

## The funding of collective redress by entrepreneurial parties: the EU and Dutch context

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*The development of collective redress in practice depends on the availability of adequate funding. In recent years third-party funding by entrepreneurial parties has become an important source of financing collective actions and settlements. Both at the EU level and in most of the Member States third-party litigation funding and related forms of entrepreneurial lawyering have generally been viewed with suspicion, though the new Representative Actions Directive (RAD) does enable third-party funding under certain conditions. The Netherlands is perhaps the Member State best known for its collective redress mechanisms, and the role of third-party funding has been important for its development. This paper discusses the financing of collective redress from a European and Dutch perspective. It assesses in how far EU law, and in particular the RAD, enables the third-party funding and how this has developed in the Netherlands. It concludes that the reluctance in Europe towards third-party funding is still visible, but the RAD and recent developments in the EU acknowledge its importance. As to the Netherlands, considering some restrictions in the latest legislative addition enabling collective action damage claims, it remains to be seen what role Dutch collective redress and developing funding mechanisms will play in Europe and beyond.*

### 1 Introduction

Collective redress has developed at a different pace in the EU Member States over the past few decades. While some have expansive collective redress mechanisms, others Member States have only limited procedural means or collective redress is hardly existent as yet. Advancing collective redress has been challenging as a result of these different levels of development and the great divergences between the existing specific collective redress mechanisms in the Member States. An important step is the adoption of the EU Directive on Representative actions for consumers in November 2020 (Representative Actions Directive, RAD).<sup>3</sup> Crucial in the development and practice of collective redress is adequate funding. At the EU level and in most of the Member States third party litigation funding and related forms of entrepreneurial lawyering have generally been viewed with suspicion. The 2013 Recommendation on Collective Redress,<sup>4</sup> however, did not prohibit funding by third parties, provided that certain requirements are fulfilled.<sup>5</sup> The new RAD more explicitly enables third-party litigation funding under certain conditions and provided that

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<sup>3</sup> Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409/1.

<sup>4</sup> Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201 p. 60-65.

<sup>5</sup> Recommendation, Nos. 14 to 16.

it is allowed under national law.<sup>6</sup> The Netherlands is a Member State known for having an advanced system of collective redress. Particularly its collective settlement system (WCAM) has received a lot of both positive attention and criticism in Europe and beyond. On 1 January 2020, the Dutch collective redress system reached a momentum when after many years of discussion it was completed when a collective action procedure for damages was introduced. Funding of collective redress actions has played an important role in this development.

This paper discusses the financing of collective redress – including both collective actions and collective settlements – from a European and Dutch perspective. It assesses in how far EU law, and in particular the RAD, enables the growth of third-party funding and how this has developed in the Netherlands, against the background of the necessity to provide appropriate funding for collective redress. Section 2 sketches the development of entrepreneurial mass litigation and describes the types of entrepreneurial parties that currently operate in the mass litigation market. Section 3 discusses EU developments on funding of collective redress and the rules on entrepreneurial parties. Section 4 turns to collective redress and funding debates in the Netherlands, also against the EU background. Section 5 discusses what further developments can be expected in the Netherlands and EU, in light of the potential benefits and drawbacks of entrepreneurial parties. Conclusions on the implications of the present rules and practice on the future of funding collective redress are drawn in Section 6.

## **2 Funding collective redress**

### **2.1 A brief sketch of the origins**

The term entrepreneurial litigation or lawyering stems from the USA.<sup>7</sup> It refers to attorneys who act as risk-taking entrepreneurs by investing in litigation with the aim of obtaining a profit. Within the context of class actions, the main route for doing so is by obtaining part of the proceeds. The so-called common fund doctrine provides the economic engine that drives class actions. In the case of success, the class counsel receives a ‘reasonable fee’ out of the successful action’s proceeds (the common fund).<sup>8</sup> This remuneration structure aims to avoid conflicts of interest between class members and to resolve the free-rider problem. The judicial supervision and determination of the attorneys’ remuneration are considered crucial elements of an effective class action/settlement regime.<sup>9</sup> The court reviews and awards the fee and informs the class members, who are entitled to raise their objections against the proposed fee award.<sup>10</sup> The fee is calculated either by determining a percentage of the proceeds, by awarding a reasonable hourly fee, possibly uplifted by a multiplier, or by a combination of both approaches. The percentage or multiplier chosen depends on factors such as the result, type, complexity and duration of the action and the amount of the proceeds.<sup>11</sup>

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<sup>6</sup> Art. 10 ff RAD.

<sup>7</sup> See, for instance, J.C. Coffee Jr, *Entrepreneurial litigation: its rise, fall, and future*, Cambridge: Harvard University Press 2015.

<sup>8</sup> See Coffee 2015, p. 18, 26 ff, and J.P. Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, *Harvard Law Review* 1974/5, p. 1602 ff.

<sup>9</sup> T. Eisenberg, G. Miller & R. Germano, Attorneys’ Fees in Class Actions: 2009-2013, *NYU Law Review* 2017/4, p. 938.

<sup>10</sup> Federal Rules of Civil Procedure 23(h).

<sup>11</sup> T. Eisenberg & G. Miller, The Role of Op-outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues, *Vanderbilt Law Review* 2004/5, T. Eisenberg & G. Miller, Attorney fees and expenses in class action settlements: 1993-2008, *Journal of Empirical Legal Studies* 2010/2, p. 248-281, B.T. Fitzpatrick, Do Class Action Lawyers Make Too Little?, *University of Pennsylvania Law Review* 2010/7, p. 2043-2083, and Eisenberg, Miller & Germano 2017.

