FRESHFIELDS BRUCKHAUS DERINGER

Recent developments in class actions and third party funding of litigation

A rapidly evolving landscape

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Introduction and overview

We thought it would assist clients if we were to update our June 2007 guide *Class actions and third party funding of litigation: an analysis across Europe*. The 2007 guide was well received and quite widely circulated. However, it is already looking very dated, such has been the pace of change: it has been a busy eight months across Europe.

We have summarised key recent developments for each jurisdiction in this update. They include new class action legislation in Austria and Italy, draft bills in France, and potentially significant policy shifts in England & Wales. One of the common features of the pre-existing European approach, as seen in our previous guide, was the frequent use of not-for-profit, sometimes state-controlled, bodies to front and manage multiparty actions. This stance is less prominent in the current proposals and the changes seem to favour a more 'free-market' approach.

The collective impact of these changes, if implemented, is to increase materially the litigation risk in Europe.

The highlights include the following.

- The Italian Parliament has introduced a statutory provision into the Consumer Code contemplating a class action on an 'opt-in' basis, which will become effective on 30 June 2008.
- In France, President Sarkozy has committed to the creation of a new group action under French law and various draft bills proposing class actions have been presented before Parliament.
- In England & Wales, recent research sponsored by the Civil Justice Council (CJC) supports the need for an 'opt-out' generic collective redress mechanism. There has also been a string of moves towards the wider acceptance of (as well as a greater volume of) third party funding. The policy issue is how best to facilitate this. Leading government agencies are also pulling in the same direction.
- Germany is looking at permitting contingency fees where they are necessary to allow clients to make a claim, following the Federal Supreme Court's ruling that the current prohibition on contingency fees is unconstitutional.

There have also been a number of developments at the European level with European Commissioners Meglena Kuneva and Neelie Kroes in November 2007 pushing the idea of collective redress for consumers across Europe, particularly in the competition context. We can expect to see a White Paper from the European Commission (Commission) on the proposals in the competition context early this year, and the consultative process for a more general European collective redress mechanism for consumers is now underway.

In this update, we use opt-in to describe the case where individual claimants need to adhere to the litigation and 'become part of it'. These systems tend to have rather low levels of participation and to be less effective in terms of damages paid to claimants. Opt-out refers to the reverse position (seen in the US) where the class is defined by reference to specific criteria (sometimes the criteria, or the right to use this method, have to be sanctioned by the court) and parties need to opt out if they do not want to participate (and therefore be bound by the result). These processes, given the inevitable inertia, tend to have high participation rates and result in large claims.

We hope you find this update interesting and helpful. We would happily respond to any questions or thoughts it provokes.

International/European developments

Further to the unveiling of the New Consumer Policy Strategy 2007-2013 in March 2007, the EU Commissioner for Consumer Protection, Meglena Kuneva, made a speech on 10 November 2007 at the conference on collective redress for European consumers in Lisbon, saying: 'To those who have come all the way to Lisbon to hear the words "class action", let me be clear from the start: there will not be any. Not in Europe, not under my watch.' Ms Kuneva expressed the need to confront the fact that at present almost half of the EU Member States have systems of collective redress, while the rest do not. However, Ms Kuneva did say that EU action to address such a situation would not necessarily mean a fully fledged legislative initiative. A number of benchmarks for an effective and efficient collective redress system have been set, against which all Member States will be assessed. If they are found not to meet these, an EU action will then be considered. The Commission has launched the consultative process, which will close on 3 March 2008[1].

Speaking at the same conference, the EU Commissioner for Competition Policy, Neelie Kroes, confirmed the Commission's intention to publish a White Paper in early 2008, making specific recommendations about empowering consumers in antitrust damages actions in Europe, including collective redress mechanisms. This White Paper is envisaged to go 'hand in hand' with Ms Kuneva's wider initiative to explore how collective actions by consumers can be strengthened across the board.

In July 2007, the OECD Council adopted the Recommendation on Consumer Dispute Resolution and Redress to protect better the rights of consumers and make online shopping safer. This Recommendation includes that consumers should have the right to band together to take legal action against a firm (known as 'collective action lawsuits').

