The Global struggle towards affordable access to justice

The Global struggle towards affordable access to justice: Dutch baby steps towards a more open legal market

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In a global context of civil justice in crisis (Zuckerman) and a legal professional under pressure to adjust to the rapidly changing legal landscape (Susskind), experiments, adjustments and transformations in the way justice is done are an almost daily occurrence. Last week, the Dutch Bar Association announced an experiment to (slightly) open up the legal market in the Netherlands.

Effective yet affordable legal representation

The administration of (civil) justice remains an expensive practice, both in terms of public spending on the courts and publicly funded legal aid, as well as for those seeking justice. In most jurisdictions, access to justice remains a far cry from reality for large sections of society. Effective yet affordable legal representation has long been one of the most important stumbling blocks, and it goes without saying that in cross-border cases these costs only increase, while self-presentation – even if allowed – is often illusory.[1] With high and unpredictable lawyer fees as one of the most prevalent impediments to access, there have been many attempts at transforming the market for legal representation.

On the side of the legal system, we have seen moves away from strict legal representation requirements by a lawyer towards more self-representation and 'do-it-yourself-justice', taking lawyers out of the equation altogether (a practice leading to some disastrous results in some places). And, in response to the resulting challenges faced by litigants in person, we see movements in the direction of permitting for different forms legal representation, such as the so-called 'McKenzie friends' in UK courts, or the 'Lay Assistant Scheme' in Singapore, that allow for non-lawyers to be present in court to assist self-representing litigants (to a limited extent).

If we add to this the growing market of private dispute resolution as well as the tectonic shifts that are to be expected from the technological innovations (in both legal aid provisions and the digitalization of court procedures) we can see how such moves are likely small steps on a long and winding road of radical transformations of the legal profession, and likely of legal markets and the justice system as a whole. In the Dutch context, we witnessed one of those small steps last week.

Burgeoning shifts in the Dutch legal market

On December 3rd the Dutch Bar Association (NOvA) announced an experiment to give more leeway to lawyers from legal assistance insurers and claims settlement offices, by letting lawyers not employed by a law firm represent clients in court. As in many other legal systems, the legal market in the Netherlands has long been a hermetically sealed bulwark. While in large parts of the Dutch legal system assistance by a lawyer is mandatory, litigation with the use of a lawyer is only allowed if that lawyer is employed firm that is owned by layers. Legal departments of service providers such as accountancy organizations and claims settlement offices are therefore sidelined in court. In this recent move, however, the bar association gave the green light to the Hague legal aid provider SRK, a company that is not owned by lawyers, to offer lawyers' services to people who are uninsured – a practice that up until now was restricted. This move is heralded as a crucial first step to break open the strictly regulated legal market in the Netherlands.

Bar under pressure

The move does not come as a complete surprise, NOvA has been under growing pressure by the Dutch Authority for Consumers and Markets (ACM) to adjust its professional rules because they may frustrate market forces. In February of this year, rather than taking action directly, the ACM gave the bar association a last chance to adjust its rules itself, while emphasizing that it could still conduct an investigation if there was reason to do so.

This pressure resulted from a request by legal aid provider SRK. The company wants to have its lawyers provide services to clients without legal expenses insurance through its subsidiary company BrandMR. However, this would go directly against NOvA rules, which stipulate, among other things, that lawyers

may provide their services only while employed by an office that is owned by lawyers. This rule is meant to prevent lawyers from being guided by business interests rather than those of their clients.

There is one exception to this rule: lawyers may be employed by a (non-lawyer owned) legal expenses insurer, provided they work exclusively for insured persons, which is the practice of SRK. However, by also catering to non-insured persons SRK would violate that principle. With BrandMR, SRK targets the market of people who earn too much for subsidized legal aid yet have no legal aid insurance. According to the legal aid provider, about 25% of the Dutch population, especially young people, avoid legal assistance because they are not insured and consider the costs of a lawyer too high and unpredictable.

