Erin Brockovich turns European : is there an interest for class actions?

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INTRODUCTION

Class actions are often related and associated to the American legal culture, as it is illustrated by several movies including the famous "Erin Brockovich" picture.

However, the class actions or collective redress actions exist also in other jurisdictions, notably in Europe.

Precisely, the European Commission has recently given an accurate definition of collective redress and of its aim in its communication named "Towards a European Horizontal Framework for Collective Redress"[1], accompanying its "Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law"[2]:

"Collective redress is a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action. Collective redress facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law."

Although collective redress and class actions exist in several jurisdictions in the world, there are some differences arising from different legal and procedural cultures, notably between the Common Law and the Civil Law legal systems.

Thus, the purpose of this questionnaire is to identify such differences as well as the common points between the collective redress and class actions in various jurisdictions.

There is also a particular focus on class actions in the anti-trust field, which is one of the main areas for such actions, as shown by the recent proposal for an EU "Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union"[3].

[1] COM(2013) 401/2
[2] C(2013) 3539/3
[3] COM(2013) 404 final

1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

Yes, there is specific legislation for dealing with class actions and mass settlements. In general, there are three ways to approach mass damages in the Netherlands.

First: collective action. Article 3:305a of the Dutch Civil Code allows an entity to act on behalf of a class to the extent that its articles promote that interests. The 3:305a-entity can (in general) only obtain a declaratory smf injunctive relief.

Second: group action. In case of mass damages, one could choose to act with (for instance) an assignment of claims model in which the victims assign the claim to a special purpose vehicle.

Third: mass settlement (also called 'WCAM-settlement'). Once a mass settlement is reached, this settlement can be declared binding for all victims, save for those who opt-out within a certain period of time determined by the court. The request must be made by a representative entity.

Please note that combinations of the abovementioned possibilities are possible. For instance, a collective action can be followed by a WCAM-settlement.

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law…)?

Collective redress applies to all substantive area's of Dutch law.

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

In the Netherlands, it is allowed to bring a class action/collective redress action on the ground of several statues.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

In the Netherlands, there is no rule that forbids emergency proceedings on behalf of a class. However, the merits of the case should be suitable for such proceedings.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors ("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

Yes, it is possible to claim cessation of unlawful practices.

Also, it is possible to obtain monetary compensation in a group action (for instance with an assignment model).

At this moment, in a collective action, one cannot claim monetary compensation yet. However, it is possible to obtain a declaratory judgment. After obtaining this declaratory judgment, the plaintiffs can either try to reach a settlement or claim for damages in a 'follow-on' procedure.

Please note that it is also possible to claim damages by combining a collective action and a group action. If the claims are assigned to the 3:305a-entity, the 3:305a-entity can claim those damages.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

See previous answer. Every type of damage that can be claimed in other Dutch civil procedures can be claimed in a group action as well. One big exception is that, at this moment, it is not possible to claim monetary damages with a collective action.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

Punitive damages are not awarded in the Netherlands.

1.8 More particularly in the anti-trust field, how does the 'passing on' defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

Litigation in the field of anti-trust actions for damages is, mostly, still ongoing. So far, the passing on defence has played a role in a follow-on action regarding the gas insulated switchgear cartel. The district court refused to acknowledge the passing on defence. However, the decision by the district court has been appealed and the passing on defence is one of the main themes in the ongoing appellate procedure.

2. Standing and admissibility to bring class actions/collective redress actions

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement ("collective actions"), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice ("representative actions")?

Both are possible. The action can be brought by both a group of individuals (group action) and by an entity that promotes the interests of the class (collective action). In a group action, only the individuals who assigned their claim to the special purpose vehicle directly benefit from a judgment.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

Yes. Collective actions can be brought by a foundation or association with full legal capacity. The action must be intended to protect similar interests of different persons to the extent that the articles promote such interests. Before instituting proceedings, the plaintiff must make sufficient attempts to negotiate with the defendant.

