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Legal responses to private debt as a business model in the Netherlands

Candida Leone and Joanna van Duin

6.1 Introduction

The market for informal (extra-judicial) debt collection in the Netherlands is flourishing; recent research established its yearly turnout at 15–20 billion euro.[1] An estimated 7–8% of Dutch residents are faced with a collection action every year; the large majority find themselves up against commercial debt collectors.[2] Not only credit institutes, but all sorts of providers resort to outsourcing of their credits – from dentists to energy and telecommunication companies to webshops. According to Government documents, the market is divided between debt collection agencies, bailiffs and so-called 'incasso-lawyers,' who – we can assume – enter the picture when the outstanding amounts are more significant. Next to this distinction, as in other countries, some agencies will engage in the direct purchase of claims and the subsequent collection as new creditors rather than contractors of the original creditor, a problem which here and there emerges in the Dutch discussion.[3] The preponderance of debt collection unconnected to traditional (mortgage or personal) credit, however, has kept the debates on debt collection and non-performing loans largely separated.

The debt collection business has been largely unregulated so far; self-regulation initiatives have appeared in recent years, but it seems that their impact on the market

1 *Kamerstukken* II 2020-2021, 35733, nr. 3 (hereinafter: *Memorie van Toelichting*) para 2.2 ('Nature and significance of claim collection services'), p. 15. This chapter was closed in January 2022. The Memorie van Toelichting (explanatory memorandum) pertains to the legislative proposal on 'Quality of debt collection services' discussed in this chapter; the law has been approved on 22 May 2022.

2 *Kwantitatief onderzoek naar de aard en omvang van incassoproblematiek onder consumenten* (ACM/Motivaction 2014). See also *Memorie van Toelichting* section 2.2, with further references.

3 See Autoriteit Financiële Markten, *Consumenten en Incassotrajecten. De verantwoordelijkheden van aanbieders van consumptief krediet bij betalingsachterstanden*, 15 November 2016 (update: 19 december 2018). In 2020, the Dutch Supreme Court confirmed that it is possible, in particular, for banks to sell their claims to non-banks, in fact legitimising the cession model (see *Hoge Raad* 10 July 2020, ECLI:NL:HR:2020:1274 en ECLI:NL:HR:2020:1276). This gives rise to the question to what extent the original creditor's duties and obligations are transferred to the debt collector. See e.g. N.J.H. Huls, 'Hoe barmhartig is het burgerlijk recht voor de consument?', *Tijdschrift voor Consumentenrecht en handelspraktijken* 2019/2, at p. 87.

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has been limited or at least slow to gain traction. The two main 'quality marks'[4] have so far registered a somewhat limited uptake,[5] while complaints keep being made to the enforcement authorities. Societal attention on questions of debt has been constant – and possibly growing – throughout the post-crisis decade, with the last government having resigned over *public* enforcement of credits viz suspected fraudsters.[6] The policy initiatives around debt collection are thus part of a broader policy agenda loosely titled 'integral approach to debt' (*brede schuldenaanpak*).[7]

Since 2012, the *costs* that can be charged to debtors are regulated in a governmental decree that caps them at a certain percentage of the concerned credit but also establishes a *minimum* compensation of 40 euro per advanced claim.[8] For very small credits (government report: a significant proportion of all claims), this has the effect that it is in fact lucrative – indeed, a business model – to immediately advance a claim as allowed charges may be several times the outstanding amount.[9] Taking the example of a cheap phone subscription that may cost a few euro per month, the same claim can be repeated several times in a row if a consumer fails to pay successive monthly installments, quickly leading to debt consisting of a few tens of euro in principal and a few hundred in collection charges. This is already poignant if the consumer simply forgot to pay, but particularly so if they do not have the money, and also if they have a disagreement with the original creditor about the delivered products or services or about the claimed amount (thus, if the claim is contested).[10]

Over the past decade, thus, stories of consumers confronted with piling debt, aggressive letters, and confusing messages have kept appearing[11] – although, as

4 'Incasso Keurmerk' by the association of Debt collectors and the independent benchmark 'Sociaal verantwoord incasseren,' see *Memorie van Toelichting* section 2.1.

5 Figures in *Memorie van Toelichting* section 2.2 indicate that around ten percent of the active debt collectors are associated with the one or the other quality marks. The figures may have changed since the *Memorie* was written, but they give a good idea of the limits encountered by the initiatives.

6 See BBC 15 January 2021, Dutch Rutte government resigns over child welfare fraud scandal, <https://www.bbc.com/news/world-europe-55674146>.

7 See 'Actieplan brede Schuldenaanpak,' <https://www.rijksoverheid.nl/onderwerpen/schulden/schulden-aanpakken>.

8 Besluit buitengerechtelijke incassokosten, art 2(2). Art 6:96(2)(c) of the Dutch Civil Code (*Burgerlijk Wetboek*; BW) stipulates that collection charges can be claimed as damages (on the basis of the debtor's contractual liability). Pursuant to art 6:96(5)–(7), the rules laid down in the governmental decree are mandatory in case the debtor is a consumer; the compensation can only be claimed 14 days after the consumer-debtor has received due notice; and the notice must encompass all claims, the aggregated amount of which is used to calculate the compensation.

