MASS DAMAGES IN THE NETHERLANDS: TO COLLECT OR NOT TO COLLECT, THAT IS THE QUESTION

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1. INTRODUCTION

Roger Van den Bergh has always shown a great interest in the use of legal remedies to correct market failures either caused by concentrations (in his publications on competition law) or by negative externalities (in his publications on accident law). In that respect, Roger often stressed that it is not only important to have adequate *material* legal provisions in place to reach the goal of curing market failures, but that *procedural* remedies are at least as important, more particularly when, for example because damages would be wide-spread, individual victims would lack sufficient incentives to bring private enforcement actions. For that reason Roger has often paid attention to collective action problems, more particularly in the field of competition law[3] and has often argued in favour of an appropriate design of collective actions to stimulate private enforcement of competition law.[4] Because to a large extent the reasons why in case of widespread damages private enforcement often fails also apply to the domain of consumer law, Roger has made a similar plea in favour of an appropriately designed collective action to remedy enforcement failures in the consumer law area.[5]

Roger has been an important source of inspiration, teacher and co-author who literally accompanied both of us in our first steps on the road towards an academic pursuit of Law and Economics. We owe most of what we know today about Law and Economics to Roger, and it is for that reason that we have chosen this important topic of collective action as the topic for the contribution with which we wish to honour our friend and teacher Roger Van den Bergh. The reason for choosing this topic is not only that it has been one of the issues on which Roger has done a lot of work and which, moreover, relates to his interests in competition law, consumer law and accident law. It is also an area which in the country where Roger has been working for the past 25 years (the Netherlands) has been in full evolution. To some extent in Western-Europe the Netherlands may have been leading in the debate on facilitating collective actions of consumer claims. There is currently a legislative draft which proposes to introduce a collective damages action, which in itself is desirable from a Law and Economics perspective. However, the draft has particular features which may equally worry Roger. The problem, as we will explain below, is that the draft refers to an 'Exclusive Representative' which to some extent runs counter to what Roger always has defended, being that also in collective action it remains important to have competition between representatives. Roger was always critical, for example, of the idea of granting an exclusive monopoly of representation to one consumer organisation. It is for that reason that in our contribution we will critically review the Dutch proposals concerning collective damage actions. The topic is of great interest, also because Roger has already critically addressed the European Directive on damages actions[6] and he will undoubtedly still use the economic analysis to provide a further critical approach to European developments in this domain.

We proceed as follows: in section 2 we briefly recall the economic theory which provides the basis for the collective action; then in section 3 we discuss the current situation in the Netherlands as far as collective damage actions is concerned and focus on the draft bill in section 4. Section 5 concludes.

2. COLLECTIVE ACTION: THE THEORY

We will explain that the basis in the economic theory for a collective action is related to the concept of market failure (2.1); this is related to the fact that without collective action private litigation may fail (2.2). Collective action may therefore remedy this market failure, but only when specific conditions are met (2.3).

2.1. REMEDYING MARKET FAILURES

As we already mentioned in the introduction, there can be many market failures, often related to the problem that damage can have a widespread nature. An example can illustrate this: suppose that Roger would have been overcharged by his mobile phone provider because his provider engaged in a cartel agreement with the other

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[3] Kirst & Van den Bergh 2016; Van den Bergh 2006.
[4] Van den Bergh 2013; Van den Bergh & Keske 2007.
[5] Van den Bergh & Visscher 2008; Van den Bergh 2008.
[6] Van den Bergh 2013; Kirst & Van den Bergh 2016.

providers in the Netherlands. As a result Roger paid €50 per year too much to his mobile phone provider during a period of six years. The classic problem in this particular case is that Roger's individual damage may only be €300. For a variety of reasons, some of which we will discuss below, Roger may not be willing to bring a private lawsuit to recover this €300. However, whereas Roger's individual damage may be relatively low, the problem is obviously that in addition to Roger, there may have been 9,999 other consumers who were disadvantaged by the mobile phone cartel to the same extent for the same period. In that case the total number of victims would be 10,000 and the total social loss would be (10,000 x 300 =) €3 million. However, as none of the individual subscribers has enough of an incentive to bring a lawsuit, the market failure remains.
The problem obviously not only arises in the domain of competition law, but also in consumer and tort law: in tort law the potential tortfeasor should be exposed to the negative externalities related to his behaviour. If the tortfeasor is able to externalise risk to others, it will lead to a too high activity level and a too low investment in care. Externalities in that particular example will not be internalised and the market failure remains. The problem in both cases is related to a lack of incentives for the individual victim to use private enforcement.

