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ENFORCING CONSUMER AND CAPITAL MARKET LAW IN THE NETHERLANDS

WILLEM H VAN BOOM[*]
CHARLOTTE MDS PAVILLON[**]

I. Public law

A. Consumer law (Case 1)[1]

1. Do eliminations of consequences, damages and skimming of profits (by fines) exist?

The 2006 Wet handhaving consumentenbescherming (Act on Consumer Protection Enforcement) brought the Dutch consumer authority into existence. This authority merged with the Competition Authority in 2013 and now goes by the name of the Netherlands Authority for Consumers and Markets (ACM).[2]

Under public law, the abovementioned sanctions do not exist. However, the ACM may impose fines for violations committed by traders. When setting the amount of the fine, it has to take into account 'the infringing trader's turnover, net profit as well as any fines imposed for the same infringement in other Member States'.[3] The exact amount of the fine depends on the seriousness and the duration of the violation, and on the specific circumstances of the case. If there have been repeat offences or if the investigation has been obstructed, the fine may be set higher. On the other hand, fines may also be lowered, for example if the aggrieved parties were compensated by the infringers. The fine must be proportional to the violation of the law but it must also have a sufficiently deterrent effect, not just on the infringer himself, but also on other companies. Fines are therefore published on the website of the ACM.[4] The maximum fines were raised in 2014 – fines can now be as high as € 900,000 or 10 per cent of the relevant turnover – but temporally speaking these new rules were held not to apply to the fact pattern of Dieselgate.

The ACM established in 2017 that between 2009 and 2015 Volkswagen AG had acted in breach of section 8.8 of the Act on Consumer Protection Enforcement in conjunction with the rules on unfair commercial practices implementing the Unfair Commercial Practices Directive (UCPD), more specifically section 6:193b, paragraphs 1 and 2, opening lines and under (a) of the Dutch Civil Code (acting contrary to the requirements of professional diligence); section 6:193c, under (b) of the DCC (provision of misleading information); and section 6:193g, opening lines and under (d) of the DCC (black list of misleading commercial practices).[5]

The ACM has established that Volkswagen AG misled consumers in the sale of its diesel cars with type EA 189 engines. Volkswagen advertised these cars as environmentally friendly, while the results of emission tests had

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[*] Willem H van Boom, mr.dr., Professor of Civil Law, University of Leiden, School of Law.
[**] Charlotte MDS Pavillon, mr.dr., Professor of Private Law, in particular of Consumer Law, University of Groningen, School of Law.
A freely accessible website where the cited cases can be found is <http://www.rechtspraak.nl>.
A freely accessible website where most of the cited statutes can be found is <http://www.dutchcivillaw.com>.

1 See Introduction Section IV.A.

2 Sjoerd Ammerlaan and Dirk Janssen, 'The Dutch Consumer Authority: an introduction' in Willem H van Boom and Marco BM Loos (eds), *Collective enforcement of consumer law in Europe. Securing compliance in Europe through private group action and public authority intervention* (Europa Law Publishing 2007) 107–21.

3 'ACM Fining Policy Rule' (1 July 2016) <http://www.acm.nl/sites/default/files/documents/2017-10/2014-acm-fining-policy-rule-amended-on-july-1-2016.pdf>.

4 'ACM Mission and strategy' <http://www.acm.nl/en/about-acm/mission-vision-strategy/our-powers>.

5 The cited statutes can be found at: <http://www.dutchcivillaw.com/civilcodebook066.htm>.

been manipulated by illegal software. In 2017, the Dutch Consumers' Association (Consumentenbond) asked ACM to launch an investigation into Volkswagen. The ACM subsequently investigated whether the company had misled consumers and established that, in the period between 2009 and 2015, Volkswagen misled consumers about the most important features of its cars. As a result, consumers may have made a different decision than if they had received the correct information. Diesel cars with type EA 189 engines of the brands Volkswagen, Audi, ŠKODA and Seat were presented as sustainable and environment-friendly, while the test results were not reliable due to the installed software. By using this 'defeat device' software, Volkswagen's actions have been in breach of the requirements of professional diligence. Moreover, Volkswagen had wrongly claimed that the cars complied with the approval requirements for admission to the European market.

After establishing the violation of the UCPD rules, the ACM has imposed a fine of € 450,000 on Volkswagen AG.[6] This is the maximum fine that the ACM was able to impose for a breach of the UCPD in the period before the legal amendment. What is more, the ACM held that it could only impose one fine of € 450,000 because the different infringements could be attributed to only one single offence, i.e. the application of the 'defeat device' software. The ACM has upheld the fine on administrative appeal. Volkswagen has used a further opportunity for administrative appeal with the District Court of Rotterdam. The public hearing took place on 16 December 2019.

2. Compared to private enforcement: How strong is the monitoring and law enforcement by public authorities or other public bodies?