9 Extra salient is that sending an automated notice can already qualify as a debt collection measure that warrants compensation; see also R.R.M. de Moor, 'Wettelijke normering van buitengerechtelijke incassokosten: alleen maar 'voordeel' voor de consument?', Tijdschrift voor Consumentenrecht en handelspraktijken 2012/5, at p. 202. In one extreme case, an amount 240 euro was claimed for legal costs whereas the original claim was only 0.05 euro: see Rb. Amsterdam 7 November 2019, ECLI:NL:RBAMS:2019:8244.

10 ACM/Motivaction 2014 (see note 2).

11 See e.g. <https://www.groene.nl/artikel/routinematige-intimidatie> ('Habitual harassment'), *Dossier De Schuldenindustrie: wie verdient er aan mensen met schulden?* ('The debt industry: who profits from people in debt?') <https://www.platform-investico.nl/dossiers/de-handel-schulden/>.

we see, less so after intervention based on unfair commercial practices rules. Next to rogue traders demanding payments of e.g., unsolicited goods and services or otherwise ungrounded claims, inflated claims and claims based on partially invalid contracts were not uncommon in an economy characterized by heavy reliance on delayed payment.

Adding pain to injury was the possibility for creditors/debt collectors to enforce a claim through court proceedings in default of appearance of the debtor, based on little documentary evidence and for the very reasonable cost of 79 euro per claim. This situation blurred the boundaries between informal and judicial debt collection, allowing creditors to have their claims rubber-stamped by local courts without, in most cases, ever going beyond merely *alleging* a claim. While the situation has changed over the past ten years (see section 6.2.1), the current state is not free from controversy and does not, of course, address the 'genuinely' informal side of the collection business.

With this background in mind, in 2020–2021 the Dutch government has been discussing a proposal entitled the 'Quality of debt collection services' (*Wet kwaliteit incassodienstverlening*, henceforth WKI), which aims to address the problem by regulating both access to the market and the way in which collection services need to be performed, in particular requiring careful communication and the provision of transparent information to debtors. The main elements in this proposal will be discussed in the second part of the paper. We will conclude by reflecting on the relationship between the Dutch proposal and the 2021 Directive on credit servicers and credit purchasers (hereinafter 2021 Credit Servicers Directive),[12] in particular with a view to exploring whether criticism raised in the Dutch debate against the pending proposal can be seen as addressed by the Directive.

6.2 First part: reigning in abusive debt collection via 'regular' (consumer) instruments

6.2.1 Blurred boundaries between informal and judicial collection and spill-over effects of ex officio *control*

Unlike in other E.U. Member States, notably Spain and Poland,[13] there is no separate order for payment procedure in the Netherlands. It is possible to file a monetary claim in summary proceedings (dubbed '*incassokortgeding*'[14]) insofar as

12 Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU.

13 See e.g. CJEU 14 June 2012, Case C-618/10 *Banco Español de Crédito v. Calderón Camino* ECLI:EU:C:2012:349; CJEU 18 February 2016, Case C-49/14 *Finanmadrid v. Albán Zambrano and Others* ECLI:EU:C:2016:98; CJEU 13 September 2018, Case C-176/17 *Profi Credit Polska v. Wawrzosek* ECLI:EU:C:2018:711 CJEU 28 November 2018, Case C-632/17 *PKO Bank Polski v. Michalski* ECLI:EU:C:2018:963.

14 Specific requirements apply, in particular a balance between urgency (*spoedeisendheid*) and recovery risk if the interim measure is revoked (*restitutierisico*). See, critically, R.P.J.L. Tjittes, 'De geest van het incassokortgeding terug in de fles', *RM Themis* 2002/3, pp. 161–163.

it is plausible that the creditor has an urgent interest – for which the threshold is relatively low – and the claim is likely to be granted. The case can be adjudicated quickly, especially if the debtor does not contest the claim or does not appear in court. The latter happens often: approximately 70% of the cases – also in ordinary (i.e., not summary) proceedings – are decided in default of the defendant's appearance.[15] Default proceedings are thus the default route. In the absence of a contentious debate, the court will usually only dismiss the claim when it appears to be manifestly unjust or unfounded.[16] This means that, in practice, the court is effectively asked to 'rubber-stamp' the claim without assessing the merits of the case.

