

Response to Consultation on Draft Dutch Bill for Redress of Mass Damages in a Collective Action

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The U.S. Chamber Institute for Legal Reform is a not-for-profit public advocacy organisation affiliated with the U.S. Chamber of Commerce, the world's largest business federation, which represents the interests of more than three million businesses of all sizes, sectors and regions, in addition to state and local chambers and industry associations. Many of the U.S. Chamber's members are companies that conduct substantial business in the European Union, and in particular, the Netherlands. ILR is therefore deeply interested in the orderly administration of justice in the Netherlands.

ILR's mission is to restore balance, ensure justice for both claimants and defendants, and maintain integrity within the civil legal system. We do this by creating broad awareness of the impact of litigation on society and by championing common sense legal reforms at the state, federal and global levels. Since its founding in 1998, ILR has worked diligently to limit the incidence of litigation abuse and has participated actively in legal reform efforts in the United States, the European Union, the Netherlands and elsewhere.

1. Introduction

ILR is pleased to contribute to the consultation commenced by the Dutch Government on amendments to the Dutch Civil Code ("**DCC**") for court procedures for collective damages actions.

ILR has carefully reviewed the consultation documents and the explanatory memorandum ('Memorandum van Toelichting'), together referred to here as the "**Consultation**," as well as the proposed legislative text (the "**Draft Bill**"), published in July 2014.

ILR has vast experience with the U.S. class action system and is therefore able to offer key insights into the effects of collective litigation on consumers, defendants, and the administration of civil justice, making it well-positioned to play a meaningful role in this Consultation.

As a threshold matter, ILR applauds the statement in the Consultation that any new mechanism “*would need to prevent abusive claims and would have to protect the justified interests of both injured parties and persons held liable.*” ILR is concerned, however, that despite these statements, the potential for abuse remains in the system proposed in the Draft Bill.

Dutch collective damages actions – like U.S. class actions – would encourage abusive litigation practices precisely because *any* procedure that permits a representative to aggregate the claims of hundreds, if not thousands, of individuals empowers that representative to threaten a defendant with significant loss. As a result, the representative can use this power to demand money from a defendant, even if the underlying claims have little chance of success. In the United States, claimants are able to use this unequal bargaining power to extract what a respected jurist has called “blackmail settlements” from defendants.¹ This is an *inherent* problem with collective damages litigation that can be mitigated by adopting certain safeguards, but cannot be eliminated.

The risk of blackmail settlements is acknowledged in the Consultation.² However, the Consultation suggests that the Dutch legal system contains some safeguards against abuse (e.g., because there are no punitive damages, result-dependent legal aid, or jury trials) and that in any case the Draft Bill seeks to reach a settlement between the litigants, so abusive blackmails settlements should not present an important risk.

ILR respectfully submits that the Consultation greatly underestimates the potential risks. The very fact of aggregation in litigation increases the incentives for third parties and creates opportunities for abuse (regardless of the availability of punitive damages, result-dependent legal aid, or jury trials) because of the negotiation leverage that this type of litigation produces, arising from the potential reputational consequences for defendants and the inability to fully recover the costs of defence.³ The Consultation seriously misjudges the lengths that profit-motivated private parties (often unconnected to the facts of the case) will go, to

¹ *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Judge Henry Friendly).

² See, for example, the references to blackmail settlements on page 7.

³ ILR points out that the risks inherent in collectivising claims have not been witnessed to an important degree in procedures such as the WCAM precisely because this procedure remains voluntary and defendants cannot be forced into a procedure to answer an unmeritorious claim, and therefore cannot be “blackmailed” into a settlement.

exploit this negotiating leverage to derive financial return from the opportunities created by collective litigation.

For these reasons, ILR strongly urges the Dutch Government first to consider carefully whether the need exists for collective damages actions at all, such that would justify these risks being taken. The Netherlands already has a system that provides access to compensation – including collective contexts. Therefore, ILR does not believe that a need for greater access to collective damages litigation has been demonstrated.

If the Dutch Government proceeds nonetheless, there is a real risk that the Netherlands will become a magnet jurisdiction for collective damages litigation. In the event that the Netherlands allows itself to become such a magnet jurisdiction for mass claims – in particular for cross-border cases – the effects on business confidence and the overall willingness to invest in the Netherlands would be both negative and significant.

If, despite the risks, the Dutch Government proceeds with implementing a general collective damages litigation procedure, ILR believes that great attention must be paid to the necessary safeguards in order to provide a fair and efficient dispute resolution mechanism for both claimants and defendants, and to prevent against the types of litigation abuse which collective damages litigation is most susceptible.

In this regard, the Draft Bill omits a number of essential safeguards that are included in the European Commission's 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 (the “**Recommendation**”).⁴ While the Recommendation is non-binding, we would strongly urge the Dutch Government to consider and adopt at least the safeguards described therein. Failure to do so will almost certainly lead the Netherlands to become a magnet jurisdiction for forum shopping to circumvent the emerging EU-wide norms for safeguards against litigation abuse.

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<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013H0396&from=EN>.

2. Collective Redress in the Netherlands – Pre-existing Collective Redress Measures

Among the reasons why ILR doubts the need for collective damages litigation in the Netherlands is that the Dutch judicial system already provides a number of mechanisms and Court procedures that can be used by claimants to obtain collective redress. These include claims bundling (where claimants sell or assign their claims to a third party), collective actions by foundations or associations representing multiple parties (which are currently permitted for all types of Court claims except damages), and the Dutch Act on Collective Settlements of Mass Claims (Wet Collectieve Afhandeling Massaschade, “**WCAM**”).⁵

These mechanisms and procedures allow the Courts to determine liability in collective or group actions, but not to determine the level of damages. Instead, following the determination of liability, the parties can reach an agreement on the level of compensation in a collective settlement, which is then approved by the Amsterdam Court of Appeal under the WCAM regime and made binding on all the injured parties. Alternatively, if the parties cannot reach an agreement on damages, individual claimants can use the judgment on liability to start proceedings to recover damages from the defendant, or reach a settlement on an individual basis.