So far, third-party litigation funding is limited within the US class action market, although it is of increasing importance. This type of litigation funding has its origins in Australia, where it has developed into an accepted form of litigation funding in the past 20 to 25 years.<sup>12</sup> Here, it is not the attorney but a third-party investor that is the beneficiary of part of the proceeds of a funded claim. Third-party funding was first allowed and used in insolvency cases in 1995, and has expanded to class actions from around 2004 onwards, in particular in securities and competition law cases.<sup>13</sup> The ‘entrepreneurial spirit of the legal profession’ first found its way into class actions through law firms that would pursue such actions by entering into conditional fee arrangements with individual class members.<sup>14</sup> However, such a funding construction turned out to be insufficient to fund class actions, and third-party funders entered the scene. Whereas two law firms have long been the main suppliers of class actions, nowadays, third-party litigation funding is the main enabler of Australian class actions.<sup>15</sup> The acceptance of third-party litigation funding in Australia is said to stem from austerity cuts that decreased public legal aid funding, and from funding difficulties in class actions: a lack of the necessary means to pursue such litigation and the cost risk that arises from the loser pays rule.<sup>16</sup> As, in general, the assignment of a bare right to litigate is not allowed; the funders receive a percentage of the proceeds from the class action. This can be arranged through individual contracts with class members or, in the absence of such an arrangement, the court might order all class members to contribute to the litigation funding costs.<sup>17</sup>

## 2.2 Developments in Europe

As most collective redress mechanisms in European jurisdictions are still relatively new and, so far, have focused mainly on (semi-)public bodies to operate the devices, entrepreneurial mass litigation is in its infancy. Yet it is on the rise, and has developed along the following lines.

In the early days of European (injunctive) collective redress, governments would subsidize certain private representative organizations, particularly in the area of consumer law, to – also – initiate collective redress.<sup>18</sup> The European Commission also subsidized collective actions by consumer associations, for (cross-border) injunctions to eliminate unfair terms in several Member States.<sup>19</sup> National public bodies could pursue

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<sup>12</sup> J. Kalajdzic, P. Cashman & A. Longmoore, Justice for Profit: A Comparative Analysis of Australian, Canadian and US Third Party Litigation Funding, *The American Journal of Comparative Law* 2013/1, p. 96 ff, G. McGovern e.a., *Third-Party Litigation Funding and Claim Transfer. Trends and Implications for the Civil Justice System*, Santa Monica: RAND Corporation 2010, p. 69, M. de Morpurgo, *Profit from justice: comparative legal and regulatory approaches to third-party litigation funding*, Milan: University of Milan 2014, p. 19.

<sup>13</sup> M.J. Legg, Shareholder Class Actions in Australia – The Perfect Storm?, *UNSW Law Journal* 2008/3, p. 669; V. Morabito & V. Waye, Reining in Litigation Entrepreneurs: A New Zealand Proposal, *New Zealand Law Review*, 2011/2, p. 331; M. Legg e.a., The rise and regulation of litigation funding in Australia, *Northern Kentucky Law Review* 2011/4, p. 628, Kalajdzic, Cashman & Longmoore 2013, p. 96.

<sup>14</sup> Morabito & Waye 2011 (fn. 13), p. 325, 331.

<sup>15</sup> Morabito & Waye 2011 (fn. 13), p. 325; Kalajdzic, Cashman & Longmoore 2013 (fn. 12), p. 96; V. Morabito, *An empirical study of Australia’s class action regimes. Fifth report*, 2017, available at SSRN 3005901, p. 35.

<sup>16</sup> Morabito & Waye 2011 (fn. 13), p. 329 ff, Kalajdzic, Cashman & Longmoore 2013 (fn. 12), p. 97-98.

<sup>17</sup> Kalajdzic, Cashman & Longmoore 2013 (fn. 12), p. 108, and V. Waye & V. Morabito, When Pragmatism Leads to Unintended Consequences: A Critique of Australia’s Unique Closed Class Regime, *Theoretical Inquiries in Law*, 2018/1, referring to, inter alia, *Pathway Investments v. National Australia Bank* [2012] VSC 625 and *Money Max v. QBE Insurance Group* [2016] FCAFC 148.

<sup>18</sup> L.J.H. Mölenberg, *Het collectief actierecht voor consumentenorganisaties op het terrein van de algemene voorwaarden*, Arnhem: Gouda Quint 1995, p. 125-126, 131, 337, COM(2000) 248 final, p. 21, M.A. Gousgounis, *Association-Driven Class Actions: Peanuts Effect and Democratization of Litigation Governance*, 2009, available at SSRN 1469046, p. 2.

<sup>19</sup> COM(2000) 248 final, p. 9.

collective redress as well.<sup>20</sup> However, over the years it seemed that public funding and (semi) public enforcement did not suffice. For instance, one of the main obstacles identified in the evaluation of the 2001 Injunctions Directive was the lack of resources by (semi-)public bodies in light of the financial risks of litigation.<sup>21</sup> Moreover, despite the European Commission's pleas to Member States to increase their expenditure on legal aid, the public funding of legal aid started to decline in the mid-1990s, and austerity measures have been increasing ever since, not only with regard to subsidized legal aid but also court fees.<sup>22</sup> Hence, the budgets of potential intermediaries such as consumer organizations were limited, and the risk of severe losses was high due to the loser pays rule which has been adopted in most EU Member States.<sup>23</sup> As a consequence of the protective function of this rule – it aims to filter out frivolous claims – the cost risk of losing is duplicated: not only does the loser pay its own litigation costs, it is also ordered to pay (part of) those of its prevailing opponent. The enforcement gap might have other explanations as well. Private non-profit organizations have been faced with a decreasing number of members (and, thus, membership fees), and both private and public bodies have a range of tasks that extend (well) beyond litigating.<sup>24</sup> As dispute resolution is not their core business, non-profit organizations might also lack expertise and display risk-averse behaviour towards litigating, given the required investment, uncertainty and cost risk.<sup>25</sup> Moreover, they might be prone to capture or a loss of independence.<sup>26</sup>

Regardless of the current legislative/regulatory position on contingency fees and third-party funding, in practice, various types of entrepreneurial parties (see hereafter) have entered the mass litigation market in the past few years. Under the umbrella of promoting access to justice, they have started to test the water, attempting to seize the opportunities that collective redress might bring. Their entrepreneurial motive is mainly expressed in the shape of a contingency fee (alike) arrangement: in return for investing in the action,

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<sup>20</sup> Such as the UK Office of Fair Trading; see for more examples the Commission's Green Paper on Access of consumers to justice of 16 November 1993, COM(93) 576 final.