[1] The benchmarks include the following: it should be possible to finance the actions in a way that allows consumers either to proceed themselves with a collective action or to be effectively represented by a third party, and plaintiffs' costs for bringing an action should not be disproportionate to the amount in dispute; costs of proceedings for defendants should not be disproportionate to the amount in dispute; the compensation to be provided should not be so excessive as, for instance, to amount to punitive damages; and the introduction of unmeritorious claims should be discouraged.

For a full list of the benchmarks and further details about the consultative process, please see **http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm**

The Commission has also launched a new study focusing on collective redress in the EU, as well as a study to provide more information on the key problems faced by consumers in obtaining redress for mass claims, which will analyse the consequences of such problems for consumers, competitors and the relevant market. The Commission intends to use the results of these studies, as well as the information provided by stakeholders and interested parties, to decide whether, and if so to what extent, an initiative on collective redress is required at EU level.

Austria

The Austrian legislator has drafted an amendment to the Austrian Code of Civil Procedure (*Zivilprozessordnung*) that provides for group litigation as follows.

- The group litigation must be initiated by a minimum of three claimants and include at least 50 claims asserted against the same person(s).
- These claims must require a decision based on similar questions of fact or law.
- Every person concerned has the opportunity to join the group litigation, ie opt in, by notifying his claim to the competent court.
- A group representative (*Gruppenvertreter*) will be nominated by the claimants to represent all claimants joining the group litigation.
- In such group litigation proceedings, the competent court will only render a declaratory judgment on mutual questions of fact and law.

This amendment was due to come into force on 1 January 2008 but has been heavily criticised by the Chamber of Commerce, Austrian Trade Union and Ministry of Economics. It therefore remains unclear as to when it will be effective.

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England & Wales

Class actions and third party funding issues have been two of the most discussed litigation topics over the past eight months, judging not only by the number of conferences and articles, but also the policy interest from government and agencies. The talk is currently ahead of the reality but the underlying position is developing very quickly in favour of a more liberal market. We, as a firm, are now seeing the first real involvement of third party funders in the litigation and arbitration markets for substantial matters.

There seems to be a strong convergence of views and activities from relevant agencies, including the Office of Fair Trading (OFT), government policy makers (such as the CJC), judges, 'plaintiff bar' law firms and investors/funders, all pointing in the direction of a steady facilitation of both (i) enhanced forms of 'collective redress' (with features that have some relation to US class action techniques) and (ii) the use of private capital to fund litigation for profit. The debate focuses not so much on whether this should happen, but rather on how it should happen to avoid abuse and provide sufficient protection for defendants.

Class actions or 'collective redress'

Research paper commissioned by the CJC

Last week (8 February 2008) saw the publication of a research paper commissioned by the CJC looking at the need for better collective redress in England & Wales[2]. This is a very significant development. The author, Professor Rachael Mulheron, conducted extensive research across Europe and the Commonwealth and the paper is a mine of useful information on the position in England & Wales[3]. It concludes that there is overwhelming evidence of the need for a further and better collective redress mechanism to supplement the present procedural tools available to claimants. It bases this conclusion on the relative failure of the current Group Litigation Order approach (at least as regards numbers of claims and types of collective action in terms of subject matter) in comparison with group claims brought in other jurisdictions, and on the anecdotal evidence of those who have struggled to bring claims. A policy driver seems to be that claimants are going uncompensated, particularly where small individual claims or logistical difficulties make the process uneconomic.

2 *Reform Of Collective Redress In England And Wales: A Perspective Of Need*, published on 8 February 2008. For a copy of the full report, please see **www.civiljusticecouncil.gov.uk/files/collective_redress.pdf**.

3 Although it is worth noting that the main sources of comment from the profession were from individuals and firms associated with bringing, rather than defending, multiple actions and not surprisingly these highlight the difficulties they have experienced as claimants rather than looking at the risks to defendants.

The solution mooted is an opt-out, generic collective redress regime. Traditionally in Europe, group actions have been opt-in: claimants have to take positive steps to become part of the litigation process. The US system is opt-out in that the class is 'certified' by a generic description and those covered have to take a positive step not to be a part of the claim. The difference in the leverage this gives claimants (and a plaintiff bar) is considerable. The author stresses that it is essential that any supplementary regime should have 'brakes' with in-built requirements to provide procedural fairness to both claimants and defendants. This includes a 'superiority' analysis, namely that an opt-out collective redress action should be allowed to proceed by the court only if it is indeed preferable to decide the dispute in that way, rather than using one of the other existing procedural tools.

