Case note: ECLI:NL:RBDHA:2023:14036 (Airbus) and ECLI:NL:RBAMS:2023:6694 (TikTok)

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Airbus and TikTok: developing contours of judicial assessment of funder influence and funder fees in Dutch collective actions

Case Note: The Hague District court 20 September 2023, ECLI:NL:RBDHA: 2023:14036 (Airbus) and Amsterdam District court 25 October 2023, ECLI: NL:RBAMS:2023:6694 (TikTok)

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1. Introduction

This duo of cases presents notable decisions by lower courts pertaining to third-party funding of mass claims under the (amended) Dutch collective action regime (WAMCA). The decisions shed some welcome light on the courts' interpretations of admissibility requirements, in particular concerning the limits of a third-party funder's influence on the representative entity initiating collective proceedings. Moreover, the Amsterdam District Court has outlined a number of principles in *TikTok* for its assessment of funder success fees should a damages claim succeed on the merits. If these principles prove workable, they may serve as an example for other courts faced with the same task.

Commercial third-party litigation funding is currently the primary source of funding for collective actions seeking damages in the Netherlands.[2] Although TPLF is not legally regulated as such, courts must determine if a representative entity bringing a collective action has sufficient means to bear the costs of conducting the proceedings and that, in light of its funding arrangements, the entity has sufficient control over the litigation.[3] The latter requirement is intended to prevent undue influence by third-party funders, whose interests do not necessarily align with those of the class.[4] While the most recent edition of the Claim Code, a non-binding code of conduct for foundations and associations that bring collective actions, sets out a number of helpful principles for third-party funding, legislative guidance on the interpretation of the statutory requirement is sparse.[5] A clear(er) view of the boundary between

1. PhD Candidate, University of Groningen.
2. Cf. the findings of the recent report commissioned by the government on the possibility of a public litigation fund for collective redress, X.E. Kramer, I.N. Tzankova, J. Hoevenaars & C.J.M. van Doorn, *Nut, noodzaak, vormgeving en kosten van een (revolverend) processenfonds voor collectieve acties*, Den Haag: WODC 2023, p. 150-151.
3. Article 3:305a (2) (c) of the Dutch Civil Code (DCC). The recent transposition of the Representative Actions Directive (2020/1828) led to a minor addition in article 3:305a (2) (f) DCC, clarifying that the funder may not be a competitor of or dependant on the defendant.
4. Cf. *Parliamentary Papers II* 2017/18, 34 608, no. 10 and *Parliamentary Papers II* 2016/17, 34 608, no. 3, pp. 11-12 and 20.
5. Claim Code 2019, Principles II and III. The code regularly serves as point of reference for courts applying the statutory admissibility requirements.

acceptable and unacceptable levels of influence will therefore have to emerge as case law develops.

This case note first discusses the courts' decisions with respect to funder influence (para. 2), followed by the Amsterdam court's guidelines for funder fees (para. 3). It concludes with a comment, offering some thoughts on the implications and consistency of these decisions (para. 4). The discussion here is limited to the aforementioned topics, but the interested reader is advised that the judgments also contain noteworthy decisions with respect to the temporal applicability of the WAMCA collective action regime (*Airbus*) and the relation between the WAMCA regime and the GDPR (*TikTok*).

2. Limits of funder influence: a possible hit and a miss

2.1. The miss – Airbus

Airbus concerns a collective action on behalf of shareholders who allegedly suffered losses as a result of the company's failure to disclose its involvement in bribery practices. Two representative entities, AIRS and SILC, had initiated actions against Airbus, both of which the Hague District Court deemed inadmissible in the certification stage. AIRS failed to meet the requisite representativeness in order to litigate on behalf of the group (class), with an estimated 0,1% of affected individual shareholders and less than ten institutional shareholders having actively joined AIRS.[6] While SILC fared better in this regard,[7] it did not withstand the court's critical inquiry into the entity's governance and its arrangements with its funders.

SILC is an ad hoc entity founded to litigate investor claims. Initial funding for its activities was provided by DRRT, an international law firm focused on securities litigation. This included costs of establishing the entity. SILC later entered into a litigation funding agreement with Therium, to which DRRT was also a party. DRRT continued to provide a variety of services to SILC as a consultant. Because of the close involvement of these commercial parties, the court emphasized the need to carefully examine if SILC's priorities lay with the interests of the claimants it represents.[8] It concluded that claimants' interests are not sufficiently safeguarded,[9] essentially because (a) SILC was financially and organisationally too dependent on its funders and (b) its governance structure afforded its funders unacceptable influence on decision-making within the entity and (by extension) litigation strategy.