The Dutch judicial system does not currently allow for a defendant that has been found liable in a collective action to be forced into a collective redress scheme to compensate claimants. The goal of the Draft Bill is to create such a mechanism, but doing so at the cost of unleashing the potential for litigation abuse.

3. The Draft Bill – Overview Description

The Draft Bill permits an ‘organisation,’ whether a claims organisation or foundation, special interest group, or other form of representative entity, or even an NGO⁶ not having itself suffered any harm (together a “**Representative Association**”), to commence proceedings for collective damages in certain circumstances, without a mandate from any potential claimants.

The **first step** of the proposed procedure is that certain criteria have to be met before the action can be admitted by the Court. The potential claimants (for whom the Representative Association is purporting to bring proceedings) cannot

⁵ Other types of collective action include the Wet Handhaving Consumentenbescherming (Law on Enforcement of Consumer Protection) which has an out-of-court settlement procedure.

⁶ We note that in a letter to the Dutch House of Representatives in October 2012, the Dutch Ministry of Justice stated that NGOs cannot act as claim foundations. However, no such prohibition appears in the Draft Bill.

have any other effective or efficient means to obtain redress in respect to the rights violated. The Representative Association must convince the Court that it fulfils certain requirements as to: its expertise regarding the claim; its competence to represent the potential claimants (adequate representation); and its ability to safeguard the interests of the potential claimants. It must also have sought redress, on an amicable basis, from the defendant before launching proceedings.

If the requirements of the first step are met to the Court's satisfaction, the Court can hear arguments on liability and give judgment on the liability of the defendant (the **second step**), but this judgment does not determine the level of damages. An appeal regarding admissibility and liability is available at this stage. It is also possible for claimants to request an injunction to prevent continuation of the activity complained of. After the second step, the judge sets a period within which the parties have to try to reach a settlement. If the defendant has been found liable and no settlement is reached after the second step, the Court hears the parties on the level of damages and the collective redress of the potential claimants (the **third step**). At this point, if the parties agree on a collective settlement scheme, it can be submitted to the Amsterdam Court of Appeal to make the settlement binding on the entire class of claimants, using the pre-existing WCAM procedure. If the parties cannot agree, the Court can refer the parties to mediation, or discuss any legal points that the parties cannot overcome.

If the parties cannot agree on a collective settlement (after the third step), the Court can invite the parties to submit their separate proposals for a collective settlement of the damages claim (the **fourth step**). The proposals are based on damage schedules; i.e., that damages be awarded to claimants based on the characteristics of the class/sub-class to which the claimant belongs, and not on their personal characteristics. Again, the Court can direct the parties to mediate over any differences in their proposals.

If the parties cannot agree on a collective settlement, either following the mediation or where the Court does not order a meditation, the Court can establish a collective redress scheme (the **fifth step**). The Court can use proposals produced by the parties as a starting point, and it can appoint an expert to advise on damages scheduling. The Court can also order the proposed claimants to submit statements of participation, i.e., opt-in to the proceedings, before the scheme is established, to check that the scheme adequately resolves the underlying claim. Thus, it is only at this late stage – at the end of the procedure (and potentially after incurring substantial costs in defending a claim through the first four steps) – that defendants might learn for the first time whether any more than a token number of claimants actually support and wish to participate in the claim, and who those claimants might be.

If insufficient claimants opt-in to the group, the Court can decide not to establish a collective redress scheme. The Draft Bill does not clarify what would

constitute an insufficient number of claimants; however, if the Court decides not to establish a collective redress scheme, it would appear that claimants would have to rely on the Court's judgment on liability established in the second step to seek damages from the defendant on an individual basis, taking up further time and resources of the parties and the Courts.

Where the Court, in the fifth step, establishes a collective redress scheme, it can order the defendant to accept the scheme and order the parties to make an announcement that potential claimants can opt-in to the scheme. Potential claimants would then be free to opt-in or to pursue their own individual claims.

4. General Comments on the Draft Bill

The Draft Bill does not add any real substance to the existing procedures and mechanisms for claimants to obtain collective redress, nor does the procedure under the Draft Bill appear to speed up or simplify the Court process for claimants. What the Draft Bill does, is allow a Representative Association to commence proceedings for damages without the support or participation of those individuals actually affected. ILR believes that without requiring a proper mandate from the individuals affected by the violation of their rights, there is a danger that Representative Associations will race to launch claims, some of which may be launched for reasons other than the achievement of redress for those allegedly harmed.

The Draft Bill also imposes on judges the discretion to permit or prevent claims for collective damages actions, applying criteria described in the Draft Bill. However, the gateway criteria and safeguards provided for in the Draft Bill are vague and inadequate, which could potentially allow spurious claims.

The failure to adopt the minimum safeguards in the Recommendation creates the danger that the Netherlands could come to be seen as an attractive destination for 'forum shoppers' seeking out jurisdictions where the safeguards against abusive litigation are low. This risk is specifically acknowledged in the Consultation, but is dismissed in light of the proposed rules regarding the scope of the collective damages action.⁷ ILR respectfully submits that the risk of litigation abuse has been underestimated, and that the proposed scope of the collective damages action will not save the Netherlands from 'forum shoppers,' for the reasons below.

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See pages 2 and 13 of the Consultation.

5. Specific Comments on Aspects of the Draft Bill

5.1 Opt-in Provisions are the End of the Process

The procedure in the Draft Bill does not require potential claimants to opt-in at the commencement of the proceedings. Instead, potential claimants can wait for the outcome of the proceedings before deciding whether to opt-in.

This is a serious flaw because it would permit a Representative Association to start proceedings without a real mandate or actual support from individual claimants, and potentially waste the defendant's and the Court's time and resources if no claimant decided to opt-in, or if insufficient numbers opted-in, at the conclusion of the proceedings (if, for example, a collective settlement agreed upon between the Representative Association and defendant is inadequate, or the damages awarded to each individual are trivial, or – as might be expected – individual claimants declined to opt-in because the Representative Association intended to reward itself, or its backers, disproportionately).

