Law & Economics Center

Searle Civil Justice Institute
Public Policy Conference

Third-Party Financing of Litigation: Civil Justice Friend or Foe?

"Costs and funding of Mass Disputes: Case Study – the Netherlands"

Ianika Tzankova

Working Paper – Please do not cite

November 9-10, 2011
Royal Windsor Hotel Grand Place
Brussels, Belgium

Costs and Funding of Mass Disputes: Case Study the Netherlands

Abstract[1]

Prof. Dr. Ianika N. Tzankova

For a long time the topic of costs and financing of litigation has had a second-rung status in civil law (continental) academic literature, at least in the Netherlands. Although in academic legal writing it has been acknowledged that financing is an essential pre-condition for the proper functioning of any legal system and one of the pillars of access to justice, most academic studies have been focused on the material aspects of the functioning of the civil law. In contrary, common law legal systems have traditionally integrated the influence of financial incentives on the functioning of the law in academic writing more consistently. This seems to be a difference not just in academic styles and traditions, but also one that is reflected in the approach of the topic by the respective legislators and in the attitude of the judiciary in the day-to-day legal practice.

This paper will focus on (i) the funding of mass claim disputes in (ii) the Dutch legal system as an exponent of the civil law family and will seek to explore whether the Dutch legal system has adequate mechanisms in place to secure access to litigation funding in mass claim disputes. To address the research question, the functioning of the main litigation funding options in the Netherlands will be assessed in the context of a concrete consumer mass claim dispute: Dexia. The main litigation funding options in the Netherlands are Legal Aid, before-the-event legal expense insurance (LEI,) and a relatively new development in the funding of mass disputes: after-the-event- third party funding (third party funding).

The paper aims to enhance awareness of the functioning of Legal Aid funding and LEI in mass disputes in an European (Dutch) context and its implications for the development of third party funding of mass claim disputes in the Netherlands.

The functioning and significance of litigation funding in the context of mass disputes is being influenced by the principle of party autonomy and its exponents: the free choice of legal counsel and the right to determine one's litigation strategy. The Dexia case study illustrates that applying those principles mechanically serves as an obstacle for the adequate funding of mass disputes

---

[1] This paper partly builds on the results of case studies conducted in an international collaborative empirical project leaded by Professors Hensler (Stanford/Tilburg), Hodges (Oxford/Erasmus) and Tzankova (Tilburg) examining the functioning of class or group litigation schemes in various countries. The output of that project will be a book, to be published in 2012, consisting of descriptions and discussion of all case studies involved in the project. Interim results of the case studies were presented at the annual Law and Society Conference in San Francisco in June 2011. Final results will be presented at the annual Law and Society Conference in Honolulu in June 2012. The Dutch case studies on four collective settlements have been jointly conducted by Professors Hensler and Tzankova.

through Legal Aid. Case law of the European Court of Justice that builds on the principle of free choice of legal counsel could have a similar impact on LEI and be disadvantageous for the business model of LEI providers, but to date this has not been the case in the Netherlands and might be attributed to the institutional environment in which Dutch LEI providers operate.

Redefining the meaning of party autonomy and free choice of legal counsel or simply limiting the impact of those in the context of mass disputes will provide only a partial improvement in the funding of mass disputes under the currents schemes. As a result of institutional and market restraints Legal Aid schemes and LEI can function as a funding option primarily in (i) national (ii) consumer related maters. Without additional coordination efforts at national and supranational level funding of mass disputes will remain problematic in the international or cross-border context (e.g. securities litigation) and in business-to-business litigation (e.g. anti-trust litigation).

To secure access to justice in these two categories of mass disputes, alternative funding options, e.g. third party financing, will remain necessary and will increasingly become available. The Dutch legal tradition and litigation landscape is advantageous for the business model of third party litigation financiers. The emerging practice in Europe proves already that there is a need and a market for that type of legal service, despite dogmatic and ethical objections that some legal scholars have put forward. There seems to be a general consensus between opponents and proponents of third party financing that it should be regulated, although the opinions on the scale and intensity of regulation vary. Regulation is of an even greater significance in legal systems, like the Dutch, where the legislator and the judiciary traditionally have been less focused on the influence of financial incentives on litigation dynamics.

1. Legal writing on costs and financing of litigation

1.1 Background

For a long time the topic of costs and financing of litigation has had a second-rung status in civil law continental academic literature, at least in the Netherlands. Many legal scholars still view the law of civil procedure as subordinated to material civil law,[2] and somehow of a lesser importance. This might explain why academic writing about costs and financing of litigation, as part of civil procedure, has been for a long time limited and underdeveloped, although it has been acknowledged that financing is an essential pre-condition for the proper functioning of any legal system and one of the pillars of access to justice[3]. Academic studies on the influence of finance on litigation dynamics was limited to dogmatic studies of costs shifting rules and discussions about the need for more resources that should be made available through Legal Aid funding to meet the legal needs of those with lower incomes. Costs and funding were considered to be a

[2] See Tzankova/Gramatikov 2011 for an overview.

[3] M. Cappelletti.

practical and intellectually less challenging matter that was of an interest mainly to the legal profession,[4] but a topic that would not help any legal scholar seriously pursuing an academic career. Comprehensive and sophisticated analyses about the influence of financial incentives on the behavior of litigants and their agents or the courts were generally lacking, at least in the Netherlands until recent. Whereas it became more and more evident that the legal profession is no longer exclusively an "officium nobile", but also a profit driven business like many others, it is overall still considered inappropriate to suggest that economic models apply also on the judiciary or that the courts are managerial entities suffering from systemic risks and operating under influence of financial incentives, just like any other agent or economic actor. A recent empirical study confirms what has been suspected for years: whereas Dutch courts appear to not experience significant difficulties when they rule on liability and damages, also with regard to matters laying far beyond their expertise[5], overall Dutch judges seem to feel uncomfortable and hesitate when they have to invoke financial incentives and sanction parties for their conduct in the course of the litigation.[6] The first Dutch studies that took a broader perspective on the influence of financial incentives on civil litigation and the behavior of litigants are relatively recent and law and economics oriented.[7]

In contrary, common law legal systems seem traditionally to have integrated the influence of financial incentives on civil procedure in academic writing and case law more consistently.[8] One could summarize the different attitudes towards costs and funding as *civil law legal idealism and dogmatism* versus *common law legal realism and pragmatism*. This seems to be a difference not just in academic styles and judicial tradition, but also one that is reflected in the approach of the respective legislators and the attitude of the judiciary. For example costs and funding were one of

---

[4] In the Netherlands organized in e.g. the Dutch association for procedural law (Nederlandse Vereniging voor Procesrecht) and the Dutch Bar Association. The Dutch association for procedural law was also the initiator for two publications about the costs of civil procedure in 1993 and 2007. See also M.L. Tuil, The Netherlands, p. 401 in: C. Hodges, S. Vogenauer and M. Tulibacka (ed.): The Costs and Funding of Civil Litigation, Hart 2010, p. 401-419.

[5] Van Boom, Rekenende rechter 2004, D. de Groot, diss. 2008, De deskundige in het civiele proces.

[6] P. Sluijter, diss. Tilburg 2011, For many years Dutch law of civil procedure knew a statutory provision ("eigen beursje") that made it possible to convict the lawyer instead of the client in the costs of the other party if in the opinion of the court the lawyer misbehaved and inadequately represented his clients interests in the case….Provision was hardly used by the courts.

[7]E.g. Barendrecht, J.M. (2011). Legal aid, accessible courts or legal information? Three access to justice strategies compared. Global Jurist, 11(1), 1-26, Barendrecht, J.M., & Vries, B.R. de (2005). Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services? Cardozo Journal of Conflict Resolution, 7(1), 83-118, Barendrecht, J.M., & Weterings, W.C.T. (2000). Rechtshulp: een groot goed met schadelijke bijwerkingen. Advocatenblad, 80(12), 435-451, M. Faure, T. Hartlief and N. Philipsen (2006), Resultaatgerelateerde beloningssystemen voor advocaten – Een vergelijkende beschrijving van beloningssystemen voor advocaten in een aantal landen van de Europese Unie en Hong Kong, (WODC rapport) Den Haag: Wetenschappelijk Onderzoeks- en Documentatiecentrum Ministerie van Justitie, M. Tuil and L. Visscher (ed.), New Trends in Financing Civil Litigation in Europe, 2010, Edward Elger, Cheltenham UK, Tzankova 2007 Mordenate, P. Sluijter, diss Tilburg 2011.

[8] E.g. W. Landes (1971), An Economic Analysis of the Courts, Journal of Law and Economics, 14, 61-107, R.A. Posner (1973), An Economic Approach to Legal Procedure and Judicial Administration, The Journal of Legal Studies, 2, p. 399-458, D. Rosenberg and S. Shavell (1985), A Model in Which Suits Are Brought for Their Nuisance Value, International Review of Law and Economics, 5, 113-120.

the main issues addressed by the Lord Woolf Reforms in the UK in 1999 and one of the main subjects of an evaluation of those reforms in 2010 that resulted in the Justice Jackson report.[10] Moreover, many leading US judges integrate economic models in their rulings.[11] A fundamental review of the Dutch Code of Civil Procedure that was inspired by the Woolf Reforms was conducted by the Dutch Ministry of Justice in 2001-2006. Costs and funding were not addressed in the Interim and Final Reports of the Dutch Commission conducting the review,[12] although the Commission acknowledged that the topic is of significant importance for the functioning of the civil justice system. There are some recent cost related initiatives that seem to be supported by a broader vision about access to justice and dispute resolution services[13], including restricting lawyers' monopoly over the litigation process[14], but those initiatives do not address the specific funding issues that are typical for mass claim disputes.

1.2 Why is funding of mass disputes problematic?

In contemporary academic literature there seems to be a general consensus that group litigation, in its various forms and variations, poses specific problems in terms of financing.[15] At least two

[9] […]

[10] […]

[11] [Posner, Auctioning class counsel services: Walker].

[12] Asser/Groen/Vranken/Tzankova, 2003, 2005.

[13] Barendracht en Ministeries/Raad voor Rechtsbijstand

[14] Increasing court fees and increasing the monetary limit for representation by non-lawyers to EUR 25.000.[…]

[15] Hensler/Erasmus book; Tzankova/Kortmann 2010.

sets of problems have been identified in the, mainly law and economics oriented, academic literature on funding issues in class actions.[16]

On one hand there is the rational apathy and the free rider problem.[17] In essence both minimize the incentive for group members to optimal invest in (group) litigation leaving insufficient financial means to their agent for the enforcement of their rights and the protection of their interests against wealthy and sophisticated repeat players, the result of which is an investment asymmetry between individual claimants and repeat players.[18] Adequately coping with rational apathy, free rider problems and investment asymmetries requires concentration of claims preferably through an opt out mechanism and a financial arrangement where the class counsel is being paid out of a settlement fund. However, such concentration measures pose a new set of problems.

