

[Informal translation from Dutch]

Amsterdam Court of Appeal

Date: 31 March 2017

Case number: 200.191.713/01

POST-HEARING SUBMISSION

in the matter of:

1. **AGEAS SA/NV**,
with its registered office in Brussels, Belgium, electing as address for service in this matter Claude Debussylaan 80, 1082 MD Amsterdam
("Ageas")
counsel: H.J. de Kluiver, D. Horeman and J.W.M.K. Meijer
2. **VERENIGING VAN EFFECTENBEZITTERS**,
with its registered office in The Hague, electing as address for service in this matter Amaliastraat 7, 2514 JC Den Haag
("VEB")
counsel: P.W.J. Coenen
3. **DRS BELGIUM CVBA**,
with its registered office in Brussels, Belgium, electing as address for service in this matter Maliesingel 20, 3581 BE Utrecht
("Deminor")
counsel: K. Rutten
4. **STICHTING INVESTOR CLAIMS AGAINST FORTIS**,
with its registered office in Amsterdam, electing as address for service in this matter Westermarkt 2-H, 1016 DK Amsterdam
("SICAF")
counsel: J.H.B. Crucq
5. **STICHTING FORTISEFFECT**,
with its registered office in Utrecht, electing as address for service in this matter Maliebaan 70, 3581 CV Utrecht
("FortisEffect")
counsel: A.J. de Gier
6. **STICHTING FORSETTLEMENT**,
with its registered office in Amsterdam, electing as address for service in this matter Barbara Strozziilaan 101, 1083 HN Amsterdam
(the "Foundation")
counsel: M.H. de Boer

1 INTRODUCTION

1. The Court of Appeal asked the Petitioners during the hearing of 24 March 2017 to provide an additional explanation regarding the dilution risk which is partly explained in table 7 of the first Analysis Group report (Annex 10 to the Petition). The Petitioners provide this explanation below.
2. In addition, the Petitioners point out that in response to the suggestion made by the Court of Appeal during the oral hearing, they will place further information on the website www.forsettlement.com in order to inform Eligible Shareholders about the effects of higher take-up rates on the compensation which can be expected based on the Settlement Agreement.

2 EXPLANATION OF TABLE 7 ANALYSIS GROUP REPORT

2.1 The take-up rates deemed to be realistic in table 7

3. During the hearing, the question of whether the results of investigations into take-up rates in the United States are representative for the Dutch WCAM settlements came up for discussion.
4. The take-up rate in similar class settlements in the United States is 20 to 35% on average.¹ With these kinds of take-up rates, Active Claimants and Non-Active Claimants are expected to be able to claim the full compensation per Fortis Share as stated in the Settlement Distribution Plan (Schedule 2 to the Settlement Agreement).² It would only be necessary to take into account a proportional reduction in the compensation per Fortis Share as stated in the Settlement Agreement in the event of an effective take-up rate of Active Claimants and Non-Active Claimants (blended take-up rate) of more than 43%.³

¹ First Analysis Group report (Annex 10 to the Petition), nos. 64-72; Submission after case management hearing of 20 October 2016, no. 23.

² Submission after case management hearing of 20 October 2016, no. 28.

³ The blended take-up rate is defined in note [1] to Figure 2 in the Submission after case management hearing of 20 October 2016 as: "Blended take-up rate is calculated by taking the weighted average of the assumed take-up rate of 100% for Active Claimants and take-up rate of 0% to 100% for Non-Active Claimants, where the weights are given by each claimant group's proportion of eligible shares."

5. Studies into similar class settlements in the United States show that it is not probable that the effective take-up rate will be more than 43%.⁴ The take-up rates in the United States are a good indication for Dutch settlements. First of all, there is no reason to assume that less will be claimed in the United States than in the Netherlands.⁵ After all, it is also of great importance for negotiators in the United States to 'mobilise' the largest possible group of shareholders in order to spur the defendant into negotiations regarding a class settlement, as has also happened in this case.⁶ The fact that there may perhaps be procedural differences between the Netherlands and the United States does not alter this.⁷
6. There are only very limited details publicly available regarding take-up rates in previous WCAM settlements. These details do however confirm the picture that emerges from American studies. In the Shell case, approximately 25% of the total number of entitled parties actually claimed compensation.⁸ In the DSB case, this was approximately 23%.⁹ In the DES I settlement, the take-up rate was approximately 18% or, in a conservative scenario, no more than 36%.¹⁰ In this last case, a certain (emotional) connection with the

⁴ See figure 1 in the Submission after case management hearing of 20 October 2016, page 11.

