

Consultation document on Dutch draft bill on Redress of Mass Damages in a Collective Action

The Dutch Minister of Security and Justice has started a consultation on a draft bill on a Collective Damages Action. Current Dutch law does not provide for a collective damages action. It provides for a collective action in which a legal entity can ask the court to give a judgement on the liability of a person. In such collective action the court cannot decide on the damage incurred by the persons on whose behalf the collective action is brought. If, in case of a mass claim, a collective settlement is reached between a legal entity acting on behalf of victims and the person held liable, the Amsterdam Court of Appeal can make that settlement binding in relation to the entire group of victims under the Dutch Act on Collective Settlement of Mass Damages Claims ("WCAM"). Victims can use their right to opt out from a collective settlement if they prefer not to be bound by it. If a person held liable 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. However, no mechanism exists under Dutch law to force a person held liable to actual collective redress of a mass damages claim. The need for such a mechanism was widely felt in the Netherlands, as was the concern about the negative consequences to which the existence of such a mechanism might lead. Therefore, any such mechanism would need to prevent abusive claims and would have to protect the justified interests of both injured parties and persons held liable.

The draft bill presented in this consultation aims to enhance the efficient and effective redress of mass damages claims and 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 contains a five-step procedure for a collective damages action before the Dutch district court.

Legal entities which fulfill certain specific requirements (expertise regarding the claim, adequate representation, safeguarding of the interests of the persons on whose behalf the action is brought) can start a collective damages action on behalf of a group of persons. 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. Those persons must not have other efficient and effective means to get redress. The entity must have tried to obtain redress from the person held liable amicably.

If the court is satisfied that all these requirements have been met (**first step**) the court will give its judgement on the liability of the defendant (**second step**). Only if the court finds that the defendant can be held liable, will it allow the legal debate on damages and the collective redress thereof.

The **third step** is a hearing of the parties, i.e. the legal entity acting on behalf of a group of injured parties and the person or persons held liable, in which the court tries to help them to reach a collective settlement of the mass damages claim. 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 injured persons. The court may also use this hearing to discuss the legal points which prevent them from reaching such settlement and how to solve those. 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. It may also give a decision on outstanding legal points.

If at this stage no collective settlement can be reached the court may invite the parties to submit a proposal for a collective settlement of the mass damages claim. Such a 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 refer the parties to mediation to discuss any divergences in their respective proposals in order for the parties to reach a collective settlement of the mass damages claim (**fourth step**).

If mediation fails or if the court has decided not to refer to mediation the court may establish a scheme for collective redress of the mass damages claim based on damage-scheduling (**fifth step**). The court may base its scheme also on the proposals submitted by the parties. It may appoint an expert to advise the court on the damage-scheduling. In order to safeguard 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 victims 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 a scheme to be established, it may decide that no scheme for the collective redress of the mass damages claim will be established.

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 do not wish to submit such an application the court will order the parties to announce the collective settlement in a suitable way in order for victims to opt in.

The consultation period will expire on 1 October, 2014.

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For full text see <http://www.internetconsultatie.nl/motiedijksma>.