The report makes clear that the opinions expressed therein should not be taken to necessarily represent the views of the CJC. It is understood that the CJC intends to publish its views on this matter in the near future. However, when combined with the CJC's report on funding mechanisms (described below), this makes for a very interesting cocktail of reform measures that has the potential to alter the litigation landscape very significantly.

OFT recommendations

In the competition context, following up on its informal discussion paper in April 2007 on reform of the redress mechanisms for breaches of competition law, the OFT held a public hearing in September 2007. This was followed in November by the OFT's recommendations to the government, which, if followed, would significantly change the conduct of private competition litigation in the UK: private actions would be capable of being pursued more easily, and with fewer associated risks, than has previously been the case[4]. In particular, the OFT recommends:

- increasing incentives for lawyers to bring claims, by permitting conditional fee arrangements (CFAs) in representative actions in certain circumstances with an uplift of greater than 100 per cent of fees (although it stops short of recommending true contingency fees, which are a proportion of damages obtained);
- enabling courts to cap parties' costs liabilities and providing for court to have discretion to give claimants protection from costs in appropriate cases;
- establishing a merits based litigation fund;

[4] For further details of the OFT's recommendations, please see our briefing *Private actions in competition law* from November 2007 **www.freshfields.com/publications/pdfs/2007/dec05/20975.pdf**.

- allowing representative actions to be brought on behalf of businesses, as well as consumers (which is highly relevant, as many of the cartel decisions to date involve sales to professional intermediaries, not consumers); and
- encouraging third party funding for competition litigation (see below).

The proposals also contemplate the possibility of opt-out classes. However, the proposed representative actions would still differ in key respects from US class actions (for example, there would be no jury trials and no treble damages, and actions could be brought only by designated bodies or bodies given permission by the courts).

Other developments

- As we reported in June 2007, the consumer body Which? brought the first representative action in the competition context in March 2007 against JJB Sports regarding price-fixing of replica football shirts. Instead of the thousands of consumer claims some had predicted, fewer than 200 individuals eventually joined the action. Proceedings were stayed pending settlement, which was eventually reached in January 2008. The 'victims', including people who bought shirts but did not sign up to the initial action, will receive up to £20 in compensation. This settlement leaves the representative action mechanism untested. The history of this case, however, has highlighted the issues for policy makers in the context of the merits of opt-out systems.
- The action brought by policyholders against Equitable Life, which was based on the mis-selling of with-profits annuities (commenced in 2004), was settled out of court in January 2008. The terms of the settlement are confidential.
- A recent decision in the High Court[5] had important restrictive implications for claimants seeking damages in the competition context. It held that exemplary damages were not available to claimants bringing actions against cartelists that have already been fined by the European Commission, reducing the incentives to bring an action. Compensatory damages remain available and are the appropriate remedy[6].
- A US court granted Avon Pension Fund the right to lead a securities-related class action against GlaxoSmithKline over its diabetes drug,

[5] *Devenish Nutrition Ltd & Others v Sanofi-Aventis SA (France) & Others* [2007] EWHC 2394.

[6] For further details, please see our briefing *Cartel damages actions: the ruling in Devenish and others v Sanofi-Aventis and others* of 19 October 2007 **www.freshfields.com/publications/pdfs/2007/oct31/20475.pdf**. We acted for F Hoffmann-La Roche AG and Roche Products Limited (the fourth and fifth defendants) in this case.

Avandia. This ties in with the fact that the National Association of Pension Funds has encouraged local and European investors to join US claims and is interesting from the point of view of the globalisation of class actions. Such involvement by English and other non-US investors in US proceedings has led to discussions about the local enforcement of foreign class action judgments. It also has an impact on policy makers, who may not find it attractive that English parties should be able to seek compensation with procedural effectiveness only in the US (although there are other issues in the securities litigation context where the substantive legal position is very different under US law).

- England & Wales' very limited move in the US direction, the new derivative action for shareholders under the Companies Act 2006, came into force on 1 October 2007. We are not aware of any reported claims to date and it remains to be seen how active this jurisdiction will be given the considerable in-built procedural protections for companies.

