

# NUON-Claim v. Vattenfall: Pivotal or dud for collective actions in the Netherlands?

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On 9 October, the District Court of Amsterdam issued its final judgment in a collective action against energy supplier Vattenfall. This judgment was eagerly awaited as it is the very first judgment in a mass damage claim under the Dutch WAMCA procedure. The new framework for collective redress, which became applicable on 1 January 2020 (see also our earlier blogpost), has received a lot of attention in international scholarship and by European legislators and policy makers due to its many innovations and making it easier for consumers and small businesses to litigate against large companies. The most notable change in the Dutch act compared to the old collective action regime is the possibility to request an award for damages, making such proceedings attractive for commercial litigation funders. A recent report commissioned by the Dutch Ministry of Justice and Security (published in an English book here) found that most collective actions seeking damages brought under the WAMCA have an international dimension, and that all of these claims for damages are brought with the help of third party litigation funding (TPLF).

Since this judgment is the first of its kind under the Dutch WAMCA, with a claim value of 400 million euros, it has gained a lot of (media) attention. This blogpost provides an update on this most recent judgment and discusses its impact on the current mass claims landscape and TPLF in the Netherlands.

## **The Case**

The claim of *Stichting NUON Claim*, the claim foundation ('the foundation') established to represent a group of SMEs who are or have been clients of energy

company Vattenfall, relates to alleged excessive energy costs imposed on specific customers. The foundation alleged that energy supplier NUON, which has since been acquired by Vattenfall, illegitimately charged a compensation for electrical capacity to its business customers and that no actual service or product was provided in exchange for this so-called kW charge. Furthermore, many other similar customers did not have to pay the kW charge. The foundation alleged that this illegitimate charge resulted in bills that were on average 80% higher than those of competing energy suppliers, in some cases resulting in tens of thousands of euros in excessive annual fees.

In short, the main question in this case is whether Vattenfall (formerly NUON) was allowed to charge business customers a fee based on contracted capacity as an electricity supplier. Vattenfall had charged these costs to business customers with a 'small bulk consumer connection' (more than  $3 \times 80$  Ampère) on the electricity grid since the liberalisation of the Dutch electricity market in 2002. These included medium-sized enterprises, small enterprises and non-profit institutions. According to the foundation, Vattenfall was not allowed to charge these costs because there was no service or product in return for the kilowatt (kW) fee charged. The foundation therefore initiated collective proceedings against Vattenfall. The foundation based its claim on Article 6:194 Dutch Civil Code (DCC), which contains a prohibition against acquisition fraud within Dutch private law.

### **The WAMCA and litigation finance**

A first judgment in a mass damage case has been eagerly awaited as it could provide for a pivotal moment in which claimants would be awarded a multimillion euro claim and the commercial funder would reap the benefits of its investment. The WAMCA has sparked continuous debate due to the regime's perceived claimant-friendly design, its attractiveness for international commercial litigation funders and its alleged risk of fostering an 'American-style' claim culture. The opt-out system, few restrictions on third-party funding, and the supposed risk of litigation abuse were the target of criticism by, most notably, the US Chamber of Commerce (see report here). This criticism was met with calls for a more nuanced approach (see earlier blogpost here) and the fears of fostering a claim culture have been dampened by the modest numbers of cases that have been brought under the WAMCA so far.

Among other discussions, the WAMCA has especially gotten attention due to the role played by commercial third party funders. (See our discussion on third party litigation funding and the WAMCA in this earlier blogpost.) In the case against Vattenfall too, there was some debate on the nature of the financing agreement between the claim foundation and international funder Bench Walk Guernsey PCC LTD. In an interim decision rendered in October 2023, the court reviewed such an agreement, which outlined the conditions under which the funder would receive a portion of any proceeds from the case. This included paying for legal costs and taking a share of any damages awarded to the claim foundation. It also detailed situations where additional funding might have been required and the rights of the claim foundation to manage the litigation and settlement discussions?.