There are no specific rules for group actions.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated;

financial/human resources/legal expertise requirements…), and can the representative entities been sanctioned if they do not comply with such requirements?

Yes. The entity must either be a non-profit foundation or a non-profit association. The articles must allow the entity to promote the interests of the victims involved. If the entity does not comply with the provisions, the claim will be dismissed.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

No, there is no separate certification stage.

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

Yes. A claimant has to have 'sufficient interest' in the case it brings. It is very exceptional for a court to deny standing because of insufficient interest. Anyone with sufficient interest has standing to bring an action, whether stand-alone or follow-on. No distinction is made in a particular statute or under case law, between, as such, direct or indirect purchasers.

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

Yes, that is possible with a group action, in which claims may be aggregated in a joint complaint (see also our answer to question 1.1). For instance by providing a special purpose vehicle with a assignment in order to be able to commence proceedings on behalf of every victim involved.

2.7 More generally, what procedural defences are available for defendants short of trail and therefore before the national court decides on the merits of a collective action?

In a collective action, the defendant could state that the entity does not have standing because in the given circumstances, it has not made a sufficient attempt to achieve the objective of the right of action through consultations with the defendant. The defendant could also state that the interests of the persons on whose behalf the right of action is instituted have not been sufficiently safeguarded by the entity.

In a group action, the defendant could for instance argue that the assignments are invalid or unclear.

3. "Opt-in" vs "Opt-out" systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed ("opt-in" principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group ("opt-out" principle)?

Both. A group action is based on the opt-in principle. Only those who expressly join the proceedings will benefit from the proceedings.

In a collective action, the entity tries to obtain a declaratory judgment for the benefit of every victim. In a 'follow-on' action, individual victims have to recover their own damages.

A WCAM-settlement is based on the opt-out principle. The settlement will be binding for every victim, save for the victims that expressly opt-out.

3.2 What are the effects of the judgment on the victims in the "opt-in" or "opt-out" system chosen in your jurisdiction?

Various answers:

Effect of a judgment in a group action: the judgment is only binding for the victims who assigned claims.

Effect of a judgment in a collective action: every victim can use the precedent to recover their own damages (by either 'follow-on' procedure or settlement).

Effect of a judgment in a WCAM-settlement: binding for every victim, save for those who opt-out.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

We will answer this question with regard to a group action. In that case, the entity that acts on behalf of the claimant, will have to reduce its claim. In a group action, entities in general want to avoid claimants to leave the proceedings. From a statutory point of view, it is possible to leave proceedings, but entities acting on behalf of claimants try to avoid this.

After a WCAM-settlement is declared binding, the claimants can only opt-out during the opt-out period. The length of the opt-out period is determined by the court.

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

With regard to a group action: yes, by increasing the claim, but the defendant can bring forward objections. In case of such objections, the court has to rule if adding parties to the procedure is against good procedural order.

The question is less relevant with regard to both a collective action and a WCAM-settlement because any victim will benefit from the outcome of these proceedings.

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

Yes.

Group action: the entity must make clear on behalf of who it acts, for instance by submitting the assignments to the court.

Collective action: in its articles, the entity must clearly describe its objectives and in particular the interests of which group it promotes.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

There are only provisions on the way in which victims are informed about a WCAM-settlement. When the court declares the settlement binding, it will also rule that the settlement must be published in at least one newspaper.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

No, there is not.

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law ("follow-on actions") or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

In the Netherlands, it is not required to have class actions / collective redress actions follow on from infringement decisions. Having said that, collective actions for damages in the field of competition law have so far been started following a finding of an infringement by a competition authority (or during the investigation by a competition authority).

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

Even though no actions have been started following a unilateral antitrust infringement, it would be possible to start an action following a finding of an abuse of a dominant position. All of these actions are based on tort, as such, unilateral conduct could qualify as wrongful behaviour in largely the same way as bilateral conduct.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

In the Netherlands, a distinction should be made between civil and administrative "fact finding".