Third party funding

The private litigation funding market in England & Wales seems to be developing rapidly.

- There is a strong sensation of more funders in the market (the following is not an exhaustive list of available funders/brokers).
  - The insurer Allianz has launched a third party litigation business in London, aimed at providing assistance for claims above £100,000. Allianz ProzessFinanz GmbH has been successfully financing litigation for a number of years in Germany, Switzerland and Austria.
  - The hedge fund MKM Longboat is said to be creating a pool of funds to invest in European legal disputes and a well resourced funder called Harbour is looking to fund claims over £3m.
  - Juridica, a Guernsey-based company chaired by Lord Brennan QC, a former chairman of the Bar Council, became the first specialist litigation fund to list its shares on the Alternative Investment Market, although much of its activity is expected to be in the US.
  - Global Arbitration & Litigation Services specialises in sourcing funding for litigation and arbitration.
  - Omni Bridgeway is looking to fund international arbitration claims.
  - Calunius Capital, a specialist broker looking to advise parties on hedging litigation risk, is authorised by the Financial Services Authority.
- The accountancy firm Smith & Williamson has set itself up as a litigation funder in the insolvency context, although it has said it is also willing to consider funding any litigation.
- Law firms are starting to develop expertise in advising such funders.
- A recent high-level market survey concluded that the UK market is immature but most market participants believe there is a significant opportunity for third party litigation funding. The key drivers of the

market are thought to be changing legal precedent, increasing legal costs and improving levels of awareness of such funding. Competition within the market is evolving, with a range of players and business models apparent. The London litigation market is said to be attractive to funders because of its sophistication and the relative speed with which cases are brought to a conclusion (thereby reducing the pay-back period for funders).

- The industry seems to be interested in potentially funding actions for high volume, low value consumer claims if they can be made economically viable through effective collective redress mechanisms (say, an opt-out regime). They are not currently regarded as viable because of both the high administrative cost of running such claims and the procedural hurdles (as was the case with the findings by the OFT against supermarkets and dairies in the dairy market in December 2007: despite the very large fines and claims of consumer detriment, the market regarded this case as unfundable and un-runnable as a group action on behalf of the wronged consumers).
- In June 2007, the CJC published a report entitled *Improved Access to Justice – Funding Options & Proportionate Costs*, providing its recommendations to the Lord Chancellor to improve access to justice through the development of improved funding structures[7]. One of the CJC's recommendations was that properly regulated third party funding should be recognised as an acceptable option for mainstream litigation and regulated contingency fees should be permitted in multiparty cases where no other form of funding is available, to provide access to justice. It also recommended the establishment of a Supplementary Legal Aid Scheme. Further, the CJC recommended that the Ministry of Justice conduct thorough research to ascertain whether contingency fees can improve access to justice in the resolution of civil disputes generally.
- More recently, the CJC has been developing its policy in this area. Very recent discussion papers and consequent debate suggest there is a consensus building in favour of creating a permissive and viable environment for funding. It is necessary to ensure defendants are appropriately protected, particularly against costs. (It may be that the *Arkin*[8] decision that partial funders (at least) are liable only to the level of their partial funding will be adapted to enhance the protection of defendants.) Similarly, claimants need to be protected from poor disclosure by funders and inappropriate contractual terms (given the recent history in the claims management area for consumer cases).

7 For a copy of the full report, please see **www.civiljusticecouncil.gov.uk/files/future_funding_litigation_paper_v117_final.pdf**.

8 *Arkin v Borchard Lines* [2005] EWCA Civ 655.

Finally, there may be a need for some light regulation of the funding sector to ensure it permits only reputable operators. However, this thinking is predicated on either a need for, or an inevitability of, active third party funding in England & Wales.

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France

The key developments in the last eight months are as follows.

