Class action developments in the Netherlands

Estelle Hurter[*]

1 Introduction

Currently, the European Union (EU) is grappling with the question of whether to consider mechanisms of collective redress as a remedy to the shortcomings of the enforcement of EU law that have become more pronounced with the enlargement of the EU.[1] Although mechanisms for collective redress developed in most European Member States from the 1960s to the 1990s, this occurred at the individual, national level. The reason for these developmental differences can be found in the different historical circumstances that produced the various mechanisms,[2] with the result that no coherent European framework exists and mechanisms differ widely from Member State to Member State.[3]

The collective mechanisms employed in the United States (US) judicial system (notably the class action and contingency fees) are unacceptable to the EU, and the application thereof in any form is met with resistance.[4] Thus, it is safe

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[*]BA LLM LLD, Professor of Law, Department of Criminal and Procedural Law, University of South Africa.

[1]See 'Towards a coherent European approach to collective redress', Commission Staff Working Document SEC (2011) 173 final (2011-02-04) para 3-6.

[2]Hodges 'From class actions to collective redress: A revolution in approach to compensation' (2009) 1 *CJQ* 43.

[3]Hodges *The reform of class and representative actions in European legal systems* (2008) 9-15; (N 1) para 21-22; Cseres 'Enforcement of collective consumer interests: A competition law perspective' in Van Boom and Loos (eds) in *Collective enforcement* (2007) 174.

[4]See eg 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union' (2008) available at http://ec.europa.ec/consumers/redress_cons/collective_redress_en.htm#Studies (accessed 2011-02-22); Draft Report 'Towards a coherent European approach to collective redress' (2011/2098 (INI)), Commission of Legal Affairs para D2. Collective redress is not a completely new concept in EU law, as provision is made for collective injunctive relief in consumer and environmental law (see Directive on Injunctions *OJ*, L166 of 1998-06-11), and some States have compensatory relief in some areas: *ibid*. See also Discussion Paper, The Directorate-General for Health and Consumer Affairs of the European Commission (DG SANCO) (undated), drafted to serve as basis for discussion at the hearing on collective redress on 2009-05-29 para 5-7. The Commission is still examining more than 20 000 responses to its consultation, and

to expect that, generally speaking, the US influence will be minimal in developments in individual Member States as well. A notable exception in this regard is The Netherlands and therefore the collective redress developments in that jurisdiction are of particular interest. The Dutch collective procedures are seen not only as the most effective mechanism evaluated in terms of direct benefit to affected consumers,[5] but are also unusual in respect of procedural features. The Dutch approach does not appear to have much in common with the uncompromising EU view on the US-style class action,[6] is more pragmatic and has in fact openly acknowledged American influence in the design of one of their collective redress procedures.[7]

Although the judicial system of The Netherlands does not form part of our common law tradition, much can be learned from its approach to collective redress. For this reason the collective redress developments in The Netherlands and the interaction with the American class action will be explored in this article.

2 A brief background to developments

In a DG SANCO services document[8] it was acknowledged that there was an 'increasing scaling up of mass claims' within the European market which, due to the lack of an effective legal framework enabling consumers to obtain adequate compensation in mass claims, led not only to a weakening of the functioning of the retail Internal Market, but also placed consumers and traders on an unequal footing. The EU consequently required Member States to take measures to protect consumer interests. In accordance with EU requirements the Dutch enacted legislation in 2000[9] aimed at stopping the breach of consumer protection laws. This Act also afforded consumer protection authorities and consumer

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it is currently unclear when it will be able to set out its intentions: see 'EU class action-style suits should only apply to some laws, says EU Parliament' OUT-LAW News (2011-07-21), available at http://www.out-law.com/page-12099 (accessed 2011-08-15); 'Collective redress: examining the way forward', Press Release by Viviane Reding, Vice-President of the European Commission, Speech/11/517, Brussels (2011-07-12).

[5] See Part 1: Main Report of the Final Report 'Evaluation of the effectiveness and efficiency of collective redress mechanisms: The European Union' European Commission – DG SANCO (2008) 87.

[6] See, eg, Asser, Groen, Vranken and Tzankova *Uitgebalanceerd/Eindrapport fundamentele herbezinning Nederlands burgerlijk procesrecht* (2006) 122 where it is pointed out that the so-called danger of abuse in respect of settlements is not borne out by empirical evidence, but is raised in scientific literature. In contrast, see (n 1) para 21.

[7] See 3.3 hereafter.

[8] (N 4) para 2 and 5. Concerns about cross-border infringements and a lack of enforcement by national authorities also led to Regulation (EC) 2006/2004 *OJ* 2004 L 364/47. The Dutch responded to this Regulation by setting up the Consumer Authority: see Ammerlaan and Janssen 'The Dutch Consumer Authority: An introduction' in Boom and Loos (eds) *Collective enforcement of consumer law* (2007) 107-109.

[9] Wet van 25 april 2000, *Staatsblad* 2000, 178. This Act amended Book 3 and 6 BW (*Burgerlijk Wetboek*).

organisations recognition to act in another Member State. Despite these measures and an accessible justice system, The Netherlands has also not been spared the 'scaling up' of mass claims,[10] and the need to effectively deal with these claims was consequently recognised.