Opt out group litigation funded through contingency fees where the class lawyer receives a percentage of the settlement fund, has been found problematic because it creates a conflict of interest between the class lawyer and the class, defined as "agency problem". The theory is that the agency problem might lead to so-called sellout or sweetheart settlements crafted by the class lawyer and the defendant, and serving their financial interests, but not necessarily the best interest of the class.[19] Settlements reached out of court and not in an adversarial environment are

---

[16] Another set of problems that has been identified in the literature but will not be discussed here relates to the so-called blackmail settlements where defendants are being forced to settle for nuisance value claims. In essence the claim behind that theory is that because defending even against a weak claim is costly and defendants will be better off by paying something to the class lawyer to get rid of the nuisance value claim instead of litigation the claim and winning the case [….]. Those theories build on the premise that there is no cost shifting rule. There is no evidence that there is any more of a problem with regard to so-called "blackmail settlements" in class actions than with regard to nuisance settlements in ordinary litigation. From a theoretical perspective, we should expect parties in a rational choice environment to sometimes prefer paying a small sum to parties seeking to prosecute a claim rather than investing more in investigating the claim and deciding on the basis of such an investigation whether to settle or defend a claim. Anecdotal data suggest that defendants normally do indeed make such judgments and settle nuisance claims, but also that their decisions are shaped by strategic considerations e.g. settling too easily may provide an incentive for opposing counsel to bring even weaker (and more) claims in the future. It would be surprising if defendants do not engage in similar thinking with regard to class actions. If such settlements were common, one should observe a high percentage of all class action claims resulting in settlements. Recent data show quite the opposite: less than 15% of class action complaints are even certified; most are dropped, settled individually (meaning for small amounts, which can hardly constitute serious "blackmail"), or dismissed by the courts and adjudicated summarily [ref. FJC and RAND study]. What has been supported by empirical evidence is the small fraction complaints that are certified are settled as a result of the parties jointly seeking court approval of a settlement. However, this set of problems are beyond the scope of this paper since they do not pose funding problems for the class but for the defendant.

[17] […]

[18] [Rosenberg]

[19] […]

considered to deserve closer scrutiny.[20] The fact that in an opt-out regime there are many absent claimants, whereas it is undecided whether the class as an independent entity or the individual claimant is the client, raises additional problems.[21]

There is no consensus in the academic literature what is the best way to cope with those problems. The various proposals that have been made to address those can be roughly divided in two types of safeguards, that both have disadvantages: monitoring and adequate financial incentives. Monitoring is considered to be costly and time consuming, whereas concerns have been expressed whether third parties would ever be sufficiently equipped to reveal potentially colluding defendant and class counsel. In connection to monitoring proposals one can think of monitoring of the settlement outcome and the class counsel fee by a sophisticated lead plaintiff, by the court or by a competent third party. Incentives entail the creation of financial incentives that minimize the agency problem between the class counsel and the class, like the auctioning of class counsel services, but are considered to ultimately jeopardize the quality of class action services and therefore the outcome.[22]

Some scholars have argued that opt in group litigation where the class lawyer is being paid on a hourly basis creates similar agency problems as discussed above, because of one essential factor that is constant in mass disputes: the big volume of claims. That volume creates a financial incentive for the class lawyer, which in most cases is disproportionate to the financial stake of the average class member in the outcome of the litigation.[23] Therefore the agency problem may derive primarily from the fact that the attorney is representing a large number of claims, rather than an individual claim, not from the applicable fee regime. With mass representation, whatever the form, it is infeasible for every claimant to exert optimal control over the lawyer, from the individual claimant's perspective, and there is a set of aggregate settlements that advantages the lawyer, whether paid individually or in the aggregate, that may advantage the lawyer more than at least some of the individual claimants. Individual litigation in theory permits both client control and properly aligns the lawyer's and individual claimant's interest but insisting on individual litigation either precludes litigation all together (the too small claim value problem) or impossibly delays it or makes it impossibly costly. Paying the lawyer on an hourly fee basis does not solve obviously agency problems as the hourly fee incentivizes the lawyer to prolong litigation which

---

[20] […] However, one may wonder whether the criticism is not exclusively founded on distributive notions and whether it sufficiently takes into account one of the main principles of ADR: out of court parties are entitled to behave differently and one should expect that any negotiated settlement will involve compromise, making it difficult to distinguish between "good" settlements (i.e. appropriate compromise, taking into account ambiguities of fact and law) and "bad" settlements (e.g. "sweetheart" deals intended to benefit both plaintiff counsel and defendant at the expense of the class).

[21] Tzankova 2007, Kalajic 2011.

[22] See Tzankova 2005, p. 116-121 for references. One may wonder whether the criticism is grounded (brief discuss EU practise of applying auctions based on multiple criteria. The key issue seems to be the transparency of the court's decision).

[23] Tzankova 2007.

might not be in the claimants' interest either[24] and a capped fee, by law or practice, desincentivizes the lawyer from investing full effort in the case.

Although there is no or insufficient empirical evidence about the magnitude or the incidence of the agency problems discussed in this paragraph the underlying economic models are a helpful tool when studying and analyzing the functioning of both opt in and opt out collective redress regimes, regardless of the question whether the class lawyer in those regimes operates on a contingency fee or hourly rates basis.

Finally, the agency problems that the concentration of claims in mass disputes seem to potentially cause, raise the question whether concentration and aggregation should not be avoided after all and whether this solution for rational apathy, free rider problems and investment asymmetries is worth all the trouble. Whatever value one attributes to avoiding rational apathy, free rider problems, investment asymmetries, one conclusion that is value-neutral and emerges from the actual experiences with mass disputes to date is that in order to adequately cope with mass disputes legal systems do not have other realistic choices, but to aggregate claims, at least to some extent. Where legal systems do have a choice is when designing funding schemes related to aggregate dispute resolution.

1.3 The scope and aim of this paper. Mode of treatment

The starting point of this paper is that every advanced legal system should have mechanisms in place to secure access to the courts and dispute resolution services and therefore to litigation funding. The scope of the paper is limited to issues related to the funding of a particular type of dispute within a specific legal system from the civil law family.

The paper will focus on (i) the funding of mass claim disputes in (ii) the Dutch legal system as an exponent of the civil law family and will seek to explore whether the Dutch legal system has adequate mechanisms in place to secure access to litigation funding in mass claim disputes. The adequacy of a litigation funding mechanism will be measured on the basis of its ability to cope with the agency problems discussed in 1.2.

To address the research question the functioning of the main litigation funding options in the Netherlands will be assessed in the context of a concrete consumer mass claim dispute: Dexia, which is one of the most prominent Dutch consumer mass cases in the last ten years. Dexia reveals that the main litigation funding options in the Netherlands in those types of cases are

[24] This is one of the reasons that the "loadstar" approach to awarding fees in class actions has lost support in the US.

Legal Aid, "before the event" Legal Expense Insurance (LEI)[25] and “after the event” - third party litigation funding (TPF).[26] The latter is a contractual arrangement after the event, whereby a third party pays the costs of litigation and in return, if the case succeeds, receives a percentage of the proceeds.[27] This arrangement seems to be particularly attractive for legal systems with a ban on contingency fees.

Furthermore, the paper aims to enhance the understanding of the functioning of Legal Aid funding and LEI funding in mass disputes in an European (Dutch) context and to explain the increasing use and popularity of TPF in that type of disputes. It aims to identify the impediments that prevent those funding mechanisms to adequately perform in the Netherlands in the context of mass disputes and to define terms for improvement.

Despite the focus on the Dutch legal system the assessment might turn out to be relevant to other European legal systems too, although the actual outcome of the analysis whether a particular legal system has sufficient means to fund mass claims through Legal Aid, LEI or other alternatives will inevitably be influenced by their specific design. That may vary per country.
It is beyond the scope of this paper to offer a ranking of funding options for (European) mass disputes, not at the least because determining the optimal funding option is a complicated matter the outcome of which depends on legal infrastructure, legal tradition and policy choices.
Although financing of mass disputes is an issue that poses problems for both claimants and defendants, this paper will be limited to the financing of mass disputes on the side of claimants.

A study of the functioning of funding mechanisms of mass disputes in the Dutch legal context requires basic knowledge of the Dutch system of collective redress. Therefore relevant elements of Dutch civil procedure will be highlighted first (2). Prior to discussing the Dexia case study (4), the paper will briefly and in general terms describe the three main funding options available in the Netherlands in consumer mass claim disputes: Legal Aid, LEI and TPL (3). On the basis of the experiences in Dexia case problematic issues of the three main funding mechanisms will be discussed and terms for improvement identified. (5) Summary and conclusions with regard to the question whether the Dutch legal system has adequate mechanisms in place to secure access to litigation funding in mass claim disputes follow in 6.

2. The Dutch system of collective redress

[25] Legal Aid and LEI are being viewed as main sources of litigation funding in a few advanced European countries, since in most European countries contingency fees are prohibited. W.H. van Boom 2010, Financing civil litigation by the European insurance industry, p. 94-95 in: Tuil/Visscher (ed), New Trends in Financing Civil Litigation in Europe, p. 92-108 discussing the English system with its comprehensive Legal Aid and the Netherlands and Germany where LEI plays an important role in litigation funding.

[26] In this paper the term “third party litigation funding” will be used as an synonym of “after the event” - third party litigation funding that is contingency fee based.

[27] Legg e.a., Litigation funding in Australia, p. 1.

2.1 General introduction

The Dutch system of collective redress is governed by two sets of rules. The collective action that is general of nature and not limited to a specific material area of law has been in force since 1994. Since its introduction it 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 learns that since 1994 at least 100 collective actions have been initiated.

The Dutch Act on Collective Settlements (WCAM) was introduced in 2005.[28] To date five collective settlements have been approved by the Amsterdam Court of Appeal in DES, Dexia, Vie d'Or, Shell and Vedior. An application for the approval of a sixth one (Converium) is pending. Only DES involved personal injury claims. Five out of the six WCAM-cases that have been submitted to the Amsterdam Court of Appeal involved financial products and services. Three out of the six collective settlements that have been submitted for approval to the Amsterdam Court of Appeal involved non-Dutch claimants and the global resolution of securities claims: Shell, Vedior and Converium.

The collective action and the collective settlement can be invoked separately and in combination. The Vie d'Or and Dexia cases are examples of collective actions that eventually resulted in a WCAM collective settlement. Sometimes one or more individual suits serve as a rainmaker and lead to a collective settlement: the DES case is an example of those.