⁵ Pleading notes Ageas of 24 March 2017, nos. 20 et seq. and 37.

⁶ It is therefore not true that only a very limited group of shareholders is active at the moment a class settlement is concluded in the United States.

⁷ The fact that a class action can be filed in the United States by a lead plaintiff and that such a plaintiff is not necessarily required to have a large number of followers for this purpose, is in itself correct. However, this also applies to the Dutch system where a foundation or association (including one without explicit members) can file a collective action pursuant to Article 3:305a DCC. Moreover, in the United States, the party with the largest equity interest is in principle considered to be lead plaintiff in securities class actions.

⁸ Pleading notes Ageas of 24 March 2017, no. 37.

⁹ In the DSB proceedings, the number of known DSB clients who were eligible for the compensation in accordance with the WCAM agreement was approximately 345,000. See Amsterdam Court of Appeal 13 May 2014, JOR 2015/9 (*Second interim decision DSB*), paragraph 5.2.1 and 6.7. It is clear from a notice of 1 February 2017 on the website of DSB that 80,000 compensation applications were assessed under the WCAM settlement. See the notice "Einde WCAM compensatieregeling" of 1 February 2017 on <https://www.dsbbank.nl/nl/home/nieuws>. That means a take-up rate of approximately 23% (80,000 / 345,000 * 100%).

¹⁰ See Amsterdam Court of Appeal 24 June 2014, ECLI:NL:GHAMS:2014:2372 (*DES II settlement*), paragraph 4.2-4.3 in which the completion of the DES-I settlement is explained. Approximately 17,000 persons were registered as potential injured parties with DES Centrum and allowance was made for twice as many entitled parties. In the period of 2007 up to and including 2012, 5,698 applications were filed, 5,252 of which were awarded. The number of pay-outs still to be anticipated from 1 January 2013 is, according to the judgment, between 362 and 906. That results in a take-up rate, based on the assumption of the maximum number of expected compensation applications, between 18% ((5,252 + 906) / 17,000 * 100%) and 36% ((5,252 + 906) / 34,000 * 100%).

(personal) injury suffered may make it more likely that claims for compensation will be made relatively more frequently.

7. Finally, it must be pointed out that the Events to which this settlement pertains already took place nearly ten years ago. This makes it unlikely that the take-up rate of Non-Active Claimants, who have not undertaken any action for all these years, will be higher than 25% (in accordance with a blended take-up rate of 43%).

2.2 Further explanation of table 7

8. Table 7 provides insight into the total compensation which Non-Active Claimants can claim in relation to different take-up rates among Non-Active Claimants. In **Annex 26** an explanation of table 7 and of the basic principles underlying table 7 is provided once again per column for the sake of completeness.¹¹
9. During the hearing, the Court of Appeal asked whether the calculation of the compensation in table 7 is based on all shares that are eligible for compensation. This is indeed the case: the figures in table 7 have been calculated on the basis of Eligible Shares; in other words, all shares that are eligible for compensation. The Subscriber Shares and Holder Shares also fall into this category. The only exception is column (2) which includes only those shares for which, in the opinion of Analysis Group, harm could have been suffered in an economic sense (the so-called Qualifying Shares).¹²
10. Furthermore, the Court of Appeal asked why column (9) appears to show a "deficit" of EUR 29.6 million for a take-up rate of Non-Active Claimants of 30% while it would appear from column (8) that the total "deficit" for such a take-up rate amounts to EUR 70.8 million. The answer to that question is that column (9) only covers the "deficit" for Buyer Shares, whereas the "deficit" is divided proportionally between the compensation for both Buyer Shares and Holder Shares. The

¹¹ Because it is necessary in the first place to assess whether the compensation for Non-Active Claimants is reasonable, Annex 26 only deals with the columns in table 7 that cover the compensation for Non-Active Claimants. This discussion therefore does not take columns 3, 5 and 7, which pertain to the compensation for Active Claimants, into account.

