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RESOLVING MASS DISPUTES

ADR and Settlement
of Mass Claims

Resolving Mass Disputes

ADR and Settlement of Mass Claims

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4. Collective settlements in the Netherlands: some empirical observations

Ianika Tzankova and Deborah Hensler

I. INTRODUCTION

1. General

The Dutch Act on Collective Settlements (WCAM) was introduced in 2005.¹ During the discussions surrounding its introduction, some practitioners expressed the view that the WCAM was going to be a one-day fly.² Although it was general in nature, the WCAM was drafted specifically for the resolution of the DES drug case³ and those practitioners believed that this was such an extraordinary matter that it was unlikely that the same circumstances would be duplicated and the WCAM was going to be used ever again. However, this line of reasoning underestimated the needs of businesses and the creativity of lawyers. The WCAM was still before Parliament when it was announced in the media⁴ that Dexia Bank was considering the resolution of the Dexia mass claim matter using the WCAM,⁵ which provoked discussions about the scope of the law and the

¹ See Dutch Bulletin of Acts and Decrees, 2005, 380. The Act entered into force on 27 July 2005.

² Pieter van Regteren Altena, 'De collectieve afwikkeling van de des-zaak in Nederland' in A.I.M. (Toon) van Mierlo and others (eds), *Het wetsvoorstel collectieve afwikkeling massaschade* (Bju 2005) 27–35.

³ For a detailed discussion of the background of the WCAM and the resolution of the DES case see Ianika Tzankova and Daan Lunsingh Scheurleer, 'The Netherlands. The Globalization of Class Actions' (2009) 622 *Annals of the American Academy of Political and Social Science* 149.

⁴ See <http://www.eegalease.nl/index.php?page=/nieuws/main_right.php?nid=68>, accessed 25 February 2013.

⁵ Dexia was the first massive consumer mass claim dispute in the Netherlands. For an extensive discussion of the *Dexia* case see Ianika Tzankova, 'Funding of

question whether it was intended to apply on disputes related to financial products and services.

In the years after the enactment of the WCAM it became clear that the act was anything but a one-day fly. Since its enactment in 2005, six collective settlements have been declared binding⁶ and each case was a pioneer in its own way. Dexia demonstrated that the WCAM was applicable also in relation to financial products and services. In the *Vie d'Or* case, which related to the bankruptcy of a life insurer, the Act was applied for the first time under the condition that the contributions of the parties to the settlement fund would not be disclosed to the court. In the *Shell* case, the WCAM was used for the first time to resolve a securities litigation dispute on a worldwide basis: an application of the law the legislature did not think of when it drafted the WCAM. The *Converium* case is another securities litigation dispute that was resolved on a worldwide basis, but unlike *Shell*, in relation to non-Dutch companies. Both rulings, but especially the *Converium* one, generated a lot of academic and media attention.⁷

The unanticipated broad use of this piece of legislation triggered an evaluation of the WCAM much earlier than is customary.⁸ The evaluation related to the private international law aspects of the WCAM,⁹ but also to the use and functioning of the WCAM more broadly. It led to draft amendments to improve the act.¹⁰ Some of the proposed amendments are

Mass Disputes: Lessons from the Netherlands' (2012) 8.3 *George Mason Journal of Law, Economics & Policy* 577–83.

⁶ See *Stichting Converium Securities Compensation v Liechtensteinsche Landesbank* [2012] LJN BV1026 (*Converium*); *Stichting uitvoering Vedior schikking* [2009] LJN BJ2691 (*Vedior*); *Shell Petroleum v Dexia Nederland* [2009] LJN BI5744 (*Shell*); *Stichting Vie d'Or* [2009] LJN BI2717 (*Vie d'Or*); *Dexia Bank Nederland v Stichting Platform Aandelenlease* [2007] LJN AZ7033 (*Dexia*); *Stichting DES Centrum v X* [2006] LJN AX6440 (*DES*).

⁷ See for example Axel Halfmeier, 'Recognition of the WCAM Settlement in Germany' (2012) 2 *NIPR* 176–84.

⁸ Usually the evaluation of legislation would take place five years after its enactment at the earliest. The evaluations had already started two years after the enactment of the Act.

⁹ For a discussion on private international law aspects of the WCAM see generally H van Lith, *The Dutch Collective Settlements Act and Private International Law. Aspecten van Internationaal Privaatrecht in de WCAM* (Ministerie van Justitie 2010), also published on <http://ec.europa.eu/competition/consultations/2011_collective_redress/saw_annex_en.pdf>, accessed 25 February 2013.