In addition, there is a serious risk of defendants being drawn into litigation without any way of knowing whether the litigation is against a token number of claimants, a small and non-representative body of claimants, or a sizeable and representative body of claimants. The system proposed would require a defendant to expend (largely unrecoverable) resources and defend itself as if it were litigating against the entire universe of potential claimants, whereas the reality might prove to be very different. This potentially will involve a significant waste of resources, the incurring of disproportionate costs, and the impediment of settlements (as a defendant cannot be expected to agree to terms until it knows the total cost and consequences, which it cannot know until the number and identity of claimants becomes clear).

Allowing a Representative Association to initiate a claim without first securing a mandate carries with it many of the defects and risks of opt-out claims. It permits a Representative Association to make statements about potential claimants which cannot be verified until the claimants are identified, or to exaggerate the potential size of the claimant class; it allows potential claimants to be shielded from the consequences of pursuing a bad claim (i.e., via the 'loser pays' rule) as they cannot be identified; it limits the ability of defendants to make reasonable enquiries of claimants regarding liability and quantum; and it allows the potential of a very large claim to be exploited by the Representative Association before it has even verified that individual claimants wish to be represented by the entity in question.

The experience of the U.S. class action system and other jurisdictions that have opt-out proceedings, such as Australia, is that such actions are inherently prone to abuse by profit-seeking third parties, including litigation funders, law firms, and other investors in litigation.⁸ The abuse arises because the scale of potential liability in such cases provides an opportunity for these parties to extract lucrative settlements from businesses that choose to settle claims as a means of avoiding the time, costs, and negative publicity associated with large-scale litigation, regardless of the merits of the litigation itself. The system proposed in the Draft Bill would effectively require defendants to answer all cases as if they were opt-out cases taken on behalf of the entire universe of potential claimants, because defendants will have no way of knowing until the end how many claimants will actually opt-in. Therefore, in terms of incentives to succumb to a “blackmail settlement,” an opt-out class action is indistinguishable from an opt-in action in which an unknown number of claimants might later opt-in, as the litigation carries all of the same risks in terms of time, cost, negative publicity, and the risk of an unpredictable and severe award.

True opt-in procedures, i.e., those in which participants affirmatively choose to participate at the beginning of a procedure, are vastly superior to opt-out procedures (or late opt-in procedures) both in deterring abusive litigation and in protecting the rights of all group members because they ensure that only individuals who participate in – and are bound by – a lawsuit are those who affirmatively seek to be a member of the group. They allow defendants to respond to the litigation in a proportionate way, because the risk associated with the litigation is more measurable than with litigation in which defendants do not know who the claimants are, or how many claimants there might be (as would arise under the Draft Bill). Also, for listed companies, financial reporting obligations require lawsuits above a particular level of materiality to be disclosed in financial filings. In circumstances where defendants cannot know how many claimants they are litigating against, they cannot adequately assess the materiality of the collective damages action and may face difficulties in complying with financial reporting obligations.

It is conceivable that defendants will go through the expense of an elaborate and complex case only to find that few, if any, defendants opt-in to the outcome. In other words, even after enduring expensive and difficult litigation, defendants might find that they have achieved no certainty, and may need to restart the same litigation again against a new entity purporting to represent the very same claimants

⁸ See for example: ILR’s report entitled “*Economic Consequences: The Real Costs of U.S. Securities Class Action Litigation*” and the litigation abuse in the *Chevron v. Donziger* case, Case no. 11-cv-0691 (SDNY), summarised at <http://www.chevron.com/ecuador/>. For Australia, see the summary report by King & Wood Mallesons, entitled “*Class Actions in Australia: The Year in Review 2012*”, available at: http://www.mallesons.com/Documents/Class_Actions_in_Australia-The_Year_in_Review_2012.pdf.

who had the possibility of opting-in to the previous litigation but chose not to do so.

The incentives of potential claimants will also be distorted. Instead of deciding whether to pursue a claim based on an evaluation on the merits, potential litigants will be entitled to wait until the outcome of litigation and only then – having been offered an amount of money (or other benefit) by a Representative Association – decide whether to take that money or benefit, or not. Such a system will not encourage potential claimants to take a balanced view of the merits of their case or the systemic costs involved in making such an outcome possible.

ILR proposes the following amendments to the Draft Bill to introduce minimum safeguards:

(a) a requirement that the Court establish at the commencement of the proceedings whether there is a class of claimants that have affirmatively opted-in in sufficient numbers; and

(b) a provision that the outcome of the collective redress scheme is binding on all claimants participating in the proceedings.

5.2 Criteria for the Suitability of the Representative Association

In ILR's view, where collective damages actions exist, they should only be instituted by lead claimants who have suffered injury caused by the actions of the defendant. Such persons will be most motivated to seek fair and effective compensation and to vindicate their rights.

Only where lead claimants are not in a position to initiate a suit on their own should third parties be able to commence representative collective actions on their behalf. To the extent that Representative Associations do become involved, they should be government approved,⁹ not-for-profit bodies with the expertise to distinguish meritorious cases from speculative claims.

In no event, however, should private organizations be authorized to commence collective damages actions. In particular, ILR is very concerned about the possibility of a Representative Association being used as a special purpose

⁹ Examples of schemes requiring Government approval include the UK's Competition Act 1998, section 47B, and the recently passed French Loi Hamon (<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028738036&categorieLien=id>).

vehicle by law firms, litigation funders or other self-interested parties to exploit the opportunity of a collective damages action for their own ends.¹⁰

The criteria set out in the Draft Bill for the suitability of an organisation to bring a claim are the same as those applicable to the previous WCAM procedure, with some new additions applicable only to collective damages claims.