The agreement also outlined the treatment of the litigation funder's fees for different groups of claimants. The claim foundation stated that it would withhold 25% of the compensation from the class members, but in cases where the litigation funder's agreed percentage (8-12%) was lower, it would not retain the difference. This meant, for example, that in case only 12% was due to the litigation funder, the additional 13% would not have been kept by the claim foundation. This 25% withholding would have only been relevant if the claim foundation could not claim compensation for all class members, limiting its representation to a smaller group. The court concluded that the explanation provided by the claim foundation on the reasonableness of the fees was sufficient. It emphasized that the uncertainty about the final amount of fees was acceptable because it depended on factors like the duration of the proceedings.

## **The Judgment**

In its judgment the District Court of Amsterdam dismisses all claims of Stichting NUON-claim against Vattenfall. It rejects the foundation's claim that Vattenfall concealed essential information about the kW compensation, since the compensation was easy to calculate based on Vattenfall's offer. Furthermore, the explanation, which was included in the offer and the energy bills, made the price structure clear. According to the court, the customers were therefore not misled. Vattenfall also made it clear that the grid operator charges an amount for the transport of electricity and that this is not included in the price that Vattenfall charges these customers.

The foundation also stated that Vattenfall abused the inaction of some of its

customers after a new annual offer. The court ruled that the kW customers in the liberalised market had the choice of which energy supplier they purchased energy from. They were therefore free to negotiate the contract terms and to switch to another supplier. In this situation, a kW customer cannot complain that they themselves did not do the comparative research, which other customers did do. Vattenfall has not exceeded any other standard of care and there is also no question of undue payment of the kW compensation.

The Amsterdam Court held that businesses ought to have exercised greater caution. It is reasonable to expect that 'average, observant businesses' will familiarize themselves with the energy prices on offer and will take the initiative to understand the information provided by suppliers. Additionally, the fact that a free market has been in place since 2002 implies that Vattenfall had no obligation whatsoever to inform its business customers about the existence of other customers with better contract terms and that contracts without the kW charge would probably be cheaper. The customers themselves were responsible for their choice of electricity supplier. The court also finds that it is incorrect to state that no product or service is provided in return for the kW fee. Electricity is provided, and including general cost components, such as personnel costs, in a tariff structure is permissible.

### **The Impact**

For those expecting this judgment to be the very first case in which a multimillion-euro damage claim would be awarded, and thus opening the door to many more mass damage claims, the result may be somewhat of an anticlimax. Since the claimants have not been successful and no damages have been awarded, the case does not provide much to go on for funders, mass claim lawyers and others following these developments with interest. At the same time, the claim foundation lost the case on substantive grounds, and nothing in the decision suggests an impairment in the WAMCA's ability to provide access to justice for victims of mass harms.

From our perspective, there are two points that could be worthy of praise from a procedural point of view. The first is that, even after deeming 92% of the claims unfounded under Article 6:194 DCC, the court still refused Vattenfall's claim that the remaining 8% would be too small of group to justify a ruling in a collective action, prioritizing the uniformity of the defendant's conduct instead. This favours

procedural expediency and guarantees that a minority of class members wouldn't suffer from an eventual dismissing of the claim against the rest.

The second point is that the court took the perspective of the average user to rule on the sufficiency of the information provided by Vattenfall. This favours the groupability of class members in an abstract fashion, in contrast to the tendency other courts have shown to excessively scrutinize the similarity of the class members' situations to consider them a group with acceptably similar claims. In a ruling on EU consumer law earlier this year, the CJEU favoured this approach for collective actions in such area (see Case C-450/22 *Caixabank*).

That said, this judgment shows that the supposed claimant-friendly design of the WAMCA does not guarantee success and may come as a disappointment to claimants and funders alike. Notably as well is the fact that this case took about 2,5 years from summons to judgement, which is a relatively short time for complex class action cases, as illustrated by the timelines of other cases that were filed well before this case and that have still some ways to go before a judgment can be expected.

The question remains how funders will look at this result and if it has any impact on their willingness to keep funding Dutch class actions. Given the outcome of this case, with a negative result for the claimants and a dismissal of all claims on substantive grounds, it seems both funders and 'WAMCA-watchers' will have to wait a bit longer for that first pivotal judgment.