- On 11 July 2007, President Nicolas Sarkozy wrote to the Minister for Economy, Finance and Employment, Christine Lagarde, setting out commitments undertaken to the French electorate requiring rapid action and saying: 'You shall create a group action à la française'.
- On 14 September 2007, the Court of Appeal of Paris partially upheld an award of compensation to the shareholders of Regina Rubens. The minority shareholders were awarded half of the purchase price of the shares, while others obtained the difference between the purchase price of the shares and their actual price. The amount of damages awarded to the main shareholder was, however, reduced from €1.5m to €300,000 on the grounds that the fraud had had a limited impact and was not the direct cause of the loss suffered.
- On 24 October 2007, a draft bill was presented by a socialist member of Parliament (Arnaud Montebourg) providing for the introduction of group actions under French law. If the draft bill is adopted, a consumer group that has existed for at least five years will be able to file a request before a judge on behalf of a group (provided they had not acted as 'professionals') for claims of a civil nature, either contractual or tortious, in matters relating to consumer issues, health, environment or competition under certain conditions.
  - Parties would be able to opt out at all times during the proceedings. A fund would provide for advertisements regarding group actions and payment of damages to the members of the group following judgment or settlement. Settlement agreements would have to be approved by a judge.
  - The draft bill will be examined by a Parliamentary Committee (*Commission parlementaire*). Although it is very likely that class actions will be introduced, in some form, in France in the near future, the chances that this draft bill will be taken as a basis for any such introduction remain very remote, notably because this initiative comes from the opposition.
- On 21 November 2007, the National Assembly rejected a proposed amendment aimed at introducing group actions into French law in the draft bill on competition in the service of consumers (*concurrence au service des consommateurs*).
- However, also on 21 November 2007, a draft bill was presented by Jacques Dessallangre (a socialist member of Parliament) providing for the introduction of group actions under French law. The draft bill allows for authorised individuals and certain associations to introduce group actions where there are the same questions of law or of fact. The draft bill proposes an opt-out system, but with a judicial review of whether a case falls properly within the system.

- If the action were admissible, the judge would then have to determine the main characteristics defining the group of persons who were party to the proceedings. The judge would also have to examine the agreement reached regarding lawyers' fees to ensure they were reasonable. The judge would be responsible for defining the method used for informing members of the group of the existence of the action, determining the amount of damages to be paid by the defendant and deciding how these amounts were to be distributed among the members of the group.
- Once again, this draft bill will be examined by a Parliamentary Committee (*Commission parlementaire*). It is thought unlikely that the draft bill will be adopted in this form for political reasons.

- On 22 November 2007, the Civil Affairs and Justice Office presented its working programme for the coming months, which included the introduction of group actions within a government draft bill on the modernisation of the economy that is due for spring 2008.

- On 6 December 2007, the new president of the Paris Bar (*Bâtonnier*) declared that he intended to ensure the French legal profession would be more proactive, including in the area of class actions.

- On 23 January 2008, a Commission for the Improvement of Growth in France (*Commission pour la Libération de la Croissance Française*) handed its final report to President Sarkozy. Among its less prominent proposals was the introduction of group actions to increase consumer confidence in the market on the basis that:
  - only consumer groups with authorisation from the Minister for Economy, Finance and Employment for a specified period of time would be permitted to launch a group action;
  - claimants who launch abusive proceedings would have to pay damages for loss suffered by the defendant(s);
  - only a restricted number of courts would be permitted jurisdiction to hear group actions;
  - only those customers who had opted in would be able to take part in the proceedings; and
  - settlement agreements would have to be approved by the court with jurisdiction to hear the claim.

  The Commission observes that to keep the costs of justice and, notably, lawyers' fees at a low level, the French principle of *réparation intégrale*, whereby individuals may obtain compensation only for actual loss (neither more nor less), must continue to apply and punitive damages should not be introduced under French law.

- A commission for the decriminalisation of business law (*Commission sur la dépénalisation du droit des affaires*), presided over by the former president of the Court of Appeal of Paris, is expected to hand its report to the Minister of Justice on 20 February 2008. This report is also said to recommend the introduction of a group action for authorised consumer

groups. A judge would make a ruling regarding the liability of the company and would fix a period during which consumers would be able to bring a claim for damages before him.

- The Secretary of State for Consumption and Tourism is due to hand his proposals on the introduction of group actions to the Minister for Economy, Finance and Employment in February 2008.
- On 11 February 2008, while discussions, reports and draft bills regarding the introduction of class actions multiply, Pierre Simon, president of the Chamber of Commerce and Industry of Paris (CCIP), warned against the dangers of introducing a group action in France. He emphasised that this would result in an increase in litigation costs for corporates, which would ultimately be passed on to the consumer. According to Mr Simon, such an increase would also inevitably reduce the competitiveness of French corporates, notably because higher insurance premiums would apply. Consequently, the CCIP recommended that (i) group actions be strictly controlled to avoid abusive proceedings, (ii) an opt-in system be adopted and (iii) the scope of group actions be limited to consumer law and disputes of a contractual nature involving low amounts.