For the WCAM procedure, Article 3:305a of the DCC currently permits a not-for-profit foundation¹¹ or association,¹² that is authorized by its articles of association to represent the interests of third parties, to submit a collective claim to protect “similar interests” of multiple third parties (“other persons”)¹³ if it has tried and failed to achieve the required result through negotiations with the defendant. Such claims are not claims for damages, but are designed to establish liability. To establish jurisdiction to make a claim, a foundation or association need not have its

¹⁰ In the case *Stichting Loterijverlies.nl/Stichting Exploitatie Nederlandse Staatsloterij* (2013), the Stichting Loterijverlies.nl (“the Foundation”) started a collective procedure (under existing rules allowing collective procedures – though not for damages) against the Dutch state lottery regarding allegations of misleading advertising. The Foundation claims to represent the interests of 23,000 people who subscribed to the suit through a website, www.loterijverlies.nl. In order to subscribe, individuals had to pay a small sum to Loterijverlies.nl BV (“the Company”). The Company is also the founder and director of the Foundation that started the procedure. It was agreed that, in case of success, the participants will receive 80% of the damages, and 20% will be kept by the Company. Although the case is still pending before the Dutch Supreme Court (“Hoge Raad”) it has been decided by lower courts that the Foundation is an admissible claimant. The Dutch Court of Appeal (“Gerechtshof”) found that the Foundation does adequately represent the individuals that subscribed on the website of the Company. Furthermore, the Court concluded that even though the Company backing the claim has a commercial interest in the outcome, it is still permitted under the Dutch civil code. See: Gerechtshof Den Haag, 28 May 2013, NJF 2013, 308 (*Stichting Loterijverlies.nl/Stichting Exploitatie Nederlandse Staatsloterij*), para. 2.4.

¹¹ A “foundation” (Dutch term: “*stichting*”) is defined in Article 2:285 of the DCC as a legal entity, established by a legal act (i.e., a notarial deed), which has no members and uses its funds to achieve a purpose set out in the Articles of Association. A foundation may be set up especially for the purpose of participating in a collective action or settlement. In the *Shell* case, for example, a foundation called Shell Reserves Compensation Foundation was set up to represent investors which sought compensation and to distribute settlement amounts to those entitled to it under the terms of the court-approved settlement agreement (see <https://www.royaldutchshellsettlement.com/Default.aspx>).

A further example is Stichting Investor Claims Against Fortis, the purposes of which are set out on its website and include obtaining compensation from Fortis, a European bank (see http://www.investorclaimsfors.com/about_us.php). The foundation is funded by a consortium of law firms representing investors (see http://www.investorclaimsfors.com/frequently_question.php).

A third example is the Stichting Convergium Securities Compensation Foundation, which was established to obtain compensation for losses allegedly suffered by shareholders in Convergium (formerly Zurich Re) as a result of alleged misstatements and omissions concerning the company’s financial condition.

¹² An “association” (Dutch term: “*vereniging*”) is defined by Article 2:26 of the DCC as a legal entity with members, which aims to achieve a specific purpose different from the purpose set out in Articles 53(1) and (2) (i.e., to provide for material needs of its members). An association may not distribute profits to its members. The Dutch Association of Shareholders (“Vereniging van Effectenbezitters”) was a party to WCAM settlements in the *Vie d’Or* and *Convergium* cases.

¹³ Such “other persons” can be individual consumers, but also companies.

own direct *financial* interest in the claim. Its interest in the claim can be to pursue the objectives set out in its articles of association, and therefore, in practice, its role can be limited to asserting the rights of the “other persons” that it represents.

For the purposes of the Draft Bill (i.e., for collective claims for damages), two additional criteria regarding suitability must be met. First, the Representative Association must be able to show “sufficient expertise regarding the claim.” Second, the Representative Association must be able to show that it can “adequately safeguard the interests of the persons on whose behalf the action is brought.”

The Draft Bill does not include any description or guidance as to what expertise or experience a Representative Association is required to bring to the claim, or how a Representative Association could show that it can adequately safeguard the interests of claimants. It is entirely unclear how a judge would decide on such issues. The Consultation makes reference to other factors that might be taken into account, though these are lacking from the Draft Bill itself. These factors include: (i) the other activities the Representative Association is involved in regarding representation of claimants; (ii) the number of people that are members of the Association; (iii) to what extent the claimants accept the Association as representing them; (iv) the extent to which the Association serves as an interlocutor not only towards the defendant but also to others, such as the government; and (v) the extent to which the Association is a spokesperson towards the media. ILR agrees that these factors may be useful guidance but: (a) they are not contained in the Draft Bill itself, and so will not have the force of law and consequently, they may not be applied consistently; and (b) these criteria are in any event vague and insufficient, and would, for example, prevent a Representative Association from engaging with a profit-motivated litigation funder demanding a significant share of any awards.

Without adequately defined criteria and proper safeguards, claims could be brought by an unsuitable and unqualified Representative Association to prosecute such claims, and judges may find it difficult to apply the law to determine the admission issues raised.

ILR proposes the following amendments to the Draft Bill to ensure the suitability of the Representative Association by:

(a) requiring the Representative Association to have a direct link with the claimants by means of a membership or other form of written agreement, in addition to their specific written request to opt-in at the beginning of the procedure;

(b) requiring the Court to establish the link between the Representative

Association and the claimants as a condition of allowing the claim; and

(c) requiring the Representative Association to be government appointed and approved, have a non-profit-making character, a direct relationship between the Representative Association's objectives and the violated rights that are the subject of the litigation, and adequate resources, expertise, and experience to bring the collective damages action on behalf of the claimants.

6. Funding

Funding mechanisms for collective damages actions must provide access to justice and still be tailored to mitigate the risks of litigation abuse. Two important corollaries of this principle are: preserving the “loser pays” rule; and discouraging funding mechanisms for collective actions that involve “investors” – be they lawyers, third-party litigation financing (“**TPLF**”) companies, or private representative organizations – profiting from the outcome of lawsuits.

6.1 The “Loser Pays” Principle

In Dutch civil litigation, the “loser pays” principle generally applies, though with some qualifications. The losing party is not required to pay all the lawyers' costs incurred by the winning party. The lawyers' fees that the losing party is ordered to pay by the courts depend primarily on the complexity of the case, measured by the number of procedural acts performed in the course of the proceedings.