This poses a particular problem in debt collection cases. First, the threat of court proceedings and accompanying costs, including the risk of a cost order based on the 'loser pays' principle,[17] may coerce debtors into a settlement before the case reaches the court, even if the claim is unfounded. Whilst empirical research has shown that litigants always make a cost/benefit-analysis, legal costs are constantly mentioned as one of the main factors deterring them from going to court.[18] Second, the writ of summons usually contains very little information to substantiate the claim; the underlying contract or a breakdown of the claim's components – e.g., installments, interest, penalties, costs – are often not provided. Third, of the cases that do make it to court, many are uncontested, even if there would be grounds to challenge them. This increases the risk of claims being granted that, on a closer look, are insufficiently substantiated and/or lack a factual or legal basis.

In recent years, lower courts have started exercising more scrutiny in respect of such claims. An example can be found in a case where a debt collection agency had filed a claim based on a – as it turned out – non-existent contract. The Subdistrict Court in Amsterdam considered this to be an 'aggressive commercial practice' and an 'abuse of procedural law': the agency in question knew (or should have known) the claim had no chance of success, but it still brought the claim while being aware that the threat of legal costs would very likely pressure the debtor into paying. The court subsequently dismissed the claim and imposed a much higher cost order than usual.[19]

15 De Rechtspraak, *Rapport incassozaken* 2018, p. 7.

16 Art 139 Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*; Rv).

17 On legal costs and other barriers to going to court, see e.g. *Study for the Fitness Check of EU consumer and marketing Law – Final report Part 1: Main report*, European Commission 29 May 2017, available at <https://ec.europa.eu/newsroom/just/items/59332/en> (accessed 24 September 2021); Burkhard Hess and Stephanie Law (eds), *Implementing EU Consumer Rights by National Procedural Law. Luxembourg Report of European Procedural Law: Volume II* (Beck 2019).

18 M.J. ter Voert and M.S. Hoekstra, *Geschilbeslechtingdelta* 2019, WODC I&O Research, Cahiers 2020-18.

19 Rb. Amsterdam 16 October 2017, ECLI:NL:RBAMS:2017:7577, r.o. 6-12 (Direct Pay Services B.V./gedaagde). See further J.M.L. van Duin, 'Wie betaalt de rekening? De kostenveroordeling in de context van het EU-consumentenrecht', Tijdschrift voor Consumentenrecht en handelspraktijken 2018/4, p. 180.

E.U. consumer law has been an important driver to question the courts' 'rubber-stamping' role in uncontested cases, especially in light of the CJEU's case law on the *ex officio* application of the Unfair Contract Terms Directive.[20] In 2013, the Dutch Supreme Court confirmed that the duty of *ex officio* control of unfair terms equally applies in default proceedings.[21] If the necessary factual and legal information is available for the court to suspect that a clause falls within the scope of the UCTD and is unfair, the court must investigate this, even if it has not been brought up by the parties themselves. When it comes to granting leave for the enforcement of arbitral awards against consumers, the Supreme Court held in 2019 that the court must exercise *ex officio* control as well, and also in respect of the arbitration clause on which they are based.[22] The duty of *ex officio* control is not limited to unfair terms: in respect of collection charges, for instance, the court must check if the creditor has sufficiently substantiated the charges and whether the mandatory rules on collection charges have been observed.[23] The Supreme Court's judgments fit in a long line of CJEU case law, which has more recently focused on the prerequisite of the court acquiring the necessary information.[24] Dutch courts have the (discretionary) power to request information of their own accord,[25] which gives rise to the question how and to what extent they should exercise this power in default proceedings.[26]

In 2010, a report was published by a special working group of (sub)district courts containing guidelines; second and third versions of the report followed in 2014 and 2018.[27] The report intended to formulate a common judicial position on applying the CJEU's case law in practice; it contains recommendations to all lower courts dealing with consumer cases. One of those recommendations is to

20 See more elaborately e.g. C. Leone and J.M.L. van Duin, 'The real (New) Deal: levelling the odds for consumer-litigants', *European Review of Private Law* 2019/6, 1227; Werbrouck and Dauw 'The national courts' obligation to gather and establish the necessary information for the application of consumer law - the endgame?', *ELRev* 2021, 46(3), 325.

21 *Hoge Raad*, judgment of 13 September 2013, ECLI:NL:HR:2013:691 (*Heesakkers/Voets*), paras 3.6.3, 3.9.2 and 3.6.1 respectively. Both in appeal and in default proceedings, Dutch civil courts must examine compliance with rules of public policy: M. van Rossum and E. van der Minne, 'De (on)mogelijkheid van ambtshalve toetsing van het Unierecht in hoger beroep' [2017] Tijdschrift voor de Procespraktijk 98, 101.

22 *Hoge Raad* 8 November 2019, ECLI:NL:HR:2019:1731 (*Intermaris*), para 2.8.7.

23 *Hoge Raad* 25 November 2016, ECLI:NL:HR:2016:2704. In the context of art 139 Rv all mandatory rules – so not only public policy – must be applied *ex officio*.