<sup>21</sup> EC Report on the application of the Injunctions Directive, COM(2008) 756 final, consideration 32. See also the EC White Paper on damages actions for breach of antitrust rules, COM(2008) 165 final, p. 4. See also the Commission's Report of the Fitness Check, SWD(2017) 209 final, p. 103, which found that '[c]lose to half of the responding qualified entities indicated that they did not initiate any injunction actions since June 2011, often because of insufficient financing.' Furthermore, Member States identified the financial risk related to injunctions as the main obstacle to its use. See also section 3.1.

<sup>22</sup> Green Paper on Access of consumers to justice of 16 November 1993, COM(93) 576 final, p. 86, Mölenberg 1995, p. 339, C. Hodges, 'England and Wales', in: D.R. Hensler, C. Hodges & M. Tulibacka, *The Globalization of Class Actions*, Los Angeles: SAGE Publications 2009, p. 110, and C. Hodges, 'Collective Redress: A Breakthrough or a Damp Sqibb?', *Journal of Consumer Policy* 2014/1, p. 3.

<sup>23</sup> Civic Consulting & Oxford Economic, Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union. Final Report, Berlin 2008, p. 70. See also the EC Report on the application of the Injunctions Directive, COM(2008) 756 final, consideration 32.

<sup>24</sup> See, for instance, the annual reports of the Dutch Consumentenbond (*Dutch Consumer organisation*), available at <consumentenbond.nl/over-ons/wie-zijn-we/onze-organisatie/jaarverslag>. See also G. Howells, Cy-près for consumers: ensuring class action reforms deal with "scattered damages", in: J. Steele & W.H. van Boom, *Mass justice. Challenges of representation and distribution*, Cheltenham: Edward Elgar 2011, p. 67.

<sup>25</sup> EC Report on the application of the Injunctions Directive, COM(2008) 756 final, consideration 32.

<sup>26</sup> M. Cappelletti & B. Garth (Eds), *Access to Justice Vol. I: A world survey*, Alphen aan den Rijn / Milan: Sijthoff/Noordhoff/Giuffrè 1978, p. 37, B. Schaefer, 'The Bundling of Similar Interests in Litigation. The Incentives for Class Action and Legal Actions taken by Associations', *European Journal of Law and Economics* 2000/3, p. 198; S.E. Keske, A. Renda & R. Van den Bergh, 'Financing and group litigation', in: M. Tuil & L. Visscher (Eds), *New Trends in Financing Civil Litigation in Europe. A Legal, Empirical, and Economic Analysis*, Cheltenham: Edward Elgar 2010, p. 67-72, S. Issacharoff & G.P. Miller, 'Will aggregate litigation come to Europe?', in: J.G. Backhaus, A. Cassone & G.B. Ramello (Eds), *The Law and Economics of Class Actions in Europe. Lessons from America*, Cheltenham: Edward Elgar 2012, p. 58; I.N. Tzankova & D.R. Hensler, 'Collective Settlements in the Netherlands: some empirical observations', in: C. Hodges, & A. Stadler (Eds), *Resolving Mass Disputes. ADR and Settlement of Mass Claims*, Cheltenham: Edward Elgar 2013, p. 104, M.G. Faure & L.T. Visscher, 'Een rechtseconomische visie op collectieve actie', in: M.G. Faure, L.T. Visscher & I.N. Tzankova (Eds), *Collectieve acties*, Zutphen: Uitgeverij Paris 2015, p. 83-84.

they are (fully) remunerated only if the action is successful. In some jurisdictions, the third-party funding of ‘regular’, two-party litigation is even reaching a point where it is considered ‘mainstream’. Of all of the European jurisdictions, this type of litigation funding is the most well developed in the UK; Germany and the Netherlands are catching up. It is plausible to assume that this type of litigation funding has sprung for similar reasons as those attributed to its rise in Australia: 1) considerably high litigation costs, 2) the limited availability of contingency fee arrangements,<sup>27</sup> 3) the ‘loser pays’ costs shifting rule, and 4) decreasing legal aid funding.<sup>28</sup>

### **2.3 The types of entrepreneurial parties and their funding techniques**

The financing of (all or part of) the litigation costs in return for a share of the proceeds by a party that is otherwise unconnected with the mass damage event takes various shapes. The following types of parties and funding techniques can be distinguished.