Private enforcement in the Netherlands is founded both on civil law procedures and on self-regulation (the so-called 'private foundation', the Dutch Consumer Complaint Boards are exemplary[7]). Private enforcement entirely depends on the initiative of private parties and the ACM only takes action when private parties fail to effectively tackle breaches of consumer law. The ACM came into being because the power of consumers to discipline the market was insufficient but 'it is statutorily obliged to organize a national forum[8] in order to ensure that its actions are aligned with private initiatives to protect the consumer'.[9]

The ACM has limited resources and is not able to address every violation of consumer law. Therefore, it has to prioritise its actions. The ACM selects the cases it deals with by answering three questions: What is the magnitude of the harm to consumers? What public interest is at stake? And is the ACM able to take action effectively?[10] The ACM may choose from a wide range of enforcement instruments: from awareness campaigns to hard sanctions such as fines. In most cases, the ACM uses a mix of instruments in order to address the underlying causes of violations, and to prevent repeat offences. It may apply a gradual, responsive approach, starting with warnings and ending with sanctions. This tailor-made approach has however been criticised for not paying enough attention to its actual deterrent effect.[11] The enforcement style of the ACM is perceived as entailing a rather soft approach, giving violators a 'second chance' before facing hard sanctions. This may lead to calculating behaviour and there are concerns among stakeholders and business managers about the extent to which violators are treated equally in similar circumstances and about the market knowledge of the ACM.[12] In the case of Dieselgate, the fine was immediately imposed, without a previous warning.

In the Volkswagen case, the ACM has played a coordinating and initiating role in the collaboration between European regulators. The joint regulators have required Volkswagen to resolve the problems of consumers with diesel cars and to treat consumers with diesel cars with modified software in an 'expedient and accommodating manner'.[13] In July 2018, 80 per cent of diesel cars in Europe (75 per cent in the Netherlands) had been repaired without any additional costs. Volkswagen has however not complied with the requirement to provide a full

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6 'ACM fines Volkswagen for misleading practices in diesel scandal' (28 November 2017) <http://www.acm.nl/en/publications/acm-fines-volkswagen-misleading-practices-diesel-scandal>.

7 <http://www.degeschillencommissie.nl/english/>.

8 The so-called 'Maatschappelijk Overleg'.

9 Anita Vegter, 'Toezicht op consumentenrechten en het Private Fundament' (*15th International Association of Consumer Law conference*, Amsterdam, 29 June 2015) <http://www.acm.nl/nl/publicaties/publicatie/14528/Speech-Anita-Vegter-Toezicht-op-consumentenrechten-en-het-Private-Fundament>.

10 See <http://www.acm.nl/en/about-acm/mission-vision-strategy/our-mission>■.

11 ACM, 'Eindrapport evaluatie Autoriteit Consument en Markt' (7 December 2015) <http://www.kwinkgroep.nl/publicatie/eindrapport-evaluatie-autoriteit-consument-en-markt-acm/>.

12 ACM, 'Resultaten Reputatieonderzoek' (23 August 2018) <http://www.acm.nl/sites/default/files/documents/2018-08/resultaten-reputatieonderzoek.pdf>.

13 'Volkswagen is taking steps to solve consumer issues with diesel cards in the EU' (17 July 2018) <http://www.acm.nl/en/publications/volkswagen-taking-steps-solve-consumer-issues-diesel-cars-eu>.

guarantee on the diesel cars after repair.[14] It has merely promised to take complaints connected to these repairs seriously. If necessary, individual Member States may take follow-up actions to compel Volkswagen to take further steps on specific issues. The authors are not aware of any follow-up actions.

B. Capital market law (Case 2)[15]

1. Do eliminations of consequences, damages and skimming of profits (by fines) exist?

Under public financial law, such sanctions do not exist. The Autoriteit Financiële Markten (Netherlands Authority for the Financial Markets; AFM) is the competent authority. The supervision of Dutch stock markets is regulated by the Wet op het financieel toezicht (Financial Supervision Act). The AFM is committed to promoting fair and transparent financial markets. In this respect, it enforces the EU's Market Abuse Regulation (MAR).[16]

The AFM may impose administrative fines upon companies for disseminating incorrect or misleading information and for violating disclosure requirements. The degree of seriousness and duration of the offence, and the degree of culpability of the offender with regard to the offence are taken into consideration when setting the amount of the fine. Consideration is also given to whether the offence has previously been committed and to the proceeds that have been realised. Finally, the offender's ability to pay is taken into account.[17] With the implementation of the MAR the maximum fines to be imposed have significantly increased. These million fines have not yet been imposed.

The AFM may also fine individuals who are aware of actions constituting the offence by the company (knowledge of the forbidden character of such actions is not required), and have the power and obligation to take necessary measures to prevent such actions.[18] The AFM is not entitled to settle compensation claims with offenders, nor does it have the competence to allocate (a portion of) pecuniary sanctions to an investors indemnification fund.[19]

2. Compared to private enforcement: How strong is the monitoring and law enforcement by public authorities or other public bodies?