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Germany

The key developments in the last eight months are as follows.

- A list of all current proceedings under the Act on Lead Cases of Private Investors (*Kapitalanleger-Musterverfahrensgesetz, KapMuG*) is now available[9].
- It may be that the scope of representative actions (*Verbandsklagen*) in Germany will increase as a result of the MiFID Implementation Act (*Finanzmarktrichtlinienumsetzungsgessetz*). From 2008, section 6 of the Securities Trading Act (*Wertpapierhandelsgesetz*, WpHG), which includes transparency obligations, will be treated as consumer protection legislation under the Act on Actions for Injunctions (*Unterlassungsklagengesetz*, UKlaG). Consumer protection associations will be able to file claims against financial institutions arising from breaches of section 6 of the WpHG if their members are affected by the breach.
- Following the decision of the Federal Supreme Court in March 2007 that the current general prohibition on contingency fees violates German constitutional law, on 31 October 2007 the German Ministry of Justice published a proposal for an amendment to the German Act on Lawyers' Remuneration (*Rechtsanwaltsvergütungsgesetz*, RVG). Under this proposal, contingency fees would still be prohibited generally but would be permitted in exceptional cases where such fees are necessary to give clients the means to raise a claim. This proposal has been sent to the German federal states and to the legal practitioner associations for comment.

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9 For a full list, please see **www.ebundesanzeiger.de** (Klageregister).

Italy

At the end of December 2007, the Italian Parliament passed the Budget Law and Financial Act 2008 and so finally introduced a specific statutory provision (article 140-*bis*) into the Consumer Code that contemplates an opt-in collective action for damages arising out of liability in connection with mass contracts, torts, unlawful commercial practices or anticompetitive behaviour. The new law will become effective on 30 June 2008.

- Under the new collective action (which is somewhat limited in scope), bodies acting on behalf of consumers or investors (previously entitled to seek injunctive relief) will be able to obtain a declaratory judgment of the right to obtain compensation and the refund of sums due (although the collective action will not necessarily lead to a direct order to pay this money).
- Standing to bring such a claim to protect consumers' interests has been granted to a few entities, namely:
  - consumer associations with a nationwide presence[10]; and
  - any other consumer group, investor group or association sufficiently representative of collective interests (as assessed by the judge).
- First, a court will filter the claim to assess admissibility; the second phase will consist of a fully fledged trial to obtain the substantive declaration and the criteria for calculating loss; then there will be further, separate individual procedures to determine damages for each claimant.
- If the action is declared admissible, the plaintiff must proceed with suitable advertising to inform all of the class members of the collective action, enabling them to opt in to the action and take part in the proceedings. Consumers may opt in to the collective action by a simple written notice (without any particular formality) to the group plaintiff, which must be sent by (and no later than) the penultimate hearing (ie the post-trial hearing at which the relief sought is finally set out). They will then be bound by the result.
- Individual consumers who do not opt in to the collective action still have the alternative option to bring individual claims against the defendant either by joining proceedings in the traditional way or by separate proceedings.

10 These will be listed on a register maintained at the Ministry of Productive Activities (the former department of Industry, now called the Ministry of Economic Development).

- There are two special procedures to assist with the binding determination of individual damages, which can be either out of court or, in whole or in part, before a judicial 'chamber of conciliation'[11].

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[11] Note that by joint request, an out of court settlement following an alternative corporate proceeding (under article 38 of the D. L.vo 17.01.2003, no. 5) may be substituted for the judicial proceedings for the assessment of damages.

The Netherlands

Mass claims continue to be a hot topic in the Netherlands as a result of the 2005 Act on Collective Settlement of Mass Damages (*Wet collectieve afwikkeling massaschade,* CSMDA). Although this was originally created for collective redress in cases of physical injury, it has become a useful device for corporate investors. We set out the recent highlights below.