It is well known that there is a high degree of access to justice in the Netherlands.[11] Not only is access provided by a myriad of institutions that offer legal advice,[12] but also through dispute resolution in the public and private sector.[13] The Dutch public have embraced the use of consumer organisations for dispute resolution, and their operation is generally seen to improve access to justice.[14] Consumer organisations in the Netherlands are juristic persons and their statutory objective is to take care of the interests of consumers.[15] Although the use of Alternative Dispute Resolution (ADR) in consumer disputes in The Netherlands is high and ADR is well developed (in contradistinction to other Member States), consumer protection is nevertheless regarded as incomplete. For example, some frequent disputes such as car rental are not covered by a sector specific scheme which operates under the supervision of the *Stichting Geschillencommissie Consumentenklachten,* and in the air transport sector some airline companies are not members of the scheme.[16] Furthermore, a study by the Dutch Consumer Authority estimated that every year some 4,6 million consumers are victims of unfair practices in The Netherlands.[17] As is the position worldwide, many consumers do not pursue claims they may have, *inter alia*, because the amount involved is very small and not considered worth pursuing, bearing in mind legal costs and effort. Many such claims originate from the same wrongdoer, thus creating a mass claim as illustrated in the above examples.

Since 1989, consumer organisations such as the *Consumentenbond* and the Ombudsman Foundation have been specifically permitted to act in collective actions on behalf of consumers in respect of certain matters[18] to protect the interests of consumers. In practice these organisations cooperate with the Consumer Authority which is also empowered to act when the collective interests of consumers have been

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[10] Jongbloed and Ernes *Burgerlijk procesrecht praktisch belicht* (2011) para 15.4.1.

[11] See, eg, Barkhuysen, Brenninkmeijer and Van Emmerik 'Access to justice as a fundamental right in the Dutch legal order' available at http://media.leidenuniv.nl/Access%20to%20justice%20as%20a%20fundamental%20right%20in%20the%20Dutch%20legal%20order.pdf (accessed 2011-02-12) 396.

[12] Van Velthoven and Ter Voort *Paths to justice in the Netherlands: Looking for signs of social exclusion* (2004) MPRA Paper no 21296 para 8, available at http://mpra.ub.uni.muenchen.de/21296 (accessed 2010-07-12).

[13] See Ammerlaan and Janssen (n 8) 117-119.

[14] Mölenberg *Het collectief actierecht voor consumentenorganisaties op het terrein van de algemene voorwaarden* (1995) 97-99.

[15] *Id* 18.

[16] *Id* para 13.

[17] See http://www.consumentenautoriteit.nl/English_summary/Survey_report_Unfair_Commercial_Practices_in_the_Netherlands_pdf_980kb (accessed 2011-02-22).

[18] Mölenberg (n 14) 107-108.

affected.[19] It is also not unusual to find that a consumer organisation has been created on an *ad hoc* basis to represent the interests of consumers that have suffered harm,[20] provided it fulfils the prescribed statutory requirements.[21]

The Dutch position is remarkable in that there are two systems for collective redress. Not only is a general collective action utilised in terms of article 305a Book 3 of the Dutch Civil Code,[22] but also a procedure under the Act on collective settlement of mass damage (WCAM)[23] in terms of which a collective settlement may be declared binding on the relevant parties.

3 The collective redress mechanisms

3.1 The general collective action

This particular mechanism is unremarkable within the EU context as, by and large, it conforms to the trend of having a mechanism for the collective redress in respect of consumer protection law which is not for damages and which allows a consumer organisation to institute a collective action on behalf of all (affected) consumers. However, it is referred to for the sake of completeness and because of its interaction with the mechanism discussed in 3.2 below. Consequently a brief discussion of this action will suffice.

In terms of article 305a BW a foundation (*stichting*) or an association (*vereniging*) with full legal competency may institute an action to protect (sufficiently) similar interests of consumers, provided these interests fall within the ambit of the stated objectives of the particular body as set out in its articles of association.[24] Action is instituted on behalf of such consumers, in fact resulting in a bundling of claims.[25] However, this mechanism cannot be used if there are individual issues (hence the requirement of '*gelijksoortige belangen*'[26]), and judgment is only declaratory – no damages are claimable.[27] Should the court declare that a breach has occurred or that

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[19]Ammerlaan and Janssen (n 8) 117-119.

[20]Such an organisation is financed by a relatively modest membership fee: see Loos Part IX 'Country report: The Netherlands' in *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union* (2008) 6.

[21]See later.

[22]Hereafter referred to as the BW (or *Burgerlijk Wetboek*). Dutch legislation does not use brackets to denote subsections and further subsections: *lid* refers to subsections and further subsections are indicated by 'sub', simply followed by letters (see later).

[23]Wet collectieve afwikkeling massaschade, Wet van 23 juni 2005 tot wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de collectieve afwikkeling van massaschades te vergemakkelijken: *Staatsblad 2005, 5 juli 2005*.

[24]*Lid* 1. An organisation obviously exists for a particular purpose and may not act *ultra vires* its statutory purpose. See also art 27 *lid* 4 Book 2 BW.

[25]Jongbloed and Ernes (n 10) 471.

[26]Article 305a *lid* 1. It stands to reason that there can be no collective interest without common legal questions.

[27]Article 305a *lid* 3.

a delict has been committed, it is then up to the individual consumers to institute his or her own action for the recovery of damages.

This section also provides that no collective action lies if those affected oppose such an action. For example, an affected person would oppose the action if he or she is a member of a group that is being discriminated against and there is fear of reprisal (or for privacy reasons). However, an affected person may not oppose an action if the effect of the judgment cannot be excluded only in respect of the opposing person. To illustrate: because it is possible that a collective action may be instituted also on behalf of people who have no interest in the action, such people are given the opportunity to seek to be excluded from the effect of the judgment. But, this cannot be done if the nature of the judgment is such that its effect cannot be excluded only in respect of such people, such as in the event of a misleading advertising campaign,[28] because the organisation acts for people who all have a common interest. Since it follows that a matter is *res iudicata* only between the parties,[29] the defendant would thus still be vulnerable to other possible actions.