Each procedural act is worth one point (minor acts are worth 0.5 points). There are 8 levels of points, with the applicable level depending on the value of the claim. At level 1, a point is worth €384 (with a maximum of 5 points). At level 8, a point is worth €3,211 (with no maximum limit as to the number of points).¹⁴ The court calculates the costs to be awarded to a successful party by multiplying the number of points accumulated by its lawyers by the value of a point at the applicable level. This points system can lead to upper numerical limits on potential costs awards. For example, in non-patent intellectual property cases, the maximum costs award under the “loser pays” rule is just €25,000.¹⁵

In summary, while the “loser pays” principle does generally apply in Dutch litigation, the award of costs to the winning party will enable it to recover only a small percentage of its actual costs.

¹⁴ Tariffs applicable on January 1, 2006: the amounts are adjusted at irregular intervals.

¹⁵ <http://www.rechtspraak.nl/Procedures/Landelijke-regelingen/Sector-civiel-recht/Documents/Indicatietarieven-2014.pdf>.

The limited application of the “loser pays” rule in Dutch civil litigation risks becoming a major problem in the event of mass damages litigation as proposed in the Draft Bill. The existence of the “loser pays” rule has rightly been identified by the European Commission in its Recommendation¹⁶ as among the key safeguards against abusive litigation in collective damages cases.

ILR proposes the following amendments to the Draft Bill, at least in collective damages cases:

(a) to allow the “loser pays” rule to apply to its full extent in order to deter those that would potentially launch unmeritorious claims, causing huge expense to defendants who – under the current system – could hope to recover only a tiny fraction of their actual costs even if they defeat a claim in its entirety; and

(b) as a corollary, this must mean that Representative Associations be required to demonstrate, as a pre-requisite to their entitlement to act, that they have sufficient means to pursue all necessary stages of the case, and in the event they are unsuccessful, that they will have adequate funds to discharge the actual legal costs of the defendant. To the extent that third party funding is involved in any collective litigation (which ILR would urge strongly against for the reasons below), such funders must also be made liable for adverse costs for any unsuccessful collective damages actions they promote and sponsor in the event that the relevant Representative Association is not capable of discharging those costs.

6.2 Preventing Lawsuits from Becoming an Investment Vehicle

Lawsuits should not be – or be allowed to become – a means for third parties unconnected to the substance of the dispute to reap profits.

Classic contingency fees (whereby the lawyers representing a party take a percentage of any damages award) are not permitted under Dutch bar rules.¹⁷ However, in line with the European Commission’s Recommendation,¹⁸ this prohibition should be given statutory footing with regard to collective damages actions.

¹⁶ See paragraph 13 of the Recommendation.

¹⁷ The Dutch Bar Association’s Code of Conduct (Rule 25, Clause 3) provides that “*a lawyer may not agree to charge a proportionate part of the value of the result obtained.*”

¹⁸ See paragraphs 29 and 30 of the Recommendation (2013/396/EU). Paragraph 30 states that Member States “*should not permit contingency fees which risk creating such an incentive [to litigation that is unnecessary from the point of view of any of the parties].*”

In addition, it is necessary to prevent contingency fees being permitted through the “back door,” by failing to prevent other, equivalent litigation funding methods. In other words, preventing funding mechanisms for collective damages actions that involve “investors” – be they lawyers, claim foundations, TPLF companies, or private representative organizations – seizing control of and profiting from successful cases is equally important.

According to the Association of Litigation Funders of England & Wales, TPLF can be defined as follows: “*Litigation funding is where a third party provides the financial resources to enable costly litigation or arbitration cases to proceed. The litigant obtains all or part of the financing to cover its legal costs from a private commercial litigation funder, who has no direct interest in the proceedings. In return, if the case is won, the funder receives an agreed share of the proceeds of the claim. If the case is unsuccessful, the funder loses its money and nothing is owed by the litigant...The funders’ share of the proceeds of a successful case is negotiated with the litigant at the outset. This financial reward typically consists of either a percentage of the damages recovered, or a multiple of the amount advanced by the funder, or a combination of the two.*”¹⁹

This mechanism is identical in many ways to a classic (banned) contingency fee arrangement (albeit one entered into by an investor and a claimant, rather than between a lawyer and a claimant). The Draft Bill does not specifically exclude (direct or indirect) TPLF for collective damages actions. This should be remedied, in line with the Commission’s Recommendation,²⁰ The Consultation accompanying the Draft Bill does suggest that a Court could consider whether a Representative Association is a suitable representative, including by examining the origins of funding and whether the Representative Association appears to act out of self-interest rather than the interests of claimants. However, this vague and unspecific suggestion is not a concrete safeguard against abuse, and the language regarding the possibility of examining funding origins does not appear in the Draft Bill itself.

Safeguards against TPLF are necessary because the litigation funding industry has been growing steadily in the Netherlands. Litigation funding has allowed funders, who may operate as hedge funds or other financial vehicles, to treat legal claims as investments, bankrolling the costs of litigating a dispute in return for control over how it is conducted and a share of any damages awarded from defendants. ILR has serious concerns regarding the growth of litigation funding and the detrimental effect that extensive use of this model, which essentially turns legal claims into an investment class, could have on businesses operating in the Netherlands.

¹⁹ See ALF website: <http://associationoflitigationfunders.com/litigation-finance/>.

²⁰ See paragraphs 14 to 16 of the Recommendation.

The Consultation states that TPLF is not yet a widespread phenomenon in the Netherlands, and therefore, there is no clear view on the positives and negatives of this mechanism.²¹ ILR respectfully but firmly disagrees with this statement. TPLF is becoming a widespread phenomenon in the EU, including in the Netherlands, and it will be much more difficult to rein back TPLF once it becomes further entrenched.²²

TPLF can encourage the filing of frivolous litigation²³ and the exertion of undue settlement pressure on defendants by providing claimants with the resources to continue litigating claims regardless of merit. In addition, the level of control often seized by TPLF providers allows them to require cases to be conducted in a way that best suits their return on investment, rather than the way that best offers redress to claimants. Claimants are often more interested in having the underlying problems resolved (e.g., a new product, better information, a practical remedy to reverse any harm caused, discounts against future purchases, etc.) and are therefore likely to be satisfied by arrangements other than a cash settlement. The involvement of TPLF greatly limits the options and can impede settlements. In addition, after satisfaction of the TPLF provider's "cut" (which typically takes priority over the claimants' compensation), there can often be little left for claimants to share. These dangers are exacerbated in collective proceedings, which already exact substantial leverage against defendants based on their sheer size and the potential for enormous exposure.