Since October of this year, and in defiance of the Bar's rules, people without insurance can turn to SRK if they have a conflict. Under the BrandMR label, SRK offers them legal assistance at a fixed price, instead of the hourly rate that law firms charge. SRK director Peter Leermakers says he 'supports' all the rules of the legal profession, but not this one. 'Our lawyers have been allowed to work for people with legal expenses insurance for over 15 years. Then why not for people without insurance? Why should they suddenly no longer be independent? ' He argues that the independence of the lawyers at SRK is guaranteed by an internal committee, which is assisted by two lawyers who previously were acting deputies of NOvA.

Political support

There has been political support for for SRK's attempt to stretch the rules for the legal profession in the Netherlands. Minister Sander Dekker of Legal Protection (VVD) has submitted a bill to allow experiments in the Dutch legal system. He wants to offer citizens more flexible access to justice and reduce the costs of justice through a wide range of potential changes to and shifts in the Dutch justice landscape. He has already indicated several times that he welcomes initiatives such as those of SRK, and also hinted in the House of possible measures if the bar does not seriously consider how it can help foster new business models in the legal profession.

As described here in an earlier blogpost, the Minister previously clashed with the legal profession about legal aid funding. The government pays lawyers for people

who cannot afford it themselves. Lawyers will then receive compensation based on a system of fixed rates for each type of court case. According to many lawyers, these are too low, but Dekker refused to make more money available, eventually leading to a strike by lawyers at the end of 2019.

A five-year experiment

The bar association thus yields to heavy pressure from politics, cartel watchdog ACM and non-industry service providers eager to enter the legal market. Although, rather than a full-fledged rule change that would open up the legal market to a host of providers, for the time being the admission of SRK is 'an experiment' with a maximum duration of five years. Service providers other than SRK may also participate, under the watchful eye of the Bar. The experiment is part of a broader investigation into a possible new system of regulations around permitting alternative business structures for lawyers.

The experiment announced by the NOvA must therefore be viewed in that light. "There needs to be movement on this subject somewhere, either by the NOvA, either by the ministry or the ACM," said General Dean of the Dutch Bar Frans Knüppe. "We think it is wise to start the experiment now, and thus gain knowledge and experience on this fundamental issue. We expect that the Minister and ACM will not have to take any steps for the time being." Knüppe emphasized that the NOvA is open to new initiatives, as long as the core values – in this case lawyers' independence – ??are guaranteed.

International shifts in the legal market

While the move by the NOvA is only a small step towards rule changes, in terms of corporate structures it could potentially lead to a significant shift in the character of the Dutch legal market. The opening up of commercial opportunities for legal service providers could be part of the solution for the segment of the population that earn too much for subsidized legal aid but are not wealthy enough to employ costly and often unpredictable services of a lawyer without legal aid insurance.

The changes in the Dutch context do not stand on their own, as we have seen considerable volatility in legal market globally. In the United Kingdom and the United States, established law firms have been facing competition for much longer. The 2011 Legal Services Act in England has made it possible for parties

other than lawyers to become co-owners of a law firm. As a result, law firms can collect money from outside the company, at the stock exchange for example. The new law opened the door for non-lawyers such as accountants and bailiffs, as well as supermarkets, to enter the legal market.

It remains to be seen what the impact of this temporary rule change will be on the Dutch legal market. The board of representatives of the NOvA expressed concern that the experiment could potentially lead to shifts in the legal landscape that prove to be irreversible after the five-year experiment. On the other hand, the ACM has applauded the move by the NOvA, yet also questions whether the relaxing of the rules goes far enough.

On request of the Ministry of Justice and Security and the NOvA, the WODC (Research and Documentation Centre) of the Ministry is currently conducting research into the consequences of the admission of alternative business structures in the legal profession.

[1] Hoevenaars, J. & Kramer, X.E. (2020). Improving Access to Information in European Civil Justice: A Mission (Im)Possible? In Informed Choices in Cross-Border Enforcement. Cambridge: Intersentia