The court observed that, besides initiating the collective action, SILC carries out few, if any, activities of its own aimed at advocacy and outreach to the claimants it represents. That is all the more pressing, given that SILC had out-sourced what the court describes as 'essential activities' of a representative entity. SILC had given a power of attorney to DRRT to engage in book building and client relationship management on its behalf. DRRT was thus tasked with approaching potential claimants, encouraging them to sign participation agreements with SILC, registering claims, collecting evidence and potentially even filing claims on behalf of participants. It had not been shown that SILC has an organisation and a staff of its own capable of undertaking these core activities. In light of this and the court's finding that, of those members of the entity's governing bodies that the court considered independent from the funders, none had sufficient qualifications, SILC lacked the required (in-house) experience and expertise to conduct the proceedings.[10]

The court went on to note that the prominent role and composition of SILC's supervisory board was problematic in view of the requirement that the representative entity has sufficient control over the litigation.[11] The three-member supervisory board had extensive powers to appoint and fire members of the board of directors. Moreover, key decisions were subject to the supervisory board's approval, including the decision to accept or reject a settlement with the defendant. The court pointed out that two out of three seats on the supervisory board were held by persons with ties to the funders, and remarked that 'it did not take a lot of fantasy' to see a risk that DRRT's and Therium's interests might thus influence the course of action taken by the representative entity through its internal decision-making. This was further compounded, according to the court, by the fact the funding agreement required SILC to consult with DRRT and Therium on strategic decisions in relation to the proceedings, including settlement, and that the success fee arrangement with DRRT meant that SILC lacked the financial headroom to part ways with DRRT if needed.[12]

This combination of circumstances led the court to conclude that SILC was an 'empty shell', set up to allow its commercially motivated funders to initiate collective proceedings, which it did not consider in line with the legislator's intent.[13]

6. *Airbus*, paras. 5.77-5.85.
7. *Airbus*, paras. 5.99-5.103, where despite a similarly negligible number of individual investors, the court deemed SILC's backing by 157 institutional investors representing an estimated 5% of total damages sufficient for establishing representativeness.
8. *Airbus*, para. 5.109.
9. See article 3:305a (2) DCC.
10. *Airbus*, paras. 5.110-5.114 and 5.123-5.125; see article 3:305a (2) (e) DCC.
11. See article 3:305a (2) (c) DCC.
12. *Airbus*, paras. 5.115-5.122.
13. *Airbus*, para. 5.126.

2.2. The possible hit – TikTok

The collective proceedings in *TikTok* pertain to alleged violations of privacy law by the company behind the popular social media app. Three representative entities – SOMI, SMC and STBYP – initiated actions seeking damages on behalf of TikTok users in the Netherlands. All three rely on some form of third-party funding. Upon an extensive review of the various admissibility requirements posed by national law and the GDPR, the Amsterdam District Court deemed the action by SOMI admissible. It further deemed the actions by SMC and STBYP admissible, provided that they amend their funding agreements to remedy certain shortcomings.

TikTok argued, inter alia, that SMC and STBYP are commercially motivated entities that primarily serve the interests of their funder and attorneys. The core of its argument rested on the contention that the claim had been conceived by the funder and/or the attorneys and on their involvement in the founding of SMC and STBYP. According to the court, however, the question of where the initiative to establish the representative entity and to start the mass claim ultimately originated and who was involved in its founding, is not significant. What matters is whether the entity at present is sufficiently independent in relation to the funder and the attorney it employs. The court further noted that in consumer privacy cases such as this one, individual claimants are unlikely to take the initiative to vindicate their claims.[14]

Although the court ultimately deemed SOMI admissible, it did voice concern over the close ties between the entity and the companies backing it. SOMI is funded by Reunion Ventures, whose director and sole shareholder is one of three members of SOMI's board, and is also on the board of a number of companies that provide services to SOMI. Because the funder had waived its entitlement to any fees and converted its funding to a gift, the court apparently felt that SOMI's funding arrangements no longer gave rise to a conflict of interest and that proper governance was otherwise also sufficiently safeguarded. It nonetheless remarked that such close ties are undesirable for a representative entity.[15]

Upon review of SMC's and STBYP's funding agreements, the court identified a number of clauses that, in its view, are incompatible with the requirement of sufficient control. This included clauses that:

- require the entity to refrain from taking steps adverse to the funder's interests, unless legally necessary to protect the interests of the class;
- stipulate that the entity may not accept or reject a settlement, without having received advice from its lawyers that such is a reasonable course of action;
- gave the funder significant say in the entity's choice of attorney and stipulated arbitration in case of disagreement;
- permitted the funder to withdraw prematurely if during litigation it became uncertain that the funder's minimum recovery would be achieved;
- permitted the funder to transfer its obligations under the funding agreement to a third party without the entity's consent.

