HOUTHOFF

# Preparing for collective actions in the pension sector

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*The pension transition is currently in full swing and the first pension funds are getting ready to switch on 1 January 2025. When the Future of Pensions Act (*Wet toekomst pensioenen*) was being drafted, the Council of State and the Council for the Judiciary warned emphatically that this unique and dramatic transition could open the floodgates to litigation.*[2] *This reality should spur the pension sector on to consider how to prepare for collective actions in the transition. This publication aims to give suggestions on this point based on previous collective actions in the financial sector, explaining the conditions that apply to collective actions under the Settling of Large-Scale Losses or Damage (Class Actions) Act (*Wet afwikkeling massaschade in collectieve actie*, or WAMCA) and discussing what collective actions could look like in the pension sector.*

## 1. Introduction

Even if relatively few people actually institute proceedings, given the large number of persons who will be affected by the transition very substantial numbers of claims are to be expected. Obviously, collective proceedings will also be conducted. On 1 January 2020, the WAMCA, drawing from the example of US class actions, considerably expanded and consolidated the possibilities for collective proceedings.[3] Many dozens of collective actions, on diverse issues not related to pensions, have since been instituted under the WAMCA regime, many more than the legislature had anticipated at the drafting stage. The Dutch 'plaintiffs' bar', comprising lawyers who institute this type of proceedings, has considerably grown and professionalised since 2020. Various new claim firms have been established. Collective action financiers, mainly from outside the Netherlands, have close ties with these firms. Nowadays, 'entrepreneurial mass

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[2] Council of State's opinion of 16 February 2022 and Council for the Judiciary's opinions of 28 October 2021 and 14 July 2022.

[3] The WAMCA has resulted in an amendment to Article 3:305a of the Dutch Civil Code and the introduction of Title 3.14a of the Dutch Code of Civil Procedure.

litigation' is a hot topic: collective actions have become an investment opportunity and their initiation is driven to a large extent by the chances perceived by financiers to use them to generate income. While the Council for the Judiciary did state that it anticipated that commercial organisations would also join in, it is doubtful whether it and the Council of State fully foresaw this development. This reality should spur the pension sector on to consider how to prepare for collective actions in the transition.

## 2. Collective actions in the financial sector: lessons learned for the pension sector

Over the past few decades, the financial sector has witnessed various mass disputes. These covered issues such as securities leasing, unit-linked insurance, interest rate derivatives, revolving consumer credit, and Euribor and Swiss franc mortgages. Although the mass disputes were unrelated to pensions, the factors that led to their inception also offer interesting insights in the context of the pension transition. This is especially important considering that, after the transition, a pension will be easily equated with a financial product.

The aforementioned mass disputes all followed a similar pattern in how they arose. The financial products at issue were initially popular, or even very popular, in the economic situation in which they had been offered. They thus became widespread in the economy. It was only years later – sometimes more than a decade after a product's initial popularity – that certain macroeconomic developments led to buyers being rudely confronted with product drawbacks that had gone largely unnoticed previously. For example, various stock market crashes and crises shortly before the new millennium and in its first decade left many buyers of securities lease agreements with a residual debt. Distributions under unit-linked policies were also lower than expected due to these crashes and crises, shifting the focus to costs. The falling interest rate, for example, prompted banks to require collateral to be paid for the interest rate swaps they had offered to SMEs to hedge the interest risk on variable-rate loans, or to require compensation for any negative value of these derivatives. That interest rate drop also left banks wondering whether they had sufficiently lowered the interest rates they charged on revolving consumer credit. A gradual but persistent weakening of the euro versus the Swiss franc considerably increased the credit burden of the once attractive Swiss franc mortgages. In short, the recipe for a mass dispute is a popular financial product that suddenly turns out to have certain disadvantages due to a subsequent change in macroeconomic conditions. It is remarkable that the consequences of these macroeconomic changes appear to have been consistently underestimated when the products were marketed. Herein lies the first lesson for the pension

sector when it comes to preventing mass disputes: a necessary step is to work out a range of economic scenarios – including those that seem less likely or a long way off – and predict how the financial product will behave in each scenario and how that will affect the product's buyers. This will allow developers to go back to the drawing board to modify the product, if necessary, or to revise the expectations created (for example, in the transition-stage uniform pension overview) or the warnings to be given with the product.