The deficiencies in this mechanism relating to damages and lack of provisions to deal with the logistics of mass actions have contributed to the more recent development of a second mechanism.

3.2 Wet collectieve afwikkeling massaschade (WCAM)

A further important step in designing an effective system to deal with complex procedures was taken by the introduction of the *Wet collectieve afwikkeling massaschade* (Act on the Collective Settlement of Mass Claims). This act is an attempt to simplify the bundling of (identical) claims for damages.[30]

The procedure created by WCAM is unusual for two reasons. First, it deals only with the *settlement* of a collective claim for damages, and not with the process of reaching a settlement; the instituting of the claim to recover damages; or the subsequent litigation process. This feature has an historical explanation: this particular mechanism was developed out of the need to resolve the so-called *DES* case[31] at a point when the parties had already reached a settlement involving

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[28]See art 305a *lid* 4 and 5 respectively. See also Hondius and Rijken *Consumentenrecht* (2006) para 22.8.

[29]Article 305a *lid* 5 stipulates the following: '*Een rechterlijke uitspraak heeft geen gevolgen ten aansien van een person tot bescherming van wiens belangen de rechtsvordering strekt en die zich verzet tegen werking van de* uitspraak *ten opzichte van hem, tenzij de aard van de uitspraak meebrengt dat de werking niet slechts ten opzichte van deze persoon kan worden uitgesloten*'.

[30](N23) para 22.20.

[31]HR 9 oktober 1992, *NJ* 1994 35. The settlement was declared binding (Hof Amsterdam, *NJ* 2006) on 1 June 2006. This matter involved the distribution of the pharmaceutical hormone DES to pregnant women to prevent premature birth and miscarriage, only to later find that the drug was associated with, *inter alia*, cervical cancer. Some 17 000 daughters of women who had taken the drug registered with the DES Centre which was formed to protect their interests. Negotiations with

damages, and wanted to ensure that the settlement was binding[32] on as many people with similar (*gelijksoortige*) claims as possible. (Hence the request that it be declared binding legislatively.) Secondly, unlike other Member States, The Netherlands found inspiration in the American class action regime in developing this particular mechanism, and consequently took over certain features in an innovative manner as will be seen later.[33] With WCAM the Dutch legislature also seized the opportunity to address an expected future need to regulate mass claims in an efficient manner,[34] and opted for a general mechanism.

3.2.1 The provisions of the Act[35]

The coming into operation of the WCAM led to the introduction of various articles into Book 7, BW[36] as well as into Title 14, Book 3, *Wetboek van Burgerlijke Rechtsvordering*[37] (which contains the Code of Civil Procedure).

In terms of Article 907 BW an agreement to pay compensation for damage caused by an event or similar events (*een gebeurtenis of gelijksoortige gebeurtenissen*) concluded between a foundation or association with full legal competence, and one or more other parties who committed themselves to this agreement to pay damages, may be declared binding by the court on all who suffered damages at the joint request of all parties to the agreement, provided the foundation or association represents the interests of such persons in terms of its articles of association. This section makes it clear that reaching the agreement out of court is a prerequisite for the parties to apply to court.

The agreement must in each instance include the following: a description of the groups(s) of persons on whose behalf the agreement was concluded, according to the nature and the seriousness of their loss; an as accurate as possible indication of the number of persons belonging to the group(s); the compensation to be awarded to these persons; the conditions which have to be met by these people to qualify for the compensation; the manner in which the compensation will be determined and can be obtained; and the name and place of residence of the person to whom written notice that an opt-out[38] of the agreement is possible, can be sent.[39]

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the pharmaceutical industry and their insurers led to the establishment of a DES fund by the industry on condition that the settlement would be final. This could not be achieved under the general collective action, and legislation was proposed to enable the settlement.

[32]See, eg, Krans 'Een nieuwe aanpak van massaschade' (2005) *NTBR* 2 at 2.

[33]See, eg, Leijten 'De betekenis van de Wet collectieve afwikkeling massaschade voor corporate litigation' (2005) 15 *Ondernemingsrecht* 498 para 3.

[34](N 27) 2.

[35]Only the salient provisions will be reviewed.

[36]Notably art 906-910 BW: see *Staatsblad van het Koninkrijk der Nederlanden* (Stb) *2005,* 340. For the sake of convenience reference to 'Book 7' is omitted hereafter unless otherwise necessary.

[37]Abbreviated as Rv. Notably art 1013-1018: see *Stb 2005,* 340.

[38]In terms of art 908 *lid* 2 and 3 BW.

[39]Article 907 *lid* 2 *sub* a-f BW.

The court is compelled to reject the above request to declare the agreement binding if: the agreement does not comply with the provisions of article 907 *lid* 2 above; the amount of the compensation awarded is not reasonable (having regard, *inter alia*, to the extent of the damage, the ease and speed with which the compensation can be obtained, and the possible causes of the damage); insufficient security is provided for the payment of the claims of those on whose behalf the agreement was concluded; the agreement does not provide for the independent determination of the compensation to be paid; the interests of those on whose behalf the agreement was concluded are otherwise not adequately safeguarded; the foundation or association is not sufficiently representative of the interests of those on whose behalf the agreement was concluded; the group of persons on whose behalf the agreement was concluded is not large enough to justify a declaration that the agreement is binding; and finally, if the legal entity that will provide the compensation is not a party to the agreement.[40]

Because the settlement must be reasonable, a judge may decide on the compensation if the decision on compensation or the manner in which the decision on compensation was reached is unacceptable according to the principles of reasonableness and fairness,[41] or if a decision is not reached within a reasonable period.[42] Once the agreement has been declared binding, the consequences are that (a) each of the persons entitled to compensation is regarded as a party to the agreement (and thus bound to it),[43] and (b) the parties to the agreement as well as those entitled to compensation may not rely on any available grounds for annulment.[44] These consequences do not follow for those who have chosen to opt-out of the agreement. Op-out is achieved by sending a written notice to the person specified in Article 907 *lid* 2 *sub* f within three months after the court's decision has been announced,[45] and allows a person to try and obtain more compensation on an individual basis. The legal costs of such proceedings would obviously be borne alone by the person who opted-out.