In the absence of a direct statutory ban on TPLF in collective damages cases, there is a real risk that a "contingency fee" system (in favour of lawyers, funders or other investors) will emerge via the "back door."

Under the DCC, Representative Associations must be not-for-profit legal entities.²⁴ They are legally independent and are not owned by any person (including

²¹ Consultation, paragraph 14.

²² By way of example, the following funders are all based in, and/or are active in the Netherlands: Bentham IMF; Cartel Damage Claims (CDC), CFI Europe; East-West Debt and Omni Bridgeway. (See: <https://www.imf.com.au/docs/default-source/site-documents/media-release---bentham-imf-limited-announces-partnership-and-expansion-into-europe>; http://www.carteldamageclaims.com/wordpress/wp-content/uploads/2014/03/121004-Press-Release-CDC_Calunius.pdf; http://www.claims-funding.eu/10.html?&tx_ttnews%5Btt_news%5D=34&tx_ttnews%5BbackPid%5D=2&cHash=f51475573c; <http://www.eastwestdebt.com/>; and <http://omnibridgeway.com/contact>).

²³ See, for example, the *Chevron Corp v. Donziger* case in the U.S. (<http://www.chevron.com/ecuador/>) and the recent English case *Excalibur Ventures v. Texas Keystone* [2013] EWHC 4278 (Comm) (<http://www.legalweek.com/legal-week/blog-post/2323328/truly-extraordinary-excalibur-case-raises-conduct-concerns-for-clifford-chance>). In the *Donziger* case, Chevron successfully argued that Donziger had procured an international arbitration award for \$18 billion through fraud. In *Excalibur*, the claimant pursued a \$1.8 billion claim through the court, financed by third party litigators. The judge found that the claimant's solicitors had aggressively pursued a number of serious allegations without apparent foundation.

²⁴ Article 3:305a of the DCC.

the persons that established them). However, Representative Associations are permitted to obtain funds from third parties to achieve the purposes set out in their Articles of Association. There is no statutory prohibition on them obtaining funds from TPLF entities or law firms. In other words: a TPLF entity or law firm cannot own a Representative Association but it can provide funds (on a contingency basis) to a Representative Association, for example, to fund a court case.

Since 1 July 2011, the requirement for Representative Associations to be not-for-profit has supposedly been reinforced by the (voluntary) Claim Code, a form of voluntary self-regulation for Representative Associations that wish to submit collective actions pursuant to Article 3:305a of the DCC, published by a committee of well-respected judges and lawyers. However, the scope of these safeguards is simply too narrow since they do not address who may fund a Representative Association or the terms on which funding may be provided. Accordingly, it is possible and entirely lawful for a Representative Association to be established specifically for the purpose of initiating a collective procedure and for it to be controlled, and funded, by parties which are profit-making, provided the Representative Association itself fulfils the not-for-profit requirement set out in Article 3:305a of the DCC and is organized in a sufficiently professional way.

Thus, Representative Associations are vulnerable to being directly or indirectly controlled by TPLF providers or other investors in litigation and should be subject to binding regulations or supervision which would prohibit them from using TPLF, or at least subject their funding arrangements to safeguards and controls.

The European Commission's Recommendation set out a series of safeguards regarding TPLF in relation to collective actions, none of which have been adopted or adhered to in the Draft Bill.

ILR proposes the following amendments to the Draft Bill to prevent collective damages actions from becoming investment vehicles by:

(a) prohibiting TPLF outright – whether direct or indirect (e.g., by funding or owning a Representative Association) in collective damages cases; and

(b) if there are any exceptional cases in which the Court determines that TPLF should be permitted in a collective redress case, these should be subject to strict safeguards including:

(i) disclosure of the agreement between the funder and organisation at the start of the proceedings;

(ii) a prohibition on the funder seeking to influence procedural

decisions and settlements; and

(iii) an absolute prohibition on charging on the basis of a proportion of the damages awarded.²⁵

7. Causation and Risks of Reputational Damage

The Draft Bill does not adequately emphasise the need for the Representative Association to prove – at an early stage – the alleged link between the act of the defendant causing the damage and the resulting injury to the claimants. As drafted, it would be open for organisations to bring proceedings that draw attention to an issue, for example, alleging a link between types of food and obesity, or types of industry and climate change.

ILR proposes the Draft Bill is amended to introduce a gateway requirement that the Representative Association show a *prima facie* arguable case that the defendant's actions are directly attributable to the specific damage that is the subject of the claim.

ILR would also advocate, as a minimum, the safeguards regarding reputational damage advocated by the European Commission in its Recommendation.²⁶

8. No Provision for Appeal of the Damages Ruling

The Draft Bill allows for the parties to appeal the judge's decisions at each step of the procedure, with the exception of the final decision on the level of damages. It follows that if the proceedings reach this stage, the parties will still be in disagreement over the level of damages, and the judge's determination is likely to be controversial.

ILR notes that the Consultation refers to two justifications for the absence of an appeal: (a) that an appeal would be inefficient because the Court of Appeal would have to revisit much of the ground that the lower court covered; and (b) that the opportunities for appeal at earlier stages of the procedure already safeguard the rights of the parties.

As to the first justification, ILR observes that it is in the nature of an appeal that an appellate court revisits the decision-making of the lower court. If a desire to

²⁵ These safeguards reflect the safeguards set out in paragraphs 14 and 16 of the Recommendation.

²⁶ See Recommendation, paragraphs 10 to 12.

avoid repetition of work was sufficient to deny an appeal, no appeals would ever be possible.

