Memo: **VEB Response to Review EC Recommendation on Collective Redress**

To: The European Commission

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1. Introduction

On 11 June 2013 the European Commission ("**Commission**") issued a Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under EU Law ("**2013 Recommendation**").[1] The Commission explained these common principles in its Communication to the European Parliament ("**EP**") and the Council.[2]

On 22 May 2017 the Commission published a Call for evidence on the operation of collective redress arrangements in the Member States of the European Union ("**Call for evidence**"). Based on this Call for evidence, the Commission will assess the practical impact of the Recommendation. Furthermore, it will determine whether further measures should be proposed to consolidate and strengthen EU law on collective redress.

The Dutch Investors' Association ("**VEB**"[3]) would like to give this detailed reaction ("reaction") to Question 18 of this Call for evidence. In Question 18, the Commission requests the participants to this Call for evidence to provide information on any major problems faced in the course of the action. VEB focuses in particular on those problems that created difficulties in gaining access to justice, affected the parties' procedural rights or allowed for frivolous litigation.

VEB, the leading collective redress organization in the Netherlands, frequently uses collective redress to uphold investor rights granted by EU law and national (mostly Dutch) law. In this briefing, VEB would like to draw your attention to the practical workings of the current Dutch collective redress mechanism. VEB will outline some issues of concern the Commission may address in its review and the measures it will propose to the EP and the Council.

After this introduction, VEB will briefly capture the EU principles of collective redress laid down in the 2013 Recommendation (para 2). Secondly, VEB sets out the basic features of the collective proceedings in the Netherlands (para 3). Thirdly, recommendations are made to

[1] 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 [2013] OJ L201/60.

[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 'Towards a European Horizontal Framework for Collective Redress' (COM(2013) 401 fin.

[3] Vereniging van Effectenbezitters. A Dutch association incorporated under Dutch law with full legal competence, being the leading investors representative organisation in the Netherlands with over 43.000 members.

overcome the practical and legal obstacles to efficient and effective collective redress (para 4). A summary will be provided in paragraph 5.

2. EU principles of collective redress

The 2013 Recommendation is not binding. The principles are as follows:

- *Collective Redress Mechanism* opt-in model; preservation of individual's right to litigate; exceptions allowed for reasons of sound administration of justice.
- *Standing to bring a Representative Action*: representative entities are subject to the following conditions of eligibility: (I) non-profit making, (II) direct relationship with, or interest in, the subject matter of the collective proceedings and (III) acting in the best interests of the group represented.
- *Admissibility*: manifestly unfounded, frivolous claims are barred at earliest stage.
- *Provision of Information*: the representative body properly informs the public on (court) proceedings.
- *Costs*: loser pays principle
- *Funding*: details of claimant's source of (third party) litigation funding revealed at the outset of the case; contingency fees are barred; no incentive for frivolous claims.
- *Cross-Border Cases*: permission to bring claims for claimants or representative entities from other Member States.
- *Collective Follow-On Actions*: after a public authority's finding of a violation of EU rights, compensatory damage proceedings are only allowed to be initiated after the regulatory action is finished.

3. Collective proceedings in the Netherlands

Dutch collective action consists of a dual system of collective proceedings. The collective action based on an opt-in model and the more recent collective settlement procedure based on the opt-out model.

The Dutch collective action was introduced in 1994 in the Dutch Civil Code ("**DCC**"). On the basis of article 305a of Book 3 DCC ("**article 3:305a DCC**") associations and foundations ("**Representative Entities**") may bring a legal action serving the interests of other legal subjects if the goals of the Representative Entity as enacted in its by-laws seek the furtherance of these interests. In case law, VEB is acknowledged as a Representative Entity. The affected legal subjects in a particular case are referred to as class members.

An important feature since the entry into effect has been the prohibition to seek monetary compensation for the represented class members.[4] Furthermore, individuals are not barred from individually protecting their rights. The judgment in the collective action is declaratory, i.e. the court declares whether or not the defendant committed the alleged wrongs against the class members.

After a declaratory judgment that the defendant committed the alleged wrongs, there are three options: (I) settlement between the defendant and the Representative Entity to distribute compensation among the known class members; (II) collective settlement declared binding by

[4] Art. 3:305a(3) DCC.

the Amsterdam Court of Appeal; (III) proceedings by individual class members seeking monetary compensation from the defendant.