¹⁰ See Kamerstukken II 2011–2012, 33 126, nr 2, also published on <<https://zoek.officielebekendmakingen.nl/kst-33126-2.html>>, accessed 25 February 2013. For a discussion of this legislative proposal see Denise Ozmis and Ianika Tzankova, 'De evaluatie van de WCAM: de kernthema's uitgelicht' (2012) 2 *TvCR* 33–42.

technical in nature and some are a codification of already established practices of the Amsterdam Court of Appeal. However, the draft proposal also contains a few more fundamental changes relating to the role of the judiciary, not only after a settlement is concluded, but also in the stage where parties are negotiating a settlement. The draft proposal caused commotion among the business community. The Dutch *Financial Times* published on its front page 'The Netherlands: paradise for mass claims'.¹¹

Apparently, the underlying assumption was that the WCAM leads to more and frivolous litigation, so an *improvement* of the functioning of the WCAM would be even more disadvantageous for businesses. Such reactions originate from a deep misunderstanding of, and a misconception about, the nature, character and the experiences to date with the WCAM. Based on the preliminary results of case studies of the four (out of six) WCAM settlements to date,¹² this chapter will demonstrate that such fear is ungrounded. Furthermore, the chapter will assess whether it is to be expected that the recent legislative proposals to improve the functioning of the WCAM are disadvantageous for businesses and will lead to frivolous litigation. The conclusion is that the proposed legislative amendments are not likely to cause extensive litigation.

2. Mode of Treatment

The structure of this chapter is as follow. After a brief overview of the main features of the WCAM, a brief description of the basic facts of the four cases will follow. The discussion of how the WCAM has been used to date and what can be learned from those experiences will be followed by a discussion of the proposed amendments. The chapter will conclude with a paragraph singling out certain aspects that do deserve the attention of the legislature but have been underappreciated so far.

¹¹ 'Nederland wordt straks paradijs voor massaclaims; Rijk gaat wetgeving verbeteren' in *Financieele Dagblad* (29 December 2011).

¹² This chapter partly builds on the results of case studies conducted in an international collaborative empirical project led by Professors Deborah Hensler (Stanford University/Tilburg University), Christopher Hodges (Oxford Centre for Socio Legal Studies/Erasmus University) and Ianika Tzankova (Tilburg University) examining the functioning of class or group litigation schemes in various countries. Final results of the case studies were presented at the annual Law and Society Conference in Honolulu, Hawaii in June 2012.

II. WCAM

1. Introduction

The Dutch system of collective redress is governed by two sets of rules. The collective action that is general in nature, and not limited to a specific material area of law, has been in force since 1 July 1994. Until now, remedies have been limited to declaratory and injunctive relief. Since its introduction, the collective action has increasingly been used in a variety of cases. Empirical studies or statistics about the use of this provision are lacking but an estimation based on the number of cases reported to date suggests that since 1994 over 100 collective actions have been initiated.

The WCAM was enacted in July 2005. The Dutch legislature was inspired by the US court-approved class settlement regime, but tried to avoid its negative connotation. One of the main reasons why the Dutch business community supported the WCAM probably lies in the fact that, unlike the US class action, the Dutch collective action provisions do not allow actions for damages.¹³ Corporations wanted a means of settling damages collectively, but did not want to be forced to settle if they did not want to. Even though not empirically grounded, the fear existed that a mechanism like the US class action for damages might increase the pressure on defendants to settle nuisance value claims.

2. How the WCAM Works¹⁴

The essence of the WCAM is a settlement reached out of court entered into by a representative organization and one or more parties agreeing to pay compensation to injured persons with the aim of settling all claims at a collective level. The settlement agreement is approved exclusively by the Amsterdam Court of Appeal, with a statutory binding effect on all group members who do not exercise their right to opt out. Once the Court of Appeal approves the settlement and the opt-out period has expired, all claimants who have not exercised their opt-out right are bound by the settlement.

The representative organization entering the settlement on the part of the claiming parties should be an association with full legal competence or a foundation. This could be a longstanding organization or a special

¹³ For a detailed discussion of the background of the WCAM and the resolution of the DES case see Tzankova and Lunsingh Scheurleer, *supra* note 3, 149.