- Dexia's court approved collective settlement is the second Dutch style 'class action' under the CSMDA. The compensation arrangements as negotiated between Dexia and four entities (associations and foundations) representing the class were joined by almost 90 per cent of the class. The settlement appeared to have survived its opt-out period successfully. However, a recent opinion of the Procurator General in an individual Dexia case has created a stir in the Dutch media. If the Supreme Court follows the Procurator General's advice, Dexia will be ordered to compensate certain individual litigants who opted out to a substantially greater extent than the settlement provided for[12]. In that respect, it is interesting to note that the majority of the people who opted out were associated with the same foundation.
- Approval by the Amsterdam Court of Appeal of the settlement between Royal Dutch Shell (Shell) and its non-US investors hinges on whether the US court hearing the US class action against Shell declines jurisdiction over the non-US investors. After the opinion of a judge (who was appointed as Special Master for this issue) recommending that the US court decline jurisdiction, the lead plaintiff and Shell continue to litigate this subject. A final judgment is not expected in the near future. However, in anticipation of a positive outcome, the Amsterdam Court of Appeal has conducted procedural hearings regarding issues of timing, confidentiality and the service of summons.
- The Dutch Investors' Association (VEB) obtained a judgment in which the Amsterdam Court of Appeal declared that World Online, ABN AMRO and Goldman Sachs had acted wrongfully against investors by misrepresenting future expectations during World Online's flotation.

[12] This is on the basis of the Procurator General's opinion that the Dexia product should be qualified as a hire purchase agreement, which may be declared void if the consumer did not validly co-sign the contract. On this basis, the contract in this individual case was declared void, requiring the undoing of all actions under the initial contract, including the payment of interest on the loan. Compensation under the settlement agreement for this type of case had consisted of only the (whole) remaining debt, without any compensation to the consumer for any interest paid. To date, case law and jurisprudence in the Netherlands have been unclear as to whether the Dexia product is a hire purchase agreement and whether interest paid by the consumer counts as damage. These issues are therefore for the Supreme Court to decide.

The foundation, VEB-Actie WOL, which represents thousands of individual investors, is a co-claimant in this case. Its claim was dismissed by the Court of Appeal due to its failure to produce proof that the specified individuals it represented had specifically assigned their claims to it (as is required if it is claiming compensation for damages rather than a declaratory judgment for the class in general). According to VEB, the case (in particular the assignment issue) has been brought before the Supreme Court.

- The issue of funding of class actions is being debated among lawyers and politicians in the Netherlands, as only non-profit organisations are currently eligible to act on behalf of a group, whether in a general collective action or as part of the procedure to request court approval for a collective settlement. Low fees and the 'free rider' problem (by which class members unassociated with the organisation representing the class still benefit from the achieved declaratory judgment) may result in insufficient funding, forcing organisations sometimes to abort their actions.
- The subject of mass claims is also popular with politicians. The government is currently monitoring the Dutch system and considering adjustments to the CSMDA.
- A pilot scheme is being established (which is expected to take five years) for conditional/success fee arrangements in the areas of personal injury and loss of dependency where access to justice is restricted, due in particular to the high costs of instructing medical experts. The general view is that the independence of lawyers is better safeguarded by conditional/success fees, whereby hourly fees depend on success, than by contingency fees, whereby legal fees amount to a percentage of the revenues of the case. Contingency fees remain prohibited in the Netherlands.

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The key developments in the last eight months are as follows.

- The most significant recent event was the filing of a quasi-class action by a representative consumer association (*Organización de Consumidores y Usuarios*, OCU) against the companies FECSA-Endesa and Red Eléctrica Española, for compensation for damage caused to an unidentified group of consumers by a blackout in Barcelona on 23-24 July 2007. The claim was filed on 30 July 2007 but the 'public calling' inviting the affected consumers to join the claim has not yet commenced. The blackout affected around 350,000 consumers and OCU is seeking minimum compensation of €300 per day, per consumer.
- No substantial legislative amendments have taken place since our guide was published in June 2007.
- Finally, although not a collective action, the first ever claim for an injunction in the area of consumer protection has been filed by the Public Prosecutor, which is significant. The execution of the judgment was passed by the Provincial Court of Cordoba and recently confirmed by the Spanish Supreme Court. This ordered the gas company to reimburse sums unlawfully charged to its clients, which could lead to the payment of millions of euros (the exact number is still unknown, but certain sources believe there could be more than 200,000 affected consumers).

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