It is not only the injured parties that may opt out. Also the person liable for payment of damages may withdraw from the agreement within six months after expiry of the opt-out period on the ground that there are too few people entitled to compensation. Withdrawal occurs by notification in two newspapers and written notice to the foundation or association. The withdrawing party bears the responsibility to give notice to all known persons entitled to compensation at their

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[40]Article 907 *lid* 3 *sub* a-h BW.
[41]Article 909 *lid* 1 BW.
[42]Article 909 *lid* 2 BW.
[43]Article 908 *lid* 1 BW.
[44]Article 908 *lid* 5 BW referring to those grounds set out in art 44 *lid* 3 Book 3; art 228 Book 6; and art 904 *lid* 1 Book 7 BW.
[45]Article 908 *lid* 2 BW. Article 908 *lid* 3 contains a similar provision in respect of a person who could not have known of his or her loss.

last known place of residence.[46] The provision allowing for the opt-out by the *defendant* is another unique feature of the procedure, as the opt-out is the method used to determine *class* membership in a typical class action. However, it is an important feature as it allows a defendant to escape from an agreement that will bind too few injured persons, thus creating the potential for too many individual claims.

In sum, this procedural mechanism has been designed to make a reasonable settlement binding on as many potential plaintiffs as possible as well as on the defendant(s). While it offers the defendant(s) the benefit of the matter being *res iudicata* in respect of a large number of potential plaintiffs, it also places the defendant(s) under pressure to agree to a reasonable settlement.

3.2.2 Procedural aspects

The Amsterdam Court of Appeal (*Gerechtshof te Amsterdam)* has exclusive jurisdiction to hear matters in terms of WCAM.[47] This decision was prompted by the fact that not only does the Court of Appeal house the important division known as the Enterprise Court (*Ondernemingskamer*) with its built-up financial expertise, but it would also be ensured that matters would be heard by a court with multiple jurisdictional competencies (a court of first instance and an appeal court).[48] This was clearly a good decision because a dedicated court is better placed to build up a solid body of precedents with little fear of conflicting decisions than would be the case if various divisions heard WCAM matters.

The court is approached jointly by the parties to the agreement[49] by way of a petition (*verzoekschrift*). Apart from stating the names and places of residence of those making the request; a description of the relevant event(s) and the particulars of the interested parties, the request must contain a brief description of the agreement,[50] and the agreement must be attached to the request.[51] The persons on whose behalf the agreement was concluded are then informed of the proceedings by ordinary mail (not registered mail)[52] to lessen the burden on the sender, as well as by notice in one or more newspapers.[53] These persons are also informed that the relevant documentation is available for perusal at the court

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[46]Article 908 *lid* 4 BW.
[47]Article 1013 *lid* 3 Rv.
[48]Jongbloed and Ernes (n 10) 476. See also Hooijdonk and Eijsvogel *Litigation in the Netherlands* (2009) 5-7 for an exposition of the court system. It should be noted that because the request is filed at the Amsterdam Court of Appeal in first instance, only appeal in cassation is possible: Jongbloed and Ernes *ibid*.
[49]Article 907 *lid* 1 BW.
[50]Article 1013 *lid* 1 Rv.
[51]Article 1013 *lid* 2 Rv.
[52]As is customary: see art 272 Rv.
[53]Article 1013 *lid* 4 Rv. The notice contains particulars of the time and place of hearing; a brief description of the agreement; and the consequences of the granting of the request.

registrar, and that a defence (*verweerschrift*) may be filed. However, it is made clear that only a foundation or association with full legal competency may file such a defence.[54]

In considering the request a judge may order one or more experts to report on relevant matters, and the costs involved are to be borne by the applicant.[55]

A copy of the decision is sent by the registrar by ordinary mail to those making the request, and it also lies for inspection at the office of the registrar.[56] A copy of the decision is also sent to those entitled to compensation, as well as to the particular foundation or association involved. Notice is also effected by publication in one or two specified newspapers and must contain a brief description of the agreement; the manner in which compensation can be obtained; the consequences of the declaration that the agreement is binding; and importantly, the opt-out procedure.[57]

3.3 The American class action as a source of inspiration for WCAM

The American class action is in brief[58] a procedural mechanism which allows the determination of the claims (or parts thereof) of a number of persons in a single action (the class action). This action is instituted by one or more persons on his or her behalf (the 'representative') and on behalf of the other persons (the 'class') who have the same or a sufficiently similar claim flowing from the alleged wrong committed by the same wrongdoer. Although only the representative is a party before court, the 'absent' class members are nevertheless bound by the outcome of the litigation.

Certification of the action as a class action is an important preliminary step allowing the matter to proceed. Class membership is determined by the so-called 'opt-out' approach by which persons are bound as members of the class unless they take a positive step to make clear their wish to be excluded from both the action and the consequences (or effect) of the judgment. The action is brought to finality either through adjudication or through a court approved settlement

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[54]Article 1014 Rv. Matters raised in the defence will mainly relate to the insufficient representivity of the applicant organisation and the extent of the agreed compensation: see Meijer 'Massaschade' (2007)10 *Ars Aequi* 748 at 753.