¹⁴ See Articles 7:907–7:910 of the Dutch Civil Code.

purpose vehicle. Unlike the collective action that was introduced in 1994, the WCAM contains the requirement that the organization entering into the settlement should be sufficiently representative of the interests of the injured persons who are to benefit from the settlement. Whether the organization meets this requirement depends on the facts and circumstances of the case at hand.

The WCAM proceedings are initiated by means of a joint petition to the Amsterdam Court of Appeal by the organization and the (potential) defendant(s) and/or the parties contributing to or distributing the settlement monies. The beneficiaries of the relevant settlement must then be notified of the content of the agreement, the date and time of the court hearing, and their right to file an objection against the petition and to appear at the hearing. Individual notifications in writing must be sent to known beneficiaries pursuant to applicable regulations and treaties; unknown beneficiaries must be notified by means of the placing of advertisements in newspapers in the relevant jurisdictions. The experiences to date show that the individual notification process that has to be applied pursuant to European regulations and international treaties in the international WCAM cases can be costly.

The right of interested third parties to file objections against the settlement agreement could be seen as a safeguard against a potential abusive use of the WCAM. In four out of the six collective settlements to date, interested parties have filed objections and defenses of various kinds. The Amsterdam Court of Appeal has responded to those objections differently. Some have been promptly rejected at the same time as the binding declaration was issued. Some led to the appointment of an expert to issue an expert opinion on certain issues. To date, all six collective settlements that have been submitted to the Amsterdam Court of Appeal have been declared binding. The Amsterdam Court of Appeal has announced in connection to the *Converium* case that it will act proactively, since principles of due process require protection by the court of the interests of the absent parties. Therefore, it is likely that, even without objectors, the Amsterdam Court of Appeal will take a critical approach towards settlement agreements that have been submitted for approval.

Following the hearing, the court will render its decision, either granting or denying the request to certify the settlement agreement. If the request is granted, the court will also determine the duration of the period during which beneficiaries can exercise their right to opt out. If the court denies the request, appeal (cassation) of the decision is only possible for the petitioners jointly and on limited grounds. The court's decision will be communicated to both known and unknown beneficiaries – the so-called *interested parties* (belanghebbenden). Standing to appeal a denial or an

allowance of the request for the approval of the settlement is not granted to interested third parties. According to the Dutch law of civil procedure, interested parties are parties who do not have a general or professional interest in the process, the proceedings or their outcome, but who would be entitled to claim under the settlement agreement, including organizations acting for those interests.

A collective settlement may follow collective litigation in Dutch or foreign courts, or it may simply take place in the shadow of potential litigation, before any lawsuits have been filed or resolved.

The Netherlands is the only European country to date where a collective settlement of mass claims can be declared binding on an entire class on an opt-out basis. Many have interpreted the statute as yet another example of the Dutch consensual culture, but the reality is, as was stated before, that the resolution of a concrete mass claim case has triggered the design of the statute, and at that time it was no longer possible to enact a statute governing only that specific mass claim case, so a general provision had to be introduced.

III. FOUR CASE STUDIES

1. Methodology and Facts

In the time period September 2010–March 2011, over 40 interviews were conducted¹⁵ with parties representing various stakeholders involved in the resolution of the Dexia, Shell, Vedior and Vie d'Or mass disputes. Each interview was scheduled for about an hour but most interviews lasted much longer than that, some even closer to two hours. All interviews followed a common protocol.

The case studies discussed in this chapter were conducted under the umbrella of an international collaborative empirical project examining the functioning of class or group litigation schemes in about a dozen countries, with scholars from North and South America, Asia, Europe and Australia. This chapter discusses some preliminary¹⁶ results of the Dutch case studies.

All four cases related to financial products or services. Dexia resolved claims by Dutch retail investors ('moms and pops') who lost money on an

¹⁵ The interviews were conducted by Professors Deborah Hensler and Ianika Tzankova.

¹⁶ The results are preliminary because, according to the case studies protocol we followed, the case narratives that served as the basis for our conclusions are subject to the comments of those who were interviewed.

investment scheme offered by the Dutch subsidiary of Dexia bank. About 300,000 claims were involved and the settlement fund was estimated at EUR 1 billion.¹⁷

Royal Dutch Shell resolved claims by non-US shareholders worldwide that their shares lost value as a result of Shell's failure to properly disclose information about its oil reserves. The estimated number of claims was 500,000 and the settlement fund was about USD 350 million.