As to the second justification, ILR would respectfully observe that it is the final ruling of the Court, which may require a defendant to payout vast damages, that is likely to have the greatest impact on the defendant. Being entitled to appeal earlier procedural stages – when the result of the case remains unknown – is far different from being able to appeal against a perceived injustice or error in a final award.

It seems highly unusual to ILR that no appeal will be allowed against the Court's decision on the level of damages. Damages calculations are necessarily complex and are often difficult, and the prospect of an occasional mistake or misunderstanding – not to mention a legal error – must be a real possibility.

ILR proposes the following amendment to the Draft Bill to avoid denying to the parties all appeals on the key issue of the level of damages and the denial of their right to an effective remedy and the right to a fair trial:²⁷

(a) that an appeal of the decision on the level of damages be made available to the parties.

9. Joinder of Similar Cases, and Multiple Cases Against the Defendant

The Draft Bill grants the Court discretion to join cases brought by different claimants where the cause of action and damages are the same or similar. If the Court does not exercise its discretion in joining cases into a collective damages action, the defendant could be confronted by a large number of similar claims, which would also consume the Court's time and resources.

Further, the Draft Bill does not prevent a Representative Association from launching multiple claims based on variations of the same causes of action and damages against a defendant. Again, the effect is to waste the Court's time and resources, and those of the defendant.

ILR proposes the following amendments to the Draft Bill to prevent the multiplicity of similar cases by:

(a) obliging the Court to join cases where the cause of action and damages are the same or similar, in line with the principle of “predominance of common issues/cohesiveness.” This should not prevent the Court from determining the

²⁷ See Article 47 of the EU Charter of Fundamental Rights (the right to an effective remedy and to a fair trial).

level of damages for each individual claimant after liability has been determined; and

(b) requiring a Representative Association or claimant to bring a claim, and any similar claims, within a single proceeding. This would not prevent other parties opting-in to the proceedings if they had similar claims.

10. Forum Shopping/International Litigation Hub

The Consultation to the Draft Bill appears on its face to allow only cases sufficiently connected to the Netherlands to be admitted as a collective damages action, as jurisdiction is limited to cases in which the defendant is domiciled in the Netherlands, the majority of the claimants have their ordinary residence in the Netherlands, or the event giving rise to the claim occurred in the Netherlands.

However, this is not the effect of the provisions in the Draft Bill, which may in practice allow a great many claims with little or no nexus to the Netherlands to proceed under the Draft Bill. In particular, many international companies have a location in the Netherlands. This fact alone should not be sufficient to grant jurisdiction to the Dutch Courts, particularly in circumstances where those Courts might make awards concerning events more closely related to other jurisdictions.

Thus, the Draft Bill fails to take the opportunity to address and rectify a worrying trend in Dutch civil litigation, which includes the Dutch Court purporting to take jurisdiction over claims which have only the slenderest connection to the Netherlands. If this trend is not arrested, the risk of the Netherlands becoming a destination for ‘forum shoppers’ is grave.

10.1 The Trend Towards Expansive View of Jurisdiction Taken by Dutch Courts

The Court has addressed the question of extra-territorial jurisdiction in WCAM cases including *Shell* and *Converium*.

In the *Shell* case, the Court – with the parties’ consent – took jurisdiction on novel grounds despite only 751 out of 120,000 class members residing in the Netherlands.

The Amsterdam Court of Appeal took a potentially significant step further in the *Converium* case. In its interim judgment of 12 November 2010, it relied – as one of the bases of its jurisdiction – on Article 5(1) of the Brussels I Regulation, which provides: “*A person domiciled in a Member State may, in another Member State, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question.*” The Court provisionally found that, since the WCAM agreement is an

agreement concluded under Dutch law, and must be executed in the Netherlands (by means of the payout), Article 5(1) could confer jurisdiction. The final judgment of 17 January 2012 did not revisit the jurisdictional issues.

The Court clearly expressed that it was seeking a basis to establish jurisdiction to permit a worldwide settlement that complemented the U.S. settlement. Given that the U.S. Courts have denied jurisdiction in “foreign-cubed” cases,²⁸ and U.S. settlements can only cover claims with a sufficient link to the U.S.,²⁹ there was, according to the Court, a “demand” for courts that could declare settlements generally binding for the rest of the world. The Amsterdam Court of Appeal stated clearly that it wanted to satisfy that demand.

The Court’s reasoning under Article 5(1) of the Brussels I Regulation has been severely criticized in Dutch legal literature.³⁰ In the *Converium* case, all parties concurred that an “agreement” binding the parties would not come into existence unless and until the Court declared the settlement agreement generally binding. Commentators have also noted a tension between the Court’s approach and case law of the Court of Justice of the European Union, which requires a strict interpretation of Article 5(1), and does not permit application of that article to the pre-contractual phase.³¹ The Amsterdam Court’s approach would, in theory, allow WCAM settlements to be declared generally binding even in the absence of any parties domiciled in the Netherlands.³²

In circumstances where cases might now be filed for collective damages – as proposed in the Draft Bill – the risks inherent in the Dutch Courts taking an expansive view of their jurisdiction multiply. If the Netherlands were to become a magnet jurisdiction for those seeking low hurdles to filing mass claims, the damage

²⁸ See *Morrison v. National Australian Bank Ltd*, No 08-1191 (2010). “Foreign cubed” was a term used in relation to securities lawsuits with claims brought by foreign investors, against foreign issuers, purchased in foreign exchanges.

²⁹ See, for example, US Supreme Court’s ruling in *Daimler AG –v- Bauman* 134 S. Ct. 746, 763 (2014) http://www2.bloomberglaw.com/public/desktop/document/Daimler_AG_v_Bauman_No_11965_2014_BL_915_1_US_Jan_14_2014_Court_Op.