[55]Article 1016 *lid* 1 and 2 respectively.

[56]Article 1017 *lid* 1 and 2 respectively.

[57]Article 1017 *lid* 3 Rv. If, of course, the application is successful, notice must likewise be given to the parties entitled.

[58]This is a simple description of the procedure, and is in no way intended to be a complete definition, covering all technical complexities. For more detailed definitions see in general Australian Law Reform Commission *Access to the courts: Class actions* DP No 11 (1979); Ontario Law Reform Commission *Report on class actions* (1982). American textbooks offer a far more sketchy contribution: see eg Freer *Introduction to civil procedure* (2006) para 13.3.1; Yeazell *Civil procedure* (2004) 791; Leubsdorf *Civil procedure* (1992) (4th ed) para 10.20.

which renders it binding and enforceable. A settlement in a class action is, unlike a settlement in unitary litigation, not permitted without court approval, and highlights the court's 'protective jurisdiction'.[59]

Legal literature abounds with criticism against class action settlements and how they can potentially be abused. This is despite available empirical evidence which indicates that while such concerns exist, they may be overstated[60] and are hardly restricted to class action jurisprudence. Although court approval of a settlement is sought either in conjunction with the certification hearing, or after certification and prior to trial, for purposes of this discussion the so-called 'settlement-only' class certification is of most interest, as the Dutch have admitted to a strong US-influence in the shaping of their procedure in this regard.[61]

Often called a 'settlement class' to indicate that a settlement was reached prior to certification, certification is sought as a condition of settlement.[62] The court has to be satisfied that all certification criteria have been met before scrutinising the terms of the settlement agreement, because certification criteria are generally seen to provide safeguards for the protection of the rights of absent class members and to protect the defendant from unjustified litigation.[63] Federal Rule 23[64] provides the test for a settlement, and stipulates that a settlement will only be approved by the court if it is 'fair, reasonable, and adequate'.

The Dutch have been very selective in receiving aspects of the American class action into their legal system. It is submitted that they have to a large extent been successful in harmonising these aspects with Dutch legal culture, thus creating a unique procedure as will be seen presently. This possibly explains the high degree of consensus among commentators in welcoming the WCAM mechanism into their system.[65]

3.4 Evaluation of the WCAM mechanism

Although to date only a few matters[66] have been brought to court and finalised under WCAM, WCAM appears to have introduced a successful mechanism for

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[59] *Tasfaat Air Freight Pty Ltd v Mobil Oil Australia Ltd* [2002] VSC 457 para 4.

[60] Mulheron *The class action in common law legal systems* (2004) 393. See also Miller 'Of Frankenstein monsters and shining knights: Myth, reality, and the "class action problem"' (1979) 92 *Harvard LR* 664; Ontario Law Reform Commission (n 58) 149. For a brief exposition of the criticism only, see, eg, Freer (n 58) para 13.3.1 and 13.3.7; Tidmarsh and Trangsrud *Complex litigation* (2002) 196-199.

[61] See, eg, Frenk 'Massaschade: De Nederlandse benadering' (2007)5 *AV&S* 214 para 3; Tzankova 'Enkele overpeinzingen naar aanleiding van de Dexia-(be)schikking' (2007)7 *Ondernemingsrecht* 282 para 1; Leijten (n 33) para 3; Meijer (n 49) 754.

[62] Mulheron (n 60) 394.

[63] *Id* 24-25. See also *Kamilewicz v Bank of Boston Corp* 100F 3f 1348 1352 (7th Cir 1996).

[64] Federal Rule 23(e)(1)(c) of the Federal Rules of Civil Procedure.

[65] See (n 61) as well as Krans (n 32) 13; Leijten (n 33) para 7.

[66] Three to be precise: the *DES* case (n 31); the *Dexia* case (Hof Amsterdam 23 januari 2007 NJF 2007 266 JOR 2007; and the *Shell case (Hof Amsterdam 29 mei 2009 LJN BI5744 JOR 2009).*

providing collective redress. This raises the question as to whether there is a use for the general collective action above, and it is interesting to note that this action is utilised as a type of 'pre-phase' to WCAM, especially to obtain a ruling from the court on certain material legal questions. One or more rulings obtained in this way could create certainty on particular matters which in turn could make parties more amenable towards negotiation or pave the way towards reaching a settlement.[67] For example, a ruling in terms of this action that a defendant is liable for causing the damages may persuade such defendant to enter into serious negotiations. Unfortunately WCAM lacks a coercive element as it contains no provision to compel a defendant to participate in a settlement or even to participate in settlement discussions. This is however a situation that the Dutch are seeking to address, and suggestions about matters such as introducing a compulsory procedure in terms of which a mediator could be appointed to assist the parties, and the obtaining of prejudicial rulings on legal questions from the *Hoge Raad* have been made by commentators.[68] (In contrast, the class action is not primarily aimed at achieving a settlement, but the very threat of a class action in the USA is often said to be sufficient to ensure a negotiated settlement.[69])

The above suggestions are all clearly aimed at making WCAM more efficient, and to facilitate the reaching of an agreement. However, that point may still not be reached despite all best efforts. The question has thus been raised whether an additional collective action which allows for damages to be awarded may not be desirable.[70] No definitive answer has been forthcoming, and this question will certainly lead to much debate in future. Given the fact that most complex matters are usually settled (as is the worldwide trend even in individual non-complex matters), and that so far in the matters finalised under WCAM such a need has not been evident, it is submitted that such a step appears unlikely in the near future. But, given the amount of influence of the US class action on WCAM, the Netherlands could probably be the first European country to adopt a class action-type collective action if this were to happen. In this regard EU views on class actions and EU harmonisation policy will certainly lend interest to any future developments.

