt-out?

The proposal does not make a clear choice between an opt-in and an or opt-out mechanism (cf. the Foundation for the Settlement of Collective Damages). The opt-in mechanism does not fit in with the principled preference for opt-in expressed in the Commission Recommendation (nr. 21) as it concerns a *late* opt-in (in the fifth stage!). What is more, a court has the *choice* not to ask for an opt-in. If it looks like parties will bring a WCAM-application, the court might waive this possibility (in order to avoid the accumulation of opting mechanisms).[95]

Freeriding is thus very likely to occur (even though the opt-in takes place before the court takes its final decision) since there is no opt-in at the *start* of the proceedings. Potential claimants may await the outcome of the proceedings before stepping in. The question however arises as to how much information these potential claimants will receive when being asked to opt-in: will they receive information about the proposed schedules or about the scheme developed by the court (cf. the Dutch Association for the Judiciary)? Unclear is whether this late opt-in mechanism is even necessary in view of the numerosity-requirement in the first stage and the complexity and length of the procedure (cf. DLA Piper, cf. section VI.3.a)).

c) Compensation for trifle losses and low value damages?

It is doubtful whether the new procedure is suitable for the enforcement of small and minor damages claims (section V.2.a)). The explanatory memorandum stresses that this action is well adapted to those types of claims.[96] This assumption is based on research conducted in 2009.[97]

The proposed procedure however appears to be very expensive due to its length and complexity (section VI.3.a)). The several measures that aim at reducing the risk of frivolous litigation reduce the possibilities for consumers to start an action. The complicated opt-in or mechanism is for example to the detriment of consumers (and because of its timing not even effective to combat freeriding, cf. *Consumentenbond*, cf. section VI.3.b)).

The availability of funding also remains a problem (sections V.1.c) and V.2.a), cf. Bentham Europe limited and the Foundation for the Settlement of Collective Damages). The proposal does not indicate how to (securely) enhance this type of financing. TPF is needed for

[92] Evaluating the admissibility of the financial set up of the action is a complicated and time-consuming task.

[93] Explanatory Memorandum, p. 37.

[94] The Dutch Shareholders Association wisely advises to postpone this requirement to the start of stage 3: since the standing requirements for a 'simple' collective declaratory redress procedure are less strict, claimants are likely to opt for this procedure to obtain a ruling of wrongfulness.

[95] Explanatory Memorandum, p. 48.

[96] Explanatory Memorandum, p. 3-4. The Dutch Association for the Judiciary has noticed that the possibility of scattered damages claims can have huge implications from an insurance point of view (as defendants currently do not take this possibility into account) and pleaded for adequate transitional arrangements.

[97] *Strooischade: Een verkennend (rechtsvergelijkend) onderzoek naar de mogelijkheden tot optreden tegen strooischade* (full text only available in Dutch): `http://www.tweedekamer.nl/kamerstukken/detail?id=2010D39312\&did=2010D39312`.

different reasons: consumers are either incapable of financing legal proceedings (the renovation of the subsidised legal assistance system does not bode well for consumers)[98] or unwilling to do so (because the costs outweigh the amount at stake; genuine freeriding is possible too[99]). It goes without saying that TPF should be subjected to criteria that warrant the claimants' interests and prevent abusive litigation at the same time. Criteria that protect defendants against abuses however often go against the interests of the claimants.

The bill as it stands contains provisions (such as the obligation to give the court insight in the financing structure of the representative organisation[100]) which tend to discourage TPF (cf. Barents Krans). The commercial interest in the outcome does in my opinion not constitute a problem if it ensures that consumers have better access to justice. As long as consumers receive a reasonable proportion of the damages they incurred, special interest groups should be allowed to commence proceedings 'on a commercial basis'.[101]

At first sight, the risk of frivolous litigation is fairly small (cf. the Dutch Shareholders Association and Eumedion) as the Dutch legal system lacks the features that can lead to excesses such as blackmail settlement and unmeritorious claims. Dutch law for example does not allow for punitive damages, it only allows penalty clauses to aid in enforcement of the obligations of the agreement.[102] The new procedure is directed at a settlement based on damage-scheduling proposed by the parties: it will only be used where parties have seriously tried to but did not succeed in reaching an agreement. And under Dutch law, the loser pays (although the award of costs to the winning party will enable it to recover only a small percentage of its actual costs).

