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Dutch Foundation Dismissed for Inadequate Safeguarding of Members' Interests

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On June 29, 2016, the Dutch Court of East Brabant **dismissed a foundation's claims** against Rabobank Group for alleged unlawful selling of interest rate swaps because it failed to meet the requirement of the Dutch Claim Code that a foundation sufficiently safeguard the interests of its members. While it is a lower court decision likely to be appealed, this dismissal depicts the increased scrutiny that foundations may face, particularly in the wake of **the €1.2 billion settlement reached by the foundation in the Fortis case earlier this year.** There will likely be an increase in the number of defense challenges to the ability of foundations to pursue litigation on behalf of members. Therefore, before joining a Dutch foundation, institutional investors should carefully scrutinize the foundation's organizational documents and governance structure.

According to the court, the Dutch Claim Code (the "Claim Code") requires that foundations sufficiently guarantee the legal interests of their members. The legislature adopted the Claim Code to prevent the commercial interests of a foundation's founders from prevailing over its members' interests. Because the Claim Code was enacted as a means of self-regulation, courts are not required to apply it. However, in making the necessary determination of whether a foundation sufficiently guarantees the interests of its members, courts consider a foundation's compliance with the Claim Code as one of four factors. These factors are: (1) the organization's past representation of foundation members' interests; (2) whether the foundation was established by an ad hoc or existing organization; (3) whether the representatives of the organization are themselves victims of the alleged wrongdoing; and (4) whether the principles of the Dutch Claim Code are satisfied.

In the matter at hand, Stichting Renteswapschadeclaim (the "Foundation") was established in June of 2014. The founding organization did not exist prior to establishing the Foundation. Rather, it was an ad hoc organization founded for the sole purpose of conducting this collective action. The Foundation's President, working full-time at €200 per hour, was not a victim of the alleged wrongdoing, but had significant experience in bringing collective actions against banks and insurance companies. The Court found these factors to evidence the commercial motivations of the Foundation's President.

Further, the Court found that the Foundation was not sufficiently protected against these commercial motivations. Until mid-December of 2015, the President was the sole director of the Foundation, which also lacked a supervisory board. It was only after Rabobank initiated its defense that the Foundation added another director, charging €2,500 per month, and two supervisory board members, each charging €10,000 per year, one of whom lacked knowledge of the Dutch language and failed to attend the hearing. This concentration of power and lack of checks and balances led the Court to conclude that the Foundation lacked a structure sufficient to prevent the President's commercial biases from overcoming the members' interests.

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