24 See e.g. CJEU 9 November 2010 (Grand Chamber), Case C-137/08 *VB Pénzügyi Lízing v Ferenc Schneider* ECLI:EU:C:2010:65; CJEU 17 May 2018, C-147/16 *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen v. Kuijpers* ECLI:EU:C:2018:320 and the case law cited in note 17 above; further discussed in Leone and J.M.L. van Duin (note 20).

25 Art 22 Rv.

26 C. Seinen and A. Ancery, 'Vorderingen in b2c-verstekken: toetsen of toewijzen?', Tijdschrift voor Civiele Rechtspleging 2015/3, 77.

27 Full title: *Ambtshalve toetsing III. Herzien rapport van de LOVCK&T redactieraad*, May 2018. The report will hereinafter be referred to as '2018 LOVCK Report.' It can be found (in Dutch) at <https://www.rechtspraak.nl/SiteCollectionDocuments/rapport-at-III-31-juli-2018.pdf>.

use a presumption that the defendant is a consumer, if they are a natural person and there are no indications of a business transaction, unless the claimant proves otherwise. When the writ of summons does not provide sufficient information, the court must take further instruction measures. Especially where 'repeat players' are involved – i.e., creditors who repeatedly bring similar claims in a standardized manner – lower courts already tended to impose stricter requirements. The 2018 report sanctions this: the claim should be dismissed if the claimant does not comply with the court's instructions.[28] And in case of 'repeat players' who continuously fail to substantiate the claim sufficiently, it can be dismissed immediately (without taking measures of instruction or giving the claimant an(other) opportunity to be heard).[29] A legal basis for this can be found in a violation of the duty to provide complete and truthful information to the court.[30] The 2018 report also contains a 'model instruction form,' requiring claimants to submit *inter alia* the underlying contract and terms and conditions, invoices, correspondence with the defendant, and a specification of the main claim, interest, and penalties.[31] Furthermore, the form asks specific questions, like how and where the contract has been concluded (e.g. at a distance), what products or services it pertains to, whether information duties have been complied with, and whether the claim is based on standard terms and conditions. The idea behind the form was that it contributes to streamlining the handling of debt collection cases and offering effective judicial protection to consumers.[32] From 2019 onwards, (sub)district courts have indeed dismissed claims because the creditor did not comply with the instructions.[33] As per mid-2020, bailiffs and collection agents are supposed to submit the required information by themselves, i.e. without the need for judicial intervention.

The form is not uncontroversial: it has tightened the requirements for claims resulting in default proceedings and endorses dismissal of the claim if those requirements are not met.[34] Common objections are that claimants do not know in

28 On the basis of art 21 and 111 Rv.

29 2018 LOVCK Report, pp. 49–51. In November 2021, the Supreme Court held that if there are uniform (non-binding) guidelines available for the adjudication of consumer cases, the claimant can be required to present its views in advance – in this case on (partial) annulment of the contract to sanction a violation of information duties – and does not need to be heard separately in default proceedings: Hoge Raad 12 November 2021, ECLI:NL:HR:2021:1677, para 3.1.18.

30 Art 21 and 111 Rv; see further C. Seinen, 'De waarheidsplicht en de geraden gevolgtrekking anno 2020: een zoektocht naar proportionaliteit' [2020] *Tijdschrift voor Civiele Rechtspleging* 33, pp. 39–40.

31 The eight-page long form (in Dutch, and by now in version 2.0) can be found here: <https://www.rechtspraak.nl/SiteCollectionDocuments/landelijk-informatieformulier-ambtshalve-toetsen-consumentenzaken21.pdf>.

32 Seinen and Ancery (note 35). C. Seinen and A. Ancery, 'Vorderingen in b2c-verstekken: toetsen of toewijzen?', *Tijdschrift voor Civiele Rechtspleging* 2015/3, pp. 77–88.

33 See <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Nieuws/Paginas/Rechter-eist-meer-informatie-in-consumentenzaken.aspx>. See e.g.Rb. Amsterdam 21 October 2019, ECLI:NL:RBAMS:2019:7985; Rb. Noord-Holland 22 April 2020, ECLI:NL:RBNHO:2020:3155.

34 See also Opinion of *Procureur Generaal bij de Hoge Raad* 16 August 2021, ECLI:NL:PHR:2021:757, paras 1.4–1.5.

advance if the defendant will appear in court (hence there should be no distinction between default and contentious proceedings), that a more elaborate assessment increases the burden on courts (to the detriment of efficiency), and that dismissing the claim (in its entirety) is disproportionate.

In addition, the Royal Federation of Bailiffs has called for more clarity and unity in the way courts assess claims in the interest of trade and legal certainty.[35] They also have doubts about the definition of 'consumers' and 'repeat players,' which some courts understand as including bailiffs. Due to the wide variety of criteria, the Federation asserts, it is impossible to develop an automated process for claims potentially involving consumers, making debt collection more costly. They observe a mismatch between the court taking into account all individual circumstances of the case and creditors focusing on large-scale processes. Moreover, when the claim is too small, a decision in a concrete case cannot be appealed, even if it impacts the overall process. In general, the introduction of the form has increased administrative costs for creditors, which makes it less worthwhile – a 'destruction of capital' – to pursue smaller claims. According to the Federation of Bailiffs, the effect of the form is thus that less claims are being brought.