[98] And legal aid is not directly available to special purpose foundations: Ianika Tzankova, 'Funding of Mass Disputes: Lessons from the Netherlands', 8 *J.L. Econ. & Pol'y* (2012), p. 589-590.

[99] An early opt-in would lower the risk of freeriding but consumers might not want to invest in proceedings anyway since these costs might be disproportionate to the amount at stake.

[100] It is the responsibility of the court to evaluate the admissibility of the financial set up of the action.

[101] In the Dutch State Lottery case it was agreed that, in case of success, the participants will receive 80% of the damages, and 20% will be kept by the company that was the founder and director of the Foundation that started the procedure.

[102] The door has been opened to the use by lawyers of contingency fees in the Netherlands. The new law has however been limited to the individual relation between a client and his lawyer and will for the time being not apply to the collective damages claim: Explanatory Memorandum, p. 15.

The ILR and the Confederation of Netherlands Industry and Employers are nonetheless convinced that the risk of frivolous and abusive litigation is very real. They argue in favour of essential safeguards such as those included in the Commission Recommendation (e.g. an early opt-in, designation and certification of representative organisations, restriction of TPF). The legislator must keep in mind that any tightening of the procedure rules will hinder the accessibility to the procedure for consumers. If the legislator chooses to add safeguards against frivolous litigation, he should opt for those safeguards that have the least impact on this accessibility.

d) Checks and balances – the review of the scheme established by the court.

At first glance the proposal does not provide any guidance as to how the court can establish a damage-schedule on its own. If the parties choose an opt-out solution, the Amsterdam Court of Appeal will have to 'approve' the settlement agreed under guidance of the competent court (section IV.3). According to the legislator, the judicial review of a court scheme will only be a marginal one (instead of a full fairness assessment).[103] As I explained before (section IV.3.b)), the assessment of settlement agreements already bears a marginal character.[104] This is problematic given the fact that the collective redress scheme established by the judiciary cannot be appealed: the marginal assessment constitutes the only review of the court's decision. Moreover the proposal does not state anything on the consequences of a rejection of a WCAM-application (cf. the Council for the Judiciary). What would this mean for the legality of the scheme?

Another point of criticism bears upon the concentration of the damages claim procedures within one court and the role of this court as both case manager and final ruler.

[103] Explanatory Memorandum, p. 25 and 47. The question was raised why the collective mass damages claim and the WCAM-application were not combined within one jurisdiction (cf. Dutch Association for the Judiciary).

[104] Carla Klaassen, 'De rol van de (gewijzigde) WCAM bij de collectieve afwikkeling van massaschade 'en nog wat van die dingen', *Ars Aequi* (2013), § 4.1.

e) No forum shopping?

Lastly, the effectiveness of the scope rule (section V.1.b)) has been called into question. The first requirement (the defendant must be domiciled in the Netherlands) remains quite broad.[105] It looks like the fact that (a branch or subsidiary of) a company has a location in the Netherlands would suffice to grant jurisdiction to the Dutch courts. The Dutch banking association and ILR suggest making the three requirements (the other two being that the majority of the claimants have their ordinary residence in the Netherlands and that the event giving rise to the claim occurred in the Netherlands) cumulative. The proposal should also clarify how the scope rule fits in with IPL rules (cf. DLA Piper and ILR).

