

New class actions act promotes efficient and effective settlement of large-scale damages cases

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Introduction

The Netherlands has always been at the forefront of the European Union in enabling collective redress for affected parties in mass damages cases. Since 1994, claims organisations have been able to pursue legal action on behalf of affected parties under the Civil Code. However, there was one significant limitation, as the Civil Code prohibited claims organisations from pursuing damages claims. This limitation resulted in a practice wherein claims organisations would litigate to obtain declaratory relief and, once successful, try to negotiate a settlement with the defendant.

In 2005 the Act on Collective Settlement of Mass Damages was introduced to encourage parties to enter into collective settlements by giving the Amsterdam Court of Appeal the power to declare collective settlements generally binding on other affected parties. However, if the party that inflicts damages is unwilling to settle, affected parties must commence litigation themselves in order to obtain an order for damages or assign their claims to a claims organisation.

This practice changed significantly on 1 January 2020 when the Act on the Resolution of Mass Claims in Collective Action entered into force. The act has introduced some important changes, primarily to the benefit of affected parties (whose collective interests are represented by a claims organisation, which will often be a foundation).

Act's purpose

According to the act's explanatory memorandum, the Dutch legislature wishes to promote the efficient and effective settlement of large-scale damages cases. For that purpose, the act introduces the possibility to initiate class actions for damages. This is a significant incentive for parties that cause damages to try and reach a settlement.

The act applies to class actions brought before the Dutch courts on or after 1 January 2020 with regard to an event that took place on or after 15 November 2016 (the date on which the draft act was published).

Important changes

The most important change introduced by the act is the possibility for claims organisations to pursue class actions in which an order to pay damages is requested on behalf of the affected parties. While the possibility of such claims organisations emerging have increased, the requirements that they must meet for the class action to be admissible have become more stringent. Among other things, claims organisations must:

- have a supervisory body;
- have a mechanism for the affected parties to make decisions;
- show that they have sufficient experience and knowledge to conduct the action; and
- have sufficient funds.

Further, a class action must be sufficiently connected to the Dutch jurisdiction. This will be the case if:

- the majority of the persons on behalf of whom the class action is initiated are Dutch residents;
- or

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- the events on which the class action is based occurred in the Netherlands.

The mere fact that the defendant is located or has a presence in the Netherlands is insufficient.

In order for class actions to be more manageable and to prevent conflicting verdicts, it will be possible (but not mandatory) for the court to appoint one or more claims organisation as the exclusive representative of the affected parties if multiple class actions have been initiated (this is somewhat similar to the US lead-plaintiff system). To enable this alignment, the Amsterdam District Court will (in principle) be the exclusive court in respect of class actions. Claims organisations must register their class action in a public register within two days of filing their petition for the class action. A violation of this requirement will result in the claims organisation's petition being declared non-admissible. In essence, all claims organisation petitions for a class action will be combined into one class action for the benefit of all affected parties. The exclusive representative is in principle the sole claims organisation that can file documents in the proceedings and is considered to be the representative of all non-exclusive representatives. As such, it is expected that the exclusive representative will take a coordinating role among all of the claims organisations. Non-exclusive representatives will remain party to the proceedings and the court may allow these parties to file documents therein.

Class action judgments will in principle be binding on all Dutch residents represented by the claims organisations, who will have the option to opt-out. In respect of non-Dutch residents, judgments will not be binding unless they opt-in.

The act authorises the courts to determine that the reasonable costs of a claims organisation must be paid by the defendant if the award for compensation of damages is granted. Conversely, a claims organisation may be convicted by the court to pay up to five times the defendant's attorneys' fees (determined on a court-approved scale of costs) if the court considers that the claims organisation frivolously pursued the claim.

Comment

With the act, the Netherlands remains a leading EU jurisdiction in respect of class actions. The act has made the Netherlands a more suitable jurisdiction for handling class actions for damages and has tried to do so without affecting the business climate. The act ensures that there are strong incentives for all parties concerned to come to a consensual settlement prior to or during proceedings to avoid unnecessary litigation.

The act bestows an important role on the courts and it will be interesting to see how they fulfil this going forward, particularly with respect to the appointment of exclusive representatives.

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