In 2005, the collective settlement procedure ("**WCAM procedure**") was enacted. Under the WCAM, Representative Entities and defendants conclude a settlement agreement. This can be either with or without preceding (collective action) court proceedings. Jointly they request the Amsterdam Court of Appeal to declare the settlement binding. If the Amsterdam Court of Appeal deems the settlement fair and subsequently declares the settlement binding, it is binding on all defined class member, unless they opt out. In that case they have to seek compensation individually.

In the *Fortis* settlement-case, the Amsterdam Court of Appeal in its interlocutory judgment refused to declare the settlement agreement reached between amongst others VEB and Ageas, the successor of Fortis Bank binding. The distinctive compensation for Active Claimants (participants to one of the various court proceedings against Ageas) and Non-Active Claimants made by the settling parties was not accepted by the Court. The settling parties have been given the opportunity to amend the settlement agreement. VEB questions whether this active court involvement in the intricate details of settlement agreements concluded between private parties is an efficient and effective remedy to solve mass damage claims.

In both types of proceedings, collective action and collective settlement proceedings, the courts have to decide on the standing of the Representative Entity at the initial stage of the proceedings. The courts tend to be rather strict in assessing whether the best interests of the class are served. The courts check the adherence to the principles laid down in a corporate governance code for representative entities ("**Claimcode**"). Issues of third party funding and the non-profit nature of the Representative Entities are dealt with at this initial stage. In the collective action, the merits of the claim will be assessed on the basis of submissions by the litigating parties subject to Dutch standard procedural law. So far academic studies have not found evidence of frivolous claims being awarded by the court or blackmail settlements.

4. <u>Recommendation to the Commission</u>

Since 1994, VEB has brought dozens of court proceedings based on this collective action based on article 3:305a DCCC.. Furthermore, VEB was the leading representative entity in cross-border investor settlements under the WCAM procedure, lately in the *Fortis*-case.[5]

The current collective redress mechanism based on the dual approach of opt-in collective action and opt-out collective settlement procedures is perfectly suited for practical and legally sound collective redress solutions.

On 15 November 2016, the Dutch government published a Bill on Collective Compensation Actions. Firstly, this Bill seeks to address the prohibition to seek monetary compensation. VEB has serious questions in regard of the following features. The proposed collective compensation action adheres to an opt-out model in the collective action procedure as well. Second, a US-style lead plaintiff model is introduced, i.e. a single Representative Entity is appointed by the court. Class members are barred from individually seeking effective redress. Even if they opt-out (after appointment of lead plaintiff but before any court ruling on the claim), their proceedings are stayed until a final judgment in the collective action is laid down.

[5] Dexia (2005), Royal Dutch Shell (2009), Converium (2010), Imtech (2014) and Fortis/Ageas (2016-2017).

In cross-border collective actions, serious practical and legal issues arise. In the BP and VW cases, the issue was raised whether entities, like the VEB, representing persons incurring losses in a particular Member State, can initiate proceedings against a defendant domiciled in another Member State on the basis of Brussels I Regulation, in particular article 7(2) of that Regulation (choice for claimant between forum locus delicti and locus damni).[6] The Brussels I Regulation[7] deals with jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The best way to ensure the applicability of the EU Regulations on private international law issues of jurisdiction, recognition and applicable law in collective action proceedings, would be a statement in that regard by the Commission. Claimants must be able to seek compensation collectively in the jurisdiction in which their losses have been incurred.

5. Summary

The Commission is reviewing its 2013 recommendation on collective redress. VEB is one of the major initiators of collective procedures in the Netherlands. It has and remains to be instrumental in solving cross-border investor compensation disputes. In order to ensure a practical and legally sound collective redress mechanism, VEB would like to recommend to the Commission to adhere to the principles laid down in the 2013 Recommendation: an opt-in model in collective action procedures and an opt-out model in collective settlement procedures, no lead plaintiff model, preservation of cross-border litigation.

[6] Art. 7(2): "*A person domiciled in a Member State may be sued in another Member State: in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.*"
[7] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.