A particular reason why the implications of macroeconomic change appear to have been underestimated is that these products' developers seem to have focused too much on the individual. If one person is hit by negative equity risk, interest risk or currency risk, this can relatively easily be labelled as 'bad luck' that the person simply has to bear. However, if a large group of persons are similarly hit, this can readily instil the notion that the product provider should have taken measures to prevent this from happening or should have been more insistent in giving its warnings.[4] Consequently, the scope of the harm in question can shift responsibility to a greater or lesser degree. The sheer size of the group of people hit by a product's negative consequences thus influences the standards applicable. This should also be borne in mind when working out the scenarios.

A final point to consider is that prevailing views and standards can gradually and almost unnoticeably change fundamentally over the years. As a result, when a court gives its judgment, significantly different views and standards may apply compared with the time that the product was offered. There will then be a tendency to make the new views decisive, partly because it can be difficult to prove what those views were in the past. In addition, hindsight bias will be difficult to avoid. In other words, the ease with which the problem that ultimately presented itself could be predicted may well be overestimated. Even if relatively clear public law standards had been embedded in the law at the time that the product was offered and regulatory authorities issued further rules or guidelines, shifting views can ultimately result in a different interpretation of those standards, rules or guidelines or in the inference of additional duties of care from private law. What was initially sufficient to meet specific public law standards and regulatory requirements will not necessarily be sufficient to (ultimately) also meet private law

[4] Cf. A.J. Rijsterborgh, '*Het begroten van schadevergoeding in een collectieve actie*', *MvV* 2017/11, p. 327, who, further to the Supreme Court's judgment in the *Staatsloterij* case (Supreme Court 30 January 2015, ECLI:NL:HR:2015:178, *NJ* 2005/377), points out that collective actions can yield different decisions than individual cases.

standards.[5] Preparing for such changes is, of course, not easy. Nevertheless, it is important to look beyond the sector-specific rules or guidelines applicable and to keep in mind that inventive parties can always claim that open private law standards imply stricter requirements. Another potentially helpful strategy when working out possible future scenarios is to extrapolate from current trends in shifting views.

Once a mass dispute has arisen, its settlement can be complicated and very time-consuming. A bad case scenario is that of Dexia and its 2005 'Duisenberg arrangement', which 165,000 consumers accepted while another 25,000 consumers 'opted out' and were therefore not bound by it. The matter triggered countless actions and has resulted in an unprecedented number of over 50 Supreme Court judgments. A solution to this issue is not yet in sight. In addition, the large scale of a dispute is a complicating factor in various ways. Judges – sometimes even at the same instances – may not always agree on fundamental points, while alternative dispute resolution bodies can pursue yet another course.[6] With the establishment of the Pension Funds Dispute Body (*Geschilleninstantie Pensioenfondsen*) on 1 January 2024, this could also become an issue in pension matters. In the past, providers could equally be confronted with numerous individual actions and with all sorts of collective proceedings initiated by various claim organisations. This made it more difficult to resolve the mass dispute in question. However, there is a silver lining here. With the WAMCA, the legislature has ensured that one collective action should theoretically be enough to resolve a dispute.

## 3. Collective actions under the WAMCA

As stated, on 1 January 2020 a new regime for collective actions came into force in the Netherlands. The main game changer is that, under this regime, a claim for damages can be filed on an opt-out basis and the judgment will be binding on all those represented by the claim organisation. A claim organisation – a foundation or an association – can thus seek compensation for all individuals of an abstractly defined group (for example, all members of a particular pension fund, or a cohort of members born in specific years). The persons who are part of the group will be bound by the outcome of the proceedings, without having asked for or agreed to these proceedings at any time. The collective proceedings will be binding on a person

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5 For more information on how this distinction was made in a unit-linked insurance dispute, see for example Advocate General T. Hartlief's opinion of 14 October 2021 (ECLI:NL:HR:2022:166).