2.2. LIMITS IN PRIVATE ENFORCEMENT

There is a variety of reasons why a victim will not use private enforcement, even though in material law the conditions to do so are fulfilled. This problem can arise in every situation where there are dispersed losses, meaning that the individual damage for a separate victim is relatively low, but the total social losses are large.
A first obvious reason for the lacking private enforcement is high cost aversion. Given the possible uncertain outcome and the potentially high court and lawyers' fees, a problem of rational apathy (also referred to as rational disinterest) may arise: the victim may find the investment in the suit (more particularly the lawyers' fees, assuming that he cannot call on legal aid) too high compared to the potential benefit (of €300).[7]
Secondly, legal proceedings also lead to substantial risks of a loss. Even in the situation where the individual damage would be high enough to make the procedure worthwhile, a risk-averse victim could abstain from the procedure out of fear for high costs in case of a loss. For the individual victim it may be difficult to accurately assess the probability of losing or winning. Even if the victim would assess his likelihood of success as relatively high, risk aversion may lead him to refrain from starting the case out of the fear to have to bear high costs in case of a loss.
A next problem, also indicated by Roger in the framework of competition law, is that a lack of information could lead to the situation that the victim fears not to be able to meet the high thresholds concerning wrongfulness or causation. There is even a likelihood that the victim (like Roger in the case of the mobile phone cartel) is not even aware of the fact that he was the victim of an actionable tort.[8]
In addition, victims could wait to see what other individuals would do. Roger, being smart and rational, could for example examine whether others would file a lawsuit against the mobile phone company, which could procure information that he could subsequently use in his own case. In that case, Roger would act as a free-rider. The problem is obviously that if too many victims would act as free-riders, the fear of free-riding would inhibit any of them from starting private enforcement.
Finally, there may also be situations where the individual damage is so small that the courts would hold that there is no standing for the particular victim. That may for example be the case if there is a reduced air quality or in other cases of environmental damage.
For all the above-mentioned reasons there is a large likelihood that notwithstanding potentially high social losses, private enforcement would fail as a result of which the above-indicated market failure would persist.

2.3. IS COLLECTIVE ACTION THE SOLUTION?

The Law and Economics literature, Roger including,[9] has argued that granting the right to a group to act on behalf of all individuals that suffered a loss, may reduce the rational apathy problem. The logic is that the costs can now be shared collectively and therefore spread over all individuals. The bundling of claims therefore allows a lower cost per individual.[10] Collective action therefore undoubtedly has important benefits, but potential drawbacks as well.

2.3.1. Benefits of Collective Action

A collective action allows sharing one claim collectively and therefore spreading the costs over a larger number of individuals. This cost-advantage is also shown in empirical research: Eisenberg and Miller found that the costs

[7] See on this problem of rational apathy Schäfer 2000.
[8] Van den Bergh 2013, p. 17.
[9] Van den Bergh 2013, but see also recently Hylton 2017.
[10] See Keske, Renda & Van den Bergh 2010, p. 59.

of individual litigation and legal counselling decreased with an increasing number of participants in a class action.[11] The bundling of claims via a collective action therefore allows remedying the rational apathy problem in case of scattered losses. In that sense a collective action can add to deterrence and cure the market failure.
If, moreover, the result of the collective action is binding for all those who are involved in the action, it also allows dealing with the free-rider problem. That is especially the case if it is impossible for participants to first await the results of the collective action.
The degree to which rational apathy and free-rider behaviour can be countered through a collective action depends on the size of the group and the way in which the group is formed. If only a few victims participate, the problem may be that the costs per plaintiff are not sufficiently reduced to cure the rational apathy. If it would also remain possible to first await the result of the collective action, the free-rider problem would persist. From this perspective there are strong economic arguments in favour of a compulsory collective action, which completely avoids the free-rider problem as victims cannot opt-out. However, that would lead to strong resistance from a legal perspective. The traditional choice is rather between, on the one hand, freedom for individuals to join the group (a so-called opt-in model) versus, on the other hand, a model whereby in principle all are presumed to join the class, unless they have shown themselves not to be interested (a so-called opt-out model).[12]
Economists strongly favour opt-out systems for the reason that since there was a rational apathy problem anyway, it allows much better deterrence: only a small number of victims would actually use the opt-out. Lawyers, on the other hand, generally do not like the mandatory aspect of the opt-out and hence would prefer a system whereby the victims can voluntarily chose to join.[13] This again is criticised in the literature since 'in many instances the problem of rational apathy would avoid most individuals from bringing a claim anyway',[14] as a result of which the argument that an opt-out model would frustrate the access to individual justice is in fact often an empty shell.