Vedior also resolved claims by US and non-US shareholders worldwide that a failure to timeously disclose information about an acquisition led to loss of share value. The estimated number of claims was 2,000 and the settlement fund EUR 4.25 million.

Finally, Vie d'Or resolved claims of about 11,000 individual policyholders who purchased life insurance policies that included an investment component. The life insurance company went bankrupt and proceedings were initiated against the Dutch State, the Insurers regulator, the accountant and the actuary. After a Supreme Court ruling, a settlement fund of EUR 45 million was established.

2. No Evidence of Extensive Litigation Caused by the WCAM

The use of the WCAM in those four cases appears to be the result of external factors rather than being triggered by its current structure. Shell and Vedior¹⁸ were concerned the spin-off of international securities disputes and aimed at a global resolution of securities claims, although none of those cases had been litigated in the Netherlands. The Shell securities settlement was a spin-off of class actions in the US. The idea to resolve the matter for the non-US investors using the newly implemented WCAM was launched by Shell's in-house counsel at that time, who had extensive experience of dealing with mass torts and resolving those in the US.

Vedior was settled without any form of litigation. The two merging companies simply wanted to deal with potential negative media coverage and move as quickly as possible to the next level after the merger. Based on the interviews, in Vedior the lawyers seem to have latched onto the collective settlement mechanism as a convenient means of quickly resolving claims that stood between the defendant and successful completion of its acquisition.

¹⁷ The remedy was that the consumers received a discount on their debt to the company.

¹⁸ Converium, the last WCAM settlement, was not included in the case study but also concerned international securities.

The non-securities claims settlements in Dexia and Vie d'Or have a national background. The WCAM made sure that in those cases, pending extensive collectively and individually commenced litigation came to an end, rather than causing more litigation. Moreover, the extensive litigation in Dexia and Vie d'Or was a result of the strategic choices made by the defending companies, rather than the result of frivolous initiated lawsuits. Dexia had initiated hundreds of individual debt recovery suits against the retail investors as part of a 'total war' scenario of the Belgian-French management, who initially endorsed a more formalistic and strict management approach, whereas in Vie d'Or it was clear from the outset that the State would litigate the case before the Supreme Court, because it wanted a court decision on the standard to be applied with regard to State liability for allegedly failing in regulatory oversight. If the Supreme Court were to have rendered a negative decision, the legislature would have been able to launch new legislation. The Foundation defending the interest of the policyholders anticipated those policy considerations and applied a strategy of getting to the Supreme Court as fast as possible, but without success. All together, the litigation from first instance until Supreme Court took about 13 years.

Moreover, both the Dexia and Vie d'Or settlements were the result of government intervention and political pressure on the companies to resolve the matter. In Vie d'Or, the outcome of the Supreme Court ruling was such that the defendants could have easily decided not to settle at all.

In sum: in all four cases, the idea for and initiative of using the WCAM came from the companies who paid. In one case the representative organization even stated that it preferred to settle without using the WCAM. It considered the use of the mechanisms in that specific case as a waste of time and effort, but the company pushed for the use of the procedure. The conclusion based on these case studies is that the expressed views that the structure or technique of the WCAM leads to extensive litigation are, at the very least, not empirically grounded.

IV. PROPOSED NEW AMENDMENTS: A BALANCED PICTURE

As already stressed in the introduction, the statutory draft proposal to improve the WCAM contains amendments that are technical in nature¹⁹

¹⁹ E.g., a stay of pending proceedings until the end of the opt-out period and not until the date of binding declaration.

and amendments that are a codification of already established practices of the Amsterdam Court of Appeal.²⁰ In addition, it contains a few more fundamental proposals.²¹

The first is the extension of the applicability of the WCAM also to cover bankruptcy proceedings, such as in the DSB Bank bankruptcy matter. This amendment was not included in the first draft proposal, but was added later and has the support of the Association of Dutch Banks. Its rationale was to speed up the resolution of the DSB bankruptcy, in which many Dutch banks were creditors.