2.2 The collective action

2.2.1 Standing

In line with the "European tradition", under Dutch law an association or foundation representing a group of persons having a similar interest and not an individual person, can bring a civil action for the purpose of protecting those interests, provided that in doing so, it acts in accordance with its articles of association. Since the collective action is initiated in the name of the organization and not in the names of the individual persons, there is no lead plaintiff as in US class action suits. In practice, such Dutch collective actions are frequently initiated both by longstanding organizations having a more general purpose, such as the Consumentenbond (Dutch Consumers Association) or Vereniging voor Effectenbezitters: VEB (Dutch Association for Retail Shareholders), and by special-purpose vehicles that have been set up to deal with a specific mass claim.

When the collective action was introduced in 1994 the Dutch legislator thought it unnecessary to require that the claiming entity is an "adequate representative" or to anticipate "competing

[28] For a detailed description and discussion of both regimes see Tzankova, Stanford/ M.J. van der Heijden, H. van Lith, W. van Boom etc.

organizations". It was a new statute which use the legislator wanted to promote and there was a fear that the courts would apply it too restrictive and undermine the provisions. In those early years established interest organizations like the Consumentenbond and the VEB were the "usual suspects" to initiate a collective action. The public opinion and even the legislator expects and demands that from those organizations. In addition, the legislator believed that the statute already provided for sufficient safeguards against potential abuse.29 However, as a result of the shrinking budgets of longstanding organizations and an increased frequency and detection of mass wrongdoings, a real market for special purpose vehicles has developed in the last ten years. The Dutch legislator is therefore considering an introduction of a "adequate representation"-requirement to address concerns for potential abuse.

As part of an integral adjudication of the case, the court will determine whether the organization has legal standing to bring the action. Before an action can be filed, the organization is required by law to attempt to obtain the desired relief by means of a negotiated out-of-court settlement. However, this requirement does not constitute a real impediment to the initiation of legal proceedings, since it will be deemed to have been met if the organization has asked the prospective defendant(s) to voluntarily comply with its demands and two weeks have since passed without the desired result having been achieved.

2.2.2 Similar interests

The action must seek to serve the protection of similar interests. This requirement will be met if the interests in question can be bundled. This will depend on the specific circumstances of the case. As a general rule, aggregation is only possible if, in order to award the relief sought, no individual issues need be decided. For that reason, the law expressly prohibits the awarding of monetary damages in such an action, since this would require the court to decide on individual issues such as the amount of damage (if any) suffered by each particular person, causation and contributory negligence. As a result, in most cases the organization seeks a declaratory judgment establishing that the defendant(s) acted wrongfully against the persons in whose interest the action was brought. If awarded, such a judgment then effectively serves as a precedent, on the basis of which each injured person can subsequently bring a separate action for damages in which the abovementioned individual issues can be addressed.

Although the collective action regime has been heavily criticized by consumer protection organizations because of the ban on the awarding of monetary damages, which is being viewed as a hurdle to impose pressure on unwilling defendants, [30] in practice some collective actions are rather successful. This is because, once the court has rendered a declaratory judgment that the

---

[29] Reference…

[30] There are also scholars who have suggested that not the statutory ban on monetary damages but funding issues and the ban on contingency fees are the real obstacles for the effective use of collective actions in the Netherlands: Tzankova & Van Doorn 2010.

relevant defendant(s) indeed committed a breach of contract or fiduciary duty, or a tortuous act, many defendants seek to resolve the matter through a settlement. The domestic WCAM-settlements to date[31] demonstrate that in the Netherlands, being a small country, effective pressure on unwilling defendants to settle a mass claim can be created in different ways, including political pressure and pressure from the media.

The problem, however, remains the fact that a (declaratory) judgment in a collective action is only binding on the organization and the defendant(s). Without an express power of attorney, an organization cannot bind individual group members to the result obtained in court or subsequently at the negotiating table. Thus, separate court actions can still be initiated by individual group members, even if a declaratory judgment has been rendered or a settlement reached. It was in order to solve this problem that emerged in the DES case that the WCAM was enacted.

2.3 The WCAM

2.3.1 Background

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 has interpreted the statute as an yet another example of the Dutch consensual culture, but the reality is that the resolution of a concrete mass claim case has triggered the design of the statute and at that time it was not longer possible to enact a statute governing only that specific mass claim case so a general provision had to be introduced. The WCAM was enacted in July 2005. The Dutch legislature has been inspired by the US court approved class settlement regime but has tried to avoid its negative connotation. One of the main reasons why the Dutch business community supported the WCAM lays probably in the fact that unlike the US class action the Dutch collective action provisions do not allow actions for damages.[32] Corporations wanted a means of settling damages collectively, but did not wanted to be forced to settle if they did not wanted to. The fear still exists that a mechanism like the US class action for damages might increase the pressure on defendants to settle nuisance value claims.[33]

The essence of the WCAM is that an out of court reached settlement agreement entered into by an representative organization and one or more parties agreeing to pay compensation to injured persons with the aim of settling mass damage claims at a collective level, can be certified exclusively by the Amsterdam Court of Appeal, with statutory binding effect on all group members who do not exercise their right to opt out. Once the Court of Appeal approves the

---

[31] DES, Dexia and Vie'Or.

[32] For a detailed discussion of the background of the WCAM and the resolution of the DES case see Tzankova, The Annals, 2009 […].

[33] See footnote … (discussing (the absence of) empirical evidence for nuisance value claims settlements).

settlement and the opt-out period has expired, all claimants who have not exercised their opt-out right are bound by the settlement.

2.3.2 Standing and procedure

The representative organization entering the settlement on the part of the claiming parties should be an association with full legal competence or a foundation. Again, this could be a longstanding organization or a special purpose vehicle. Unlike the collective action that was introduced in 1994, the WCAM contains the requirement that the organization entering 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) c.q. the parties distributing the settlement amount. 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 learn 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.

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. This period should be at least three months. The court's decision will be communicated to both known and unknown beneficiaries, the so-called “interested parties” (*belanghebbenden*). If the court denies the request, appeal (cassation) of the decision is only possible for the petitioners jointly and on limited grounds. Standing to appeal a denial or an allowance of the request for the approval of the settlement is not granted to third interested parties. According to the Dutch law of civil procedure "interested parties" are not parties who have a general or professional interest in the process, the proceedings or their outcome, but only parties who would be entitled to claim under the settlement agreement, or organizations acting for their interests.

2.3.3 Funding issues

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[34] 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 the Amsterdam Court of Appeal seems to become increasingly aware of the fact that the funding issue could be problematic, especially in the international context where US class lawyers and other related fees are being paid out of the settlement fund on a contingency fee basis, leaving less proceeds for the claimants.[35] It is uncertain how this practice of the Amsterdam Court of Appeal will further develop and whether it will lead to denials of the requests for approval of collective settlements. The question remains whether an explicit statutory provision with regard to the oversight of funding issues in mass disputes can be missed and whether a legal system can afford to be entirely dependant on the competence and discretionary powers of individual judges deciding on a case 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,[36] 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 the European civil law, or at least Dutch, tradition for the "rational apathy" with regard to this issue on the side of the legislator and the judiciary could lay in the concept of contractual freedom that is being 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 about 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 has been a funding problem on the plaintiff side[37] so the danger of an overpaid WCAM class counsel is not the first thing that comes to mind. In view of the agency problems discussed in 3, one may conclude that those explanations are insufficient justifications for disregarding the funding issue under the Dutch system of collective redress. A last explanation about 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 and VEB, but the evolvement of the Dutch collective action as discussed above and the increased “activism” of special purpose vehicles set up by class lawyers, resemble features of the US class action system for which it has been heavily criticized: the raise of the lawyer without a (tangible) client.

---

[34] See par. 3.

[35] Reference to the summary of the case management conference in the Converium case that took in August 2010: questions about the lawyers fees.

[36] [Green paper DG Sanco, Kuneva. Groen/white paper Kroes.]

[37] Consumentenbond and VEB have to fund collective actions from their members’ fees and have limited resources.

A feature of the WCAM that strengthens this phenomenon is the grant for standing to special purpose vehicles. Recent experiences in the Netherlands with mass disputes show that it is relatively easy to ad hoc establish such an entity that, assisted by the media, can generate of lot of nuisance value. This has strengthen the phenomenon of "competing organizations", which seems to be an obstacle for defendants whose litigation strategies require to explore out of court settlement options with groups of claimants, and for claimants since it becomes difficult for them to asses which organization to join. What makes it problematic is that special purposes vehicles cannot be missed in 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 to monopolize the collective resolution process. Moreover, 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 organizations that has been underappreciated in the Netherlands to date, failed.

There are some recent unregulated initiatives aiming to improve the accountability and governance of special purpose vehicles: a Claim Code was drafted by an ad hoc formed Commission[38] 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 on special purpose vehicles acting as 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 which task is to overview the functioning of the Board Members. The Claim Code applies the principle "apply or explain".

It 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 this will improve the functioning of the WCAM. In any event the issue of competing special purpose vehicles has not been addressed to date by the Claim Code nor by the legislator but it must be noted that in the draft Explanatory Memorandum to the legislative proposal for the amendment of the WCAM the Minister, in the context of the representativeness requirement, stated that it may also be relevant whether the claiming organization complies with the Claim Code.

The right of third interested parties to file objections against the settlement agreement could be seen as a safeguard against a potential abusive use of the WCAM. In three out of the five

[38] The Chairman of the commission was a former president of the Dutch counsel for the judiciary. In the Commission participated members of the legal profession who have experience with collective actions and settlements both on the plaintiff or the defendant side, Consumentenbond, a law professor who was also one of the Board members of the Foundation that was established in Shell and a communication advisor.

collective settlements to date interested parties have filed objections and defenses of various nature. The Amsterdam Court of Appeal has responded to those objections differently. Some have been promptly rejected at the same time as the binding declaration has been issued. Some led to the appointment of an expert to issue an expert opinion on certain issues. To date all five collective settlements that have been submitted to the Amsterdam Court of Appeal have been declared binding.

The Amsterdam Court of Appeal has recently announced in connection to the Converium case that it will act proactively since principles of due process require protection by the Court of the interest 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.

Despite of the identified imperfections the use of the WCAM in the cases to date seems to be the result of external factors rather than to be triggered by its current structure. Three out of the six collective settlements that have been submitted for approval to the Amsterdam Court of Appeal concern the spin off of international securities disputes (Shell, Vedior and Converium) and aim at a global resolution of securities claims, although none of those cases has been litigated in the Netherlands. The Shell and Converium (securities) settlements are spin offs of class actions in the US. Vedior was not litigated at all and it was the Dutch company Vedior that initiated settlement negotiations with the VEB. The non-securities claims settlements (DES, Dexia and Vie d'Or) have national background. DES was a mass tort case and pre-existed the WCAM. The WCAM was drafted at the request of the Dutch insurance industry to facilitate the final resolution in that matter. Both Dexia and Vie d'Or concerned financial products and services and both WCAM settlements were crafted in an adversarial environment. Lengthy individual proceedings, an inquiry commissioned by the Dutch Government and two collective actions preceded the WCAM (settlement).]