6 See, for example, the course followed by the Dutch Institute for Financial Disputes (Kifid) as laid down in Arbitration Commission 18 April 2023 (no. 2023-0305), which differed fundamentally from the approach taken by the ordinary court.

belonging to the defined group unless this person actively informs the court in good time that they do not want to join. This notification is known as an opt-out statement. The option of litigating on an opt-out basis makes it considerably easier to litigate for large groups. It eliminates the logistic challenge of requesting and obtaining permission from a large number of persons. Moreover, this method also enables people to be represented who have a relatively neutral view of the proceedings and would therefore, in different circumstances, not have gone to the trouble of joining the claim initiative. This development makes collective proceedings interesting for commercial parties wishing to finance such proceedings in return for a share in the proceeds if the party sued pays out. On the one hand, these financiers' involvement increases access to justice, as injured persons no longer need to pay for (costly) proceedings themselves. On the other, it will induce entrepreneurial mass litigation, a continuous search for opportunities to make money from a collective action. As stated, many dozens of collective actions have already been initiated since the new collective action regime was introduced. A quick search on Google and in the Chamber of Commerce register reveals that various foundations and associations have now been established to promote the interests of pension fund members and retired members through collective actions.

How do collective proceedings in a potential mass pension dispute work and what requirements must be met in that regard? The procedure for collective actions is divided into an admissibility phase and a substantive phase. The admissibility phase serves to assess whether the claim organisation's claims are admissible. Aspects to be assessed include the type of legal entity, the articles of association, the similarity of the claims, and the safeguarding of the interests of the persons represented. This safeguarding of interests requires the interest organisation, among other things, to be 'sufficiently representative', in view of the persons represented and the amount of their claims. This representativeness requirement, which requires a little more elaboration here, prevents foundations and associations from bringing legal action without the support of any persons they are supposed to represent. Not just any organisation can step in as a protector of aggrieved parties' rights. It must be clear at the outset that it is representing a sufficiently large share of the group of injured parties. What share will be enough depends on the case at hand and can only be determined in relation to the number of injured parties. This has not yet been crystallised in case law, but some claim organisations were found to have no cause of action because they appeared to be driven by the financier to too great an extent and enjoyed too little support from injured parties. Paragraph 6 will discuss how the pension sector can use this when preparing for the possibility of a mass dispute. Past experience has shown

that it can easily take one to two years before the admissibility phase has been completed at first instance. In the subsequent substantive phase, discussions will focus on the substantive dispute. Paragraph 4 will discuss the possible claims to be assessed then. If the claim organisation also files a claim for damages, proceedings can end with a collective settlement or by the court's determination of a collective claim settlement. A collective settlement will be the likely object to be pursued. Importantly, individual proceedings will be stayed when a collective action is brought. This will make it less appealing for claimants to bring individual test cases and more appealing to bring a collective action right away.

## 4. Types of collective claims and parties to hold liable

Various types of claim can be lodged in a collective action: for an injunction, an order, a declaratory judgment or damages. In relation to the pension transition, this could be, for example, an order to amend the transition plan to ensure that a particular age cohort will receive higher compensation, an injunction against conversion, or a claim for compensation of damage incurred due to the discontinuation of the average contribution system. Claims can be combined. From the perspective of a commercial financier, damages claims will be particularly appealing as these can generate a return on the financier's investment in the proceedings (for example, 20% of the damages awarded). At the same time, however, it is notable that proceedings for damages can easily take 10 to 15 years to be concluded. For pensioners and people close to retirement in particular, this is not an appealing prospect.

Several parties can be sued in a collective action (simultaneously, in the same proceedings). The pension provider is an obvious choice of defendant, but other candidates could also be directors and any relevant administration organisations, actuaries, regulators, the Authority for the Financial Markets (AFM), the Dutch Central Bank (DNB) and the State. Further, employers and employers' and employees' organisations can be taken to court. Where a pension fund is involved, claim organisations face the challenge of a zero sum game: if a cohort of current or retired members receive more or are entitled to damages, other current or retired members will typically receive less. In addition, the financier will also have to be paid. However, the reallocation that may ensue from a collective action can be favourable to certain member cohorts, making collective proceedings potentially worthwhile for them. Directors seem less appealing targets at present, given the higher threshold for directors' and officers' liability and the relatively limited recourse options. Bringing action against regulators DNB and AFM is an equally unappealing option, in view of the statutory limitation of liability. Damages claims

against employers' and employees' organisations seem pretty unlikely, but an order to implement the transition in a certain way is quite conceivable.