Some of these criticisms would concern all judicial guidelines, such as the question whether they undermine or actually contribute to efficiency. In a recent judgment, the Supreme Court tended towards the latter: not only do guidelines enable the claimant to appreciate which information must be provided at an early stage, they also make the applicable rules more manageable and may enhance legal certainty and equality.[36]

The form essentially establishes clearer boundaries between informal and formal debt collection practices. Creditors must think twice before they seek to enforce their claim in court. The upside is that they are actively discouraged from bringing 'bad' claims, such as claims that are based on unfair terms or entail excessive charges. On the other hand, the downside may be a rise of informal enforcement, pushing creditors to look for alternative solutions.

This turns debt collection into a pressing access to justice issue, not only for creditors[37] but also and especially for consumer-debtors. Recent years have seen a decline in small claims brought before (sub)district courts.[38] Possible explanations concern an increase in court fees, efforts of municipalities and other organisations

35 <https://www.kbvg.nl/nieuws-en-opinie/kbvg-nieuws/kbvg-presenteert-rapport-over-de-ambtshalve-toetsing-door-de-rechtspraak>.

36 *Hoge Raad* 12 November 2021, ECLI:NL:HR:2021:1677, para 3.1.19.

37 Calls have even been made to introduce a national order for payment procedure for uncontested claims: M. van Zanten, 'Voorstel voor een nieuwe procedure bij onbetwiste vorderingen', *Beslag, executie & rechtsvordering in de praktijk* 2021/6, 15–19. For consumer cases, such a procedure would be hard to reconcile with the CJEU's case law on the requirement of effective judicial protection. Apart from the bailiff not being an independent judicial organ, it is highly questionable whether consumer-debtors who are confronted by a bailiff (operating on behalf of a creditor) are able to fully apprehend the claim, let alone the consequences of not contesting it. See further J.M.L. van Duin, *Effective Judicial Protection in Consumer Litigation* (Intersentia 2022), at p. 85.

38 *Rapport incassozaken* 2018, p. 7.

to prevent (further) indebtedness, as well as the rise of out-of-court debt collection mechanisms, e.g. via digital arbitration.[39] As the controversy that has arisen over one such mechanism (e-Court) shows,[40] out-of-court disputes may impair the effective (judicial) protection of consumer-debtors on a whole new level, and puts the efficacy of court intervention into perspective. Meanwhile, however, debt collection was also on the agenda of public enforcement.

6.2.2 Tackling abusive providers via unfair commercial practices

In 2015, the Authority for Consumers and Markets (ACM) announced its concerns regarding debt collection practices. A joint investigation by the ACM and the Financial Markets Authority revealed a practice of collecting non-existing or unfounded claims, charging excessive fees and exerting undue pressure on consumers.[41] In response to these findings, the ACM adopted a particularly comprehensive approach: next to the classical instruments of warnings, commitments, and fines (on which more in the next paragraph), it addressed debt collection service providers as well as creditors who used collection services, who were sensitized to choose and act responsibly.[42] Additionally, it set up an educational campaign – including a 'toolkit' – addressed not only at consumer-debtors but also, perhaps most importantly, at social workers (*schuldhulpverleners*) possibly assisting them.[43] The toolkit is meant to help debtors and their caseworkers to (1) verify the legitimate nature of the claim; (2) calculate whether the fees and interest charged are in line with Dutch law; (3) check the language of the demands for aggressiveness; (4) prepare an appropriate response letter, by making use of specifically dedicated sample letters. It appears that empowering individual consumers via information and education was considered insufficient in the case of debt collection due to the 'fear factor' that can prevent consumers from taking care of their interests in debt contexts.[44]

39 See e.g. Emma van Gelder, 'Online Dispute Resolution: een veelbelovend initiatief voor toegang tot het recht?' [2018] *Maandblad voor Vermogensrecht* 262.

40 See <https://www.groene.nl/artikel/vonnis-te-koop>;
Dorien Thiescheffer, *E-court naast overheidsrechtspraak. Online rechtspraak als alternatieve geschilbeslechting en de garanties voor consumenten* (Celsus juridische uitgeverij 2018).

41 See <https://www.acm.nl/nl/publicaties/publicatie/14892/Oneerlijke-praktijken-bij-incassobureaus>.

42 See in particular the intervention viz telecom service providers, who were found to carry out several illegitimate behaviors in collecting their credits – from demanding excessive fines to setting too short terms and providing misleading information; see <https://www.acm.nl/nl/publicaties/telecombedrijven-passen-incassopraktijk-aan-na-onderzoek-van-acm>. Hierover ook B.B. Duivenvoorde, 'Oneerlijke handelspraktijken 2018-2019', *Tijdschrift voor Consumentenrecht en handelspraktijken* 2020/1, p. 26.