As with the US class action, representation poses challenges. Because members are absent when their rights are adjudicated (as in the American class

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[67]Frenk (n 61) para 4.

[68]See Asser, Groen, Vranken and Tzankova (n 6) 119-121.

[69]Much criticism has been directed at the class action for this very reason, as many feel that it leads to abuses such as 'blackmail settlements' when class actions have the effect of extorting unjust settlements from defendants, especially in respect of unmeritorious cases. This topic received much attention during the 1990s: see eg Morabito 'Federal class actions, court fees and the rules governing litigation costs' (1995)2 *Monash University LR* 231 at 248-249; Johnsons 'Resolution of mass products liability litigation with the Federal Rules: A case for the increased use of Rule 23(b)(3) class actions' (1996) Vol 64 *Fordham LR* 2329 at 2351-2353; Gallacher, Parker and De Vries 'Back to the future: Product liability class actions and proposed Rule 23 changes' (1997) 2 *Defense Counsel Journal* 195 at 198-202.

[70]Frenk (n 61) para 5.

action), or are negotiated (as in WCAM), great care must be taken to ensure that their representation is adequate. It is generally accepted that 'adequacy' in this context is mostly demonstrated by the quality and the competence of the representation. Consequently, the fact that only an association or foundation may bring an action has a few important consequences.

A mass damages situation brings about the registration of various interest organisations which all represent more or less the same interests of the injured parties. This automatically causes the organisations to compete for members and they do so via their own websites and the media (such as consumer programmes on television). Unfortunately conflicting opinions so expressed through these channels have in the past led to confusion and dissatisfaction for those who suffered harm.[71] Further, to complicate matters and apart from structured interest organisations (such as the Consumer Board or *Consumentenbond* and the *Vereniging van Effectenbezitters or VEB)*, many '*ad hoc*-registered' interest organisations have also appeared on the scene.[72] WCAM has provided the opportunity for this to happen as it simply requires that such organisations be 'sufficiently representative',[73] but without giving an indication which of these competing organisations would in fact be competent to represent the affected consumers in the settlement agreement. Despite these unfortunate circumstances it must be noted that these organisations undoubtedly play an important role in WCAM as they give the consumers a voice in the process, and unnecessary limitations on their role are thus not desirable. In this regard it is interesting to note that the legislature purposely opted against specifying criteria for representivity, and was of the opinion that representivity can be inferred from a variety of factors, such as the number of members signed up; the activities of the organisation to set itself up to take care of the interests of those who suffered harm; and the extent to which such consumers viewed the organisation as representative.[74] Article 1016 *lid* 1 Rv, which provides that the court may order an expert to deliver a report on a matter of interest, could arguably be used to address the question of the representivity of a particular organisation. However, it is submitted that it is unfortunate that at least some guidelines are not provided in an otherwise economic and judicial economic mechanism, as this route could unnecessarily prolong the proceedings. A further area of concern is that the requirement relating to representativeness does not assist consumers in the pre-agreement phase, as illustrated by the *Dexia* case. In this case several interest organisations were not involved in the settlement negotiations, and therefore did not benefit from the end result. This resulted in these organisations stating in the media and via the Internet

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[71]Van Doorn 'Een collectieve afwikkeling van massaschade en de belangen van de individuele benadeelde' (2010) *NTBR* 46 para 1.1. In the *Dexia* case, in which lease agreements were concluded with approximately 395 000 consumers, the power struggle among consumer organisations was carried on by using the media: see Tzankova (n 61) para 2.1.

[72]Van Doorn (n 71) para 5.3.1.

[73]Article 907 *lid* 3 *sub* f BW.

[74]Krans (n 32) 5. See also Hondius and Rijken (n 28) para 22.6.

that the settlement did not represent the best result possible, thus leading to confusion among consumers and making no contribution towards feelings of being adequately represented and justly treated.[75] As these feelings affect peoples' perceptions of the quality of access to justice, the Dutch legislature may well in future be seen to address the matter of representativeness.

Part and parcel of class and collective redress actions is the managerial role[76] of the judges. In the Anglo-American legal family where the role of the judge is traditionally described as that of an umpire (signifying neutrality),[77] case management is a relatively new change in the individualistic civil procedural practice of countries within this family. The advent of the class action especially has required judges to adjust to a new role in adjudication. Individualist civil procedure has never been part of the Continental civil procedural systems where the judge plays a more active role in proceedings. Nevertheless, the managerial role required of a judge in WCAM has contrary to the expectations generated by a common law perspective elicited significant attention by Dutch legal commentators commenting on the 'new role' of judges.

Before evaluating this 'new role' it needs to be pointed out why this role is important. In common law jurisdictions it is accepted that the reason for a judge's managerial role in collective/class actions is because these types of actions are by definition complex. These complexities may render a matter unmanageable if not procedurally controlled in a way that assures that the interests of all are fairly represented. In this regard the interests of absent members are particularly important due to the *res iudicata* consequences. It has been argued that the adequacy of representation must be complemented by the 'adequacy of judicial management in order to justify dispensing with these fundamental rules that guarantee to each party his day in court in person or by a self-chosen representative'.[78]

The *Dexia* case offers an insight into how the Dutch judges view their roles in WCAM matters. In the *Dexia* case the court played an active role in the matter by ordering a case management conference (*regiezitting*) with the legal representatives of the parties during which not only the manner in which the practical proceedings were to be conducted were set out, but also the time frames involved.[79] It also appointed an expert on the question of whether loss was actually suffered.[80]

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[75]Van Doorn (n 71) para 5.3.1.