2.3.4 WCAM and private international law

An interim ruling of the Amsterdam Court of Appeal in Converium might have significant implications for the global resolution of mass claims. In its interim ruling of 12 November 2010, the Amsterdam Court of Appeal assumed jurisdiction to rule on the petition to declare the non-US Converium collective settlement binding. Referring to the recent US Supreme Court opinion in Morrison v. National Australia Bank, which limited the scope of securities class actions brought in the US by non-US claimants who purchased shares in non-US companies,[39] the Amsterdam Court of Appeal indicated its awareness of the need for global resolutions of international securities class actions. To that end, a collective settlement approved by a Dutch court complements a US settlement for US claimants.

[39] L. Silberman […]

In two prior matters, the Amsterdam Court of Appeal had approved collective settlements with an international scope while assuming jurisdiction on the basis of article 6(1) of the Brussels I Regulation and article 6(1) of the Lugano Convention. These decisions related to an Anglo-Dutch company (Shell) and a Dutch company (Vedior) that had offered compensation for losses allegedly suffered by shareholders. In its interim Converium ruling, the Court of Appeal based its jurisdiction on articles 6(1) and 5(1) of the Brussels I Regulation and articles 6(1) and 5(1) of the Lugano Convention. The court held that article 5(1) is applicable since the place of performance of the settlement agreement is the Netherlands, whereas the companies involved in this settlement are Swiss companies.

The interim ruling of the Amsterdam Court of Appeal has generated a number of reactions in the legal community. Generally speaking, the interim ruling has been criticized for what is perceived to be an extensive interpretation of article 5(1) of the Brussels I Regulation and 5(1) of the Lugano Convention.[40] Another point of criticism concerns the fact that the reasoning adopted by the court would practically cause the court to assume jurisdiction in any international collective settlement approval proceedings, as long as one of the parties is a Dutch Foundation representing the potential claimants and there are at least a few potential claimants domiciled in the Netherlands. This criticism is understandable, especially in view of the problematic features of the WCAM discussed above. However, there is also appreciation for the approach taken by the Amsterdam Court of Appeal since it aims at enhancing the access to justice (i.e. recovery) in mass disputes[41] and contributing to the global and final resolution of mass disputes.

The experiences to date show that the Amsterdam Court of Appeal is willing to facilitate parties seeking a global resolution. It must be emphasized that the Court's willingness probably stems from the fact that the collective settlements that are submitted for approval before the Court are viewed by the Court more or less as "amicable settlements". By submitting these settlements to the Court, parties demonstrate a perceived need for a global solution and resolution, for which the Court, a "public servant", is obviously responsive. However, the Court of Appeal's ruling is provisional.[42]

If the Amsterdam Court of Appeal reaffirms its decision on jurisdiction and also declares the settlement agreement binding, this decision will bind all eligible purchasers of the relevant company's securities who, after having been given notice, do not exercise their right to opt out. However, it remains undecided whether, assuming the settlement agreement is declared binding, a court in any of the other EU member states or in Switzerland, Iceland or Norway would indeed recognize such a decision pursuant to the Brussels I Regulation or Lugano Convention and give preclusive effect to it.

---

[40] [Van Lith/Ondernemingsrecht, Kortmann/JOR, French law journal]

[41] TOP.

[42] No interested parties have advanced a different view or filed objections on the jurisdiction issue during the fairness hearing of the settlement.

A decision under the WCAM certifying a settlement agreement with binding effect arguably constitutes a judgment in a civil matter as defined in the Brussels I Regulation (Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).[43] Consequently, such a decision should be recognized and its preclusive effect enforced in other EU member states, unless one of the grounds for refusal set out in Article 34 of the Regulation applies. Under this provision, a court decision shall not be recognized if recognition is contrary to public policy in the member state in which recognition is sought. Another ground for refusal relates to judgments given in default of appearance: a judgment shall not be recognized if the defendant was not served with the document which instituted the proceedings, or with an equivalent document, in sufficient time and in such a way as to enable him/it to arrange his/its defense. Since there is no case law on this issue at this time, it is as yet uncertain if and under which circumstances a court in another EU member state may indeed refuse recognition and enforcement of a decision under the WCAM on the basis of one of the abovementioned grounds.

However, if unknown or absent beneficiaries have been properly notified – in accordance with the relevant provisions of applicable treaties or other international instruments – of the filing and content of the petition and their right to file an objection as well as, subsequently, the court decision certifying the settlement and the beneficiaries' right to opt out, it can very well be argued that refusal grounds such as those described above do not apply. Consequently, the settlement agreement would be binding on non-Dutch residents who are beneficiaries under the settlement and who did not opt out in time.

The international scope of the WCAM is one of the topics on the agenda of the Dutch Ministry of Security and Justice. When introducing the WCAM the Dutch legislator did not expect it would be used successfully in a cross-border context. Currently the Ministry is considering amendments of the WCAM in that field and to that end it commissioned a study.[44] The amendments that could be considered by the Ministry vary from "a hard and fast rule" for the minimum number of parties (claimants) that has to be domiciled in the Netherlands, to setting a more loose standard like "a sufficient link with the Netherlands", which will leave discretionary powers to the Dutch court to decide on a ad hoc basis whether it can take jurisdiction in a certain matter. In any event only some of the questions with regard to the international scope of the WCAM can be dealt with by the Dutch legislator. There are also (interpretation) issues that stay beyond the reach of the Dutch legislator and that can be addressed only by the EU Court of Justice or the EU Commission and Parliament.

The background of the aforementioned considerations to regulate the international scope of the WCAM is not (primarily) the interim ruling of the Amsterdam Court of Appeal in Converium but an overall evaluation of the WCAM. The Dutch legislator considers amending the WCAM also because there is another prominent (Dutch) financial services case that has to be resolved: the

---

[43] Van Lith 2010.

[44] Van Lith 2010.

DSB Bank bankruptcy. The law has to be adjusted to facilitate and speed up this process too. There seems to be a political consensus that this should be done expeditiously.

With regard to the private international law aspects of the WCAM the draft legislative proposal contains only rules that aim to improve the notification of non-Dutch shareholders, for example by allowing the Court to set up a minimum rate for successful notifications and to postpone the oral hearing until a sufficient number of known interested parties has been adequately notified. It does not contain proposals with regard to the jurisdiction of the Dutch court as discussed during the round table in Rotterdam. It is not clear how the Ministry will proceed with amendments of the WCAM that might delay the resolution of the DSB bankruptcy, like those with regard to the international scope of the WCAM, given the perceived urgency in the Netherlands for the resolution of the DSB bankruptcy.

The private international law implications of collective redress mechanisms within the EU are on the EU legislative agenda too.[45] However, the expectation is that the topic is too delicate and complicated to be dealt with expeditiously.

2.4 Other relevant procedural themes

2.4.1 Fact finding

Although discovery and fishing expeditions are not allowed in the Netherlands, the alternatives for fact finding are improving. In securities litigation the so called "enquiry proceedings" (enquete procedure) are of increasing significance to gather evidence to be used in securities litigation against corporations and directors and officers.

In civil cases it is relatively easy to preliminarily (pre-trial) hear witnesses. The hearings are public and there is a trend among lawyers to cross-examine witnesses, which used to be unusual for the Netherlands. Those preliminarily hearings do not only serve fact finding purposes but can also create a nuisance value in high profile cases.

There have been some proposals to introduce a limited discovery (extension of exhibitieplicht) but without improving the safeguards against abuse.

Moreover, Dutch lower courts have ruled that evidence obtained through US discovery can be used in Dutch civil proceedings.[46] There is a slow but undeniable establishment of a plaintiff securities litigation Bar, increasingly cooperating with US plaintiff lawyers in the area of

[45] […]

[46] President of District Court of Utrecht and Amsterdam Court of Appeal: see also K.J. Krzeminsky, U.S. Dicovery for use in Dutch Civil Proceedings, TCR 2008, p. 47-55.

securities litigation.[47] In fact US plaintiff lawyers appear to act not just as a co-counsel sharing know how and best practices but serve also as yet another category of entrepreneurial third party litigation funders in the Netherlands, as the Shell and Converium case illustrate.

2.4.2 Cost shifting rules

Under Dutch law of civil procedure a cost shifting rule applies, although the effect thereof is mitigated: the bailiff's costs, witness' costs and the court fees are being fully shifted to the losing party but the lawyer's fees of the winning party, which are quite substantial, are not fully compensated. The compensation that the loosing party has to pay to the winning party is being determined on the basis of a schedule.[48]

However, the system is predictable since the amount of money that the loosing party has to pay relates to the amount at stake and the number of procedural steps taken by the parties. Indeed, the loser has to pay but relatively little for an entrepreneurial third party funder. There is also a rule in the Netherlands that the winning party has the right to claim reimbursement of certain pretrial costs and expenses. Although the current practice of the courts is that the amounts granted are modest, there is a statutory basis to claim substantial amounts if the claimant can motivate the pretrial costs made and if parties reach a out of court settlement, that statutory provision facilitates the class counsel to negotiate higher fees. Moreover, in its Vie d'Or ruling on 13 October 2006 the Dutch Supreme Court ruled that an organization or a foundation is allowed to claim the pretrial costs it incurred in the preparation of the collective actions.[49]

2.4.3 Prejudicial rulings Dutch Supreme Court

With regard to the resolution of mass claim disputes the Dutch legislator has proposed the introduction of a procedure aiming to facilitate rulings by the Dutch Supreme Court on questions of law. The idea is that this would facilitate and speed up the out of court resolution of a mass dispute and would promote a fair collective settlement that can be submitted for approval to the Amsterdam Court of Appeal pursuant to the WCAM. A lower court faced with an individual case, part of a mass dispute, or with a collective action is entitled at its own initiative and without consent of the parties involved to fill in an application with the Supreme Court to issue a ruling on questions of law that are relevant for the resolution of the case.

3. Funding of consumer mass disputes in the Netherlands

---

[47] A. Halfmeier has reported similar development in Germany, not only on the part of the plaintiffs.

[48] M. Tuil 2010, p. 415-417 (ed. Hodges 2010).