43 <https://www.acm.nl/nl/publicaties/nieuwe-toolkit-van-acm-maakt-actie-komen-tegen-oneerlijke-incassopraktijken-makkelijker>.

44 P.T. Dijkstra and A.A.M. Tuinstra-Karel, 'Toepassing van gedragsinzichten in het consumentenrecht door de Autoriteit Consument en Markt', Tijdschrift voor Consumentenrecht en handelspraktijken 2017/6, 279.

Taking an intertemporal look at the published interventions towards providers, one can see a bifurcation between two groups of infringers: on the one hand, collectors of genuine credit which were using excessively stark manners or charging excessive fees; on the other hand, companies acting as debt collectors which were effectively part of aggressive telemarketing networks or connected to shady websites pushing doubtful claims (rogue traders).[45] This bifurcation may be connected to empirical research conducted on behalf of the Authority during the intervention period to assess 'compliance-readiness' in the industry, which was published in 2017.[46] The research, in fact, had concluded that the vast majority of operators in the debt collection business were open to changing their behavior when confronted with their misdeeds. However, a smaller subset of the industry was made up of rogue traders which should simply be taken out of the market.

Examples of the breaches that were contested against the genuine providers are easy to summarise: the 'sample letter' published on the Authority's website to show consumers what *not* to give in to includes

1) failure to put consumers on notice before claiming collection charges,
2) inflated costs,
3) illegitimately charging VAT,
4) excessive interest rates, and
5) aggressive or misleading language (e.g. suggesting that the debt collector may directly deliver a summons notice).[47]

These genuine providers were ostensibly issued a demand that they adapt their collection practices.[48] In one case, a particularly large actor which had been the object of many complaints has been put under reinforced supervision until the ACM was satisfied that its practices had been sufficiently reformed.[49] While the ACM makes a point of avoiding legalistic language in its communications with both service providers and consumers, it is clear that they treated attempts at excessive collection as an unfair commercial practice under the general rules in the Dutch civil code; hardly any fines were issued.

45 In both scenarios, either via phone or via a website, consumers would be lured into vaguely agreeing to some kind of service provision, on the basis of incomplete and confusing information, making it likely that no binding contract had effectively been concluded. The debt collectors would then, possibly months or years later, get in touch with the consumer to claim payment.

46 ACM, *Incasso, Faciliterend of aggressief* ('Debt collection: helpful or aggressive?'), 2017, <https://www.acm.nl/nl/publicaties/onderzoek-naar-de-nalevingsbereidheid-de-incassosector>.

47 See <https://www.acm.nl/nl/onderwerpen-verkoop-aan-consumenten-toolkit-incasso-voor-schuldhulpverleners/foute-incassobrief>.

48 See e.g. <https://www.acm.nl/nl/publicaties/hendriks-incasso-past-agressieve-werkwijze-aan>.

49 <https://www.acm.nl/nl/publicaties/incassobureau-intrum-nederland-niet-langer-onder-verscherpt-toezicht>.

After the years 2015–2018, the Authority seems to have concentrated on rogue traders, issuing warnings to consumers[50] rather than to the traders themselves as well as imposing fines. Such fines were reserved for particularly egregious cases: in some cases, the claim collection activities appear to be pure scam, unconnected to any presence of service provision – as for Unitedcall[51] and Credit Invest;[52] in the case of De Reisplanner BV, a company that offered consumers a sort of timeshare contract and started billing before any written contract had been signed and before consumers had received any comprehensive information, the debt collection seemed connected to pretty extreme forms of telemarketing.[53]

Imposing a fine, which is of course subject to judicial review, requires extensive investigations and evidence collection; consumer warnings are, then, sometimes an interim measure, sometimes the only measure the ACM will manage to adopt.[54] Companies of this kind seem to fall squarely in the definition of traders that, according to the 2017 study, could not fruitfully be addressed for compliance but should rather be taken out of operation. While fines under unfair commercial practices rules can be one way to try and achieve such a result, regulating the debt collection market is perhaps the most obvious approach.

The second part of this chapter is thus devoted to recent developments seeking to establish comprehensive rules on consumer debt collection in the Netherlands, which are finally assessed and analyzed against the recently approved Credit Servicers Directive in the chapter's conclusions.

6.3 Second part: a more targeted regulatory framework? Towards specific rules for debt collection agencies

When the previous Dutch government took office in 2017, combating abuse in the debt collection industry was one of its declared policy goals.[55] A proposal to regulate debt collectors (WKI: *Wet kwaliteit incassodienstverlening*) was introduced on 16 February 2021 and is currently pending, its discussion in Parliament going

50 <https://www.acm.nl/nl/publicaties/acm-waarschuwt-voor-incasso-cc-jacobs-bemiddeling-en-herms-incasso, https://www.acm.nl/nl/publicaties/acm-waarschuwt-voor-incassobureaus-lootsma-en-partners-smits-en-co-en-inter-payment-service>.