First, entrepreneurial lawyers can be involved. Contingency fee arrangements are, by and large, prohibited in Member States. However, attorneys/law firms can set up a claim vehicle or be involved therein (see also hereafter) and charge an hourly or conditional fee. Nowadays, various US law firms are active on the European mass litigation market. Such law firms might negotiate their fee to be paid out of the action’s proceeds (a common fund-like technique). For this construction, the consent of individual class members is not necessarily required as the entrepreneurial party can enter into such an arrangement with the liable party as part of the settlement agreement. Second, an entrepreneurial party might set up an ad hoc special purpose vehicle (SPV). This SPV can act as a representative organization, such as the Volkswagen Investor Settlement Foundation. In this situation, individual class members normally conclude a participation agreement with the SPV, which includes a contingency fee. Alternatively, the SPV might enter into a settlement agreement that includes a common fund technique such as the one above. The SPV can also use the construction of (bundled) assignments to pursue the claims, as MyRight has done. In this situation, individual class members transfer their claim or right of action to the SPV, and this transfer includes a contingency (like) fee. The SPV then pursues the claim(s) in its own name. Third, the ‘stranger’ can be a third-party litigation funder, such as AdvoFin or Bentham, that cooperates with a law firm or SPV. Such funders can be subdivided into passive and active ones, although in practice the dividing line is not always easily drawn.<sup>29</sup> A passive funder’s main role is to foot the bill. This construction does not necessarily include the individual class members; their contract can also be concluded with the law firm or SPV. The passive litigation funder is approached by the – potential – representative of the claimants, and if they decide to fund the action they are regularly informed but not actively involved in litigation strategies and decision-making. In essence, it is a financial services provider. Conversely, active funders are involved in litigation strategies and decision-making. Moreover, they might search for potential claims, screen cases, invest in developing the action on their own initiative, approach and inform potential claimants, and possibly initiate collective action themselves, through a SPV or in cooperation with a law firm. In that sense, they resemble the first and second type of entrepreneurial parties.

Entrepreneurial mass litigation can thus involve multi-bilateral relationships, which may comprise i) class members and attorney, ii) class members, attorney and entrepreneurial party, or iii) class members, attorney,

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<sup>27</sup> In fact, many litigation funders are former attorneys.

<sup>28</sup> See also De Morpurgo 2014 (fn. 12), p. 21.

<sup>29</sup> C. Veljanovski, ‘Third-Party Litigation Funding in Europe’, *Journal of Law, Economics & Policy* 2012/3, p. 408.

entrepreneurial party and representative organization that cannot be identified with the entrepreneurial party. Nevertheless, all aforementioned routes have in common that the entrepreneurial party provides or endorses a platform to assemble class members and increase leverage to pursue collective redress, in order to, eventually, share in the proceeds of the action in case of success.

### **3 The EU debate on the funding of collective redress**

#### **3.1 The collective redress debate in a nutshell**

In the European context, the debate on collective redress stems from discussions on consumer protection in the 1970s and 1980s, which resulted, inter alia, in the obligation for Member States to adopt means to prevent or cease infringements of various consumer laws.<sup>30</sup> Such injunctive action could be brought by qualified organizations with ‘a legitimate interest’ in representing consumers’ collective interests. The (mere existence of) preventive mechanisms would deter wrongdoers from displaying detrimental behaviour, which would render dispute resolution and compensation redundant. Over time, however, it appeared that injunctive relief did not suffice in preventing mass infringements. This debate resulted in various papers and studies, in particular in the field of consumer and competition law,<sup>31</sup> and in 2013 in the first horizontal European approach to collective redress.<sup>32</sup> This Recommendation set out basic principles that Member States needed to consider with regard to collective redress mechanisms, taking account of their own legal tradition. At all times, however, it was stressed that Europe would have to refrain from adopting anything like the American class action with its undesired effects.

In May 2017, the Commission published the Fitness Check of consumer rights and advertising, which included the Injunctions Directive.<sup>33</sup> The evaluation emphasized the importance of this directive, but also revealed its shortcomings. Injunction procedures remain underused, mainly due to the costs, length and complexity of the proceedings, the limited effect of rulings on, inter alia, individual consumer redress, and the difficulty of enforcing such rulings.<sup>34</sup> These shortcomings limit the procedure’s effectiveness in terms of reducing consumer detriment as well as its preventive, deterrent effect. The Commission therefore concluded that the procedure could be further harmonized in order to improve its use and effectiveness.<sup>35</sup> Parallel to this debate, in January 2018, the Commission issued its report on Member States’ practical implementation of the Recommendation and the application of its principles.<sup>36</sup> It concluded that the Recommendation has contributed to fruitful discussions and a reflection on collective redress across the EU, yet its impact by way of national legislation remains rather limited and unevenly distributed. Hence, the ensuing ‘New Deal for Consumers’ of April 2018 also focused on strengthening redress and enforcement aspects, by proposing the Representative Actions Directive.<sup>37</sup> Successfully so, as it was adopted in 2020, albeit after intense negotiations and many amendments. The RAD aims to modernize and

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<sup>30</sup> This option was included in the 1984 Directive on misleading advertising (84/450/EEC), the 1993 Directive on Unfair Terms in Consumer Contracts (93/13/EEC), and the 1998 Injunctions Directive (98/27/EC) (later repealed by Directive 2009/22/EC).

<sup>31</sup> See, inter alia, the Commission’s Green Paper on consumer access to justice, COM(93) 576 final, and the Commission’s Green and White Paper on damages actions in competition law, COM(2005) 672 final and COM(2008) 165 final.

<sup>32</sup> Recommendation 2013/396/EU, and Communication COM(2013) 401 final.

<sup>33</sup> Commission’s Report of the Fitness Check on various EU consumer law, SWD(2017) 209 final.

<sup>34</sup> Commission’s Report of the Fitness Check, SWD(2017) 209 final, p. 31 and p. 101 ff. See also section 2.2.

<sup>35</sup> Commission’s Report of the Fitness Check, SWD(2017) 209 final, p. 31 and 105.

<sup>36</sup> Commission’s Report on the implementation of the Recommendation, COM(2018) 40 final.

<sup>37</sup> A. Biard & X.E. Kramer, The EU Directive on Representative Actions for Consumers: a Milestone or Another Missed Opportunity, *Zeitschrift für Europäisches Privatrecht* 2019, p. 249-259.

replace the Injunctions Directive, by requiring Member States to implement an (additional) procedure for representative actions that allow for, inter alia, collective *compensatory* measures in situations of domestic or cross-border mass harm. It covers infringements of various types of European Union consumer law, including financial services and data protection.