[49] Hoge Raad 13 October 2006, NJ […]

3.1 Legal Aid[50]

The Netherlands has a strong tradition in legal aid funding en is internationally known as a country with one of the best legal aid systems in the world. In 2008 42% of the Dutch population was entitled to Legal Aid. Moreover, there are probably not many national legal aid systems that provide for a legal aid to non-Dutch citizens.[51]

Under the Dutch Legal Aid regime there is a free choice of legal services provider, also in mass claim matters. Only natural persons and not entities are eligible for legal aid,[52] which means that interest organizations acting in collective actions or collective settlements, like Consumentenbond and VEB, or special purpose vehicles are not eligible for Legal Aid. The Dutch legal aid system is basically a two-fold model that encompasses two lines that provide legal aid. A total of 30 Legal Services Counters throughout the country, being the first line, provide front services, e.g. primary legal advice. Legal matters are being clarified to clients and information and advice given. If necessary, clients will be referred to a private lawyer or a mediator, who act as the secondary line of legal aid. Clients can also apply for funding of a lawyer directly, but the focus is on conflict prevention and conflict resolution in an early stage by the Legal Services Counters.

The functioning of Legal Aid in the Netherlands is under pressure as a result of shrinking budgets and an increased demand. Public expenditure on Legal Aid is increasing every year and in order to stop this trend the Dutch government has imposed a cost reduction of EUR 50 million per year.

3.2 LEI

LEI providers are the second significant category of litigation financiers in the Netherlands. The number of LEI's in the Netherlands is rising. There is a market for businesses, mainly SME, and one for households and traffic accidents. The number of LEI policies taken out by SMEs in the Netherlands has almost doubled between 2000 and 2005, meanwhile halving claim frequency. Generally, penetration of LEI has increased from 14% in 2000 to 19% in 2004.[53] In 2000 14% of the Dutch households had a legal aid insurance policy and in 2006 28%.[54] This percentage

---

[50] The information about the Dutch legal aid system incorporated in this sub paragraph is obtained from materials of the Legal Aid Board, including a presentation given by Mr. H. Schilperoort at the 4th International Conference on the Globalization of class actions in Miami, December 2010.

[51] If they have a claim against the Dutch State or a Dutch entity. For example the Srebrenica model cases ("proefproces") against the Dutch State […] and the Nigerian collective action against a Dutch multinational (Royal Dutch Shell), were both funded through legal aid. Both actions were initiated before the District Court of the Hague.

[52] For a brief description of the Dutch system of Legal Aid see also Tuil 2010, p. 406-407.

[53] Van Boom 2010, p. 104, footnote 3.

[54] Monitor Gesubsidieerde Rechtsbijstand 2008, L. Combrink-Kuiters, S.l. Peters en M. van Gammeren-Zoeteweij, Boom Juridische uitgevers, 2009, p. 92.

increases with 2% every year[55] so it could be estimated that by the end of 2011 about 36% of the Dutch households would have a LEI.

Generally speaking there are two markets: a market for "in kind" polices where the legal services can also be provided by the in-house counsel of the LEI provider and a market for legal expenses, incurred when an external qualified lawyer[56] has been instructed. The Netherlands, unlike Germany for example, is a market for "in kind" policies since in the Netherlands lawyers do not have a statutory monopoly to provide legal advice and litigants do not need the assistance of a member of the Bar in disputes with a monetary value up to EUR 25.000 and in many consumer law related matters. Obviously a market for in kind polices will be more favorable to the business model of legal expense insurers than a market for legal expenses, since that allows them to minimize costs by using predominantly in-house (qualified) lawyers. Similar to the Legal Aid Board a legal expense insurer can not build on portfolio of selected profitable cases to spread the litigation risks and has to fund the cases as they come. The financial incentives of legal expense insurers who already received their premium by the time they have to render a service is such that the insurer's effort will be directed towards keeping out of court and settling swiftly at an acceptable level, rather than maximizing the number of hours spent on a file,[57] or outcome.[58]

The institutional environment in which the LEI providers operate, for example the intensity of national regulation of legal services and the national system of predictability of costs, influences the market for LEI. At the European level, LEI providers are regulated to some extent under Directive 87/344 on the coordination of laws, regulations and administrative provisions relating to legal expense insurance ("Directive").[59] The Directive aims at neutralizing agency problems: potential conflicts of interest between insured and insurer, coming forth from the fact that the LEI provider acts as an insurer also for other individuals or other class of insurance. Furthermore, issues of merits between the LEI provider and the insured should be settled efficiently. Another distinct feature is that equally to the Dutch Legal Aid scheme, the Directive guarantees the free choice of lawyer as well, including mass claim disputes. The European Court of Justice determined on 10 September 2009 (Case C 199/08) in a case against an Austrian legal expense insurer that the practice of selecting lawyers to represent policy holders contravenes Article 4 (1) of the 1987 Legal Expenses Insurance Directive. European Law guarantees policy holders the freedom to choose their own legal representation. Even in a group action, where several parties wish to pursue a claim against the same opposing party, the insurers are not entitled to select the

---

[55] Answers of the Minister of Justice Hisch Balin (received on July 20, 2010) on questions (sent on June 2nd, 2010) of Mrs. F. Koster Kaya (D66) to the ministers of Justice and Finance at a Parliamentary hearing about the regulation of legal expence insurances.

[56] It must be noted that in the Netherlands qualified lawyers could be employees of the LEI provider.

[57] Van Boom 2011, p. 97.

[58] For a general analysis of the business model of legal expense insurers see also Van Boom 2011, p. 94-99 with further references. For agency problems in relation to LEI see Van Boom 2011.

[59] The provisions of the LEI Directive are to be copied into the Solvability II Directive.

legal team for the insured. The decision implies that legal expense insurers cannot insist that the insured be represented by a class representative on the insurer's panel. Furthermore, the insured cannot be penalized for choosing their own representative.

3.3 TPF[60]

Contingency fees are not allowed in the Netherlands for members of the Dutch Bar[61] but virtually anyone else could enter into a contingency fee agreement with a potential claimant. Legal assistance on the basis of contingency fees is being offered by special purpose vehicles sometimes set up and run by entrepreneurial lawyers who are no (longer) member of the Bar.[62] In this arrangement the consumer commissions the special purpose vehicle on contingency fee basis and the special purpose vehicle subsequently commissions a lawyer on a traditional hourly fee arrangement.[63] In a typical third party litigation funding arrangement the funder will enter into an agreement with one or more potential litigants. The funder pays the costs of the litigation and usually accepts the risk of paying the other party's costs in the event that the claim fails through providing the claimant with an indemnity. In return, if the claim is successful, the funder will receive a certain percentage of any funds recovered by the litigants either by way of settlement or judgment, and the litigants will assign the funder the benefit of any costs orders they receive. The share of the proceeds is agreed with the litigants, and is typically between one third and two thirds of the proceeds, usually after reimbursement of costs.[64] Ideally the percentage of recovery going to the funder should reflect the risk inherent in the proceedings. The riskier the proceedings, the greater the share of the proceeds that will need to be payable to the funder to make the investment attractive.[65]

In the literature two main business models of litigation funding have been distinguished. The first is to be an incorporated company that obtains the funds to be invested in litigation from debt and equity sources. Under this model, the company is listed on a stock exchange and as such will comply with prospectus requirements in obtaining equity and the usual requirements for listed public corporations such as continuous disclosure obligations. The second business model used

---

[60] With relation to third party funding in general see also Van Boom 2011, p. 99-104.

[61] It is however allowed to agree on a fee sufficient to cover only nominal costs and to stipulate a substantial success fee in case a certain outcome is being achieved for the client. It is not clear whether this option is being much used in ordinary cases, let alone in mass disputes.

[62] For example former lawyers who determinate their membership of the Dutch Bar Association and establish a special purpose vehicle for litigation purposes. Sometimes those entities are designed as a commercial entity, sometimes as a foundation. There are also examples where the financier is an individual. In theory this could be anyone, including US plaintiff lawyers or law firms, as long as the individual is not a member of the Dutch Bar Association.

[63] M. Tuil 2010, p. 408.

[64] Legg e.a. p. 4-5 (see also Legg, e.a. footnote 15 for further references).

[65] M. Legg a.o. 2010, Litigation Funding in Australia, p. 5.

by litigation funders involves the funder sourcing funds from domestic and/or overseas high wealth individuals or corporations.[66]

In common law countries TPF has been considered problematic from dogmatic point of view because of the doctrines of maintenance and champerty,[67] but the case law has evolved and is still evolving in such a way that in the main common law jurisdictions there are examples of cases successfully funded by TPF.[68] Unlike common law jurisdictions the Netherlands is unfamiliar with doctrines similar to that of maintenance and champerty and in addition to that the Dutch cost (shifting) rules and a Dutch Supreme Court case law from 1994[69] also unintended facilitate the business model of TPF.[70] Moreover, in the Netherlands there is already an extensive experience with the assignment of claims after adjudication in the context of debt collection and asset tracing, where the debt collector retains a percentage of the recovery. Assignments of (the collection of) claims in an earlier stage are a variation of these and there are statutory provisions governing the contracts of assignment of claims. Although after-the-event third party litigation funding differs substantially from before-the-event third party litigation funding like in the LEI,[71] the general concept of entrepreneurial TPF is not new. Therefore it is unlikely that the business model of third party financiers on itself will be considered unethical under Dutch law or against Dutch public order. The default position with regard to TPF in the Netherlands is likely to be that

---

[66] Legg e.a., p. 5-6 discuss those two models in the Australian model but they apply also for the Netherlands.

[67] […]

[68] Canada and Australia [England: Jackson report].

[69] Deciding that a representative association that files court proceedings for the benefit of numerous named claimants can add additional claimants at a later stage of the proceedings without the need to issue new writs of summons: it is essential for third party financiers that claims can easily be bundled, also as the litigation proceeds. Hoge Raad 2 December 1994, NJ 1996, 246.

[70] An attempt of the VEB in the World Online securities collective action to develop case law to facilitate the assignment of claims in mass disputes however, did not succeed. The collective action was combined with a number of individual model proceedings for damages on behalf of representative shareholders and the suggestion to allow a simplified method for proving the validity of claim assignment agreements, was rejected by the Dutch Supreme Court: the VEB had to submit as exhibits to the court documents a copy of the agreements including all details stipulated in the applicable statutory provisions. The Supreme Court motivated its decision by referring to due process that requires that the defendant has a procedural right to be informed about who he has to oppose and defend himself against. Even though administrative burdensome, assuming that the claiming entity can meet the requirements and submit a valid copies of the assignment agreements, there is no obstacle to recognize the validity of the contract between the third party financier and its client. Hoge Raad […].