¹² First Analysis Group report (Annex 10), no. 52 et seq. which specifies the shares for which harm could have been suffered from an economic perspective.

remaining "deficit" of EUR (70.8 – 29.6 =) 41.2 million is deducted from the compensation for Holder Shares (see also Annex 26).¹³

11. The Court of Appeal also asked whether column (9) also includes any possible increase (up to a maximum of 115% of the compensation under the Settlement Distribution Plan). As is also clear from the explanation of table 7, this is indeed the case, subject to the proviso that (i) for the take-up rate of 20% stated in column (1), the sum of money that is available for compensation to Non-Active Claimants (EUR 407.8 million) is larger than the sum of money that is required to pay the maximum compensation of 115%; (ii) for the take-up rate of Non-Active Claimants of 25% stated in column (1), there is a limited increase up to 102% of the compensation offered; and (iii) for the take-up rate of 30% stated in column (1), there will no longer be any increase but rather a decrease of 14.8% (i.e. a reduction of up to 85.2% of the compensation offered). This decreased compensation, however, is in every respect reasonable because it is higher than the economic harm calculated by the Analysis Group as stated in column (2). Furthermore, a considerable number of such Non-Active Claimants will still receive an additional compensation – reduced in the same manner – for their Holder Shares.
12. In order to provide more insight into what can be deduced from column (9), Analysis Group has prepared a more comprehensive version of table 7 to which a number of extra columns have been added. This more extensive table, including a reader's guide for the new columns (10) to (13), is appended as **Annex 27** to this submission.
13. If columns (9) and (13) of this more extensive version of table 7 are compared, it is clear that for take-up rates of Non-Active Claimants of 15% and 20% – blended take-up rates of 35% and 39% respectively – the Box 2 Surplus is large enough to increase the compensation for Non-Active Claimants by the maximum of 15% (up to a total of 115%).

¹³ For a take-up rate of Non-Active Claimants of 30%, Non-Active Claimants claim a compensation of EUR 478.6 million in total – see column (8). The total available amount for Non-Active Claimants is however EUR 407.8 million. This means that for a take-up rate of Non-Active Claimants of 30%, there is a total "deficit" of EUR 70.8 million. In that case, Non-Active Claimants receive approximately 85.2% of the compensation offered per Fortis Share (EUR 407.8 million / EUR 478.6 million = 85.2%). Non-Active Claimants therefore receive a total compensation for Buyer Shares of EUR 170.4 million (EUR 200.0 million * 85.2%) and a total compensation for Holder Shares of EUR 237.4 million (EUR 278.6 million * 85.2%).

For a take-up rate of Non-Active Claimants of 25%, corresponding with a blended take-up rate of 43% of Active Claimants and Non-Active Claimants, the Box 2 Surplus is still large enough to result in an increase of 2% (up to 102%).

14. A comparison of columns (2) and (10) moreover shows that there is a reasonable relationship between the possible economic harm calculated by Analysis Group and the compensation offered for Non-Active Buyers for the various take-up rates. This applies *a fortiori* also for the compensation to Non-Active Holders.

2.3 A graphical representation of the effect of a higher take-up rate

15. The details in column (13) fit seamlessly with Figure 2 in the Submission after case management hearing, in which the dilution risk for Non-Active Claimants for different blended take-up rates of Active Claimants and Non-Active Claimants is detailed (see **Annex 28**).
16. During the hearing, the Court of Appeal asked whether the "dilution" of the compensation for Non-Active Claimants progresses linearly as the take-up rate among Non-Active Claimants increases. This is not the case. As is also clear from Figure 2 in the Submission after case management hearing, any eventual dilution effect levels off progressively. This is also evident from column (13) of the more detailed elaboration of table 7 (see also Annex 27).
17. This can be clarified as follows. The total amount which Non-Active Claimants can claim under article 2.1 of the Settlement Distribution Plan¹⁴ increases linearly as the take-up rate among Non-Active Claimants increases. This is also apparent from the more detailed version of table 7 (Annex 27): for every extra 5% of Non-Active Claimants, the compensation for Buyer Shares and Holder Shares which may be claimed increases by approximately EUR 79.8 million – column (8).
18. The total available compensation for Non-Actives is however limited to EUR 407.8 million so that from a certain blended take-up rate (approximately 44%), the compensation which may be claimed

¹⁴ Schedule 2 to the Settlement Agreement.

exceeds the available compensation of EUR 407.8 million. From that moment onwards, the total compensation that will be paid to Non-Active Claimants remains constant (at EUR 407.8 million), while the claim of the Non-Active Claimants to compensation, as calculated based on article 2.1 of the Settlement Distribution Plan, indeed continues to increase. As a consequence of this, the total available compensation for Non-Active Claimants (of EUR 407.8 million) is divided by an increasing amount.¹⁵ The division of a fixed amount by an increasing amount results in this kind of diagram.

Amsterdam, 31 March 2017

Counsel for Ageas
On behalf of the Petitioners

¹⁵ The "dilution effect" revealed by Figure 2 in the Submission after case management hearing of 20 October 2016, is calculated by dividing the total amount that is available as compensation for Non-Active Claimants (EUR 407.8 million) by the total compensation which Non-Active Claimants can claim.