51 <https://www.acm.nl/nl/publicaties/acm-beboet-unitedcall-voor-agressieve-incassopraktijken>.

52 <https://www.acm.nl/nl/publicaties/uitspraak-boetezaak-incassobureau-credit-invest>.

53 See <https://www.acm.nl/nl/publicaties/acm-beboet-dereisplanner-voor-incasso-onterechte-rekeningen-huur-vakantievillas>.

54 While the Authority sometimes makes a commitment to consumer indemnification, part of its negotiations with observed companies or otherwise expressly requires reimbursements to take place, there is no sign that something like this has happened (on large scale) in this investigation.The only trace we could find concerns the reimbursement of telephone expenses incurred for calling a non-existing debt collector: <https://www.acm.nl/nl/publicaties/publicatie/12448/Consumenten-krijgen-geld-terug-voor-bellen-naar-0900-nummer-Corpus-Justitia>.

55 In 2016, two Members of Parliament had already launched a draft legislative proposal (<https://www.christenunie.nl/incassowet>), in response to – *inter alia* – ACM reports on abusive debt collection practices.

forward as this chapter is finalized.[56] With the current government being to a large extent a continuation of the previous one, the WKI proposal has good chances of being approved, despite a degree of controversy and, as we will see, the possibility that more rules on similar issues will be required by the E.U. Credit Servicers Directive. The present section discusses some salient aspects of the proposal: the scope and contours of its registration requirement and procedure, quality requirements, enforcement, and overall regulatory philosophy.

6.3.1 Introducing a registration requirement

The WKI proposal introduces for the first time a registration requirement for collection in respect of individual debtors, next to some quality requirements and liminal rules. The registration requirement applies to all companies targeting individual Dutch residents/debtors.[57] This specific aspect seems designed to catch foreign debt collectors known to be active on the Dutch market. Dutch companies operating abroad, in contrast, are not covered by the regulations.

The government's records show that research has been conducted to secure compatibility of this aspect of the WKI proposal with EU law, in particular with the 2006 Services Directive.[58] According to the government, introducing a registration requirement for service providers established in other MS is justified in light of public policy, particularly with a view to the vulnerability of the groups to which the service is directed. These concerns should anyhow be largely solved by the adoption of the new Credit Servicers Directive.

The registration requirement and accompanying rules are, furthermore, only applicable to *private* debt collectors, which has prompted some questions in light of public entities' rather well-known misgivings in debt collection over the past decade.[59] Further excluded are the debt collection activities carried out in-house by providers of consumer services. While the move has drawn some criticism from the ACM,[60] the Authority's own enforcement activities suggest that in-house collection by regular (i.e. non-rogue) traders has not been a point of major contention – which could make sense to the extent that, unlike external claim collectors, providers of goods and services have an interest in maintaining a harmonious commercial relationship with the consumer.

56 Full reference can be found at the end of this chapter. The law has been adopted on 22 May 2022, see note 1.

57 Thus to the exclusion of collection viz companies; individual professionals, in contrast, fall under the scope of the envisaged regime.

58 Directive 2006/123/EC on services in the internal market. See Memore van Toelichting 3.7.1.

59 <https://www.socialevraagstukken.nl/driegesprek-rijksincassobeheer-wordt-menselijker-overheid/>.

60 The ACM's advice is included as an annex to the Memorie van Toelichting; see full reference at the end of this chapter.

Applications to the registry of debt collectors are not automatically accepted.[61] They must show how the company intends to comply with the quality requirements set out in the proposed law (see infra), provide information concerning their personnel composition and address any potential reasons that may lead to rejecting the request (e.g. in case the legal record of key employees contains previous charges or an insolvency).[62] The proposal criminalizes the unlicensed operation of collection services[63] and clearly states that debtors need not pay when approached by an unlicensed collector.[64] It also introduces fines and other administrative sanctions (suspension or, possibly, removal from the registry)[65] in case of severe breaches by registered providers. The combination of a register and a prohibition of acting without registration, including criminal sanctions, seems designed to address the problem highlighted above, namely the existence of rogue traders and trade practices, whereby aggressive claim collection is only one part of an overall abusive scheme.

6.3.2 Quality requirements and dispute resolution

Article 13 in the WKI proposal articulates a number of quality requirements directly connected to the performance of the collection services. These requirements concern personnel, transparency, ethical behavior, dispute resolution, and procedure.

