

An update on the proposed introduction of a Collective Action for Damages in the Netherlands

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In November 2016, the Dutch Ministry of Security and Justice submitted unique draft legislation introducing collective damages actions in the Netherlands (the "Draft Legislation"). The Draft Legislation introduces an option to claim monetary damages in a 'US style' class action. In January 2018, some fundamental amendments to the Draft Legislation were made.

History of Collective redress

The Netherlands has a longstanding practice of collective redress with two statutory collective redress procedures. The first procedure is a representative collective action which can be used by a foundation or association on behalf of interested parties in order to obtain a declaratory judgment against a third party. The second statutory procedure enables a collective settlement of mass damages' claims on an opt-out basis allowing a potential worldwide class (i.e. the class is not limited to Dutch members).

What makes all (existing and proposed) collective redress procedures in the Netherlands unique within Europe is that the use is not restricted to a specific type of damages. Sometimes driven by foreign plaintiff firms and often funded by foreign litigation funders, the procedures are often used as a supplement to a US class action.

The November 2016 Draft Legislation

The key features of the November 2016 Draft Legislation are:

- The draft introduces an **option to claim monetary damages** in a collective action on an opt-out basis. The Draft Legislation consequently 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 for an **opt-out mechanism, inter alia**, because this will create closure for the defendant. It will prevent new collective actions being brought on the same facts and regarding the same legal issues, once a collective action has finished.
- **Enhanced standing and admissibility** (e.g. in terms of governance, funding and representation) will be introduced, which will be assessed at an early stage of the proceedings (comparable to the US 'motion to dismiss').
- 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:
 - o if the majority of the individuals on behalf of whom the collective action is initiated reside in the Netherlands;
 - o if the defendant resides in the Netherlands; or
 - o if the circumstance(s) on which the collective action is based took place in the Netherlands.
- An **Exclusive Representative** can be appointed if there are more than one collective action organisations wishing to bring an action for the same circumstance(s) on similar points of law and of fact. This compares with a Lead Plaintiff in the USA.

Some key amendments of January 2018

In March 2017, the Dutch government tendered its resignation and the Draft Legislation was declared contentious. After the new government came into power, certain important amendments were made to the draft Legislation in January 2018 (the "**Amendment**").

The key changes of the Amendment are:

- **The class will in principle be limited to Dutch class members.** Initially, the Dutch legislator had international ambitions: the November 2016 version of the Draft Legislation did not limit the size of the (opt-out) class. Provided the scope rule was met, the class could consist of international class members. 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'.

- A **second opt-out option** will be introduced where a settlement is reached. In the November 2016 version of the Draft Legislation, there was only one opportunity for class members to opt out: after the appointment of the Exclusive Representative – therefore at an early stage of the proceedings. In the Amendment, a second opt-out option is introduced after the Court's approval of the settlement agreement.
- Collective actions may be filed at **all Dutch District Courts** and the Amendment provides that the Amsterdam District Court no longer has exclusive jurisdiction. Initially, the general opinion was that it would be preferable if there were only one specialized court for these specific collective damages actions.

Next steps

The Draft Legislation still needs to go through two chambers of Parliament. On 12 February 2018, additional questions were posed by Members of Parliament with respect to the Draft Legislation as amended. After these questions have been answered, a public debate will follow in the House of Representatives.

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