The second amendment (preliminary or pretrial hearing) seeks to address criticism made by consumer organizations that the current collective settlement regime does not allow collective actions for damages, leaving the WCAM behind as an entirely voluntary mechanism. The draft proposal contains a provision allowing parties to ask for the assistance of a judge in mass disputes before legal proceedings have been initiated, to explore whether parties could settle, if not the entire dispute then at least part of it. The idea is that an experienced judge or a special master could be helpful in facilitating that process and could bring unwilling defendants to the negotiation table. If the outcome is that a settlement is not a viable option, subsequent proceedings can take place in a more structured and efficient way. This amendment is part of a broader litigation vision and philosophy of the legislature to provide courts and parties with different tools to achieve settlements, preferably out of court, but with assistance of the court. Such settlements should do justice to the legitimate rights and positions of the parties involved. The vision of the legislature is that the shadow of the law can be created in different ways. There are many ways that lead to Rome and a collective action for damages is not the only one.

Another measure that is not part of this proposal, but fits within this philosophy, is a request for a pre-judicial ruling from lower courts to the Supreme Court to rule on questions of law. The lower courts can invoke this provision at their own initiative or at the request of one of the parties. This provision was brought into force on 1 July 2012²² and would have been able to speed up the resolution of cases like *Dexia* and *Vie d'Or* if it had existed at that time.

²⁰ E.g., a case management conference prior to the oral hearing to discuss matters of logistics.

²¹ For an extensive discussion of those, see Ozmis and Tzankova, *supra* note 10, 33–42.

²² See Dutch Bulletin of Acts and Decrees 2012, 65, also published on <<https://zoek.officielebekendmakingen.nl/stb-2012-65.html>>, accessed 25 February 2013.

Finally, the draft proposal contains an extra requirement on standing to sue in *collective actions*: organizations will now have to show that they are able to sufficiently represent the interests of consumers or of the injured parties.

Given the fact that the first and the third proposals are beneficial for businesses, the interim conclusion should be that even if the second proposal would overall be more beneficial for consumers, that would still make the draft legislative proposal at the very least 'well balanced'. However, some have argued²³ that although the legislature should review the details of the specific provision proposing the 'pretrial hearing', and that it should pay attention to the implementation of the provision in terms of training the courts on how to use it, it serves the interests of both consumers and businesses that are held liable, even though for different reasons.

In sum, the suggested improvements of the WCAM are overall not likely to be disadvantageous for businesses nor will they lead to frivolous suits.

V. ISSUES THAT SHOULD CAUSE CONCERN

Despite the foregoing relatively reassuring outcome of the analysis of the proposed amendments of the WCAM, there are a few issues that do raise worries although they are different from the ones identified by the business community and the media. Those issues are related to the funding of mass disputes and to achieving the right balance between *ad hoc* and longstanding organizations as the driving forces behind the resolution of mass disputes.

1. Funding of Mass Disputes

Although the WCAM was inspired by the US class settlement regime, at least one essential feature of that regime did not make it into the statute: the court's review and approval of class counsel fees, which is one of the safeguards against the potential abuse of collective settlements. Such a requirement was not considered by the Dutch legislator. The latest legislative proposals aiming to improve the WCAM are also silent on this topic. However, it must be noted that when the class counsel fees are being paid out of the settlement fund, as was the case in *Converium*, the Amsterdam Court will have to review and approve those fees as part of its assessment of the fairness of the settlement agreement. In its consideration of the

²³ See Ozmis and Tzankova, *supra* note 10, 33–42.

fairness of the conversion settlement with respect to the amount of compensation awarded, which was proportionally considerably lower than the settlement payment for the smaller group of US shareholders, the court heavily relied on the fact that the non-US shareholders had been excluded from the US class, and that it is not plausible that they would therefore have effective remedies in or outside the US absent the settlement agreement. In other words, the difference between the US settlement and the WCAM Converium settlement was not unacceptable, since the legal position of the two groups of shareholders was essentially different and could accordingly be treated differently in terms of settlement outcomes.

The Amsterdam Court also assessed the reasonableness of the US counsel's fees, which represented 20 percent of the settlement payment and was perceived by the objecting parties as excessive and incompatible with Dutch public order. The Amsterdam Court of Appeal dismissed this objection, finding that in the context of determining the fairness of a collective settlement under Dutch law, the court may take into account customary US fee practices, when US law firms are involved and the legal services they provided took place predominantly in the US. Furthermore, the Amsterdam Court of Appeal pointed out that the US lawyer's fees were also thoroughly scrutinized by the US court that approved the US settlement, and that a fee calculated on the basis of the *load star* method (hourly fees) would lead to a similar remuneration.