Private enforcement aims at compensating investors who have sustained losses. The practice of class actions and collective settlement of investor claims is well developed in the Netherlands.[20] The Association of Stockholders (*Vereniging van Effectenbezitters*, VEB) is powerful and the number of investor claims has raised significantly in the past 15 years (thanks to the WCAM, see below). The VEB has issued a claim against car manufacturer Volkswagen for the losses incurred by investors pursuant to the infringement of US environmental legislation.

Public enforcement complements private enforcement by serving a different goal, i.e. promoting fair and transparent financial markets. However, public bodies often face criticism mainly for being too mild in their approach and for adopting a wait-and-see strategy. Public authorities supervising the financial markets (this also includes the Dutch central bank) have been criticised after failing to adequately address the problems and eventual collapse of the DSB Bank.[21] Recent criticism pertains to the AFM's oversight arrangements.[22]

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14 'The European Commission and EU consumer authorities publish final assessment of dialogue with Volkswagen' (Brussels, 17 July 2018) <http://europa.eu/rapid/press-release_IP-18-4549_en.htm>.

15 See Introduction Section IV.A.

16 Mario Hössl-Neumann and Andreas Baumgartner, 'Dealing with Corporate Scandal under European Market Abuse Law: The Case of VW' (2018) 37 EU Law Working Papers <http://www-cdn.law.stanford.edu/wp-content/uploads/2018/11/hoessl_baumgartner_eulawwp37.pdf>; Loes Lennarts and Joti Roest, 'Netherlands: Protection of Investors and the Compensation of their Losses' in Pierre-Henri Conac and Martin Gelter (eds), *Global Securities Litigation and Enforcement* (Cambridge University Press 2019) 469–516 (hereafter Lennarts and Roest, 'Netherlands').

17 <http://www.afm.nl/en/over-afm/werkzaamheden/maatregelen/boetehoogte>.

18 College van Beroep voor het bedrijfsleven, 14 August 2018, ECLI:NL:CBB:2018:400 – Imtech; College van Beroep voor het bedrijfsleven, 14 August 2018, ECLI:NL:CBB:2018:401 – Imtech.

19 Lennarts and Roest, 'Netherlands' (n 16) 469–516.

20 Tomas Arons and Willem H van Boom, 'Beyond Tulips and Cheese: Exporting Mass Security Claim Settlements from the Netherlands' (2016) 6 EBLR 857–83.

21 A liability claim against the AFM was however rejected in 2014: Hoge Raad, 21 November 2014, ECLI:NL:HR:2014:3349 – AFM-DSB.

22 Stephanie Wix, 'Netherlands' regulator faces criticism after courts overrule sanctions' (*The Accountant*, 8 January 2018) <http://www.theaccountant-online.com/News/netherlands-regulator-faces-criticism-after-courts-overrule-sanctions-6022014>.

In disclosing inside information, the main rule is that inside information which directly concerns the issuer involved must be disclosed as soon as possible by the issuer.[23] For its supervision of compliance with this disclosure obligation, the AFM disposes of a variety of enforcement mechanisms. Among them is the imposition of an order for incremental penalty payments or an administrative fine, including publication of this. The AFM can also report the matter to the Public Prosecution Service.[24] It may also take a trade measure, i.e. suspend trading if damaging and unlawful information inequality or misleading/incorrect information is present in the market.

Insider dealing or any attempt to engage in insider dealing is prohibited. The AFM proactively monitors behaviours, orders and transactions of investors in the market. If necessary, the AFM conducts an investigation into the compliance with the prohibition of insider dealing. The proactive supervision by the AFM of compliance by issuers with their obligations, such as publishing inside information as soon as possible, functions as an important means of detecting possible violations. The framework for supervising compliance with the MAR enables the AFM to obtain information from anyone that might reasonably be expected to possess information relevant for this supervision. If transactions or activities violate the insider dealing regulation, an administrative or criminal sanction can be imposed. In other words, the AFM has the authority to fine the infringer itself or to refer the matter to the Public Prosecution Service.

The AFM budget is paid by the parties under supervision. The government does not contribute to the budget but is entitled to income generated by the AFM through administrative fines and orders for incremental penalty payments, to the extent this amount on a yearly basis exceeds € 2.5 million.

In order to fine Volkswagen, the AFM must first look for evidence determining whether Volkswagen failed to disclose information about cars that did not comply with EU emission standards when it issued certain securities to investors (and whether insider trading has taken place as suggested by Case 2). The authors are not aware of any ongoing enforcement action by the Dutch AFM in this respect.

II. Private law/civil procedure: Consumer and capital market law (Case 1 and Case 2)

A. What forms of collective actions are available (class action, representative action, etc.)? Who is entitled to bring action? How can collective redress actions possibly be financed? Are there any special mechanisms for achieving collective settlements?

There are four instruments available in civil proceedings.