Regarding civil fact-finding, there is a limited system of discovery in place, based on article 843a of the Dutch Procedural Code ("DPC"). This article gives claimants the possibility to claim pieces of evidence (such as documents, audio or digital evidence) under certain conditions. These conditions are as follows:
1. The evidence has to concern a legal relationship (including tort) to which the claimant is a party.
2. The evidence has to be sufficiently described, in the sense that it is possible to identify the claimed evidence.
3. The claimant has to show a genuine interest in obtaining the evidence.

Apart from these conditions which must be satisfied to grant access to evidence, parties which hold the evidence may refrain from providing access if important reasons prevent them from granting access to the evidence.

With regard to the administrative track, the Dutch *Wet openbaarheid van bestuur*, the Freedom of information Act ("FIA"), grants claimants the possibility to acquire documents from the administrative procedure prior or pursuant to a finding of an infringement. The authority has long refused to make public documents whilst the investigation is ongoing. The court has abolished this policy since the FIA is applicable to the administrative track with the authority, therefore, no exception should be made. However, the authority still often refuses to grant access to documents on the basis that they contain confidential information.

With regard to evidence obtained under the leniency program, the Dutch authority has always felt that the importance of its public enforcement outweighs the need for public access to leniency documents. Given that the rule following out of the *Pfleiderer* and *Donau Chemie* judgments are to be reversed by the proposal for a directive on actions for damages for infringements of competition law, it is likely that the authority will revert to its preferred policy of not granting access to leniency material.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

Under Dutch law, limitation periods commence when it is possible for claimants to start an action. As such, it might depend on the case at hand if the limitation period commences prior to or following a finding of an infringement of competition law. So far, the Dutch court has ruled on this issue in favour of the claimants. In a case following the Gas Insulated Switchgear-cartel, defendants raised the issue that the limitation period had lapsed since claimants were, or had to be, aware of their potential claim since the publication of the investigation by the European Commission. The District Court did not agree with the defendants' view. It ruled that claimants did not have to be aware of their potential claim when the investigation was announced. However, this should not be regarded as a hard and fast rule. Under circumstances it could be possible that claimants would have to be aware of their potential claim prior to a decision by a competition authority.

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment

of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

The Dutch Supreme Court ("DSC") ruled on the issue of the binding force of Dutch administrative decisions in the *Smit/Staat*-case. In this case, the DSC ruled that a civil court is bound by the presumption that an admistrative decision is binding until it has been annulled in an administrative procedure.

With regards to *Masterfoods*, the Dutch court has ruled on this case in the procedures regarding the *air cargo*-cartel and the *parafin wax*-cartel. In these cases, defendants attempted to invoke *Masterfoods* in order to stay the proceedings. The Dutch High Court of Amsterdam has given the following rules for a potential stay based on the *Masterfoods*-doctrine:
1. defendants have to show that they have appealed the administrative decision within the applicable time limit.
2. defendants have to show that their administrative appeal has a certain degree of merit; i.e. a *pro forma* appeal or an appeal that is *prima facie* without any merit cannot result in a stay of the civil proceedings.
3. defendants have to give show which defences they are going to bring forward in order to allow a judge to decide to what extend these defences are dependent on the outcome of the administrative procedure.