2.3.2. Drawbacks of Collective Action

Collective action unfortunately does not only have benefits. One problem is that someone has to act on behalf of the class. It may usually be an attorney who acts as an entrepreneur and will represent the class. The fact that the class will be represented by someone else creates so-called principal-agent problems. It is well known that if it is difficult for the principal to control the agent, there is an inherent danger that the agent would serve his own interests rather than the interests of the principal. Principal-agent problems will already arise in individual legal cases as it may anyway be difficult for an individual client to judge the quality of the work done by the attorney, as he simply lacks the expertise to do so.[15] In collective actions the interest of each individual plaintiff is relatively small and the legal issues at stake may be complex, as a result of which the principal-agent problems may even be larger. There is, in other words, the danger that the agent will serve his own interest and that no individual victim may have sufficient incentives to control the behaviour of the agent.
The principal-agent problem has especially been examined in relation to the payment system of the agent. The agent has an interest in, after judging the merits of the case and making a substantial upfront investment, collecting a substantial fee out of a positive judgment or a settlement. The attorney representing the class will de facto pre-finance the claim often on the basis of a conditional fee arrangement. The literature has analysed how different remuneration systems for lawyers affect the timing of a settlement.
Generally, one can hold that a lawyer who bears his own costs under a contingency fee system would accept a settlement offer sooner (and probably for lower amounts) than under an hourly fee system. By accepting settlement of the case, the lawyer could (under conditional fees) save on costs and would thus have incentives to settle for low amounts and relatively quickly.[16] In that case conditional fees would create a potential conflict of interests between the lawyer and his client.[17] However, one should realise that a conflict of interest also arises under an hourly system, albeit in the opposite direction. In that case the self-interested lawyer will have an incentive to refuse the settlement in order to increase the hours he can spend on the case.
The empirics with respect to this issue seem to be somewhat divided: Rickman argues that in repeat periods of bargaining, lawyers under a contingency fee system could also reject early settlement offers as 'hard bargaining' in order to increase the final offer.[18] However, in another study Fenn and Rickman argue that lawyers who bear some risk (through contingent payment) appear indeed to settle their cases quicker.[19] Interestingly, they also found that legally aided cases were associated with longer delays to case closure, thus arguing that legal aid would reduce

[11] Eisenberg & Miller 2004.
[12] For differences see Keske, Renda & Van den Bergh 2010, p. 60-61.
[13] See Stadler 2009, p. 315-317.
[14] So Tuil & Visscher 2010, p. 185.
[15] See DeMott 1998.
[16] See Gravelle & Waterson 1993.
[17] See Faure, Fernhout & Philipsen 2010, p. 37.
[18] Rickman 1999.
[19] Fenn & Rickman 2010, p. 145.

the incentives for case monitoring.[20] Helland and Tabarrok analysed the effects of fee limits on contingencies fees and found that in Florida fee limits led to a 21 per cent increase in settlement duration.[21] The argument hence runs that limits on contingency fees reduced the lawyers' incentives to monitor the cases carefully, as a result of which they take longer to settle. The fee limits that thus were meant to protect clients apparently had the adverse effect of increasing settlement duration.[22]

The payment system can also have an influence on the incentives of a lawyer to accept a settlement. It can generally be held that a shift to a result-based compensation system provides better incentives for a lawyer to accept a settlement. Under a result-based compensation system, lawyers may have a greater propensity to settle since they will only continue to negotiate (or decide to litigate) when it is cost effective.[23] In theory a system whereby the lawyer is paid on an hourly basis has the reverse (undesirable) effect: lawyers may have incentives not to accept a reasonable settlement and hence to litigate too many cases, although the latter could be controlled through legal ethics or through reputational sanctions. These reputational effects may, however, mostly work in cases of repeat players such as, for example, commercial clients rather than with individuals (like consumers) who are so-called 'one-shotters.'

There is ample empirical evidence of how the payment systems of lawyers influence incentives to settle, especially in cases of collective actions (like class actions). Various studies of Hensler have shown dangers of so-called collusive settlements. These collusive settlements would be mainly beneficial for the attorney (receiving high fee awards) but not for the consumers.[24] Well-known cases are those whereby the settlement provided victims with low-value coupons for price reductions on further purchases instead of damage payments, whereas the attorney's fee was calculated on the basis of the total value of the coupons.[25] To some extent, principal-agent problems may arise that could endanger the efficiency of a settlement in collective action cases. However, as Hensler makes clear, some of the horror stories of abuses by (US) attorneys involved in class actions are more myths than reality, arguing that such abuses would be more the exception than the rule.

Another potential problem that emerges from the literature is the danger of unmeritorious suits being brought in order to extract an early settlement.[26] Plaintiffs would bring (unmeritorious) class actions, exercising pressure to settle (in order to avoid legal fees and reputational losses), as a result of which defendants would settle (even for high amounts) although the case may have no merits at all. Even though this type of 'legal blackmail' may certainly occur, Hensler also stresses that these horror stories should not be overstated, as there is no strong empirical evidence that this would actually often occur in the legal practice of class actions.

The result is that in theory the payment system (more particularly conditional fees) could either give incentives for too early or too many settlements (in case of legal blackmail), although the empirical evidence on both issues is inconclusive.

2.3.3. Arguments for Monitoring

Given the potential problems resulting from the principal-agent relationship between the class and the lawyer representing the class, there are some arguments for including safeguards. In principle various types of remedies for this principal-agent problem could be worked out, varying from (1) restoring control by the class members to (2) judicial review of the merits of the case, the terms of the settlement and the amount of the contingency fee and (3) auctions determining the lawyer to represent the class.[27] The most popular type of safeguard, at least in the US, is the second one, a judicial review which can be found in Rule 23 (e) of the Federal Rules of Civil Procedure which requires the judge to review (after a public hearing) and then approve a proposed settlement only if he finds that the settlement is 'fair, reasonable and adequate.'[28] Federal judges also used this rule to extend their authority for reviewing and approving (or disapproving) fee requests in class actions.[29] This shows that in collective actions there is an important task for the judge not only to review the terms of the settlement, but also to review the fee requested in such a class action. This review by the judge could hence provide an important remedy against collusive settlements.[30]

3. COLLECTIVE DAMAGES ACTIONS IN THE NETHERLANDS – THE CURRENT SITUATION

[20] Fenn & Rickman 1999.
[21] Helland & Tabarrok 2003, p. 517-542.
[22] Fenn & Rickman 2010, p. 143-144.
[23] Faure, Fernhout & Philipsen 2010, p. 37.
[24] Hensler 2010, p. 157-158.
[25] Keske, Renda & Van den Bergh 2010, p. 65; Hensler 2000.
[26] Keske, Renda & Van den Bergh 2010, p. 66.
[27] Idem, p. 67.
[28] See Hensler 2010, p. 156.
[29] Idem., p. 157.
[30] Tuil & Visscher 2010, p. 185.