First, Dutch law allows voluntary aggregation of individual claims based on voluntary joinder or consolidation of claims. Such aggregation can be troublesome if the individual claims pertain to damages because the principle of Dutch law of damages is that as far as quantum is concerned, each claim must be assessed individually. However, the aggregation can be efficient because Dutch courts will try to answer questions of wrongfulness, protective scope of the rule, fault and causality (to the extent possible) in the abstract so that the questions common to the entire group of claimants are answered consistently and efficiently as much as possible.[25]

Second, there is a general rule on representative action, which authorises representative organisations to initiate a collective representative action in the civil courts.[26] Such organisations need to be an association or foundation and their articles of association/foundation and byelaws need to state that their aim is to represent a specified group of persons or specific and commonly shared interests. In the representative action procedure, the representative foundation/association may (1) seek a declaratory judgment to the benefit of interested parties that are alleging the defendant has acted wrongfully against these parties, and is thus legally obliged to do something or to abstain from doing something towards them; (2) seek injunctive relief in the form of either a positive mandatory injunction or a prohibitory injunction; (3) seek performance of a contractual duty of the defendant owed to various interested parties; or (4) seek the termination or rescission of a contract between the defendant and various interested parties.

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23 <http://www.afm.nl/en/professionals/onderwerpen/marktmisbruik/openbaarmaking-voorwetenschap>.

24 <http://www.afm.nl/en/professionals/onderwerpen/marktmisbruik/voorwetenschap-mm-be>.

25 See, e.g. Hoge Raad, 27 November 2009, ECLI:NL:HR:2009:BH2162 – World Online; Hoge Raad, 5 June 2009 ECLI:NL:HR:2009:BH2815 – De Treek/Dexia.

26 Arts 3:305a-c of the DCC. See also Franziska Weber and Willem H van Boom, 'Dutch Treat: the Dutch Collective Settlement of Mass Damage Act (WCAM 2005)' (2011) 1 Contratto e impresa/Europa 71ff.

The crucial limitation to the representative action is that the claim cannot be for individual damages for the interested parties.[27]

Third, in response to the aforementioned limitation to the representative action, the 2005 Collective Settlement of Mass Damage Act (Wet collectieve afwikkeling massaschade (WCAM)) was introduced. Briefly explained, the WCAM operates as follows. First, an amicable settlement agreement concerning payment of compensation is concluded between the allegedly liable party or parties on the one hand, and a foundation or association acting in the aligned common interest of individuals involved (and injured) on the other; the parties to the agreement then jointly petition the Amsterdam Court of Appeals to declare the settlement binding on all persons to whom damage was caused; these interested persons are not summoned in this procedure but are notified by post or by newspaper announcement. The Amsterdam Court hears the arguments of all interested parties and considers several points concerning the substantive and procedural fairness and efficiency of the settlement (e.g. amount of compensation, adequate representation of interested parties). If the Court rules in favour of the settlement, it declares the settlement binding upon all persons to whom damage was caused and who are accommodated by the settlement, leaving non-willing parties with the opportunity to opt out within a certain period, after which the opt-out option lapses. The WCAM 2005 has been used frequently since its enactment and can be called a successful tool to efficiently settle and put claims to rest. The WCAM settlements mostly concern capital markets litigation.

Fourth, in 2019, the Collective Mass Damages Action Act (Wet afwikkeling massaschade in collectieve actie; WAMCA) was enacted. It came into force on 1 January 2020.[28] The Act applies to collective actions if the underlying event(s) date from 15 November 2016 or later (that latter date being the date of introduction of the Bill to Parliament). The WAMCA 2019 builds on the three previous instruments. It opens up the possibility of class action proceedings initiated by a representative association or foundation provided it represents these interests under the terms of its articles of association and these interests are sufficiently safeguarded by the governance structure of the association/foundation. Moreover, the association/foundation does not have standing if its directors have a commercial motive to directly or indirectly profit from the action. The collective claim needs to be registered in a central register; this allows consolidation of several claims. The claim needs to have a sufficiently close relationship with the Netherlands. Then, an exclusive group representative (the EGR, or 'lead claimant') is appointed to represent all claimants and interested parties. After the appointment, such claimants and interested parties have the opportunity to opt out from the proceedings. Then, the defendant(s) and EGR are under a duty of best efforts to negotiate a settlement before the case goes to trial. If a settlement is reached, it will be reviewed and declared binding by the court, after which a second opt-out period starts to run. If no settlement is reached, the proceedings continue and the court may award damages to the interested parties behind the EGR. It may also dismiss the claim. The court decision has *res judicata* effect for all those who did not opt out.