[71] After-the-event third party financiers select cases that are profitable to them. For a litigation funder to determine whether to fund an action they must calculate the risk associated with the litigation, that is, the prospects of success. They must also quantify the amount of a successful recovery and their potential liability for the costs of the proceedings. To be successful the third party financier must be able to spread the risk associated with a particular proceeding by adopting a portfolio approach to its inventory of cases. In that way they resemble the business model of US plaintiff lawyers operating under contingency fee arrangements. The selection criteria applied by the after-the-event provider assure a relatively comfortable chance of collecting high revenues. Third party financiers typically favor contractual money claims over tort claims, which may turn out to be especially complicated if liability and causation are contested, and they assure themselves of the defendant's solvability.Van Boom 2011, p. 100 (+ references).

the principle of contractual freedom allows parties to take an informed business decision how much to care about their financial interests and to what extent they are willing to attribute decisional power to the third party litigation funder.

Traditionally third party litigation funders invest in insolvency matters, commercial matters and group actions.[72] Indeed, in September 2010 the first anti trust mass claim funded by a professional third party litigation funder was filed before the Amsterdam District Court[73] using the assignment model.[74] However, Dexia was the first case where TPF and its implications in consumer mass claim disputes became apparent.

4. Dexia case study[75]

4.1 The facts

For many years the Dexia case was a news item in the Dutch media on a weekly basis. It was the first massive consumer mass claim dispute in the Netherlands. Dexia is a European Bank from French-Belgium origin that expanded its activities to the Netherlands in 2002 by acquiring two Dutch banks. One of the acquired banks was a market leader in structured financial products. The product, so called "financial lease contracts" was invented in the mid 90s. The idea was to make stock markets available for consumers in general and to not discriminate low incomes in particular. The bull market in the 90s made the product look like a risk-free investment. For a variety, also tax related, reasons the product became very popular. Between 1992-2003, 713.000 lease-contracts were sold to 395.000 consumers by that specific provider. 10% of the Dutch

---

[72] Legg a.o., p. 4/footnote 14 with further references.

[73] The Air cargo cartel case was initiated before the District court of Amsterdam against e.g. KLM and Air France on behalf of [number] direct purchasers and is being funded by the Irish branch of the Australian Claim Funding International. Claims Funding International plc. is the Irish spin off of the professional Australian third party funder IMF Australia Limited. In March 2008, Claims Funding International plc was established in a joint venture with interests in Maurice Blackburn Pty Ltd in Ireland to pursue opportunities in Europe. The Dutch air cargo claim was filed by CFI's company Equilib. The Court was advised that the total expenditure of companies on air freight exceeds €5.3b. Other third party litigation funders that are active in Europe or have announced plans in the field of mass claim litigation funding are Alliantz Litigation Funding and Omni Bridgeway.

[74] The claim was funded by Claims Funding International (CFI), a litigation funder with Australian roots. CFI has signed up companies in its group from 11 EU member states to pursue extensive damages claims. These claims arising from the Air Cargo cartel cover major names in the pharmaceutical, automotive, electronics, food and fashion industries. CFI's special purpose company, 'Equilib', is the claimant in the proceedings. CFI pays all the costs of the legal proceedings and assumes all the risk in return for a commission, only if damages are successfully recovered. Interestingly enough the case is not designed as a collective action, but resembles the features of a US style inventory of cases or non-class mass litigation. There is not much information available in the public domain about the design of the action and more details about its structure remain to be seen.

[75] This paragraph partly builds on the results of a case study of the Dexia case conducted in collaboration with Professor D. Hensler. Funding was only one of the topics that was explored in the case study.

households had such a product that relied on big profits made on the stock markets: only then the buyer would be out of the costs and able to make profits.[76]

During the acquisition negotiations and until early 2001 the portfolio of the acquired bank looked rather good in the books, but only an year later the stock market fell, leaving about 391.000 Dutch households with in total of 713.000 lease contracts. The average loss per household amounted to EUR 3.000, but some households suffered losses up to EUR 50.000 and in exceptional cases even more. At the end of 2001 Consumentenbond started receiving phone calls from its members about their financial lease contracts, but the magnitude of the problem became visible not earlier than an year later. In March 2002 a popular Dutch consumer TV-program issued a special about the product and its provider. After the show an unusual high number of disgruntled consumers contacted the service line of the TV-show.[77] Consumentenbond established a special purpose vehicle, a Foundation to pursue the interest of the consumers and instructed a lawyer to represent the interest of the consumers. About 80.000 households joined the Foundation and contributed EUR 45, resulting in about EUR 3,6 million litigation fund.

Subsequently, two collective actions were initiated against Dexia. At the same time, in 2003, Dexia had started individual debt collection suits against those consumers who did not meet their contractual obligations and refused to pay their debts. Many consumers choose the attack as a strategy and summoned Dexia for breach of fiduciary duty. In 2005 about tens of thousands individual cases were pending before the lower Dutch courts, resulting in duplicative and contradictory case law. The matter was highly complicated from legal and factual point of view and in the course of the litigation novel questions of law continued to emerge. The Dutch judiciary was overwhelmed by the magnitude of the problem and established in a later stadium a special “Dexia task force” to deal with the coordination and logistics issues among judges in the course of the litigation.

Although a mediation attempt in 2004 commissioned by the Dutch government failed Dexia settled for EUR 1 billion[78] with the Foundation, Consumentenbond and VEB in the summer of 2005 under the supervision of Mr. Wim Duisenberg, a prominent Dutch financial expert and a former president of the European Central Bank. A petition was filed and the settlement was declared binding by the Amsterdam Court of Appeal in January 2007 pursuant to the provisions of the WCAM on an opt-out basis. The settlement was criticized for being unfavorable for consumers with spouses who were not aware of the contracts. Special purpose vehicles operating on contingency fee basis succeeded in mobilizing about 23.000 clients to opt out from the

---

[76] Its structure was that consumers buy a “basket of shares” and the purchase is funded by a loan. The loan and the basket of shares, both provided by Dexia’s successor, were sold as a package deal that would end after a number of years. Consumers had to pay a monthly interest on the loan. In the meantime the stock market was supposed to go up and at start it did. The benefit on the stocks was used to pay back the loan. At the end of the contract consumers would receive as a profit any positive difference between the profits made on the shares and the amount of money the consumer had paid for the loan and the interest on the loan.

[77] Radar received between 15.000-20.000 phone calls.

[78] The remedy consisted of a reduction of a portion of the debt of the consumer and not a payment by Dexia.

collective settlement.[79] After the settlement agreement was declared binding a number of test cases were decided by the Supreme Court and resulted in rulings on the basis of which most cases could be resolved out of court. Nevertheless individual suits of some of those who opted out from the settlement are still pending.

4.2 Litigation funding in Dexia

4.2.1 Individual contributions

In Dexia a number of funding methods was applied and some of the applied methods emerged and were developed in the course of the litigation. A substantial part of the litigation was resolved through the collective actions initiated by the special purpose vehicle and the subsequent WCAM-settlement and were mainly funded through the individual contributions of EUR 45 of the members of Consumentenbond.[80] According to the terms of the settlement agreement Dexia had to reimburse EUR 45 to consumers who contributed to the initial litigation fund, leaving a significant part of the proceeds in that fund unexhausted. According to the terms of the settlement agreement the remaining proceeds were redirected to cy pres distribution, a precedent under Dutch law.[81] In theory those proceeds can be used to fund subsequent collective actions.

From the perspective of Consumentenbond the funding in Dexia was successful and the success can be attributed to the high number of consumers that were willing to contribute to the litigation fund and the collective resolution of the matter.[82] An explanation for the latter, in addition to the incentive provided by LEI providers for policyholders to join the action of the Consumentenbond that will be discussed below, could be that this was the first massive consumer financial services case in the Netherlands and Dutch consumers were not yet aware of the litigation dynamics in this types of disputes like the fact that they could profit from the results of the collective action even if they did not contributed to the funding of the litigation. The common fund doctrine is not

---

[79] However, it must be noted that in Dexia lawyers non-members of the Dutch Bar Association and operating on contingency fee basis could be involved in the litigation on a larger scale than usual, because of the fact that the financial lease contracts were consumer contracts and in that types of consumer matters the lowest courts, where a representation by a member of the Dutch Bar Association is not mandatory, have exclusive jurisdiction. Until July 2011 those courts had jurisdiction in matters with value up to EUR 5.000. As discussed above, the government has raised the financial interest threshold to EUR 25.000. That makes it easier for lawyers non-member of the Dutch Bar association to represent clients in court. Kamerstukken II, 32 021, 2008-2009, 2009-2010 and 2010-2011.

[80] The WCAM-settlement covered about […] consumers.

[81] A new foundation was established promoting research and education with regard to collective actions and the resolution of mass disputes. Subsequently, a chair on mass claim litigation was established at Erasmus University Rotterdam in 2011.

[82] Presentation Brechje Krijnen/Consumentenbond at 4th International Conference on the globalisation of class actions in Miami, December 2010.

applicable under Dutch law. It is to be expected that the free rider problem will be more manifest in subsequent consumer mass disputes.[83]

4.2.2 Legal Aid

Whereas Consumentenbond was able to concentrate the representation and aggregate claims by establishing a special purpose vehicle for the purpose of the collective action, instructing one lawyer and law firm and raising a substantial fund by requiring a modest contribution from its members, the Legal Aid Board had to take a different approach with regard to the claimants eligible for Legal Aid. The statutory guaranteed free choice of legal services provider turned out to be an obstacle for the Legal Aid Board to appoint a small number of lawyers or law firms to deal with the matter and facilitate aggregation of the claims. About a total of 4.222 individual cases in connection to Dexia financial lease contracts were funded by the Legal Aid Board[84] and between 2002-2010 the Legal Aid Board spend about EUR 3,3 million on lawyers fees. This is not a final figure. About 150 individual cases are still pending.[85]

In terms of litigation dynamics Legal Aid clients had a financial incentive to pursue their individual case: they could gain from the collective action and settlement and at the same time try to do better without worrying about costs. About 50% of the Legal Aid customers[86] opted out from the collective settlement, whereas the overall percentage opt-outs was about 10%. The difference suggests that litigants eligible for Legal Aid opted out more frequently.

The Legal Aid Board had a different perspective on the expenditure and the success of litigation funding in Dexia as a result of the unrestricted free choice of legal services provider. Although in comparative perspective the lawyer's fees of at least EUR 3,3 million that were paid by the Legal Aid Board are relatively modest,[87] the amount is disproportionate to the number of consumers involved in the matter.[88] Furthermore, the number of EUR 3,3 million does not include the costs

---

[83] As appears to be the case in another recent matter related to unit linked insurances. While about 6 million Dutch households have such a product the organizational grade of consumers here is much lower. This could be contributed to a variety of factors and goes beyond the scope of this paper to discuss those.

[84] The actual number of cases in connection to financial lease contracts is higher, since there are also individual law suits against other financial services providers.

[85] Status per 2011.