The first three clauses, the court reasoned, did not respect that ultimate say over litigation strategy, which includes choice of attorney, should lie solely with the representative entity.[16] The entity should be free to decide which course of action is in the best interests of the claimants it represents. The court noted in particular that conflicts of interests may arise in view of a potential settlement. It is therefore essential that the funder has no say over the decision to accept or reject a proposed settlement.[17] However, because the funding agreements, on the whole, demonstrated a good faith effort by the entities and their funders to prevent undue influence, the court saw fit to allow SMC, STBYP and their respective funders an opportunity to revise their agreements.[18]

3. Tentative principles for judicial assessment of funder success fees

The new collective action regime is premised on the idea that actions by multiple representative entities concerning the same controversy are consolidated, with one of the entities appointed exclusive representative to take the lead in the litigation while the others remain parties to the proceedings. This can result in a complicated situation, in which the various entities have differing agreements on fees with their respective funders and with the class members that signed participation agreements with the entity in question. Meanwhile, the bulk of the class is likely not affiliated with a particular entity. In the absence of a participation agreement, it is unclear what percentage, if any, would be withheld from damages awarded to these claimants to account for fees. Given that Dutch law at present does not have something akin to the common fund doctrine in US class actions, how to allocate funders' fees in such situations is still uncharted territory. Because the parties in *TikTok* may potentially find themselves in these murky waters, the court felt it necessary to provide clarity upfront about how intends to proceed if the claim succeeds on the merits or a settlement is approved.[19]

14. *TikTok*, paras. 2.68.1-2.68.2.
15. *TikTok*, paras. 2.30.10 and 2.66.
16. *TikTok*, paras. 2.69.3 and 2.70.5.
17. *TikTok*, para. 2.68.12.
18. *TikTok*, paras. 2.71-2.72.
19. *TikTok*, para. 2.68.7.

The principles outlined by the court entail that claimants who are affiliated with a particular representative entity can turn to that entity to be disbursed their damages, minus the percentage fee stipulated in the participation agreement, but subject to a maximum percentage to be determined by the court. Damages paid to unaffiliated claimants will be no more and no less than damages paid to those affiliated claimants who are subject to the highest percentage fee.[20] Presumably this means that unaffiliated claimants can turn to any of the entities for disbursement of their damages, but it is not entirely clear.

Although a success fee of 25% of recovered damages has so far generally been considered the acceptable maximum in case law, the court expressed concern that such an undifferentiated percentage would lead to excessive payments to funders if a significant total sum of damages is ultimately awarded. Funders are entitled to an suitable reward for the risks they take on, but that reward should be proportionate to the amount of their funding. According to the court, a sum equal to five times the funder's investment in the litigation constitutes an appropriate maximum for actual fees paid to the funder. The court signalled its intent to set the maximum percentage fee in line with that number.[21]

4. Comment

Airbus was met with concern by some, as a pessimistic reading of the line taken by the court could suggest that any situation in which a commercial funder is involved in the founding of the entity or maintains a close working relationship with the entity is automatically suspect. That would cast doubts on the continued viability of what is currently seemingly not an unusual practice. The Amsterdam court's clear statement in *TikTok* that what matters is not where the initiative originated, but whether the entity at present is sufficiently independent and capable of safeguarding the interests of the class, may help assuage those concerns. It does not seem likely, in my opinion, that *Airbus* signifies a radically different view that only a 'grass roots' initiative by claimants or by established interest groups can be legitimate. Naturally, however, these types of 'funder-founder' scenarios will invite close scrutiny by the courts, as there is potentially more of a risk that the entity is not sufficiently independent. Given combination of circumstances in *Airbus*, the court was arguably justified in its concern that SILC was not a meaningfully separate organisation from its funders. That does not necessarily mean that its or its funders' motives are impure, but it does cast doubts on the entity's ability to stand up against the funder if a conflict of interest between the funder and the class were to arise.