### 3.2 Funding in the Recommendation and the RAD

As discussed in section 2.2, (semi-)public bodies might be allowed to pursue mass claims, but will not always be able or willing to do so. Nonetheless, until recently, the tone of the debate on *private* enforcers did not really change. In 2010, the European Commissioners Reding, Almunia and Dalli stated that adequate financial means should be available to allow citizens and businesses to have access to justice in a mass claim situation, but that contingency fees for third-party investors or lawyers should be firmly opposed as being incompatible with the European legal tradition.<sup>38</sup> The European Parliament subsequently stressed that a European framework on collective redress should not address contingency fees, as they are, by and large, unknown in Europe.<sup>39</sup> However, the European Commission did not leave the topic fully to the Member States' own devices. In its 2013 Communication, it mentions that contingency fees and third-party funding could serve the objective of ensuring access to justice. As it might also inspire abusive behaviour, regulation should be carefully designed.<sup>40</sup> Therefore, Recommendations 30 and 32 state that Member States, in general, should not permit contingency fees or third-party litigation funding, unless such funding is regulated by a public authority to ensure the interests of the parties.

A new chapter has started with the RAD, which lays down minimum requirements for representative actions in order to protect the collective interests of consumers. Member States are encouraged to provide entities with (structural) support, by way of access to legal aid, other public funding and/or by limiting court fees. In addition, however, the RAD acknowledges the potential contribution of third-party funders, albeit still cautiously. Representative actions can only be brought by non-profit qualified entities, but under conditions, third-party funding is allowed. In short, the RAD requires Member States to ensure that entities are transparent about their funding source in general, that the funder cannot unduly influence the entity's litigation decisions, is not a competitor of or dependent on the defendant, and that (other) conflicts of interest are prevented. Courts or administrative authorities should be empowered to assess compliance to these requirements.

The growing importance of third-party litigation funding and the interest of the European institutions is also evident from the recently published EPRS report on Responsible private funding of litigation.<sup>41</sup> The report analyses the development of third-party litigation funding, including the potential risks and impact. It considers that it is necessary to have access to affordable, high quality and efficient procedures and that the present EU legislative framework would need upgrading.<sup>42</sup> This is due to the diverging regulatory approach towards representative actions between Member States and the ensuing risk of a diverging level of

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<sup>38</sup> Joint information note by Commissioners Reding, Almunia and Dalli, SEC(2010) 1192, p. 6. See, similarly, the rejection of contingency fees by the European Economic and Social Committee in its Opinion on defining the collective actions system and its role in the context of Community consumer law, 2004/C 162/01, 25.6.2008, consideration 1.6.

<sup>39</sup> European Parliament's resolution of 2 February 2012, 2011/2089(INI), consideration 20.

<sup>40</sup> Communication of 11 June 2013, COM(2013) 401 final, p. 3, 8-9, and 15.

<sup>41</sup> J. Saulnier, K. Müller & I. Koronhalyova, *Responsible private funding of litigation. European added value assessment*, European Parliament Research Service, March 2021.

<sup>42</sup> *Ibid* p. 1.

protection for claimants across the EU. A responsible regulatory framework, according to the rapporteurs, should include contractual, ethical and procedural aspects of third-party litigation funding. They consider a moderate and a strong regulatory approach scenario, and compare their quantified benefits and costs to the baseline scenario. This results in a slightly higher European added value for the strong regulatory approach, but both scenarios allow for a higher level of guarantee for claimant rights, while allowing adapted flexibility for private funders. In addition, they ensure that liability costs for businesses and the cost of access to justice remain relatively low. A choice between the two, however, is not made. The rapporteurs provide the estimations as evidence to underpin further political debate on the matter, which should go beyond the potential economic added value.

#### **4 The Dutch debate on the funding of collective redress**

This section turns to collective redress and funding in the Netherlands. It will briefly discuss the Dutch collective redress mechanisms, address the position of these in the EU and globally, including criticism on the Dutch approach and continue with the discussion of funding of Dutch collective redress. In the aforementioned EPRS report the Dutch collective redress system are also referenced, and according to this report the Netherlands has the highest number of active litigation funders, after former EU Member State the United Kingdom.<sup>43</sup>

##### **4.1 Two instruments for collective redress: collective action and WCAM settlement**

Collective redress regulation in the Netherlands has been developed over the past decades and was completed when in 2020 a collective action for damages was introduced. At present, the Netherlands has two general civil law mechanisms that have been designed specifically for judicial collective redress: the collective action (section 3:305a BW) and the collective settlement (section 7:907-910 BW). These have been introduced in three stages.<sup>44</sup>

First since 1994, section 3:305a BW grants authority to either a foundation (*stichting*) or an association (*vereniging*) to bring a collective action to court. The act introducing this collective action is generally abbreviated as the WCA.<sup>45</sup> This action may concern any type of civil case and must represent similar interests of other persons. Until January 2020, the procedure did not allow the representative organization to claim for damages (no compensatory collective action). Collective actions were primarily brought in order to obtain a declaratory judgment that states the legal relationship between parties, such as the establishment that the defendant has committed a tort against the aggrieved parties. The judgment could then provide a basis for settlement negotiations – possibly followed by a collective settlement – or for individual proceedings to seek monetary compensation.

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<sup>43</sup> *Ibid* p. 8.

<sup>44</sup> See more extensively I. Tzankova and X.E. Kramer, From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands, in: A. Uzelac and S. Voet (eds.), *Class Actions in Europe: Holy Grail or a Wrong Trail?*, Springer (forthcoming 2021).