[86] Figures provided by the Legal Aid Board.

[87] For example the total budget of the Legal Aid Board for civil cases in 2011 is about EUR 188 million and the overall budget in 2011, including criminal cases is EUR 378.7 million. And compared to US fees.

[88] In contrast: in Vie d'Or (11 000 consumers) the lawyers fees were about EUR 2 million and were incurred in criminal, disciplinary proceedings and in a subsequent collective action and test cases, litigated in three instances (District Court, Court of Appeal and Supreme Court). Moreover, it is not evident that in the cases that related to a breach of a fiduciary duty by Dexia overall a more favourable result for the consumers was achieved, compared to the WCAM settlement.

incurred by the Legal Aid Board in disputes related to other financial lease contracts providers than Dexia. The Dexia WCAM collective settlement and related case law set a minimum standard also for other providers of financial lease contracts and their clients could try to do better at practically no cost. Although overall Legal Aid services providers are being paid a relatively humble hourly rate,[89] in the course of the litigation some of them had discovered that due to the volume of many similar cases and the economies of scale that could be achieved by informal aggregation, the financial lease contracts cases could be profitable.[90]

4.2.3 LEI

Figures about the number of Dexia clients that had an LEI are not publicly available, but it has been estimated[91] that it was substantial enough to unbalance the day-to-day operations of LEI providers without exceptional measures. Legal expense insurers reimbursed the membership fee of EUR 45 to those policy holders who chose to join the Foundation and in fact, many did that. In that way LEI providers in fact co-funded the collective action initiated by Consumentenbond, at the same time achieving substantial economies of scale.

Some Dutch legal expense insurers anticipated problems as a result of the free choice of legal advisor as experienced by the Legal Aid Board by stipulating in their general terms and conditions, that in case of a mass dispute the insurer retains the right to limit the client's choice of a legal services provider. Clients who opted out from the WCAM settlement agreement were represented in the subsequent individual settlement negotiations by in-house lawyers of the LEI provider or by selected qualified external lawyers. This "informal aggregation" by LEI providers has not been reported by the latter as giving rise to concerns or being problematic and could be explained by the fact that there is no statutory obligation for LEI providers to actively disclose the right of free choice of counsel to the policyholder. Since most policyholders are not aware of this right, they will probably simply follow the suggestion of their LEI provider. Moreover, the right of free choice of legal counsel can not be invoked during settlement negotiations, which gives LEI providers of in kind policies a powerful tool to control the out of court resolution of mass disputes and provides an additional incentive for LEI providers to promote an out of court resolution of mass disputes.

LEI providers did not seem to have experienced significant difficulties with the funding of the Dexia claims either. They could redirect most of their clients to the special purpose vehicle and Consumentenbond at virtually no cost. After the collective settlement was declared binding and some of their clients opted out, LEI providers of in kind polices were able to resolve most cases

---

[89] EUR 107 per hour.

[90] A similar dynamic revealed by the case studies on personal injury funding discussed in the book of Ch. Hodges 2001 has lead to the collapse of the until then successful English Legal Aid system and the Woolf reforms.

[91] On the basis of interviews that the author conducted with employees of a legal expense insurer involved in the matter.

by their in house lawyers out of court, without incurring costs related to the instruction of external lawyers. The evaluation would have been different in a system where the emphasis is on a resolution through litigation and in an institutional environment where LEI providers are obliged to cover the full costs of "free chosen" legal services providers.

4.2.4 TPF

The last funding mechanism that was used in Dexia was third party litigation funding. Whether the special purpose vehicle that organized the opt outs of about 23.000 consumers from the collective settlement has been commercially successful is unclear. The picture that emerges is that although Dexia was the first consumer mass claim dispute for that funder, it was not the first case that funder ever funded. Such commercial entities tend to develop an inventory of cases to spread the litigation risks.

In relation to Dexia there have been some public indignation with regard to the advertising methods used by the funder to mobilize the 23.000 consumers to opt out from the collective settlement and to the success fee, which some considered inappropriate and disproportional to the investment of the funder and the effort the funder put into the case. As discussed, after the settlement agreement was declared binding by the Amsterdam Court, the Supreme Court ruled in selected test cases favorably for a big portion of those who opted out. Dexia funded those test cases.

5. Concerns

5.1 Legal Aid

Although there is not a uniform system of European civil procedure and it is not very likely that there will be one in the near future,[92] there is at least one general acknowledged concept or principle that influences the operation of most funding mechanisms available throughout Europe, or at least in the Netherlands and that is the principle of party autonomy and its exponents the free choice of legal counsel and as a part of it, the right to determine one's litigation strategy.[93] The Dexia case study demonstrates that applying the principle of party autonomy mechanically to

[92] See Hart Publishers book (2011) about this challenge for the European legal order (Tzankova&Gramatikov).

[93] Party autonomy has many exponents. R.B. Capalli, C. Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6. TEMP. INT'L & COMP. L.J. 217, 219 (1992) define the right to choose one's legal counsel, the right to be heard before suffering the consequences of a judgment and notice of the proceedings as procedural rights. In essence those three are also exponents of the principle of party autonomy.

the funding of mass disputes serves as an obstacle[94] for the adequate funding of mass disputes through Legal Aid.

In the absence of a proper functioning concentration mechanism as a result of the free choice of legal services provider finality of resolution and the effective use of public funds in mass claim disputes are not enhanced. In support of proposals made in the legal literature[95] the Legal Aid Board has demonstrated to be a proponent of a legislative reform limiting the free choice of legal services providers in mass disputes to lawyers or law firms on a newfound Legal Aid Board's mass disputes panel. Another position that is being advanced by the Legal Aid Board concerns an amendment of the eligibility criteria to make it possible to fund special purpose vehicles acting in collective actions or WCAM settlements.

Although the Dutch government has imposed a cost reduction of the Legal Aid budget of EUR 50 million per year, to date no intentions with regard to mass disputes have been announced, whereas there much can be gained not only in terms of cost savings but also in terms of improving the quality of representation and reducing investment asymmetries between individual consumers and repeat corporate defendants. Another paradox is that reorganizing the Legal Aid system of funding of mass disputes in order to facilitate concentration and collective resolution is also expected to improve the quality of representation in mass disputes and respective outcomes not only for individuals eligible for Legal Aid funding but also for litigants in general. A study of the Ministry of Justice showed that in terms of access to justice not the low but the middle incomes experience thresholds.[96] Individuals not eligible for Legal Aid will have advantage of the results achieved in collective actions or settlements funded with public means as well.

Furthermore, the involvement of the Legal Aid Board in the selection of the class lawyer might be expected to positively contribute to coping with the governance and transparency problems signaled with respect to the functioning of special purpose vehicles in collective actions and settlements. At the same time concentration enables the Legal Aid Board to effectively cooperate with and monitor the conduct of other third party financiers of consumer mass disputes like LEI and TPF.

---

[94] F. Valguarnera, Legal Tradition as an Obstacle: Europe's Difficult Journey to Class Action 2 (2010), Global Jurist 1 explains the difference between the US and the European approach to group litigation partially on the basis of Professor Mirjan Damaška's seminal work "The Faces of Justice and State Authority" (M. Damaška, *The Faces of Justice and State Authority*, New Haven and London, Yale University Press, 1986), where he distinguishes between a "coordinate ideal of authority", towards which the American legal system leans, and a "hierarchical ideal", closer to the continental European tradition. The latter explains why most European legal systems resist prominent elements from the US class action regime like standing to sue to individuals, opt out etc. One could state that another phenomenon that strengths this resistive effect is the mechanical application of the principle of party autonomy to mass disputes, whereas the latter require rethinking and redefinition of concepts and principles that are being viewed as fundamental.

[95] I.N. Tzankova, Mordenate, 2007.

[96] […]

Since the Legal Aid Board and LEI providers share a common interest in early detection of (mass) disputes and early conflict resolution, and partly as a result of the negative experiences of the Legal Aid Board in Dexia, there have been informal initiatives on the side of the Legal Aid Board and legal expense insurers to work together by establishing an informal network at management level for sharing of information. The idea is that problems of large groups of consumers with providers or services can be detected, monitored and addressed at an early stage and litigation can preferably be avoided. Another field of cooperation that has been identified and that could save costs and improve the quality of the legal services is the joint selection and instruction of expert witnesses in mass disputes which can promote and facilitate the out of court resolution of mass disputes through collective settlements.

5.2 LEI

The case law of the European Court of Justice in relation to the Directive that also builds on the principle of party autonomy and the right of free choice of legal counsel could have a negative impact on the funding of mass claim disputes through LEI. A question that has not been answered to date is how the Directive and related case law of the European Court of Justice will influence the practice of LEI providers in mass disputes in the Netherlands to restrict in their general terms and conditions the right of a free choice of legal counsel and promote "informal aggregation" in mass disputes by instructing selected (in-house) lawyers to deal with a specific mass claim matter.

According to case law of the Amsterdam Court of Appeal the ruling of the European Court of Justice addresses only the situation where the decision that an external lawyer has to be instructed has already been taken by the LEI provider. It does not apply in the situation of a "in kind" polices, where the LEI provider has decided to handle the matter, also after the commencement of proceedings, by an in-house legal counsel who is not qualified as a lawyer.[97] According to the Amsterdam Court of Appeal, a policyholder has a right of a free choice of legal counsel only after the LEI provider has decided to instruct a qualified (internal or external) lawyer to represent the client in legal proceedings. However, according to the Amsterdam Court of Appeal that right of the policy holder is not based on EU law, but on a Regulation of the Dutch Bar Association[98] that has also been signed by LEI providers and the qualified lawyers employed by them. Moreover, Dutch courts[99] have ruled that the right of free choice of counsel exists from the moment proceedings are issued. This means that prior to proceedings or in the context of WCAM settlement negotiations the policyholder is restricted in his choice and the LEI provider is able to facilitate the concentration of representation by instructing selected lawyers to deal with the matter.

---

[97] Hof Amsterdam 26 juli 2011, LJN: BR5339, at 3.5 and 3.6. As pointed out earlier in relation to Dexia, in the Netherlands lawyers who are not a member of the Dutch Bar Association are allowed to represent clients in court.

[98] Hof Amsterdam 26 juli 2011, LJN: BR5339 at 3.8.

[99] Hof Amsterdam 26 juli 2011, LJN: BR5339.

Whether this interpretation of applicable Bar regulations, EU law and case law of the European Court of Justice will stand the test of the Dutch Supreme Court and subsequently of the European Court of Justice remains to be seen. For the moment the status quo has significant implications in the Dutch institutional setting, with a mechanism like the WCAM that aims to facilitate the out of court resolution of mass disputes. This setting favors the business model of LEI providers of in kind polices. They will be able to concentrate claims and promote the out of court collective resolution of mass disputes. It may be expected that LEI providers will play an increasingly important role in the resolution of mass disputes in the future,[100] although that role will probably be restricted to domestic consumer mass disputes since this seems to be the most significant market of LEI providers.