## 5. Bases for potential mass pension claims

Bases for mass pension claims can primarily be found in generic (EU and other) fundamental rights, especially the protection of property[7] and the ban on discrimination based on age[8] or sex[9]. Other examples include specific provisions of the Pension Act (*Pensioenwet*) on the need for a balanced transition,[10] a balanced weighing of interests of all parties affected, the conditions for switching[11] and requirements for the operations used to control company processes and company risks (such as data quality[12]).[13] Broader bases that also apply to pension funds can also be an option, such as pension funds' duty of care, which takes a variety of forms (obligations to provide information, to investigate, to warn, to advise and, most recently, to provide guidance). And finally, general standards of fairness and reasonableness can be invoked. Obviously, such bases will not be used in isolation, but will be combined where possible to optimise their weight. Both these fundamental rights and the Pension Act operate with relatively open standards that offer little guidance, creating scope for long discussions on all sorts of issues. Scalability of a claim is essential to claim foundations and financiers: claims should be more or less the same for a large number of persons.

EU protection of property is particularly relevant to pension scheme conversion. Despite the prevailing view in the literature that this conversion is reconcilable with the protection of property under EU law,[14] complex discussions can be conducted on the questions whether

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7 Article 1 of the ECHR First Protocol and Article 17 of the EU Charter.

8 Directive 2000/78 and Article 3(e) of the Equal Treatment in Employment (Age Discrimination) Act (*Wet gelijke behandeling op grond van leeftijd bij de arbeid*).

9 Article 23 of the EU Charter, Directive 2000/78/EC, Directive 2006/54/EC and Article 5(1)(e) of the Equal Treatment Act (*Algemene wet gelijke behandeling*).

10 The law requires that account be rendered of this balance (Article 150d(1) of the Pension Act) (in which respect conversion is not permitted if this would result in an unbalanced disadvantage for any current or former members, other persons with pension entitlements or retired members, Article 150l(4)(b) of the Pension Act).

11 Article 150l(4) of the Pension Act.

12 On this subject, see also DNB's 'Good Practices for pension funds' data quality assurance ('*Good Practice borging van datakwaliteit door pensioenfondsen*') (in Dutch), available at: https://www.dnb.nl/voor-de-sector/open-boek-toezicht/sectoren/pensioenfondsen/verzamelpagina-transitie-wet-toekomst-pensioenen/implementatieplan/good-practice-borging-van-datakwaliteit-door-pensioenfondsen/

13 Article 143 and Article 150l(4)(c) of the Pension Act.

14 See, for example: R.H. Maatman and others, '*Invaren onder het Handvest*', *TPV* 2015/32; E. Lutjens, '*Invaren pensioen: de betekenis van eigendomsrecht – invaren is niet juridisch onhoudbaar*', *TPV* 2020/20; A.G. van Marwijk Kooy, '*Invaren na de Hoofdlijnennotitie: juridisch aanvaardbaar, maar alle hens aan dek*', *PensioenMagazine* 2020/106.

injured parties can invoke this protection of property in relation to a pension fund, whether this property right is being infringed and whether this is justifiable.[15] These discussions will probably not only be conducted in abstract terms, but will also inherently address economic developments and the specific choices to be made regarding the allocation of pension funds' pension assets.[16]

The ban on discrimination entails that no direct distinction must be made based on age or sex, but also that a measure must not give rise to this distinction. As a result of the discontinuation of the average contribution system, pension entitlements will be accrued degressively instead of on a time-weighted basis. This leads to an indirect distinction according to age, which requires objective justification.[17] In addition, it disadvantages persons for whom the switch from time-weighted to degressive accrual takes place approximately mid-career. The amount of compensation for this group could be relevant in the justification of the indirect distinction according to age. A complicating factor in this is that assumptions on future developments will need to be used in determining how much compensation will be sufficient.