3.1. INTRODUCTION

After briefly having sketched the economic approach to collective action in section 2 above, we now turn to an economic evaluation of the Dutch approach to collective damages actions. If one oversees this development, it is interesting to see that over time, the Dutch situation is becoming more and more in accordance with the Law and Economics principles set out in section 2. We do not claim that the Dutch legislator had the explicit goal to do this, but one can certainly view these developments *as if* the legislator has tried to build an efficient and effective framework for collective litigation. In section 3.2 we discuss the current article 3:305a from the Dutch Civil Code, after which we analyse the Dutch Act on Collective Settlement of Mass Damage Claims (Wet Collectieve Afwikkeling Massaschade – WCAM) in section 3.3. Neither article 3:305a nor the WCAM enable a collective handling of damages in case of an unwilling defendant. This lack of a 'big stick' was the reason for a legislative initiative to introduce mass damages claims in the Netherlands. The development of this initiative, in various stages, forms the topic of section 4.

3.2. ARTICLE 3:305a CIVIL CODE

Before article 3:305a was introduced in 1994, no general arrangement for collective litigation existed. There were only a few specific acts which allowed representative organisations to litigate on behalf of represented individuals.[31] In addition, in several judgements the Dutch Supreme Court acknowledged standing of representative organisations who meet certain criteria to bring a collective claim on behalf of others, because such a collective claim was necessary for effective and efficient legal protection.[32] And there were, of course, the possibilities of assignment for collection, granting power of attorney and mandating.
Article 3:305a introduced a general competence for representative organisations to initiate collective actions. Reasons to introduce a collective action included better enforcement of legal rules and prevention of their violation. Rational apathy (albeit not in those wordings) was mentioned as important reason for the need for collective action.[33]

The fact that article 3:305a enables collective litigation can be evaluated positively in itself. After all, in as far as collective litigation overcomes rational apathy (because the costs and risks per plaintiff decrease and/or the information asymmetry diminishes), the deterrent incentives of tort law are improved. In cases where there is no rational apathy, collective litigation can be desirable because it reduces litigation costs as compared to a series of individual claims. After all, the questions which are identical in the individual claims (e.g. regarding unlawfulness, causation et cetera) can be answered for all cases at the same time.[34] Furthermore, settlement negotiations are less complicated than in a series of individual settlements and the larger group size on the plaintiffs' side likely results in a more equal bargaining power and hence in quicker and better settlements. In addition, the total size of the losses caused by the defendant(s) can be better assessed if more victims claim damages. This size of the losses is an important factor in determining negligence (on the basis of the (incremental) Hand formula), so that collective actions can improve the determination of negligence as well. And if collective litigation reduces the litigation costs of the defendant, a larger fraction of his assets remains available for tort damages.[35] However, the more different the individual cases are, the smaller the benefits of collective litigation will be. It is therefore a good starting point that article 3:305a requires 'similar interests'. Also in cases where no individual has standing as victim, but there are social losses (e.g. environmental pollution), a representative action can provide desirable behavioural incentives.[36]
As discussed is section 2.3.2, principal-agent problems may increase in collective litigation vis-à-vis individual litigation, because in the former case the incentives per victim to adequately monitor the representative organisation and/or the lawyer are low.[37] The fact that article 3:305a requires that the representative organisation is a foundation or association with full legal capacity, and that this organisation according to its articles of association has the objective to protect specific interests, addresses this issue. In addition, article 3:305a(2) states that the representative organisation is inadmissible if the claim insufficiently guarantees the interests of the represented persons. This also limits the degree to which the organisation can serve its own interest, thereby departing from the interests of the represented parties. One could even consider requiring that the representative organisation in the past has already shown to represent the interests at stake, to avoid a boom of *ad hoc* organisations of which the individual victims cannot assess the quality.[38] However, as Roger Van den Bergh has

[31] Examples are misleading advertisement, onerous standard terms, copyright infringements and equal treatment.
[32] For example Hoge Raad 27 June 1986, *NJ* 1987, 743 (*De Nieuwe Meer*).
[33] Tweede Kamer, vergaderjaar 1991-1992, 22 486, nr. 3, p. 2.
[34] Frenk 1994, p. 285.
[35] Silver 2000, p. 205.
[36] See e.g. Faure 1991, p. 585.
[37] See e.g. Tzankova & Kortmann 2010, p. 124.
[38] Tzankova & Kortmann 2010, p. 119.

