Europe *Netherlands*

The wait is over: collective actions for damages are here

On 19 March 2019, the Dutch Senate finally approved legislation introducing collective damages actions in the Netherlands (the "Legislation"). This introduces the option to claim monetary damages in a "US style" class action.

Collective Action For Damages

When the Legislation will enter into force has not yet been determined. Its scope has, however: it will apply to harmful events which took place on or after 15 November 2016.

The key features of the Legislation are:

- An option to claim monetary damages in a collective action on an opt-out basis. The Legislation lifts the current prohibition on representative organisations claiming monetary damages in a collective action. The proposed action can either result in a judgment in which the court will award damages or in a collective settlement held to be binding by the court.
- The Dutch legislator chose an opt-out mechanism, inter alia, because this will create closure for the defendant – preventing new collective actions being brought on the same facts and about the same legal issues once a collective action has finished. Initially, the legislator had international ambitions; the draft legislation did not limit the size of the (opt-out) class. Provided the scope rule (see below) was met, the class could include international class members. But after some heavy criticism, the Dutch legislator decided on an amendment to limit the class to Dutch class members only, giving foreign class members the opportunity to opt in. No rule without an exception: upon request by one of the parties, the court may also apply the opt-out regime to those foreign class members who are "easily identifiable".
- An "exclusive representative" can be appointed if there is more than one collective action organisation seeking to bring an action for the same circumstance(s), on similar points of law and fact. This compares with a "lead plaintiff" in the USA. The exclusive representative will litigate on behalf of all collective action organisations involved in the procedure. This means it will be important for the organisations to coordinate with each other. After the appointment of the exclusive representative, class members can opt out.
- Once the exclusive representative is appointed, the court will set a period for the parties to try to negotiate a settlement agreement. If a settlement agreement is reached and declared binding, there's a second opt-out opportunity for class members. If no settlement agreement is reached, the proceedings will continue.
- However, if, at some point in the proceedings, the court deems it appropriate, it can order the parties to file a settlement proposal. On the basis of this proposal, the court can determine the amount of compensation to be paid. The possibility of reaching a settlement is laid down in the collective action for damages procedure.
- Enhanced standing and admissibility (eg in terms of governance, funding and representation) are introduced for collective action organisations. These will be assessed at an early stage of the proceedings (comparable to the US "motion to dismiss"). Among other actions, the collective action organisations must appoint a three-headed board, a supervisory board and an accountant. In addition, each collective action organisation needs to have a website and communicate with its stakeholders. The persons behind the organisation are not allowed to make a profit.
- One of the admissibility requirements is that the action must have a sufficiently close connection with the Dutch jurisdiction (the so called "scope rule"). This connection will exist if any of the following conditions are met:
  - the majority of the individuals on whose behalf the collective action is initiated reside in the Netherlands
  - the defendant resides in the Netherlands or
  - the circumstance(s) on which the collective action is based took place in the Netherlands.

At the final moment, an amendment was filed by a few members of parliament to prevent this scope rule from leading to an upsurge in collective actions against Dutch companies. The Legislation now states that if the connection is based on the condition that the defendant resides in the Netherlands, to fulfil the requirement of "a sufficiently close connection", the circumstances should also indicate a connection with the Dutch legal sphere. To be assessed by the court in each action, this could be the case if the revenue of a large multinational passes – to a significant extent – through its Dutch subsidiary.

- As well as mandating requirements for the collective action organisation, the Legislation also introduces requirements for the action itself. To proceed, a collective action must be shown to be more efficient and effective than initiating individual claims, because (i) the factual and legal questions to be answered are sufficiently common (ii) the number of persons whose interests are protected by the claim is large enough and (iii) if the claim (also) relates to the award of damages, these persons alone or together need to have a sufficiently large financial interest.
- The Dutch government anticipates an increase in third-party litigation funding. The Legislation gives the court the opportunity to ask the claim vehicle to substantiate that it has sufficient means to finance the collective action. The court will also assess whether the claim vehicle has sufficient control over the claim. The funder may not, for example, decide whether or not the claim vehicle should enter into a settlement. Finally, the court will establish that the claim is not prima facie unfounded. To prevent nonsense claims, the Legislation – by way of a last-minute amendment – provides that the court can order the plaintiff to pay five times the normal court-approved scale of costs if the claim does not pass the prima facie unfounded-test. This cost order is still far from the "loser pays all" principle, but it's more than can be awarded under normal circumstances.

Carlijn Van Rest
Counsel, Amsterdam
T +31 20 55 33 635
carlijn.vanrest@hoganlovells.com

Bas Keizers
Associate, Amsterdam
T +31 20 55 33 760
bas.keizers@hoganlovells.com