<sup>45</sup> *Wet Collectieve Actie* (Act on Collective Actions).



Second, in 2005, the law on collective settlements, abbreviated and widely known as WCAM,<sup>46</sup> was established.<sup>47</sup> In short, this procedure provides for one or more representative organizations on the one hand, and the alleged liable party on the other, to submit a joint application to the Amsterdam Court of Appeal requesting it to declare legally binding a settlement that holds rights to compensation for the class members. A WCAM settlement may follow a previous test case or collective action, or may have arisen fully out of court. As part of the WCAM proceedings, the Amsterdam Court of Appeal assesses whether the interests of the class members are sufficiently guaranteed; for example, whether the amount of the compensation awarded is reasonable. During the proceedings, other representative organizations and individual interested parties have the right to bring forward objections against the settlement. If the court declares the settlement binding, all individuals affected by the mass damage event are bound by the settlement, unless they opt out within a certain period (of at least three months) following the announcement of the order.

Third, in January 2020 the amended collective action regulation, abbreviated as WAMCA,<sup>48</sup> came into effect, which expanded the collective action under 3:305a to actions for damages. The aim is to enhance efficient and effective collective redress, while striking a balance between individuals' rights to damages and the justified interests of those held liable. One of the main features is to further stimulate collective settlements, by improving the quality of the representative parties (their governance, financing and representativeness), the coordination of collective actions (judicial case management and the appointment of an exclusive representative organization), and the finality of a settlement agreement or judgment (opt-out technique). A settlement remains the preferred route to obtain collective redress, but it was considered a carrot without a stick as such settlement is fully voluntary and no mechanism for a collective action against unwilling parties. The main motive for the amendment is to provide a 'threat' to cross swords in court if an alleged liable party is not willing to negotiate, and to prevent prolonging the settlement of mass damage because aggrieved parties need to bring individual actions after a declaratory judgment.

## 4.2 Dutch collective redress in the EU and global context

The Dutch collective redress system, and in particular the WCAM, has attracted considerable attention both at the EU and at the global level. While the WCAM was originally conceived as an instrument to settle a product liability case, it proved to be a useful instrument for transnational security cases in particular. The majority of the WCAM settlements so far have involved foreign parties. Key issues that have led to debate in the EU context in particular are the opt-out system and the wide territorial reach the Amsterdam Court of Appeal has allowed itself in declaring WCAM settlements binding in a number of high impact cases. As this has been the topic of a substantial number of papers,<sup>49</sup> this section will only briefly discuss the position of Dutch collective redress in the EU and international context, before turning to the funding of collective redress.

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<sup>46</sup> *Wet Collective Afhandeling Massaschade* (Collective Mass Claims Settlement Act).

<sup>47</sup> The WCAM has been discussed in an international context frequently. See, *inter alia*, H. van Lith, The Dutch Collective Settlements Act and Private International Law, study WODC and Ministry of Justice, available at <https://repository.wodc.nl/handle/20.500.12832/1803>, and published with Maklu, Apeldoorn, 2012; T. Arons and W.H. van Boom, Beyond Cheese: Exporting Mass Securities Claim Settlements from the Netherlands. *European Business Law Review* 2010, p. 857-883; X.E. Kramer, Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries, *Pacific McGeorge Global Business & Development Journal* 2014, p. 235-279.

<sup>48</sup> *Wet Afwikkeling Massaschade in Collectieve Acties* (Act on Collective Damages Claims).

<sup>49</sup> Morabito & Wayne 2011, p. 325, Kalajdzic, Cashman & Longmoore 2013 (fn 12), p. 96.

A key element of the Dutch collective redress is that it is primarily an opt-out system. In the WCAM settlement scheme this is without exception.<sup>50</sup> Opt-out systems make it without a doubt more attractive to reach a settlement as this gives final closure for the responsible party (the defendant in a collective action). It is generally known that opt-out rates are very low, whereas having to actively opt-in leads to far less individuals being bound by and being able to benefit from the settlement.<sup>51</sup> Dutch law provides for ample possibilities to opt out of the settlement or procedure and has various rules in place for the protection of the beneficiaries, while the court has an active role in securing the reasonableness of the settlement and the protection of procedural rights.<sup>52</sup> However, the Netherlands is in an exceptional position in this regard and has been criticized for that. Fear for abusive procedures and the requirement of having an express consent to litigation have led the EU to favour an opt-in model in the EU Recommendation, while exceptionally allowing for an opt-out if ‘duly justified by reasons of sound administration of justice’.<sup>53</sup> This has led to discussions in literature as to whether Dutch WCAM settlements would be enforceable in other EU Member States, particularly with a view the public policy exception.<sup>54</sup> With the European position in mind, the new WAMCA, which extended collective actions to damage claims, also relies on an opt-out rule but provides in principle for an opt-in regime for *foreign* parties.<sup>55</sup> This is in line with the RAD which provides that in *domestic* cases member State are free to either have opt-in or opt-out collective redress mechanism, but in *cross-border* cases only opt-in actions are allowed.<sup>56</sup>

The second element that has attracted attention is the establishment of international jurisdiction in a number of high-impact WCAM cases. These are the cases *Shell* and *Converium*, in which the Amsterdam Court of Appeal addressed the issue of international jurisdiction extensively.<sup>57</sup> The jurisdictional issue is complicated by the WCAM mechanism, where a joint request to declare the settlement binding is made by the representatives, on behalf of the victims (designated as “interested parties” or “beneficiaries”), and the allegedly responsible party. The Brussels I-bis rules, relying primarily on the court of the defendant and lacking specific rules for collective redress, are not a good match as there is no real defendant in such joint request. make the application of the existing jurisdiction rules complicated. In both cases the Dutch court accepted jurisdiction, which was fiercely criticized in relation to the *Converium* case in particular as not only the responsible company was non-Dutch, but also only 3% of the victims were domiciled in the Netherlands.<sup>58</sup> Some criticism was also voiced in the Netherlands, and this is one of the reasons for

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<sup>50</sup> See Article 7:908(2) Dutch Civil Code.