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

There is no formal prohibition on third party financing of procedures as long as the independence of the claimant is not in any way limited. The code of conduct regarding collective redress actions stipulates that representative parties are not allowed to receive third party funding if this might endanger its independence.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

No.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant

party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

No.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

There are no public funds available for the funding of collective actions. However claimants could, in some instances, receive funding from their legal aid insurance. This does depend on the coverage of the insurance.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

Contingency or success fees for legal services are, at present, not permissible under Dutch law.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

The "loser pays principle" applies under Dutch law. However, the legal costs are fixed, there is reimbursement of the actual costs borne by the winning party.[4] As such, the winning party will, in most cases, not be able to reimburse the total legal costs since the fixed fees in general do not cover the costs of legal representation. On the other hand, the financial risk of litigation is mitigated to a large extend since the losing party does not have to fully reimburse the costs of the (expensive) lawyer of the winning party.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

With reference to the answer to question 2.2, collective actions can be brought by a foundation or association with full legal capacity only if the action is intended to protect similar interests of different persons to the extent that the articles of association of the foundation or association promote such interests. In principle, it does not suffice if only the articles of association mention such interests, the foundation or association should, in most cases, actually employ activities related

4 Apart from intellectual property-cases where article 1019h DPC provides for a *lex specialis* regarding the reimbursement of actual costs in IP-cases.

to the interest it promotes. Furthermore, before instituting proceedings, the plaintiff must make sufficient attempts to negotiate with the defendant.

5.8 Are the parties to an action able to insure against the cost risks?

Given the limited "loser pays principle" in the Netherlands, most of the cost risks concern the lawyer's fees.

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

The DPC provides for very limited possibilities to apply for an order for security of costs. Such an application is only open to a defendant who has been summoned by a claimant who is not domiciled or habitually resident in the Netherlands. This proviso limits the scope of the article dramatically.

5.10 Are there (other) ethical of Bar rules in your country relevant with respect to class actions?

The code of conduct regarding collective redress actions provides for a number of rules with respect to the diligent use of the collective redress mechanism. Additionally, article 25 paragraph 2 of the Bar rules prohibit the use of contingency fees by lawyers admitted to the Bar. This is sometimes considered to be a limiting factor on the successful starting up of an action for collective redress.

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

The general international private law rules apply to such actions.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

No, there are no specific Dutch rules which forbid that.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

No, that is not possible with regard to a collective action. However, a non-Dutch entity can have standing in a group action.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

In such a situation, the general international private law rules on jurisdiction apply: where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings (article 28 Brussels I).

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trail and are the implications for refusing?

A mechanism for the collective settlement of mass claims has been implemented through the Law on the Collective Redress of Mass Claims ("CRMC"). The law has been implemented in the DPC. This system is entirely based on alternate dispute resolution since the role of the court is limited to the ratification of a settlement that has been concluded between a representative foundation or association and a party which has committed itself to the payment of damages.

7.2 Are the parties encourages to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

Article 3:305a paragraph 2 DCC requires claimants acting on behalf of a group to attempt a settlement prior to filing an action. Failure to adhere to this requirement might result in the inadmissibility of the claim. In general parties to a dispute who attend a court session are generally encouraged by judges to pursue an out of court settlement.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

The limitation period regarding the claims would be interrupted by starting negotiations regarding a settlement. The limitation period is then "renewed" following the action which initiated the interruption of the limitation period. For example, if the limitation period of five years for an action following a tort is interrupted, an additional period of five years commences from the moment of interruption.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

The rules on consumer protection stipulate that contractual clauses which prevent consumers from bringing an action before the competent court are considered to be unreasonable and are therefore at risk of being nullified. However, these rules do not preclude the possibility of mandatory arbitration. Furthermore, it remains to be seen if representative parties are able to invoke these rules since they are not themselves consumers.

8. Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

If a collective settlement has been ratified, the decision is made public by the court. Additionally, the decision is made public through one or more national papers in order to allow the victims to *opt out* of the settlement.

8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

The injured parties are considered equivalent to third parties which have accepted a "third-party clause". The method of payment and damage scheduling are established in the ratified settlement agreement.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

With regard to injunctive orders, there are no hard and fast rules regarding their effective compliance. However, upon the request of a party, courts may impose non-compliance penalties in their injunctive orders. This is often times an effective way to ensure effective compliance of the court order since it allow the winning party to collect these non-compliance penalties.