Note that it is doubtful that a Dieselgate fact pattern can be adjudicated under the WAMCA regime, assuming that most of the wrongful acts have occurred before 15 November 2016.[29] Also, it should be borne in mind that the WAMCA regime is different as regards foreign claimants.[30] A claim vehicle will only have standing in court concerning foreign claims if there is a sufficiently close connection with the Dutch jurisdiction. If the underlying claims represented by the claim vehicle meet this requirement, the case can be heard. However, if the case is one for a collective compensation, persons belonging to the precisely specified group who are not domiciled or resident in the Netherlands are only bound by the court-imposed scheme if they have opted into the proceedings. To do so, they must inform the court registry in writing that they agree to have their interests represented in this collective action within a time limit to be determined by the court (at least one month). This means that if a Dutch foundation starts a representative group action for collective compensation in the interest of consumers affected by a company that has wrongfully caused damage to consumers in Germany and the Netherlands, the court will first test whether there is a sufficiently close connection with the Dutch jurisdiction. If there is, the proceedings will affect Dutch consumers who are part of the 'precisely specified group' unless they opt out. It will affect the German consumers

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27 Art 3:305a (3) of the DCC: 'A legal claim as meant in paragraph 1 may be brought to court in order to force the defendant to disclose the judicial decision to the public, in a way as set by court and at the costs of the persons as pointed out by the court. It cannot be filed in order to obtain compensatory damages.'

28 Staatsblad 2019, 130 and Staatsblad 2019, 446.

29 The WAMCA has not yet entered into force but has, to some extent, a 'retroactive' effect, thanks to which the new procedure may prove useful in Dieselgate. The WAMCA is applicable provided that the underlying event(s) date from 15 November 2016 or later. This requirement could perhaps be met if the action does not focus on the misleading practices prior to that date but on the fact that by failing to offer appropriate solutions in the past four years, the harm inflicted on car owners has been perpetuated.

30 Willem H van Boom and Charlotte MDS Pavillon, 'The Netherlands takes collective redress to a next level. An introduction to the Collective Redress of Mass Damages Act 2019' (2019) 4 Zeitschrift für Verbraucherrecht 133.

only if they opt in (unless the court sees good grounds to bind foreign consumers on an opt-out basis).[31] Note that this is not the case with a 'lone standing' WCAM settlement procedure; there, German consumers can derive benefits from the settlement declared binding unless they opt out.

B. Have substantive assignment models developed for the process-based bundling of compensation claims (myflight / myright, etc.)? How do they possibly fit into the respective procedural landscape?

Assignment of claims falls under the first instrument mentioned above. It is relatively straightforward under Dutch law: unless the claim is unassignable, it can be assigned by means of a written and signed document by the assignor. Notification of the debtor can be substituted by a simple procedure involving official date stamping of the document by the Dutch tax office. Thus, individual claims can be assigned to a genuine buyer or to a claims agency for the purpose of debt collection.[32] There are no rules against using assignment by claims agencies in a 'no cure no pay' construction. In this sense, anyone can open up shop as a claims broker. Attorneys, however, are not allowed to charge contingency fees of this sort.

C. Are remedies such as eliminations of consequences, damages and skimming of profits available?

Generally speaking, in claims for damages (based on tort or contract), the damaged party has a right to be brought in the position – financially speaking – he would have been in but for the tort or non-performance of the contractual duty. In other words, he has a right to compensation either in money or otherwise.[33] The court has the authority (but not the duty) to assess the damage by reference to the amount of profit the liable party gained by his behaviour[34] (article 6:104 of the DCC[35]). Although this instrument is not a proper instrument for skimming off profits, it can be used for that purpose in deserving cases. If, however, the damage of the claimants is calculable, it seems unlikely that the profit can serve as a gauge for damages.[36]

D. Does facilitation to give proof exist – how is the burden of proof distributed?

An investor or a consumer who has been misled by Volkswagen, has to state and prove to establish causation in order to claim compensation for his/her financial loss. The general rule with respect to the burden of proof applies: the party invoking a certain legal consequence must prove the necessary facts and circumstances. Pursuant to a special rule or based on the requirements of reasonableness and fairness the burden of proof may be allocated differently between the parties (article 150 of the Dutch Code of Civil Procedure). Those requirements allow for a shift of the burden of proof. A court may for example choose to adopt a rebuttable presumption of causation.

In this area, the 2009 *World Online* ruling by the Hoge Raad may be relevant.[37] There, it was decided that a misleading prospectus could be presumed to have influenced the buying behaviour of stock owners. The Hoge Raad alleviated the burden of proof for claimants in view of the European law background of the prospectus liability and the European law mandate of effective and dissuasive enforcement. As a result, in prospectus liability cases, the court may presume that the misleading prospectus influenced the investor's decision unless the specific circumstances of the case point in a different direction. Whether this EU principle of effectiveness plays a role elsewhere is not certain.[38]

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31 See art 1018f (5) of the DCCP (after entry into force of the WAMCA).

32 Hoge Raad, 27 November 2009, ECLI:NL:HR:2009:BH2162 – World Online. Attorneys are not allowed to act as assignee of claims which are subject of ongoing litigation in their district; see art 3:43 of the DCC.

33 Art 6:95ff of the DCC.

34 Art 6:104 of the DCC.

35 'If someone, who is liable towards another person on the basis of tort or a default of complying with an obligation, has gained a profit because of this tort or non-performance, then the court may, upon the request of the injured person, estimate that damage in line with the amount of this profit or a part of it.'