Whether an assessment of the counsel fees by the court will take place depends, however, on the design of the settlement agreement, and can therefore be 'manipulated' by the settling parties. If the settling parties agree that the counsel fees are to be paid out of a separate fund, based on a separate agreement, there is no requirement for the court to approve the reasonableness of the counsel fees. Parties can thus manipulate the involvement of the court in such a review through the design of the settlement agreement that is to be declared binding. Statutory provisions that class counsel fees should be presented to and approved by the court in any event increases transparency and is therefore a safeguard against potential abuses.²⁴

On a more general level, the questions remain whether an explicit statutory provision with regard to the oversight of funding issues in mass disputes can be omitted, and whether a legal system can afford to be entirely dependent on the competence and discretionary powers of individual

²⁴ Ianika Tzankova and Hélène van Lith, 'Class Actions and Class Settlements Going Global: the Netherlands', in Duncan Fairgrieve and Eva Lein (eds), *Extraterritoriality and Collective Redress* (OUP 2012), 67.

judges deciding on a case-by-case basis whether or not to pay attention to funding dynamics in mass claim disputes. The European Commission has acknowledged that financing in class or group actions is a significant issue,²⁵ but a vision – let alone concrete proposals – on how access to justice should be preserved while the potential for abuse is avoided, is lacking.

One explanation, in line with European civil law or at least Dutch tradition, for 'rational apathy' with regard to this issue on the part of the legislator and the judiciary, could lie in the concept of contractual freedom, which is viewed as fundamental to many advanced legal systems. Contractual issues should be addressed primarily by the parties involved. The remuneration of the lawyer is a matter of contract between a client and his legal counsel and, as long as there is no conflict between those parties, third parties should not interfere. In collective actions and settlements under Dutch law, the client is a (representative) organization that is deemed capable of dealing with its agent. If and when the client is not satisfied with the financial arrangements and the lawyers' fees, the client can submit a complaint and follow the disciplinary proceedings established by the Dutch Bar Association or (in theory) go to court. Another explanation could be that traditionally in collective actions there is a funding problem on the plaintiff side,²⁶ so the danger of an overpaid WCAM class counsel is not the first thing that comes to mind. In view of the existing agency costs theories,²⁷ one may conclude that those explanations are insufficient justifications for disregarding the funding issue under the Dutch system of collective redress.

A final explanation for the absence of a provision on class counsel fees in the WCAM could be that such a provision is not necessary, since the class counsel is being monitored by powerful and sophisticated players, like Consumentenbond (the Dutch Consumers' Organization) and VEB (the Dutch Shareholders' Association), but the increased activism of special purpose vehicles set up by commercially operating entities resembles

²⁵ European Commission, *Commission Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress* (SEC 2011 173 final), para 3.5, see also <http://ec.europa.eu/justice/news/consulting_public/0054/sec_2011_173_en.pdf>, accessed 25 February 2013.

²⁶ The Consumentenbond and VEB have to fund collective actions from their members' fees and have limited resources.

²⁷ For a discussion of why the funding of mass disputes is an issue that deserves closer scrutiny and for a demonstration of how various funding mechanisms, traditional and new ones, play out in the Dutch context of mass disputes, see Tzankova, *supra* note 5, 41.

features of the US class action system, for which it has been heavily criticized: the rise of the lawyer without a (tangible) client.

2. Framing the Representative Organization

Recent experiences in the Netherlands with mass disputes show that it is relatively easy to establish an *ad hoc* special purpose vehicle to act in a collective action or settlement. This has strengthened the phenomenon of 'competing organizations', which seems to be an obstacle first for defendants whose litigation strategies require to explore out of court settlement options with groups of claimants, and secondly, for claimants, since it becomes difficult for them to assess which organization to join. What makes it problematic is that special purpose vehicles cannot be absent from the collective redress scene, since longstanding organizations like the VEB and Consumentenbond will not always be inclined or able to facilitate group or collective actions. In addition, special purpose vehicles promote diversity among representative organizations and that should be valued since it prevents a limited number of established longstanding organizations from monopolizing the collective resolution process. Further, an attempt in Shell to contribute to this kind of diversity and extend the WCAM standing requirements to public pension funds (another type of established longstanding interest organization that has been underappreciated in the Netherlands to date) failed. Moreover, in the recent proposed amendments the legislature has explicitly excluded pension funds from being considered as a representative organization under the scope of the WCAM.²⁸

There have been some unregulated initiatives aiming to improve the accountability and governance of special purpose vehicles: a Claim Code was drafted by an *ad hoc* Commission²⁹ and presented in 2011 to the Dutch Ministry of Justice. The Claim Code was the result of a broader consultation that took into account the reactions of various actors professionally involved in collective actions and settlements. In essence, the Claim Code is a set of principles that should apply to special purpose vehicles acting as

²⁸ See Kamerstukken II 2011–2012, 32 612, nr 3, p 14, also published on <<https://zoek.officielebekendmakingen.nl/blg-146303.html>>, accessed 25 February 2013. See also Ozmis and Tzankova, *supra* note 10, 41.