repeatedly argued, the demands should not become so strict that in fact a monopoly of one representative organisation results, because that increases the agency-issues again.[39] Of course, the degree to which the represented parties can actually influence the organisation and the organisation can influence the lawyers, affect the degree to which the agency issues really are tackled.[40] An opt-out possibility for represented parties who are not satisfied with the work of the representative organisation, so that they might decide to bring their claim individually or via another organisation, can be beneficial in this respect.[41] Article 3:305a(5) offers this opt-out possibility. In addition, in 2011 the *Claimcode* was introduced. In this piece of self-regulation, basic requirements were formulated for representative organisations.
Article 3:305a(2) states that the representative organisation is inadmissible if it has made insufficient attempts to reach a settlement over its claim through consultations with the defendant. This emphasis on settlement and consultation makes economic sense, for several reasons. First, the system costs of settling are lower than those of litigation. Second, if parties reach a settlement, they can include all the aspects which they deem relevant. It is uncertain that a court-decision is also able to do so. This point relates to the general preference in Law and Economics for voluntary transactions over forced transactions, hence for property rules over liability rules.[42] Such voluntary transactions are more difficult to reach if transaction costs are high. Article 3:305a reduces transaction costs in mass damages cases, exactly because it is now possible for one (or a few) representative organisation(s) instead of many individuals to negotiate with the defendant(s). Of course, this advantage has to be weighed against the agency issues, but the above-discussed requirements regarding representability and opt-out limit these problems. Third, the emphasis on consultation reduces the risk of blackmail settlements. It is unlikely that a representative organisation that wants to coerce the defendant into such a settlement can meet the criteria for sufficient consultation. This will result in inadmissibility of the organisation, so the blackmail-threat of the organisation is incredible.

So far, article 3:305a can be evaluated positively from an economic perspective. However, paragraph 3 contains a problematic provision: the collective claim cannot be filed in order to obtain compensatory damages. An important argument for this prohibition is that the losses of individual victims may differ substantially and hence cannot be adequately dealt with in a collective procedure.[43] In our view, this argument cannot justify the prohibition. First, paragraph 1 already requires 'similar interests' and the issues that *are* similar in the individual cases can be handled collectively. Second, one can apply 'damage scheduling' to distinguish between groups of victims. Of course this does not result in the same diversification as individual claims, but it is very doubtful whether such individual claims would be brought in the first place, due to rational apathy. In our view, a collective damages action which distinguishes between groups of victims is preferable to individual litigation which will not happen in the first place. In addition, from an economic perspective it is more important that the tortfeasor pays the correct amount than that every individual victim receives the correct amount.[44]
Due to the prohibition of paragraph 3, article 3:305a lacks a 'big stick' (i.e. the threat of a collective damages action) to induce a defendant to settle. If the settlement fails, there is no real risk of a series of individual claims, due to rational apathy. This likely affects the settlement behaviour of both parties, resulting in a lower quality settlement than with the threat of litigation. It is very doubtful whether the actions that paragraph 3 does allow (injunction and public disclosure of the judicial decision) provide enough incentives. Again, rational apathy might play a role (now these actions do not result in a monetary reward), especially because these actions suffer more from free rider problems than a damages action. After all, free riders would fully and directly profit from such actions, whereas in a damages action they would still have to undertake activities to claim individual damages.

Summarizing, article 3:305a opens the possibility of collective litigation, which is desirable given all the advantages. It addresses principal-agent issues as well as the problem of blackmail settlements. However, it does not allow collective damages actions, which is problematic.

3.3. THE WCAM

If the representative organisation and the defendant reach a settlement regarding damages, due to the Act on Collective Settlement of Mass Damage Claims (Wet Collectieve Afwikkeling Massaschade – WCAM) they can ask the Court of Appeals in Amsterdam to declare this settlement generally binding. This way, also victims who were not involved in the settlement can be held to the achieved result. From an economic perspective this is desirable, because it avoids the need of subsequent (individual or collective) claims of those victims who were not involved in the settlement. This reduces the system costs.

[39] Van den Bergh 2008, p. 294; Van den Bergh 2013, p. 30.
[40] Schäfer 2000, p. 198; Keske, Renda & Van den Bergh 2010, p. 70ff; Keske 2010, p. 113; Van den Bergh 2013, p. 29.
[41] Van den Bergh 2008, p. 294; Van den Bergh 2013, p. 30.
[42] Calabresi & Melamed 1972.
[43] Tweede Kamer, vergaderjaar 1991-1992, 22 486, nr. 3, p. 2.
[44] Kaplow 1994, p. 313ff; Kaplow & Shavell 1996, p. 194.

The Court has to assess whether the organisation is representative, whether the interests of those involved are sufficiently guaranteed and whether the agreed amounts are reasonable, which combats agency-issues. The same holds for the opt-out possibility, which enables victims who are not satisfied by the result to start a separate procedure. This also limits the risk of structural under-compensation and hence under-deterrence. On the other hand, the opt-out possibility may increase the risk of free-riding, because victims can first wait until the result of the settlement is known. However, empirical research generally shows very low opt-out rates.[45]
A possible problem with the WCAM is that it requires a joint request of representative organisation and defendant. This implies that a defendant cannot be *forced* into a collective handling of damages. Again, the big stick is lacking. This is exactly the reason for the draft bill on collective damages actions, which we will discuss in section 4.