<sup>51</sup> See, for instance, Eisenberg & Miller 2004, p. 1532.

<sup>52</sup> See also Section 4.3.

<sup>53</sup> EU Recommendation, No. 21.

<sup>54</sup> See, *inter alia*, Kramer 2014 (fn. 47), p. 262-271; A. Stadler, Kollektiver Rechtsschutz und Revision der Brüssel I-Verordnung, in R. Geimer and R.A. Schütze (eds.), *Recht ohne Grenzen*, 2012, p. 951 at 957; A. Halfmeier, Recognition of a WCAM Settlement in Germany, *Nederlands Internationaal Privaatrecht* 2012, p. 176 at 178-180; H. Muir Watt, Brussels I and Aggregate Litigation or the Case for Redesigning the Common Judicial Area in Order to Respond to Changing Dynamics, Functions and Structures in Contemporary Adjudication and Litigation, *IPRax* 2012, p. 114.

<sup>55</sup> Article 1018f(5) Dutch Code of Civil Procedure. An exception is that the court may, at the request of a party, decide that non-Dutch domiciles and residents belonging to the precisely specified group of persons whose interests are being represented in the collective action, are subject to the opt-out rule.

<sup>56</sup> Article 9(3) RAD.

<sup>57</sup> Court of Appeal Amsterdam, 29 May 2009, ECLI:NL:GHAMS:2009:BI5744 (*Shell Petroleum NV/Dexia Bank NV Netherlands*); Court of Appeal Amsterdam, 17 January 2012, ECLI:NL:GHAMS:2010:BO3908 (*Scor Holding*).

<sup>58</sup> See, for instance, B. Allemeersch, Transnational Class Settlements: Lessons from “Converium”, in S. Wrba, S. Van Uytsel and M. Siems (eds.) *Collective actions: enhancing access to justice and reconciling multilayer interests?*, Cambridge University Press, Cambridge, p 364-384; A. Gidi, The Recognition of U.S. Class Action Judgments Abroad: The Case of Latin America, *Brooklyn Journal of International Law* 2012, p. 893-965. See for an extensive discussion Kramer 2014 (fn. 47), p. 248-262.

including a *scope rule* in the new WAMCA act for collective actions.<sup>59</sup> The new act provides that a representative only has legal standing if the claim has a sufficiently close relationship with the Netherlands.<sup>60</sup> This is further explicated, and requires that either (1) it is plausible that the majority of persons whose interests the legal action aims to protect have their habitual residence in the Netherlands; or (2) the party against whom the legal action is directed is domiciled in the Netherlands, and additional circumstances suggest that there is a sufficiently close relationship with Dutch jurisdiction; or (3) the event or events to which the legal action relates took place in the Netherlands. Though framed as a standing or admissibility requirement and not as a jurisdiction rule, one may wonder whether this rule is in line with the Brussels I-bis Regulation as it effectively restricts access to the Dutch courts beyond the criteria of international jurisdiction under EU law.<sup>61</sup>

### 4.3 The regulation of funding collective redress

The funding of collective redress has also received attention in the Netherlands, in part resulting from the international cases that have reached the Dutch courts. As discussed in section 4.1, both in collective actions and WCAM settlements, the pursuit of collective redress is undertaken by a representative organization that is legally structured as either a foundation or association. According to Dutch law, foundations and associations are legal entities established for a particular goal (usually but not exclusively a non-profit goal). Any profits made must be distributed in line with the goal of the foundation or association. For a long time, representative organizations were not otherwise regulated by law or bound by professional rules and rules of conduct, unlike Dutch practising attorneys.

However, an increase in the establishment of (ad hoc) representative organizations after mass damage events, combined with media criticism about the performance of certain organizations, led a group of practitioners to establish the Claim Code, a self-regulatory initiative on good governance that went into effect in 2011 and was updated in 2019. The Claim Code lays down general provisions that aim to give represented parties more clarity and guarantees on the organizations that act on their behalf. Since its establishment, the code has also been used as a guideline for courts to assess a representative organization's admissibility. The Claim Code is based on the principle of 'comply or explain' and consists of seven principles and some explanatory comments on, inter alia, the composition, task and remuneration of the organizations' (supervisory) board and, as of 2019, on third-party litigation funding. Neither the representative organization nor its (in)direct stakeholders should pursue profit, but the organization is allowed to be compensated for expenses incurred or services provided. This may include a reasonable uplift for future actions (the war chest) and/or the investment made. If the organization is backed by a third-party funder, this should be publicly disclosed, as well as the outlines of the funding arrangement. Furthermore, the funder should be financially sound, may not influence the organization's litigation decisions, nor otherwise create a conflict of interests. The Claim Code does not include sanctions for non-compliance, but courts can take this into consideration when assessing the organization's admissibility.

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<sup>59</sup> The WCAM has not been adjusted, while the criticism was raised in relation to the application of that mechanism.

<sup>60</sup> Article 3:305a (3)(b) the Dutch Civil Code.

<sup>61</sup> See more extensively I.N. Tzankova & X.E. Kramer, From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands, in: A. Uzelac & S. Voet, *Class Actions in Europe: Holy Grail or a Wrong Trail?*, New York: Springer 2021 (forthcoming, author copy available at SSRN 3755845).