One may assume that a different institutional setting would transform mass disputes into a threat to the business model of legal expenses insurers. For example, if the emphasis within a legal system is on resolution through litigation and there is lawyers' monopoly on the market of legal services as is the case in Germany,[101] the aforementioned case law of the European Court of Justice, prohibiting the promotion of aggregation in mass claim disputes in general terms and conditions, causes a different dynamic. Indeed, it has been reported that the German legal expenses insurer Foris AG who was involved in the litigation funding of the massive Deutsche Telecom case, is considering the exclusion of mass disputes from its coverage.[102] This illustrates that mass disputes pose challenges not only to Legal Aid but also to legal expense insurers, leaving the market of legal services in certain category of cases to other commercial litigation financiers who are not restricted, nor regulated by European or national legislators.

5.3 TPF

As discussed earlier dogmatic discussions about the admissibility of third party litigation funding by a legal system or tradition are lacking in Dutch academic literature. However in studies on the funding of class actions several problematic issues in connection to TPF have been identified that deserve consideration. Those issues emerge predominantly in consumer matters and in opt out

---

[100] A measure that is expected to increase the role of LEI providers in the Dutch dispute resolution field in general is the raise of the financial interest threshold for which a representation by an attorney, member of the Dutch Bar, is mandatory, to EUR 25.000. This aims to make it cheaper and easier for litigants to bring claims but it will also extend the possibility for LEI providers offering in kind polices to make use of in house lawyers.

[101] It is sometimes stated that Germans are more litigious by nature than for example the English: Van Boom 2011, p. 95 with further references. The recent KapMug Referententwurf is yet another example of the latter. Although it aims to introduce a court approved opt out settlement regime along the lines of the Dutch WCAM, it still requires that the individual claimants who are going to be bound by the collective settlement agreement have filed a suit.

[102] A. Halfmeier, Interim results of the case study of the Deutsche Telecom case at the annual Law and Society Conference in San Francisco in June 2011.

regimes.[103] In contrast: competition disputes between members of a cartel and direct purchasers using the assignment model will be viewed as business-to-business disputes, involving sophisticated commercial players on both sides. They will be deemed capable of making informed business decisions and choices with regard to the terms and conditions of the funding contract and the assignment, the monitoring of the group lawyer etc. It may be assumed that most companies who assigned their claims to the funder would have done so after they acquired a legal opinion, as they usually do with regards to other types of contracts concluded by the company. In that respect the claimant company will probably not only consider the chances of success of the action and the success fee of the funder, but also opportunity costs and cost savings as result of the fact that the management of the company is no longer intensively involved in the monitoring of the progress of the litigation.[104]

In the first place there is the question to whom the fiduciary duty of the class lawyer who is instructed by the third party funder applies. In other words who is the client and who decides ultimately on the litigation strategy.[105] The answer to this question is not merely of a theoretical importance, since the interests of the third party funder and the client in a certain stage of the proceedings might diverge, for example when an acceptable outcome is sufficient for the funder to recover costs and make some profit but is not the best alternative for the class. Since the class lawyer is being paid by the funder, in practise the class lawyer has two (types of) clients: the group and the funder. Ideally, the contract between the class lawyer and his clients should address potential conflicts and should stipulate how the lawyer should act when such a conflict of interests between the funder and the class emerges.

Another problematic feature that has been identified relates to the success fee of the third party funder. The agency problems inherent to class and group litigation have been extended to and multiplied by the involvement of a third party funder.[106] It could be expected that the type of remedies identified in the literature to cope with agency problems in the relationship class lawyer- class should be sufficient to address agency problems in the relationship third party funder-class. The identified main types of remedies are monitoring and financial incentives. The proposals that have been advanced in the academic literature to date to address the specific agency problems in relation to third party funding vary from soft regulation and judicial oversight, to strictly enforced statutory provisions that prescribe safeguards promoting transparency and good governance.[107] They classify as “monitoring” proposals. According to

---

[103] Predominantly from Australian origin. Third party funding is widely used in Australia since there is a ban on contingency fees.

[104] Ideally, such assumptions should be empirically tested to find out what sophisticated businesses as litigants value and really care about when they contract a third party litigation funder.

[105] […]

[106] Although the opposite argument could also be made: that a third party litigation funder helps monitor the conduct of the class lawyer and in that way help decrease agency problems in the relationship class lawyer-class: Tzankova 2010.

[107] Cashman and Mulheron 2008, Tzankova 2010, p. 148-157 monitoring remedies in general.

some authors (soft) regulation should address at least issues like the monitoring of the conduct of the third party financiers prior and in the course of the litigation, the level of involvement of the financier with the litigation strategy and the fiduciary duty of the class lawyer, the award of the third party litigation funder and its solvability.

Law and economics analyses should point out to the type of financial incentives that cope with agency problems in the relationship class – third party funder most sufficiently.[108] Another area of further research is whether and how the knowledge of the value of a claim would ultimately influence the courts' decision on the merits. Usually the situation is the opposite, that is, the expected decision of the judge is indicative for the value of the claim. The potential effects of a market of liability claims on the courts and the judiciary have not been explored yet and its potential implications require further assessment and empirical evidence.[109]

Those concerns are particularly relevant in the Dutch context where TPF enjoys a favorable institutional treatment. Future developments seem also to favor the business model of TPF in the Netherlands. Although it is yet uncertain whether and how future national and EU legislative initiatives in the field of private international law or case law of the European Court of Justice will influence the functioning of the WCAM, for the moment the Netherlands is the only European jurisdiction with a devise as the WCAM.[110] This might attract third party litigation funders who may use the WCAM more frequently as part of their global options and litigation strategies. The WCAM might be an attractive devise since according to its statutory provisions there is no judicial control over the remuneration of lawyers and success fees.[111]

6. Summary and conclusions

Societies design litigation funding systems that suit best their legal tradition and culture. Traditionally European countries rely on state funded legal aid or on LEI and prohibit contingency fees, at least for members of the Bar. Generally speaking Legal Aid and LEI are the two main sources of litigation funding in the Netherlands not only in general but also in consumer mass claim disputes. However, as the Dexia case study illustrates third party litigation

---

[108] [Law and economics studies analyzing the relationship class-third party funder].

[109] A. Pinna 2011, p. 126 (p. 109-130).

[110] Briefly discuss German "Referentetwurf". It contains a few technical improvements and enlarges the scope of application a little bit in the direction of claims not only against issuers of securities, but also against intermediaries and consultants (banks) in this context. A main improvement is the introduction of a court-approved opt-out settlement possibility, much along the lines of the WCAM. The main differences to the WCAM are that civil proceedings are necessary before the settlement option can be considered and that the settlement will only affect those claimants who have formally filed individual suit. So it is still much „weaker" in impact than the WCAM. Although an improvement, the proposal is still only a very modest step in the direction of establishing effective collective procedures in Germany.

[111] Although the Amsterdam Court of Appeal seems to take a critical approach with regard to class counsel fees, absent a statutory provision and guidelines this remains a discretionary power and there is no guarantee that the Amsterdam Court will use those powers consequently and consistently.

funders have also entered the mass claim litigation funding scene despite of the ban on contingency fees. It would be useful to further explore how various groups of litigants valued the process and outcome that was achieved through Legal Aid funding, LEI and TPF.

Despite of the wide range of funding mechanisms to fund mass claim disputes in the Netherlands, the question whether the Dutch legal system has adequate mechanisms in place to secure access to litigation funding in mass claim disputes cannot be answered affirmatively.

The Dexia case study illustrates that the functioning of Legal Aid and LEI in the context of mass disputes is being negatively influenced by the principle of party autonomy and its exponents: the free choice of legal counsel and the right to determine one's litigation strategy. Dexia illustrates that applying those principles mechanically serves as an obstacle for the adequate funding of mass disputes through Legal Aid and that a legislative reform is needed to guarantee the adequate use of Legal Aid in mass claim disputes. A legislative reform that redefines the meaning of the principle of party autonomy in mass claim disputes.

Case law of the European Court of Justice that builds on the principle of free choice of legal counsel could have a similar impact on LEI and be disadvantageous for the business model of LEI providers. However, to date this has not been the case in the Netherlands, an effect that could be attributed to the institutional environment in which Dutch LEI providers operate: in kind polices and the promotion of out of court dispute resolution and dispute resolution by in house lawyers. The business model of LEI providers that fund mass disputes and operate in a (European) legal system that builds on different premises is expected to be negatively affected by the free choice of legal services providers. Therefore a legislative reform at EU level is probably needed to secure the access of LEI to the European litigation market of mass disputes.

However, redefining the meaning of party autonomy or simply limiting its impact in the context of mass disputes will provide only a partial improvement in the funding of mass disputes by Legal Aid or LEI. As a result of institutional and market restrains Legal Aid schemes and LEI can function as a funding option primarily in (i) national (ii) consumer related matters. Without additional coordination efforts at national and supranational level funding of mass disputes will remain problematic in the international or cross-border context (e.g. securities litigation) and in business-to-business litigation (e.g. anti-trust litigation).

Since contingency fee arrangements with qualified lawyers member of the Bar are being considered problematic by most European countries, including the Netherlands, it is expected that to secure access to justice in these two categories of mass disputes alternative funding options, e.g. TPF, will remain necessary and will increasingly become available. It appears that the Dutch legal tradition and litigation landscape is advantageous for the business model of TPF. The emerging practice in Europe[112] proves already that there is a need and a market for that type of legal services, despite of dogmatic and ethical objections that have been put forward. There

[112] [Veljanovski]

seems to be a general consensus between opponents and proponents that TPF should be regulated, although the opinions on the scale and intensity of regulation vary depending on the profiles of the litigants and the type of dispute[113] and on the design of the action.[114] TPF should be regulated at least in relation to consumer matters and opt out regimes.

Theoretically regulation can be achieved through financial incentives and monitoring, although in the European context monitoring measures seem to be the realistic option. This still would require a substantial departure of the current practice where the courts and the judiciary are not used or trained to monitor funding arrangements and, in the context of mass disputes, will have to determine at their own discretion where the freedom of contract stops and the duty of the court as a public servant, watching over the interests of absent claimants, begins. In a (civil law) tradition where the members of the judiciary are predominantly "career judges" and absent a legal culture of a judiciary monitoring the financial conduct of parties and lawyers, judges should be trained in the handling of mass disputes.

[113] Business-consumer as opposed to business-to-business.

[114] Assignment of claims as opposed to class or group action with absent class members.