4. COLLECTIVE DAMAGES ACTIONS IN THE NETHERLANDS – THE DRAFT BILL

4.1. INTRODUCTION

In July 2014, a pre-draft of the bill on collective damages actions was published for public consultation. Goal of the bill is to enhance an efficient and collective handling of mass damage. A balance between the interests of the victims and the defendant(s) is sought, in which both the problems of rational apathy and of frivolous suits and blackmail settlements play a role. The draft bill introduces the desired big stick by proposing a procedure for mass damages actions. We will briefly sketch this pre-draft in section 4.2. In section 4.3 we will discuss the recommendations the 'Lawyers' Group' made in response to the pre-draft. We analyse the final draft in section 4.4. As mentioned in section 3.1, with each step the proposal becomes more and more in conformity with Law and Economics principles.[46] However, as indicated in section 1, a possible problem of market power for representative organisations is introduced at the same time.

4.2. THE PRE-DRAFT FROM JULY 2014

The pre-draft maintains the emphasis on consultation, which is indeed desirable. The pre-draft actually requires concrete attempts for consultation, rather than a pro forma attempt. This decreases the risk of frivolous suits and hence can be evaluated positively. In addition, the requirements regarding representativeness of the organisation are increased, e.g. concerning its expertise.[47] Specific attention is spent to the risk that an organisation might enhance its own financial interests rather than the interests of the represented. This is good because it addresses agency-problems, but the requirements should not result in only one or a few eligible organisations.
An attractive feature is that the court decides about admissibility of the organisation before it addresses the issue whether the defendant has acted unlawfully. This reduces system costs because frivolous claims are terminated quickly, and it limits the risk of blackmail settlements.
After the decision on admissibility, the parties first have to try to reach a collective settlement. If this fails, the same is tried but now under direction of the court, possibly using mediation. If this fails, the court orders, on request of one of the parties, the presentation of a proposal for a collective settlement, possibly using a third party (e.g. a mediator) to help the parties. If this fails, the court itself can decide on a collective handling of the losses, and the decision can be (partly) based on the proposal from the previous phase. In all described phases, if a party does not try hard enough to reach a settlement, the court may stop the procedure. This again reduces the risk of frivolous claims and blackmail settlements.[48]
In our view the emphasis on trying to reach a settlement is good. However, it is problematic that so many steps have to be taken before the court decides on the collective handling. A quicker procedure would be less costly and would probably provide more incentives to indeed reach a settlement, before the court decides the case. Also problematic is that the pre-draft envisages a possible opt-in before the court decides on the handling (so before parties know what the result will be). If too few people opt in, the court may refrain from a decision. In section 2.3.1 it already became clear that opt-in procedures are evaluated negatively in Law and Economics. But, of course, better an opt-in than no collective damages procedure in the first place! If the court has decided on a collective handling, all parties that already opted in are bound by it, and other parties can now also opt in (so an opt-in after the result is known). Here again, all arguments against opt-in and in favour of opt-out hold. Note that in case of an opt-out action, not all parties may actually collect their damages, so it does not by definition result in more compensation. However, provided that the non-collected part of the damages does not flow back to the defendant, the opt-out confronts tortfeasors better with the losses they have caused.

[45] Eisenberg & Miller 2004, p. 1532. This - American - research does not deal with the WCAM.
[46] We will not discuss the 'scope rule' which deals with the issue how closely connected the mass claim should be to the Netherlands.
[47] For a debate on these requirements, see Stapel & Thuijs 2014 and Arons & Koster 2014.
[48] We therefore do not share the fear of Van Duin & Lawant 2015 that the possible long procedure exactly induces blackmail settlements.

In conclusion, the pre-draft rightfully introduces a collective damages action, in which the emphasis still lies with reaching a settlement. However, the proposed procedure seems too complicated and long (which increases the system costs), the opt-in is undesirable, and the increased requirements may result in market power for only one or a few representative organisations.

4.3. THE RECOMMENDATIONS FROM THE LAWYERS' GROUP

The pre-draft was subject of consultation and in April 2015 a meeting of stakeholders took place. Following this meeting, a group of practising lawyers from both the plaintiff and the defendant side, together with lawyers from the Department of Safety and Justice, has further elaborated upon several points of discussion. This has resulted in a set of Recommendations,[49] which are broadly supported by many stakeholders.