[76]See, eg, Resnik 'Managerial judges' (1982) 96 *Harvard LR* 376; Andrews 'A new civil procedure code for England: Party-control – going going gone' (2000) 19 *CJQ* 19. See also the extensive range of orders that a court may make under the American Federal Rule 23(d) during the course of a class action to manage class actions effectively, as well as the seminal work by Homburger 'State class actions and the Federal Rule' (1971) 71 *Columbia LR* 399 at 657 concerning the (then) new approach required for the success of class actions.

[77]See Pollak and Maitland *The history of English law* (1923) vol 2 671; Jacob 'The English system of civil proceedings' in *The reform of civil procedural law* (1982) 191.

[78]Homburger (n 76) 657.

[79]Frenk (n 61) para 2.1.

[80]*Id* para 6.13.

Tzankova[81] questions to what extent this approach will set a precedent for future cases involving complex procedures, but nevertheless applauds the court's approach and the manner in which it embraced its new role. She goes further and suggests that the court should, on considering a settlement when there are no or very few defences filed, *mero motu* appoint an '*amicus curiae*' to formulate as many objections as possible against the settlement to ensure the best possible outcome.[82] This is indeed strong support for judicial activism, and can be supported as it could avoid the possibility of a so-called 'sweetheart settlement', much criticised in American literature.[83]

Also arguing for a more expansive approach by the court, Van Doorn[84] criticised the court for applying a 'marginal test' to the *Dexia* settlement agreement, instead of scrutinising the contents of the agreement more thoroughly. In response to this criticism Frenk[85] points out that the judge is required only to establish whether the interests of those affected are sufficiently protected, and especially whether the amount of the compensation is reasonable, as measured against the factual worth of the claim and bearing in mind the chances of success. Moreover, to require more from the judge is akin to having the judge participate in the negotiations. This reasoning appears sound, but it is submitted that the mere fact that a settlement was reached after long negotiations cannot be an indication of reasonableness, as a settlement is, after all, the intended outcome under WCAM. A better indication would be the fact, as in the *Dexia* case, that the major plaintiffs were strong and knowledgeable players (the *Vereniging van Effectenbezitters* and the *Consumentenbond*)[86] with the expertise to properly evaluate the settlement, supported by a number of *ad hoc* interest groups which would be unlikely to not object by way of filing a defence if the settlement was not reasonable. This is also in line with the view of Croiset van Uchelen,[87] referring to the *Shell* case in which the proceedings were co-instituted by two large and expert investors.

Although the question initially arose whether the judge should play a role in the pre-phase to assist in the reaching of an agreement, no such provision was made in the final version of the Act. The relevant minister was of the opinion that the parties were able to acquire any expert assistance needed during this phase,[88] despite commentators arguing for an active role by the judge.[89] The view

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[81] *Id* para 2.3.
[82] *Ibid*.
[83] See, eg, Hay and Rosenberg '"Sweetheart" and "blackmail" settlements in class action: Reality and remedy' (2000) *Notre Dame LR* 1391.
[84] 'De tweede WCAM-beschikking is een feit' (2007)3 *AV&S* 104 at 109, 114.
[85] (N 61) para 7.
[86] Tzankova (n 61) para 3.
[87] 'De verbindenverklaring volgens de WCAM als procesvorm' (2007)5 *AV&S* 222 para 2.
[88] Krans (n 32) 8.
[89] See Asser, Groen, Vranken and Tzankova (n 6) para 8.5.4.1- 8.5.4.2; Krans *ibid*. See however Leijten (n 27) 3.

has been mooted that a judge's involvement in this phase in giving rulings on various aspects would assist him or her to (eventually) better rule on the merits of the settlement agreement, and would contribute to the view that the procedure is procedurally fair.[90]

So far it does not seem to be a necessary provision, as the three cases[91] that have so far been finalised, were finalised without such a need becoming evident. In fact, notably in the so-called *Shell* case, the settlement was reached on the initiative of Shell, the defendant. This is significant, as it seems to indicate that the WCAM is not viewed as a threat to those potentially liable, but rather as a useful instrument to dispose of multiple cases in a satisfactory and efficient manner.[92] There may of course also be many other reasons why a potential defendant would initiate settlement negotiations, apart from the wish to save time and legal costs. A company's reputation, for example, may be enhanced and consumers might view the company as honest and/or caring, thus enhancing consumer trust in the company and its products; or, conceivably, it may be done to create a less hostile negotiation environment in which a more beneficial settlement may be achieved. However, this does not detract from the fact that the defendant's actions were significant. Moreover, the *Shell* case also seems to confirm the Dutch legal culture as a litigation-avoiding culture.[93]

WCAM is regarded by several commentators as an efficient and judicial-economic mechanism.[94] Compared to the American class action which is noted for its often protracted and complex procedure, WCAM displays some noteworthy features. It is trite that judicial resources are scarce, and so one recurring theme in access to justice debates is the reform of the procedural system to decrease, *inter alia*, the amount of litigation to avoid costly hearings. Simplifying court procedures can obviously contribute to achieving this goal. Leijten[95] analyses Articles 1013-1018 Rv and notes the deviations from the ordinary application procedure relating to the notice requirements and the defence. In all instances of notification ordinary mail as well as notice in court assigned newspapers are provided for, thus lessening the procedural burden on not only the registrar, but also on the applicants. Also, the registrar need not send copies of the defence and all annexures to each of the injured parties, and parties are notified that the judgment is also available for inspection at the registrar's office. These provisions are in stark contrast to those in the American class action