36 Cf Hoge Raad, 24 December 1993, ECLI:NL:HR:1993:ZC1202 – Wayen-Scheers/Naus; Hoge Raad, 18 June 2010, ECLI:NL:HR:2010:BM0893 – illegal subletting.

37 Hoge Raad, 27 November 2009, ECLI:NL:HR:2009:BH2162 – World Online.

38 Cf Hoge Raad, 30 January 2015, ECLI:NL:HR:2015:178 – Staatsloterij/Loterijverlies. The Hoge Raad upheld in that ruling the declaratory judgment that the Dutch State Lottery had breached the misleading advertising directive: 'Dutch Supreme Court: State Lottery misled players over winning odds' (30 January 2015) <http://www.barentskrans.nl/en/news/lottery-misled-players/>. The burden of proof for claimants was however not alleviated.

E. Are there any demands for information against the alleged injuring party?

Pursuant to articles 87 and 88 of the DCCP, the court may hold an oral hearing at any stage of the proceedings, either to investigate whether a settlement is possible or to obtain additional information from the parties.[39] The court may do so either at its own initiative or at the request of one or more of the parties. There is no general discovery or disclosure under Dutch procedural law. Depending on the circumstances, a party may be obliged by the court to submit information and documents that are relevant to the case. If parties fail to do this, the court can draw adverse inferences if it deems appropriate. However, privileged data or documents are protected against disclosure, unless privilege has been waived.

III. General procedural law

A. Consumer and capital market law (Case 1 and Case 2)

1. Is a simultaneous coexistence of several legal actions possible?

Collective actions can co-exist with a joinder, a test case or the bundling of claims by an entrepreneurial party.[40] Such collective actions do not deprive the aggrieved parties of their individual right to litigate. Under the WCAM, individuals would need to opt out from the court-approved settlement to secure their individual rights.[41]

To date, several actions – collective actions and bundled claims – have simultaneously been initiated both by consumers and investors (VEB, stichting Investor Settlement Foundation, Consumentenclaim, Diesel Emissions Justice Foundation[42]).[43] Some of these organisations/foundations under Dutch law are still trying to settle. The only pending representative consumer action is the action brought before the Amsterdam District Court. The only pending representative investors' action is the one initiated by the VEB in February 2016.

2. Are there any procedural simplifications in consumer and capital market law?

No, there are no specific procedural simplifications in consumer and capital market law. The rules governing collective procedure are the same, irrespective of the legal provisions underlying the claim.

3. What is the binding effect of decisions for subsequent proceedings?

Court decisions, even decisions by the Hoge Raad, are not binding on courts in deciding future cases. There is no rule of precedent in Dutch law. Even the Supreme Court itself is not bound by its own decisions and from time to time amends its earlier opinions and judgments. The binding effect of collective action judgment is restricted to the representative organisation and the defendant.

Decisions of the Hoge Raad, however, are often followed by the lower courts. A lower court will generally take a test case judgment as a starting point. The same goes for a collective action judgment. Both can constitute the basis of a settlement. Individual circumstances define the possibility to challenge this judgment and to deviate from it.

This also holds particularly true for preliminary rulings issued by the Supreme Court upon the request of lower courts. In 2013, a procedure of referencing for preliminary rulings to the Dutch Supreme Court in civil cases came into existence. In cases in which the need for a landmark ruling is felt – often cases of mass damages – the Act on Requests for a Preliminary Ruling to the Hoge Raad enables civil courts to obtain in an early stage the answer to a pressing legal question. The new procedure has proven to be successful. The Act has furthered the development of civil law: development of the law, legal uniformity and legal certainty have all been stimulated by it.[44]

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39 Tom Claassens, 'Litigation in the Netherlands – A Practitioner's Guide' (2013) < http://loyensloeffwebsite.blob.core.windows.net/media/2116/litigation-in-the-netherlands-x.pdf >.

40 Ilja Tillema, *Entrepreneurial Mass Litigation; Balancing the Building Blocks* (Erasmus University Rotterdam 2019) 268–69.

41 Under the WAMCA, individual proceedings can be suspended upon request of the most appropriate party (art 1018m of the DCCP).

42 'Dieselgate: lawyers back legal action for Europeans affected by the scandal' <http://www.euronews.com/2019/11/28/dieselgate-lawyers-back-legal-action-for-europeans-affected-by-the-scandal>.

43 'Overzicht: Claims tegen Volkswagen vanwege dieselschandaal' (13 June 2017) <http://www.nu.nl/volkswagen-schandaal/4211413/overzicht-claims-volkswagen-vanwege-dieselschandaal.html>.

44 <http://www.wodc.nl/binaries/2631-summary_tcm28-124548.pdf>.

4. When is the statute of limitations for collective redress suspended?

There are two limitation periods in damages actions. First, there is a limitation period of five years for a claim for compensation of damage. The limitation period begins on the day following the one on which the claimant was aware of both the damage and the identity of the person responsible for the damage. There is also a long-stop period of 20 years following the event that caused the damage.