VII. Conclusion – new developments in litigation funding and a plea for public law solutions

The draft proposal pays insufficient attention to the problem of the (third party) funding of collective redress (the court must decide on the admissibility of TPF in a peculiar case, section VI.3.c)). The draft statement of ELI on Collective Redress and Competition Damages Claim stresses the need to explore *new funding techniques* such as crowdfunding.[106] The Dutch example of Crowdsuing is quite interesting in this respect.[107] This particular initiative aims at enabling collective actions by raising money on behalf of the group that wants to start proceedings against a multinational in order to change its behavior. Crowdsuing is a moderating organisation (a so-called 'platform') that brings the parties together to launch the idea. Individuals, organisations, lawyers can propose the case to be funded. At least 1000 people need be affected. Individuals can support the initiative by funding it without having any legal interest in the outcome. The platform purports to attract funding from people outside the circle of people who are directly affected by the practice. The foundation Crowdsuing will

[105] The Dutch Shareholders Association on the other hand deems the scope rule too strict.

[106] ELI, Draft Statement, p. 9, 28.

[107] http://www.mr-online.nl/juridisch-nieuws/24073-crowdsuing-rechtszaken-bekostigen-via-crowdfunding.

then start the proceedings.[108] Before starting raising the money, affiliated lawyers will evaluate the chances of success. If a case is abandoned the donations will not be returned and will be used for new proceedings. Lawyers will be paid whatever the outcome of the proceedings (as opposed to class actions).

For the time being the collective enforcement of consumer rights still fails when it comes to compensation of low-value damages (lower internet speed than advertised, a switch to minute-billing by a mobile phone provider or expensive customer services phone lines).[109] The draft bill on mass damages claims tries to strike the balance between consumers' and traders' interests. It however proves impossible to reconcile such diverging interests. Preventing abusive litigation is crucial but strict rules might discourage the forming of interest groups and the funding of typical consumer – low-value – damages actions. As it stands, the new action will not facilitate the compensation of trifle losses (in which the WCAM already proved unsuccessful). And even if the procedure is simplified, it will still set high thresholds to the collective enforcement of consumer rights in order to counter the threat of abusive litigation. The gap left by failing private enforcement should in my opinion be filled by public enforcement. Public compensation following the Australian example should be a serious option. This option entails that public (supervisory) entities can 'claim compensation' on behalf of consumers.[110] Another less far-reaching possibility would be to allow 'collective follow-on actions'.[111] The 2009 research on small and scattered damage in the Netherlands has explored these and other[112] public alternatives to collective private compensatory redress and came

[108] Crowdsuing.nl does however not intent to resolve claims by means other than litigation and is not prepared to negotiate and to accept mediation. This stance is completely out of line with the law. Before starting a collective action, the legal entity must have attempted to reach its goal by discussion out of court (art. 3:305a(2) Cc). The new law even makes (a try at) mediation compulsory.

[109] See for more examples: Willem van Boom, 'De Minimis Curat Praetor – Redress for Dispersed Trifle Losses', *Journal of Comparative Law*, Vol. 4 (2009), p. 173.

[110] Cf. the Australian compensation orders for non-party consumers on application by regulatory authorities: ACL pt 5-2 Div 4 s. 239-241.

[111] Cf. the Commission Recommendation, nr. 33-34; ELI, Draft Statement, p. 50; Willem van Boom, 'De Minimis Curat Praetor – Redress for Dispersed Trifle Losses', *Journal of Comparative Law*, Vol. 4 (2009), p. 182-184.

[112] Such as duties to compensate damage enforceable under public law or the authority to demand the transfer of profits.

to the conclusion that supervisory entities can effectively tackle small damage.[113] The draft bill did however not pick up on these findings.

[113] *Strooischade: Een verkennend (rechtsvergelijkend) onderzoek naar de mogelijkheden tot optreden tegen strooischade*, p. 20 (full text only available in Dutch): http://www.tweedekamer.nl/kamerstukken/detail?id=2010D39312&did=2010D39312

Public litigation in Sweden

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