The first Recommendation pleads for clear and strict admissibility requirements regarding governance, financing, expertise, track record etc. of representative organisations. Such organisations have to argue why they meet the requirements. The requirements, which are based on the Claimcode, should be included in the legislation, because self-regulation via the Claimcode did not have the desired effect. This will not surprise a Law and Economics audience, which generally is sceptical towards self-regulation.[50] Existing organisations such as the Consumentenbond are assumed to meet the requirements. As became clear above, clear and substantial requirements are indeed desirable to address agency-issues and to avoid frivolous suits. However, they should not result in too high barriers to entry. This holds even more now existing organisations are assumed to meet the requirements, which may have an anticompetitive effect to the advantage of these incumbents. Van Boom and Weber fear that the requirements are too demanding for collective claims which do not concern damages.[51]

The second Recommendation introduces the possibility for the court to appoint an Exclusive Representative ('ER'), in case more organisations are involved in the procedure. Given the market power of this ER, it is essential that enough competition exists in the battle to become ER. An advantage of an ER is that it may reduce system costs as compared to having multiple organisations doing similar work. However, the distance between one ER and the represented parties is likely larger than when working with more organisations (which might all represent similar yet not identical interests). It is therefore good that the Recommendations allow for appointing several ERs. This enables closer connections between the organisations and the represented parties, and retains competition between the organisations to serve the represented interests well (which reduces agency-problems).

The third Recommendation replaces the opt-in of the pre-draft by an opt-out. Individual victims can opt out before the collective procedure starts. A decision by the court is binding for all those who did not opt out. However, if a settlement is reached, there is still an opt-out possibility at that phase. The replacement of the opt-in by an opt-out can be evaluated positively.[52] The opt-out before the procedure allows victims with high losses to choose for an individual procedure (they cannot start a separate collective procedure) and the opt-out after a settlement is reached limits the risk of low quality settlements due to agency-issues. The Recommendations do not clarify what should be done with the non-collected part of the damages. From an economic perspective, this money should not flow back to the defendant because that would reduce the degree of internalisation.

The fourth Recommendation pleads for a simplified procedure. The court first sets a deadline for reaching a settlement. If this fails, the defendant can respond to the merits of the claim. Throughout the procedure the court can instruct the ER to further substantiate the losses of the victims, or to provide a damage schedule. The proposed simplification is to be applauded, especially removing the phases in the procedure which only have a low chance of success. This reduces the system costs and the greater threat of a court decision may induce settlement.

In conclusion, the emphasis still lies with reaching a settlement, which is desirable. The procedure is simplified and the opt-in is replaced by an opt-out, which is also positive. However, the increased requirements for representative organisations may result in undesirable market power, especially now existing organisations are assumed to meet the requirements.[53] In addition, working with one Exclusive Representative may exacerbate these problems. The possibility to appoint multiple ERs therefore is important.

4.4. THE CURRENT DRAFT BILL

[49] https://www.rijksoverheid.nl/documenten/rapporten/2016/11/10/tk-2015-aanbevelingen-juristengroep-uitvoering-motie-dijksma-def.
[50] See e.g. Zacharias 2009, p. 1152.
[51] Van Boom & Weber 2017, p. 297. This topic lies beyond the scope of our chapter, which focuses exactly on the collective damages actions.
[52] We expect that Roger Van den Bergh shares this view. For example, about European Commission Recommendation C (2013) 3539/3 on collective redress, he wrote 'It may be doubted that the recommendation will solve the collective action problems in cases of mass harm, since the opt in requirement may reduce the number of claims….' See Kirst & Van den Bergh 2016, p. 18. Arons & Koster 2017, p. 490 are critical about this opt-out (while Arons & Koster 2014 seemed more positive).
[53] Bauw & Voet 2017, p. 244 also mention the risk of monopolizing the market for collective procedures and refer to Belgium as an example.

The current draft bill has chosen to follow the Recommendations closely, and to depart only on a limited number of issues.[54] We will not repeat all the issues where the Recommendations and the draft are similar, but instead will focus on the differences. The envisaged procedure, which again induces parties to settle, does not distinguish between the cause of the losses, so that not only torts and breach of contract, but also infringements of competition law should be dealt with this procedure. As mentioned in section 1, Roger Van den Bergh has spent ample attention on collective redress for infringements on competition law and in our view, the current draft addresses several of his concerns, e.g. regarding opt-in versus opt-out and agency-issues.[55]

An issue on which the draft bill originally departed from the recommendations, is that in the draft bill all collective procedures would be dealt with by one District Court (namely Amsterdam). An important reason for this concentration was that it allows specialization.[56] However, if a case is local or regional, the Amsterdam Court may decide that a different Court will handle the case. Both centralisation and the option for decentralisation make economic sense. Biard has extensively analysed mass litigation and the question whether judges are able to provide all the safeguards law expects them to provide. One conclusion was that specialization may help in enabling judges to do so.[57] However, in local or regional cases, this advantage is outweighed by the lower information and procedural costs if the case is handled by the regional court. The envisaged concentration in Amsterdam is, however, recently removed from the draft.[58] The primary reason does not seem to be that concentration and specialization is no longer deemed desirable, but that this might also be necessary on the *content* of the claim, e.g. maritime law or governmental liability. Such specialization exists in different courts and from that perspective it makes sense to handle collective claims on such topics by the court already specialized in that area. In essence we see a trade-off between on the one hand specialization in the area of collective claims, and on the other hand specialization in a specific area of law. In our view it is likely that in specific areas of law, specialisation on the content is more important than specialisation in collective claims as such (especially now collective claims are relatively rare). However, for more general topics such as product liability of infringements of consumer law, it still seems desirable to concentrate the mass claims in one court, to allow developing expertise specifically in the collective redress of such cases.