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[90] See Van Doorn (n 71) para 5.3.3. His view is premised on a finding that court-annexed procedures score better than bilateral settlements on a scale measuring fairness as experienced by parties.
[91] The *DES* case (n 31); the *Dexia* case (n 66); and the *Shell* case (n 66).
[92] Frenk (n 61) para 3.
[93] See Blankenberg and Bruinsma *Dutch culture* (1994) 5; Hooijdonk and Eijsvogel (n 48) 'Foreword'; Blankenberg 'Avoiding civil litigation in The Netherlands and West Germany' (1994) 4 *Law and Society Review* 789 at 790-807.
[94] See, eg, Frenk (n 61) para 1; Croiset van Uchelen (n 87) para 3; Leijten (n 33) para 5; Van Doorn (n 71) para 6.
[95] (N 33) para 5.

where 'the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort'[96] is required. This burden falls upon the plaintiff representative, and in the *locus classicus, Eisen v Carlisle and Jacquelin*[97] the court held that Federal Rule 23 requires that individual notice be sent to all identifiable class members. In this matter the plaintiff class numbered some 6 000 000 of whom over 2 000 000 could be 'easily identified'.[98] Clearly such a requirement jeopardises the potential effectiveness of the class action and defeats the object of the procedure.

Also, it is significant to note that the WCAM procedure, from the application to the declaration of the agreement to be binding, took a mere seven months in the case of the *DES* case, and 14 months in the *Dexia* case.[99] This is clearly due to the fact that WCAM mimicks the 'settlement-only' class certification process, fulfilling the goal of judicial economy. However, as pointed out above, WCAM unfortunately does not contain any coercive measures to act as incentives for the parties to enter into negotiations and to reach a settlement.

Finally, in contrast with the trend in the European Union,[100] the Dutch have chosen the opt-out, instead of the opt-in procedure. In this regard the view of the Commission of the European Communities is based on the 'perceived risk of encouraging the excessive litigation experienced in some non-European jurisdictions' (which as pointed out above, is not supported by empirical research[101]), and seemingly not on policy considerations such as whether a person's legal rights should be determined without his or her explicit consent to take part in legal proceedings.[102] Usually those that argue for an 'opt-in' regime express concern for the 'preservation of the liberty of the individual' to take part in litigation out of his or her own free choice.[103] It should, however, be remembered that in a true class action absent

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[96]See Federal Rule 23(c)(2).
[97]479 F2d 1005 (2d Cir 1978).
[98]The cost of individual notice was estimated at US$225 000 (in 1973), and it should also be borne in mind that the matter typically concerned individuals with small claims.
[99]Croiset van Uchelen (n 87) para 3; Loos (n 20) 7.
[100]See Green Paper *On consumer collective redress* Commission of the European Communities COM (2008) 794 final para 55-56. On the position in the Nordic countries, see Hodges (n 2) 31.
[101]See Frenk (n 61) para 3 where he indicates that although criticism against the class action is not unfounded, it is often left unsaid that it is '*een zeer nuttig en waardevol instrument'* to provide injured parties access to justice in the event of mass injury. He also points out that views on class actions in the US (and I submit, elsewhere as well) are strongly influenced by politics, and therefore such criticism should be viewed with the necessary scepticism. See also Fiss 'The political theory of the class action' (1996) 53 *Wash and Lee LR* 21 at 30 where he points out that in the 1970s and 1980s 'American law moved to the Right, and, in that climate, *the class action became a frequent target of conservative forces'* (own emphasis). During this period there was a revival of orthodox capitalism and classical liberalism, both highly individualistic ideologies. The class action runs counter to individualistic values, and this of course explains why most of the critical commentaries on class actions appeared during this period. See also Homburger (n 76) 615, 643.
[102]Mulheron (n 60) 29.
[103]*Id* 30.

members' interests are represented by a representative, and the opt-out regime is therefore appropriate. It is submitted that the procedures requiring members to opt-in often amount to no more than 'permissive joinder devices', and are usually not true class actions.[104] Because WCAM shares many features of the US class action, it is perhaps fitting that the opt-out procedure is the preferred choice.[105]

4 Conclusion

The Netherlands have embraced the opportunity to develop an effective, innovative and efficient collective redress regime with circumspection and after reflection. The result is exceptional and instructive: not only has a Continental system found inspiration in and borrowed from a common law system, but it has done so in a pragmatic manner and without compromising its own legal culture, thus gaining almost unanimous acceptance by its own legal commentators.

Perhaps the best testimony to the new regime will come from the *Converium*[106] case in which the settlement has not yet been finally declared binding. Whereas the court ruled in the *Shell* case that a class settlement was binding on non-Dutch class members, the court in *Converium,* in a preliminary ruling went a step further and held that non-Dutch plaintiffs could obtain a class settlement against a non-Dutch company even when the Dutch jurisdictional connection is minimal. In so doing this ruling has opened up the possibility for The Netherlands to become a centre for the international collective settlement of mass claims.[107] Time will tell.

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[104] See, eg, the Group Litigation order in England and Wales, contained in CPR 19.III.

[105] In the *DES* case in the pre-WCAM period, the general collective action required an opt-in, but this was viewed as 'unworkable' and an opt-out procedure was proposed and was adopted in WCAM to enable settlement.

[106] Hof Amsterdam November 12 2010 LJN BO3908.

[107] See Ouwehand and Maric '*Converium* decision opens up Netherlands for class settlements' in *Newsletter of the International Law Office* (2011-01-18) available at http://www.international-lawoffice.com (accessed 2011-06-12).