³⁰ See, for example, the annotation of J.S. Kortmann in *Jurisprudentie Ondernemingsrecht* 2010, no. 46, at page 460; B. de Jong, “Een nieuw exportproduct” (“a New Export Product”), *Ondernemingsrecht* 2010/17, pages 141-142; and the report Commissioned by the Dutch Ministry of Justice and written by Van Lith et al, which is cited in the previous footnote.

³¹ Including Case C-189/08 *Zuid-Chemie BV v Philippo’s Mineraalfabriek NV/SA*, ECR I-6917; and Case C-334/00 *Fonderie Officine Meccaniche Tucconi SpA v Heinrich Wagner Sinto Machinerfabrik GmbH (HWS)* [2000] ECR I-7357.

³² One caveat must be made: in the *Converium* case, the Amsterdam Court of Appeals assumed jurisdiction on multiple grounds, including a connection between claims relating to Dutch residents and claims relating to residents of other countries. It remains to be seen whether the Amsterdam Court of Appeals would also assume jurisdiction in a case with no Dutch residents.

to the Netherlands' reputation as a jurisdiction which is open to international business would be immense.

10.2 A More Appropriate View of Jurisdiction

The Draft Bill provides that jurisdiction is limited to cases in which (a) the Defendant is domiciled in the Netherlands, (b) the majority of the claimants have their ordinary residence in the Netherlands, or (c) the event giving rise to the claim occurred in the Netherlands.

The Consultation states that “when the international rules on jurisdiction do not point to the jurisdiction of a Dutch court, the collective damages action cannot be pursued,” suggesting (as required by operation of law) that the provisions of the Brussels I Regulation³³ must in all cases take precedence, and that the Draft Bill provides *additional* restrictions on when Dutch Courts may take jurisdiction in collective damages cases.

ILR's first observation is that this legal hierarchy (i.e., the requirement first to satisfy Brussels I Regulation, and then next to satisfy the additional requirements of the Draft Bill before jurisdiction can be confirmed) should be more explicitly set out in the Draft Bill to avoid any risk of misunderstanding or argument that the test in the Draft Bill is an alternative to the Brussels I Regulation test.

Second, ILR believes the better jurisdictional standard would be to make the three prongs of the test (domicile, ordinary residence of claimants, and place where the relevant act occurred) cumulative, rather than alternatives to one another, by replacing the “or” with an “and.” The purpose of doing so would be to prevent global entities from being subjected to group litigation in the Netherlands simply because claimants reside there, whether or not the entity being sued has any connection to the country or engaged in any conduct there.

Third, ILR recommends greater clarity be given with respect to potential jurisdiction over defendants who may be branches or subsidiaries of entities based elsewhere. A worrying trend has emerged in some European jurisdictions (notably England and Wales) of local subsidiaries who were not even aware of the acts complained of in a suit being regarded as suitable defendants on the basis of imputed knowledge of their parent's activities, and thus being regarded as “anchor defendants” potentially allowing actions to be taken against multiple foreign defendants.³⁴ The opportunity should be taken to explicitly exclude the possibility of such claims in the Netherlands.

³³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

³⁴ See, in this regard, *Roche Products Ltd. & Ors v Provimi Ltd* [2003] EWHC 961 (Comm) (02 May 2003), *Cooper Tire & Rubber Company Europe Ltd & Ors v Dow Deutschland Inc & Ors* [2010] EWCA Civ

ILR proposes the following amendments to the Draft Bill to clarify the jurisdictional position:

(a) the priority of the Brussels I Regulation should be set out expressly in the Draft Bill;

(b) the additional jurisdictional tests for collective damages actions should be cumulative, not alternatives to one another; and

(c) jurisdiction over foreign corporations should be exercised only where the allegations in the litigation are directed at the Dutch domiciled defendant itself (not its parents or foreign affiliates). Consistent with the Brussels I Regulation, Dutch domicile must mean that the defendant corporation has its statutory seat, central administration or principal place of business located in the Netherlands.³⁵ This determination should be made by looking at the corporation's activities worldwide, rather than merely the activities of a subsidiary or affiliated company located in The Netherlands.

11. Conclusion

The Netherlands is showing signs of becoming a global litigation hub, taking on claims with little or no connection to the country or its citizens. Ongoing political, legal and financial developments risk giving rise to a “perfect storm” of collective damages actions, contingency fees,³⁶ excessive jurisdictional reach, and third parties seeking out and promoting litigation as a profit-making enterprise. To avoid the abuse and excess associated with mass litigation in the United States, the Dutch Government should reject these developments, avoid creating new categories of “class action,” and introduce formal regulation of third party litigation funders and claims vehicles.

If, despite the above, the Dutch Government intends to put in place any form of collective damages action, it is imperative that the Dutch Government adheres, as a minimum, to the essential safeguards identified by the European Commission in its Recommendation. While the Consultation appears to acknowledge many of the risks in its explanatory materials, it fails to include robust safeguards in the Draft Bill itself.

864 (23 July 2010) and *KME Yorkshire Ltd & Ors v Toshiba Carrier UK Ltd & Ors* [2012] EWCA Civ 1190 (13 September 2012).

³⁵ Brussels I Regulation Articles 4(1), and 63(1).

³⁶ Noting that an “experiment” is currently underway which allows lawyers to charge contingency fees in personal injury cases, with the possibility of this being expanded to other areas.

A recent study comparing liability costs across the world showed that liability costs in the Netherlands as a proportion of GDP are for the time being lower than in other major European jurisdictions (such as France, Germany and the UK) and far lower than in the United States.³⁷ This is good for businesses and for the economy as a whole, and calls into question, when the Netherlands already has a number of procedures and mechanisms to provide collective redress for claimant groups, why the Dutch Government needs to introduce the very features that have contributed to the excessive and abusive litigation culture of the United States.

In light of all the above, ILR hopes that the Dutch Government will consider very carefully the creation of unnecessary, excessively broad and unsafeguarded means to pursue collective damages actions in the Netherlands.

³⁷ David McKnight and Paul Hinton (NERA Economic Consulting) for the U.S. Chamber Institute of Legal Reform, “*International Comparisons of Litigation Costs: Canada, Europe, Japan and the United States*”, June 2013.