The limitation period can be interrupted by sending a letter to the allegedly liable party (stating in unequivocal wording that the party is deemed liable and the rights to claim compensation are reserved) or by initiating legal proceedings. This starts a new period of five years. In 2014, the Hoge Raad held that a representative association or foundation could, for the benefit of all potential claimants it represents, interrupt the statute of limitations by sending such a (pre-litigation) letter to potential defendants.[45]

5. Who bears the litigation risks?

In a summons procedure where a collective claim is submitted, the principle is that 'the loser pays'. So, if the claim fails the claimant organisation will be ordered to pay court fees and the defendant's attorney fees. However, as a rule, the 'loser pays' rule means that the cost awards consist of fixed and therefore predictable amounts in court fees; the opposing party's attorney's fees are calculated on the basis of a crude tarification model, which means that the amounts are predictable and very low. The actual attorney costs almost always go beyond these tariffs, which means that even a winner loses somewhat. This prospect is thought to both deter overly litigation-happy parties and ensure access to justice for less pecunious parties.[46]

6. Who receives any awarded or settled damages or skimmed profits?

Any awarded damages or profits accrue to the claimants in case of a voluntary joinder of individual claims. Under the WAMCA 2019, the court will award damages to groups of interested parties in accordance with their group characteristics ('damage scheduling').[47]

In Case 2, the damage suffered does not concern consumers as such but investors who see the value of their stock plummet. The main line of defence of the manufacturer will likely be that there is no causation between the late notification of the damage: the stock value would have decreased just as well if the exchange would have been informed earlier. This defence will not help if, due to the tortious manipulation, there is damage in the difference between the hypothetical situation (i.e. the hypothetical current market value of the shares without the manipulation) and the actual situation (i.e. the market value of the shares after the manipulation came to light).

Whether the illicit gains obtained by the board member can be skimmed off to the benefit of the aggrieved shareholders remains to be seen. The first hurdle is whether the act by the board member was wrongful vis-à-vis all shareholders (or only in relation to the actual shareholders he sold his shares to). If the tort lies in the trading as such and not so much in the fact that he was complicit in keeping information from the market, then it is debatable whether the board member actually acted wrongfully vis-à-vis any and all shareholders. The second hurdle is causation: what damage did he cause to the shareholders by selling his shares? In such cases, where damage is difficult to assess, the court may label the profits as the damage suffered by the shareholders. That would mean that the board member can be held to account for the profits and that the shareholders have a right to skim off these profits.

B. Recent developments

1. Consumer law (Case 1)

The foundation Stichting Volkswagen Car Claim has hoped (and still hopes?) for an appropriate settlement, of which a financial compensation may be a part. The foundation is privately funded, and private investors will probably get up to 15–18 per cent of the damages/compensation awarded. Car owners may join the collective

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45 Hoge Raad, 28 March 2014, ECLI:NL:HR:2014:766 – VEB NCVB/Deloitte Accountants.

46 Note that under the WAMCA 2019, in a collective claims action the court has the authority to award the respondent(s) the attorney tariff multiplied by five if the claim is apparently frivolous. Conversely, if the respondent is ordered to pay damages to the interested parties, the court may also award 'reasonable and proportionate court costs and other costs that the successful party has incurred'. See art 1018l of the DCCP (after coming into force of the WAMCA 2019).

47 Art 1018i of the DCCP (after coming into force of the WAMCA 2019).

action for free. Thousands of owners have done so; the foundation, however, is acting in the interest of all 180,000 involved car owners in the Netherlands (the number of applicants is not a prerequisite for standing).

After the negotiations hit a dead-end street – discussions have not even been entered – the foundation filed collective (representation) action proceedings under article 3:305a of the DCC at the Amsterdam District Court against *inter alia* Volkswagen, Audi, Škoda, SEAT, Dutch importer PON, software supplier Bosch and the official Dutch Volkswagen dealers on 2 May 2018. The foundation has requested the court to declare that the sales contracts can be terminated, that Dutch car owners are authorised to return the affected vehicles to the Dutch dealers (authorised Volkswagen dealers) and to receive a full refund of the purchase price. For consumers and business drivers who have purchased the affected cars second-hand, the foundation is demanding a declaration that Volkswagen c.s. have acted unlawfully.[48] The claim is, among other legal grounds, based on national laws transposing the Consumer Sales Directive[49] and the UCPD. In order to establish the breach of the UCPD, the administrative decision of the ACM might be helpful, though not decisive. If the court honours the foundation's claims, car owners may use this judgment in a subsequent (individual) procedure.[50] Another possibility is that Volkswagen offers an appropriate solution such as a hardware-repair; the software-fix already offered by Volkswagen does not suffice according to the foundation. It has indeed led to new problems and many complaints.