The draft also departs from the Recommendations in not allowing an opt-out after a settlement.[59] Above we explained that this opt-out limits the risk of low quality settlements due to agency-issues, so that we do not support this change.[60] However, we have also argued that several other characteristics combat agency issues, and that opt-out rates are low anyway, so the magnitude of this step in the wrong direction might be limited.

A final departure concerns the role of the Exclusive Representative. In the draft, the Court can decide that other plaintiffs than the ER are also allowed to perform processual acts, so that they can plead (these plaintiffs are entitled to a fair trial ex article 6 ECHR).[61] In the recommendations, these plaintiffs only had a right to be heard if there were reasons to do so. The proposal in the draft is in our view a desirable departure from the Recommendations, because it limits the market power (with all the attached possible problems) of the ER.

5. CONCLUSIONS

We discussed the evolutions in Dutch legislation with respect to collective damages actions to honour Roger Van den Bergh. In his spirit we have shown how the economic approach to collective action can be used in a fruitful manner to enrich the debate on the desirability of collective actions. As we sketched in section 2, it is not difficult to make an economic argument in favour of allowing collective actions: it is an important tool to cure rational apathy and free-riding problems that would especially exist in case of dispersed losses. That could lead to a lack in private enforcement and therefore to a market failure in a variety of cases, more particularly those on which Roger paid a lot of attention, being competition and consumer claims, but also in claims related to mass torts. However, the economic literature equally indicated that collective actions do not only have benefits. As someone will have to represent the class, potential principal-agent problems may arise which can lead to several questions regarding for example payment structures, but also the timing of settlements. The economic literature (both theoretical but increasingly empirical) therefore shows that the effectiveness of collective actions (in curing market failures) strongly depends on the particular design.

The Netherlands started with private enforcement merely based on individual actions. Article 3:305a of the Civil Code enabled collective actions, but still had the major drawback that it could not be used for claiming monetary compensation. That seriously limited the attractiveness of article 3:305a. That fundamentally changed when the

[54] Tweede Kamer, vergaderjaar 2016-2017, 34 608, nr. 3, p. 5.
[55] See e.g. Van den Bergh 2013.
[56] Tweede Kamer, vergaderjaar 2016-2017, 34 608, nr. 3, p. 35.
[57] Biard 2014, p. 288 ff. Also see Faure & Visscher 2015, p. 62. Tzankova 2017, p. 118 advocates training for judges to better handle mass litigation.
[58] Tweede Kamer, vergaderjaar 2016-2017, 34 608, nr. 6, p. 20.
[59] Tweede Kamer, vergaderjaar 2016-2017, 34 608, nr. 3, p. 10.
[60] Bauw & Voet 2017, p. 246 and Van Boom & Weber 2017, p. 299 also negatively assess the removal of this second opt-out possibility.
[61] Tweede Kamer, vergaderjaar 2016-2017, 34 608, nr. 3, p. 44.

WCAM allowed the Court of Appeals of Amsterdam to declare a settlement regarding damages generally binding for all victims. An important weakness of the WCAM is that it relies on voluntary collaboration of both parties, including the defendant. An uncooperative defendant can therefore not be forced in a collective redress.
The pre-draft bill of July 2014 did provide such a possibility to force defendants in the procedure, but still had important drawbacks. One drawback was that the procedure was very complicated; the other was that it relied on opt-in, which may seriously reduce the effectiveness. This pre-draft was followed by Recommendations from a lawyers group in April 2015, which had a strong influence on the current draft bill. The Recommendations chose for an opt-out model and pleaded for a less complex procedure. The current draft bill follows the Recommendations to a large extent, but still has a few deviations which are not all desirable. The specialisation of the judge who would be dealing with collective claims has to some extent been redressed by focusing on a specialisation in a specific area of law (rather than in handling collective claims). Still that may provide a better adjudication than with no specialisation whatsoever. A second point is that in the draft bill there is no opt-out after a settlement. Opt-out could be beneficial to limit agency problems. In practice it may not be a big issue as there are other ways to deal with the principal-agent problem and opt-out rates are low anyway. A final point of concern is the introduction of a so-called Exclusive Representative (ER). The risk of too much market power for representative organisations has repeatedly been addressed by Roger Van den Bergh, so that this figure of ER should be used with caution. The current draft bill departs from the Recommendations in also allowing others than the ER to act on behalf of the group. That is entirely in the spirit of Roger as it allows for more competition between representatives.

Summarising, one has the impression that the design of collective damages actions in the Netherlands increasingly goes in the direction of the economic desiderata as they have been formulated in Roger's various publications in this domain. Still there remain specific concerns, more particularly in the area of competition between the organisations that could represent a group. There is a danger that the requirements related to the representativeness of the group would become so severe that only few organisations could meet them. De facto this could lead to a strong market power and a de facto oligopoly on the market for collective action. Within the collective claims there also seems to be market power for the Exclusive Representative. Our conclusion is therefore straightforward: the Dutch legislator would do well to study the many writings of Roger Van den Bergh, not only on collective action, but also on competition, in order to further improve the draft bill on collective damages actions.

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