The court's decision in *Airbus* nonetheless illustrates that there may in practice be some tension between the expectations set by the different requirements for representative entities, especially where ad hoc entities are concerned. In order to establish its representativeness and to vie for the position of exclusive representative, the entity may need to pour significant efforts into book building, and in order to demonstrate that has sufficient experience and expertise to conduct such complex proceedings, it will need attract the right people to its organisation. Certainly for a newly established ad hoc entity, taking care of all of that entirely in-house may not be realistically feasible. If the entity relies too extensively on a third party, especially if that third party has a financial stake in the outcome of the litigation, this may come to pose an issue with respect to the requirement of sufficient control. In that sense, arrangements in which the entity's funder is also the entity's main consultant and its provider for client management services would ideally be avoided. On the other hand, as the funder is typically a repeat player, it may simply be the case that 'that is where the expertise is'. This tension can surface, for example, in cases where a collective action is initiated as a follow-on to mass claim litigation against the same defendant in the US. The US law firm that served as class counsel may be the one to fund the representative entity, while also possessing important expertise that the entity may want to tap into. At some level, there may be something of clash between the US and European models of class actions at play here.

The contours that tentatively emerge from the decisions in *Airbus* and *TikTok,* in my view, is that 'sufficient control' implies that the ultimate decision with respect to litigation and settlement strategy, including choice of attorney, should rest solely with the representative entity. That does not entail that the entity should not take the funder's legitimate interests into account or that the funder may not require the entity to consult it on key decisions. The Claim Code recognizes as much, in that it specifically permits one member of the entity's supervisory board to be appointed on nomination by the funder.[22] The entity should, however, be empowered to take those decisions that *it* deems necessary in the best interests of the represented claimants, even if it may be adverse to the funders interests. That supposes not only that its obligations under the funding agreement do not put external limits on the entity's decision-making, but it also supposes that the entity's governance guarantees that its process of internal decision-making is not unduly influenced by a third-party's interests. If the latter is not guaranteed, it does not much matter what the funding agreement says.

Whether the standards applied by the various courts at present are entirely consistent, is perhaps debatable. One might wonder, for instance, if *TikTok's*

20. *TikTok*, para. 2.68.8.
21. *TikTok*, paras. 2.68.4-2.68.5.
22. Claim Code 2019, Principle VII.3.

SOMI would be considered sufficiently independent from its funder under the standard applied by The Hague District Court in *Airbus*. From a distance, the situations seem somewhat reminiscent: the funder was closely involved in SOMI's founding, the funder's director and sole shareholder held a position on SOMI's board and SOMI apparently procured a number of services from companies related to its funder. Though the Amsterdam District Court expressed its disapproval about these close ties, it ultimately did not deny SOMI admissibility. Of course, one significant difference is that SOMI's funder decided at some point to waive its fee and provide pro bono funding. Had it not done so, these arrangements would likely not have held up in court. Additionally, it does not seem that funder-affiliated persons effectively controlled a majority vote on key decisions within the entity's governing bodies in SOMI's case, which was understandably a major concern for the court in *Airbus*.

Similarly, the Amsterdam District Court's disapproval in *TikTok* of clauses requiring the entity to heed its attorneys' advice in accepting or rejecting settlement and limiting the entity's choice of attorney seems difficult to reconcile with a decision on the same day by that same court (though a different set of judges) in *Vattenfall* with respect to similar clauses. The funding agreement in *Vattenfall* obligated the entity to follow its lawyer's advice, unless it had taken advice from a another lawyer approved by the funder. It further required the entity to obtain the funder's consent if it wished to appoint a different lawyer. According to the *Vattenfall* court, this merely concerned practical arrangements with the funder that did not imply that the entity had insufficient control over the litigation.[23]

In the absence of an established body of case law, occasional inconsistencies are to be expected as courts gain experience in applying the admissibility requirements to a variety of fact patterns. Nonetheless, the resulting uncertainty can be tricky for representative entities and their funders. In light of this, it seems doubly prudent for them to closely follow the principles set forth in the Claim Code, and it seems sensible for courts to allow entities and their funders an opportunity to address shortcomings in their funding agreement if they have a demonstrated a good faith effort, as the court did in *TikTok*. Hopefully, courts will converge on a common standard as case law develops. One important point of convergence already apparent in case law is *ex nunc* review of admissibility requirements. The courts in both *Airbus* and *TikTok* have (rightly) held, as have others, that admissibility should be assessed on the basis of the facts as they are at the time of the inquiry.[24] If the principles the Amsterdam District Court set out for the award and the practical implementation of funder's fees prove workable, they could also serve as a model for other courts. With a view to further development of case law, such efforts may be applauded.

23. Amsterdam District Court 25 October 2023, ECLI unknown, case no. C/13/716600 / HA ZA 22-332 (*Vattenfall*), para. 2.19.
24. *Airbus*, para. 5.65 and *TikTok*, para. 2.36