²⁹ The Chairman of the Commission was a former president of the Dutch counsel for the judiciary. The Commission included members of the legal profession who have experience with collective actions and settlements, both on the plaintiff and the defendant side, the Consumentenbond (the Dutch Consumers' Association), a law professor who was also one of the Board members of the Foundation that was established in Shell, and a communications adviser.

representative organizations in collective actions or settlements. The Claim Code has five principles relating to the promotion of collective interests without a profit motive: the composition, tasks and working procedure of the Board, the independence and avoidance of conflicts of interests, the remuneration of Board members, and the Supervisory Committee whose task it is to overview the functioning of the Board Members. The Claim Code applies the principle of 'comply or explain'.

This has the potential to add an extra layer of costs and bureaucracy in the functioning of representative organizations and it remains to be seen whether and how it will improve the functioning of the WCAM. In any event the issue of competing special purpose vehicles has not been sufficiently addressed to date by the Claim Code or by the legislator.

With respect to finding the right balance between *ad hoc* and longstanding organizations as the driving forces behind the resolution of mass disputes, Europeans should be careful about relying too heavily on longstanding public interest and consumer organizations to take the lead in the resolution of mass disputes. Currently, the assumption is that limiting standing to act in mass disputes to such organizations offers safeguards against abusive litigation. This appears to be a false assumption and not only for the reasons that are too obvious to point out.³⁰

At least one of the case studies revealed that longstanding organizations, once involved in the resolution of a mass dispute, might have to defend a position that advances the interests of only one group of their members. It was reported that the Consumentenbond lost many members after it supported and participated in the WCAM settlement in Dexia, because those members (rightly or wrongly) felt betrayed by the position the Consumentenbond took in that settlement. This has had a negative impact on the willingness of the Consumentenbond to be involved in the future in the collective resolution of mass disputes and has made the Consumentenbond more cautious about doing so – which might not be a good thing.

The bottom line is that eliminating or restricting the role of *ad hoc* organizations where the usual suspects, the established longstanding organizations, are unable or for policy reasons unwilling to act, is a bad idea. On the other hand, longstanding organizations offer a valuable perspective on the mass claim resolution process and contribute to the systems of checks and balances in the same way as *ad hoc* organizations do with respect to

³⁰ E.g., they are underfunded, do not always have the needed expertise, might have other priorities, monopolies are seldom a good idea, there should be checks and balances, etc.

longstanding organizations. A solution to this complex issue in the Dutch financial mass disputes context could be to extend the group of parties allowed to play a more active role in the resolution of mass disputes to public pension funds, who combine the virtues of longstanding and *ad hoc* organizations. And coincidence or not, Eumedion, the Pan-European organization of pension funds, has openly endorsed such a position.³¹ This is a story to be continued.

VI. CONCLUSION

When the WCAM was introduced in 2005, it was considered by some to be a one-day fly. The years that followed proved that this assumption was wrong. However, this, in combination with the plans of the Dutch legislature to amend and improve the functioning of the WCAM, has raised different kinds of concerns on the side of the business community. The fear exists that the WCAM promotes frivolous litigation. The case studies of four collective settlements that have been concluded under the WCAM to date reveal that such fear is not well grounded. In the cases settled to date, the use of the WCAM has been invoked at the initiative of the settling companies. Moreover, many of the proposed amendments to improve the functioning of the WCAM are to be considered business friendly. However, there are issues with respect to the resolution of mass disputes that need to be considered, although, as mentioned earlier, they are not the same as the ones identified by the business community or the media so far. Those issues relate to the funding of mass disputes and the framing of the representative organizations. To date, those issues have been underappreciated by the Dutch legislature. It remains to be seen how these will develop in the future.

³¹ See Ozmis and Tzankova, *supra* note 10, 41.