During the first stage of the proceedings, only the former board members of Volkswagen objected to the jurisdiction of the District Court of Amsterdam. Volkswagen and the other defendants accepted the jurisdiction of the District Court of Amsterdam. Since the proceedings against the defendants will be dealt with simultaneously, the proceedings against the former board members would delay the progress of the proceedings against Volkswagen and the other defendants. To prevent this delay the foundation decided to remove the indictment against the former directors from the summons proceedings. The former directors can be sued in a separate procedure if need be.

The second stage, in which the Amsterdam District Court had to address all kinds of other formal questions such as to the admissibility of the claim, was completed on 20 November 2019.[51] The Court gave all parties – after exchanging written documents – the opportunity to explain their views orally during a plea that was held in October 2019. Most collective claims of the foundation were declared admissible. The interests the action aims to protect were considered to be 'sufficiently similar'. The Court considered it plausible that Dutch car owners have suffered damage from Dieselgate. Two claims, however, were not admissible: a declaratory judgment that car owners are not obliged compensate the seller after dissolving the sales contract for the use of the vehicle and a declaratory judgment that dealers are responsible for unfair commercial practices. Both claims require that (diverging) individual circumstances are taken into account and thus pertain to interests that are not sufficiently similar.

The Court will now examine the merits of the admissible claims in the third, final stage of the proceedings. The hearing will take place at the beginning of June 2020.

2. Capital market law (Case 2)

Volkswagen is currently defending a representative shareholder case based on a liability claim. The representative action proceedings under article 3:305a of the DCC were initiated in February 2016 by the VEB with a writ of summons. The VEB acts for those Volkswagen shareholders who (1) held Volkswagen shares on Friday evening 18 September 2015 after trading hours, (2) bought these Volkswagen shares through an investment account in the Netherlands or through a Dutch bank or broker, and (3) have incurred a loss.[52]

The Netherlands have in recent years become a preferred forum for investor actions from around the world. The aforementioned Dutch initiative, organised on behalf of Volkswagen securities holders whose investment interests were harmed as a result of the emissions-related scandal may represent the most significant effort since the *Converium* case to try to use the Dutch WCAM procedure on behalf of an aggrieved class of investors. This initiative raises a number of potentially complicated questions about jurisdiction, priority, potential preemption,

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48 <http://www.stichtingvolkswagencarclaim.com/progress-process>.

49 A potential problem is the notice of default: a consumer should inform the seller that a lack of conformity exists to benefit from his rights. This may jeopardise the availability of the remedies under the consumer sales directive.

50 In individual procedures car owners will face the potentially difficult task of proving that the damages they suffered were caused by Volkswagen's misleading practices.

51 Rechtbank Amsterdam, 20 November 2019, ECLI:NL:RBAMS:2019:8741.

52 'VEB holds Volkswagen liable for investor losses' (25 September 2015) <http://www.veb.net/artikel/05790/veb-holds-volkswagen-liable-for-investor-losses>.

and international comity.[53] It is rather uncertain whether the Dutch mechanisms can be used where the alleged wrongdoing took place outside the Netherlands and there are no other factors connecting the case to Netherlands.[54] For instance, at this very moment a preliminary ruling from the CJEU is pending on request of the Hoge Raad in another mass damage case. The question is on the international jurisdiction of the Dutch court (article 7, introductory sentence and paragraph 2 of the Regulation Brussels I-bis (Brussels I Recast, no 1215/2012)).[55] The Supreme Court has asked the CJEU whether article 7(2) of the Brussels I-bis regulation should be interpreted as meaning that the direct occurrence of purely financial damage to an investment account held in the Netherlands as a result of investment decisions made under the influence of widely distributed but incorrect, incomplete or misleading information from an international listed company, provides a sufficient starting point for assuming international jurisdiction of Dutch courts.[56] In the meantime the collective proceedings against Volkswagen were stayed. It is expected that the outcome of this preliminary ruling procedure has implications for the Volkswagen case.

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53 Kevin M LaCroix, 'Dutch Shareholder Foundation Seeks to Represent Global Class of VW Investors' (*The D&O Diary*, 17 February 2016) <http://www.dandodiary.com/2016/02/articles/international-d-o/dutch-shareholder-foundation-seeks-to-represent-global-class-of-vw-investors/>.

54 Kevin M LaCroix, 'Dutch Court Dismisses Collective Investor Action Against BP on Jurisdictional Grounds' (*The D&O Diary*, 13 October 2016) <http://www.dandodiary.com/2016/10/articles/international-d-o/dutch-court-dismisses-collective-investor-action-bp-jurisdictional-grounds/>; <http://www.issgovernance.com/file/publications/764v4s5.pdf>.

55 Hoge Raad, 14 June 2019, ECLI:NL:HR:2019:925; Marcus Wagemakers, 'Supreme Court seeks answers from the european Court of Justice in BP case' (16 June 2019) <http://www.mwagemakers.nl/supreme-court-seeks-answers-from-the-european-court-of-justice-in-bp-case/>.

56 Sjoerd Yntema, 'Deepwater Horizon' (*Leiden Law Blog*, 27 June 2019) <https://leidenlawblog.nl/articles/deepwater-horizon>.