While, strictly speaking, the Pension Act only requires *account* to be rendered of how a balanced transition has been ensured,[18] the Explanatory Memorandum does hint at a requirement to ensure balance in the transition as a whole.[19] According to the Explanatory Memorandum, this entails that "*the discontinuation of the average contribution system, the modification of the pension scheme, the choice as to whether or not to switch and the arrangements on compensation must be finalised and reviewed in full. This situation is compared with the situation of unchanged continuation of the current pension scheme under the current financial assessment framework.*"[20] In that respect, the Explanatory Memorandum states that the net or gross benefit effects do not need to be zero and the transition is therefore

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15 In that context, the documented hesitation in 2011 of the Minister of Social Affairs and Employment as to whether the absolute necessity of conversion could be properly substantiated could also play a role; see (in Dutch): https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2023Z19880&did=2023D48523

16 Cf. also The Hague District Court 23 July 2024 ECLI:NL:RBDHA:2024:13255 (*Retired civil servant v the Dutch State*), ground 4.9, in which the Subdistrict Court ruled that the question of whether property rights have been infringed can only be assessed when the transition's consequences for the old-age pension accrued can be specifically determined.

17 See CJEU 26 September 2013, ECLI:EU:C:213:590 (*HK Danmark v Experian*). See also Parliamentary Papers II, 2021/22, 36 067 no. 3, p. 184.

18 The law requires that account be rendered of this balance (Article 150d(1) of the Pension Act) (in which respect conversion is not permitted if this would result in an unbalanced disadvantage for any current, former or retired members or other persons with pension entitlements, Article 150l(4)(b) of the Pension Act).

19 See, for example, Parliamentary Papers II, 2021/22, 36 067 no. 3, p. 111: "*The transition as a whole should be balanced.*"

20 Parliamentary Papers II, 2021/22, 36 067 no. 3, p. 112.

permitted to result in allocation, provided that this is found to be balanced. The Pension Act (deliberately) provides little guidance here. The Pension Agreement states that compensation must be adequate and cost-neutral. However, according to the Explanatory Memorandum, it is up to the parties agreeing on the pension scheme to determine what would be adequate compensation in any specific situation.[21] On this front, much will depend on how well the balance has been thought through and can be explained, and whether – possibly due to later developments – at some point certain groups of persons will turn out to have been disproportionately disadvantaged.

## 6. Preparations by the pension sector

The phenomenon of entrepreneurial mass litigation calls for measures to limit vulnerability to collective actions as much as possible. The pension sector should be aware of the risk of collective actions driven by commercial financiers. To mitigate this risk, it is important to make preparations in at least two respects: support and scenarios.

First, a substantiated claim and a financier will not be sufficient for a collective pension action under the WAMCA: due to the representativeness requirement, the claim organisation will also have to be able to mobilise a group of persons to represent. Pension funds will be better placed to garner support among their current and retired members. Communications with and involvement of current, former and retired members should prevent dissatisfaction in certain cohorts as much as possible. This will make it more difficult for claim organisations to bring together a sufficiently large group of persons to support the claim. After all, claim organisations must be sufficiently representative to be declared to have a cause of action in a collective action. If a financier doubts whether a claim organisation can mobilise a sufficiently large group, it will be less inclined to invest in costly and lengthy proceedings.

Second, pension providers should consider a wide array of scenarios that could arise in the future and may affect the transition's outcome. In view of previous collective actions in the financial sector, it is particularly important to also work out various scenarios that are relatively far in the future, while consistently considering their specific impact on groups of current and retired members.[22] In that regard, pension providers should consider not only the public law

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[21] Parliamentary Papers II, 2021/22, 36 067 no. 3, p. 107.

[22] DNB rightly points out that it would be too limited for the transition plan to focus mostly on median pension expectations, arguing that it will be necessary to also specifically analyse and consider which groups of members will be hit if specific risks actually materialise in a bad case scenario. See (in Dutch): https://www.dnb.nl/nieuws-voor-de-sector/toezicht-2024/transitienieuws-dnb-

details and the regulator's views, but also the open private law standards as well as both written and unwritten duties of care that may apply. The above should not only result in better decisions but also in better justification in the event that any choices made need to be defended in court a decade from now.

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