Moreover, with the amended 3:305a regulation, the judiciary has obtained further powers to scrutinize representative parties' admissibility. The admissibility requirements concern the organization's governance, funding, and representativeness. The court has the authority to assess the organization or its (supervisory) board, its financial means, experience and expertise, its measures to enable class members to monitor or control its decisions, and to request the disclosure of its annual account and report. These strict requirements can be disregarded if they are deemed to be disproportionate, for instance, for representative organizations with a public interest motive.

Last but not least, the billion euro Fortis settlement has given rise to a landmark ruling that also sharpens the rules for (entrepreneurial) representative parties.<sup>62</sup> It entails two new interpretations of the WCAM regulation. Over the years, as part of collective settlements, the party that was held liable would bear the representative organizations' costs and fees.<sup>63</sup> This way, the recovery of costs 'and something' had turned into an important method of funding representative organizations' activities, as well as allowed them to establish a war chest for future activities. In the Fortis settlement, the Amsterdam Court of Appeal first held that its assessment of the settlement's reasonableness should always include that of the organization(s)' remuneration. Regardless of whether the organization is a non-profit body or has an entrepreneurial motive. And to help the court do so, parties should be transparent on their business model and the fee provisions in the settlement documents.

## **5 The way forward: paving the way or cutting off?**

The involvement of entrepreneurial parties in collective redress has two sides. In brief, four aspects can be highlighted as potential benefits or drawbacks. First, it can fuel access to justice by providing adequate funding, but it could also create or sustain a claim culture. Second, it can improve price and quality competition and thus benefit collective redress litigants or, on the contrary, create a race to the bottom as is sometimes feared. Third, it can increase the quality of claims and equality of arms as funders can serve to filter out unmeritorious claims, but it could also lead to adverse selection and abusive behaviour by (potential) litigants. And fourth, the involvement of entrepreneurial third-party funders could contribute to aligning interest of the parties involved, but on the other hand it may also trigger a conflict of interests. There is a fine line between these (de)merits, and they illustrate the difficult balancing act for policy makers.<sup>64</sup> And as the EPRS report on Responsible third-party funding analyses, the regulatory outcome strongly depends on the point of view taken: that of claimants, funders, businesses, the legal services market and/or the judicial system. Hence, the way forward will depend on policy objectives and political viability. As Silver has rightfully noted, 'the class action will always be a political football'.<sup>65</sup>

The structure of entrepreneurial mass litigation, with its multi-bilateral relationships, obviously complicates litigation and the traditional roles that are assigned to parties in litigation. It is added to an already convoluted litigation mechanism, in which the (un)quantifiable and (un)identified class members are or are not a formal party to the procedure. The extent to which the benefits and/or drawbacks of entrepreneurial

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<sup>62</sup> Amsterdam Court of Appeal 13 July 2018, ECLI:NL:GHAMS:2018:2422. On this judgment, see also Tzankova & Kramer 2021 (fn. 61).

<sup>63</sup> In particular in the Shell, Converium and DSB settlements. See I. Tillema, Tien jaar WCAM: een overzicht, *Maandblad voor Ondernemingsrecht* 2016, p. 90-99.

<sup>64</sup> See more extensively I. Tillema, *Entrepreneurial mass litigation. Balancing the building blocks*, The Hague: Eleven Publishing 2019.

<sup>65</sup> C. Silver, "We're scared to death": class certification and blackmail, *New York University Law Review* 2003/4, p. 1429.

mass litigation indeed occur is closely tied to this structure, the collective redress mechanism, and the relevant rules and features of the jurisdiction in which it operates. As has been shown, the Dutch legislative and regulatory framework increasingly acknowledges the importance of private funding and at the same time aims to curtail its risks. Entrepreneurial parties no longer enjoy full freedom of movement, but there is still plenty of leeway for the market to further flourish. Yet, many legal issues remain open for debate, such as the extent to which transparency requirements should be interpreted and what constitutes a reasonable fee. Hence, keeping a close eye on developments such as the Dutch ones is essential. Before (re)constructing the European regulatory framework, let us further monitor the rules and features in their natural habitat, the legal tradition and context in which they function. Leaning back is also prudent since private litigation funding, in the context of collective redress, is a relatively new phenomenon in Europe. As the EPRS report has noted, significant changes could affect the justice system, while businesses, claimants and funders might be affected with varying intensity. It remains to be seen how the market will mature, but incidents might occur that require (further) regulation, fine-tuning thereof or control thereon. At all times, however, it is essential to observe the place of the rules and features in the bigger picture and maintain the balance.

## **6 Concluding remarks**

In the USA, class actions have been part of the day-to-day legal business since the 1960s. In Europe, collective redress is a relatively new phenomenon, yet it is gradually developing into an important means of enforcement. Most European jurisdictions focus on non-profit bodies to pursue collective redress, yet increasingly, entrepreneurial parties are involved: law firms, claim vehicles and/or litigation funders. They, too, can profit from the outcome and therefore have a stake in the litigation that ensues from mass harm situations. As a complement to (semi-)public enforcement, legal aid insurance and class members' own resources, entrepreneurial funding might very well be part of the way forward. In this article, we have explored how entrepreneurial parties by way of investment have entered the litigation and discussed how collective redress and funding has developed in the EU and in the Netherlands, being one of the Member States where collective redress and third-party funding have advanced significantly. The reluctance in Europe to allow third-party funding is still visible in the RAD, but it does not forbid it. Most importantly, it explicates that the funding of collective redress needs attention and that Member States can take measures to this end. This opens the door to further develop paths taken and explore new ones. The EPRS report also makes clear that third-party funding is here to stay. It remains to be seen what the role of the Netherlands will be in European and global collective redress and new funding mechanisms. The latest legislative addition finally enables collective action damage claims. But at the same time the co-existence of different mechanisms, the new scope rule and other stringent requirements as well as reversing the opt-out rule for foreign parties may have an impact on the global reach and funding of Dutch collective redress.