The Advocate
EUROPEAN FOCUS

Investors Can Toll the Dutch Statute of Limitations with a Simple Letter

By Flip Wijers

After sending the "tolling letter" to Deloitte, the VEB filed a collective action against Deloitte in Amsterdam. The Court determined that the tolling question presented an important legal issue that needed to be decided by the Dutch Supreme Court as an initial matter.

In the early 2000s, a massive accounting scandal at Dutch international supermarket chain Royal Ahold N.V. ("Ahold") shocked the global investment community and resulted in criminal and civil charges being filed in the Netherlands and the U.S. Almost a decade later, a Dutch shareholder association called Vereniging van Effectenbezitters (the "VEB") filed a declaratory judgment action against Deloitte & Touche LLP ("Deloitte") for its role in the $800 million scheme to overstate Ahold's reported income. Despite the lapse of time, the VEB did not want Deloitte to go unpunished for damaging Ahold's investors.

Days before the statute of limitations was set to expire, the VEB sent Deloitte a pre-litigation letter to toll the statute of limitations for a collective action seeking declaratory relief under Dutch law, and any potential follow-on individual actions asserting claims for monetary damages. On March 28, 2014, the Dutch Supreme Court issued a landmark decision endorsing investors' ability to timely sue Deloitte for its role in perpetrating the accounting fraud at Ahold. The Dutch Supreme Court decided that a shareholder association like the VEB "that is established to protect investors' rights" can, and did, toll the statute of limitations for all investors who suffered damages due to the same misconduct by sending a simple letter.

Background: The Dutch Collective Action Provides Numerous Protections For Public Investors

A Dutch collective action has some of the same attributes as an American class action. For instance, under Dutch law, a foundation or association such as the VEB can file a collective action to protect the investors with substantially similar interests. Dutch laws governing such collective actions also offer shareholders a wide range of protective measures, including injunctive and declaratory relief. However, unlike an American class action, a Dutch collective action cannot currently lead to an award for monetary damages.


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The decision in VEB has a number of important practical implications and is consistent with the growing trend toward collective actions and settlements in the Dutch courts. It means that an association and the interested investors it represents — together with any covered damaged claimants — can toll the statute of limitations on their damages claims by sending a pre-litigation letter to potential defendants.

To date, most Dutch collective actions seek declaratory relief — *e.g.*, a declaration that the defendant committed a tort that resulted in economic harm. If a plaintiff and any person or entity covered by a collective action successfully obtains the requested declaratory relief, then all represented investors can bring a follow-on individual action to obtain money damages. The inability to pursue monetary damages in a Dutch collective action is generally considered a "missing link" by those who conduct comparative studies. Why does the "missing link" exist? Among other reasons, Dutch legislators note that, in order to award monetary damages in a collective action, Dutch courts would have to determine issues of causation and the apportionment of fault, which have traditionally been dealt with on an individual — not collective — basis. Nevertheless, the Dutch parliament is expected to address the "missing link" issue this coming fall 2014, potentially bringing Dutch collective actions closer to providing for monetary relief. Until then, however, even without the ability to obtain monetary damages, the Dutch collective action remains a powerful tool to bring corporate wrongdoers to justice, as in the case of *VEB v. Deloitte* (*"VEB"*).

The Ahold Accounting Scandal And Its Legal Aftermath

In February 2003, Ahold, which is known for operating grocery stores around the world — including the Stop & Shop and Giant chains in the United States — went to the brink of bankruptcy when its financial reports were overstated by at least $800 million between 1999 and 2002.

In October 2004, the U.S. Securities and Exchange Commission ("SEC") filed a civil enforcement action alleging fraud against Ahold and three executives, including former Ahold CEO Cees van der Hoeven and former CFO A. Michiel Meurs. That day, Thomas C. Newkirk, Associate Director of the SEC's Division of Enforcement, stated: "This case is yet another deplorable example of a massive, multifaceted fraud at a major corporation."

In February 2012, the VEB set its sights on Deloitte for failing to detect the fraud at Ahold and for issuing misleading opinions on financial statements when the supermarket retailer was overstating its profits. Mere days before the statute of limitations expired, the VEB sought to toll the statute of limitations — for declaratory relief and damages claims based on tort — by sending a letter to Deloitte advising of its intent to file claims, and thereby to stop the clock on the statute of limitations. The letter was sent by the VEB on behalf of itself and a class of Ahold shareholders who suffered losses as a result of the fraud, as defined in the VEB's articles of association.

In its letter, the VEB informed Deloitte that the letter sufficiently tolled the statute of limitations under Dutch law for collective actions seeking declaratory relief, and also for any follow-on individual actions asserting claims for monetary damages. After sending the "tolling letter" to Deloitte, the VEB filed a collective action against Deloitte in Amsterdam. The court determined that the tolling question presented an important legal issue that needed to be decided by the Dutch Supreme Court. The Dutch Supreme Court usually only opens its doors if the

answer to a question is relevant to multiple claims based on the same facts, or if the response is needed to resolve or terminate numerous similar disputes. By dealing with an important, generic, legal question at an early stage in the litigation, a smooth and expedited decision-making process is preserved. Accordingly, the court in *VEB* asked the Dutch Supreme Court to decide whether a shareholder foundation that is entitled to bring a collective action — like the VEB — can toll the statute of limitations for individual damages claims on behalf of the investors it represents by sending a letter, even though Dutch law currently does not allow collective actions for damages. The Dutch Supreme Court answered that it could.

Inside The Dutch Supreme Court's Decision In *VEB v. Deloitte*

In answering the tolling question presented by *VEB*, the Dutch Supreme Court examined the fundamental rationale underlying collective actions. The Court held that the collective action primarily aims to facilitate an effective and efficient legal protection to injured claimants. The Court also observed that the legislative history of the Dutch collective action law provides that tolling letters can cover a demand for specific performance, which raises the question of whether the scope of a tolling letter is limited to just that type of demand or whether a wider, more flexible approach is appropriate.

Deloitte argued, among other things, that a narrow, limited approach should be adopted based on the literal text of the legislation and the accompanying explanatory notes. But the Dutch Supreme Court rejected Deloitte's arguments. The Court held instead that, while damages claims are not yet permissible in collective actions for technical reasons (i.e., the individualized issues of causation and fault), these issues need not be dealt with in order to extend tolling protections — and thus should not preclude collective tolling. To hold otherwise would undermine the pragmatic considerations underlying collective actions and settlements.

About The Author

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The holding in VEB serves the investor community well. It also appears to stand in stark contrast to the trend in some U.S. federal courts. A number of U.S. courts have held that the filing of a class action does not stop the clock on the three-year statute of repose for certain U.S. federal securities law claims.

VEB has a number of important practical implications and is consistent with the growing trend toward collective actions and settlements in the Dutch courts. It means that an association and the interested investors it represents — together with any covered damaged claimants — can toll the statute of limitations on their damages claims by sending a pre-litigation letter to potential defendants. In effect, this allows all investors covered by a collective action to wait to decide whether or not to bring an individual action for damages without their claims expiring. Additionally, the broad "collective effect" of this simple letter-writing process may provide investors with additional leverage to draw defendants to the negotiation table to discuss a potential settlement.

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