Transparency, dispute resolution, and professional ethics requirements seem to be the most actionable points from a consumer's point of view and will be briefly elaborated upon here. As concerns transparency, the proposal seems to try to incorporate the lesson from the 2015 enforcement exercise: providers must take care that the build-up of the enforced monetary claim is clear to the consumer. Such clarity is of cardinal importance for consumers to challenge the claim or resist collection, for instance, because the amounts claimed are incorrect or have partially been repaid. The proposal further requires that providers secure a 'correct handling' in respect of both debtors and creditors. In this respect, the proposal can be seen to expand upon the requirements descending from consumer protection legislation – unfair commercial practices rules mainly target behavior towards *consumers* (here: debtors), leaving out the professional *creditors*. Besides this, the primary purpose of incorporating the requirement in the WKI proposal would be to make breaches actionable within the sanctioning system that the proposal also suggests putting in place. Further quality requirements would be articulated in a regulation to be adopted after approval of the proposed legislation.[66]

61 See art 7 detailing reasons for refusal.
62 See art 12 WKI proposal.
63 Art 25.
64 Art 18.
65 See art 9 and 10 (suspension or removal), 15–16 (fines and orders subject to penalty).
66 Art: 13.

As to dispute resolution, providers must establish a complaint procedure and take part in a dispute resolution scheme: this requirement makes sense from the Dutch perspective since in the Netherlands ADR is generally provided by sector-specific private dispute resolution bodies.[67] Currently, only collectors associated with the National Association of Debt Collectors provide for a generally applicable dispute resolution procedure attached to an easily identifiable dispute resolution body.[68] The establishment of a generally competent dispute resolution body may provide an indirect behavioral incentive for providers, even though it is not entirely clear to what extent consumers may directly benefit from it. This becomes quite apparent if one looks at the current regulations for the existing ADR body *Klachten Instituut Gecertificeerde Incasso Diensten (KIGID)* (Complaint Institute for Certified Debt Collection Services), which clarify that they are only competent for complaints concerning the behavior of credit collectors (thus excluding any check of the underlying claim and putting the burden on consumers to challenge debt collection practices) – raising the question of what kind of claims a consumer could submit and, crucially, what remedy they could expect. This question is not really addressed by the WKI proposal, which does not provide consumers with a specific remedy in case an authorised collector breaches the proposed quality requirements.

This means that in practice consumers are not expected to play a significant role in the enforcement of the proposed rules. The ADR body can also be seized by competitors, who may more easily benefit from this opportunity; the procedure is currently somewhat accessible, with a filing fee of 50 euro – possibly a non-negligible amount for a troubled debtor, but very affordable for a competing company. It is worth mentioning here that the most straightforward remedy is placed outside the remit of ADR, as it is provided exclusively against unregistered debt collectors. The proposal, in fact, makes clear that debtors do not have to pay if the collector is not authorized.[69] These providers will, quite self-evidently, almost necessarily not be part of the dispute resolution scheme.[70] As this remedy is left essentially to self-enforcement (the consumer refusing to pay) and relies on the consumer checking the status of the collector via the official register, it is possible to doubt whether, at least initially, information asymmetries and pressure will not prevent consumers from making use of this possibility.

67 E.N. Verhage, 'The implementation of the Consumer ADR Directive in the Netherlands'. In: Cortes P. (Ed.) *The New Regulatory Framework for Consumer Dispute Resolution.* Oxford: Oxford University Press 2016, 229.

68 See <https://www.nvio.nl/geschillenregeling>.

69 The lack of further civil law consequences has been critically highlighted by the ACM in its response to the government's request for input in early 2020. The government's accompanying text explains that connecting civil law consequences to the unauthorized performance of debt collection was considered a sufficient means to discourage abuse.

70 Furthermore, this straightforward solution addresses the 'inversion of the dispute' issue that arises when the debtor is expected to bring a case instead of the creditor.

6.3.3 Supervision and enforcement

One of the points in the WKI proposal which has drawn the most (obvious) criticism is fragmentation in the supervision and enforcement competences. Since the proposal distinguishes between three categories of service providers – bailiffs, claim lawyers, and debt collectors pur sang – it is perhaps no surprise that enforcement is also split. The Bar Association is competent for supervision in respect of registered lawyers; the Royal Federation of Bailiffs is in charge of bailiffs; finally, an office at the Ministry of Justice has direct supervision over the newly registered debt collection providers.[71]

Given that the main sanctions associated with violations of the proposal's substantive rules are suspensions or disbandment and given that the law creates different registration channels for lawyers and bailiffs, it is consistent to establish that such providers would also be supervised by their respective disciplining bodies. On the other hand, the risk of uneven enforcement seems more than material with three different bodies in charge, two of which have previously established customs that may or may not transfer well to these new competences. This risk seems a direct consequence of the choice not to establish one single register for all service providers in the debt collection industry.

6.3.4 Reluctance to tackle debt collection as a business model

As mentioned above, a governmental decree in place since 2012 regulated the costs that can be charged to debtors. These are capped at a certain percentage of the concerned credit, but collectors can still charge the *minimum* fee set at 40 euro per advanced claim for very small claims. This is seen as particularly problematic for small amounts, for instance, a subscription to a web or smartphone service, which could be only a few euros per month. The WKI proposal seeks to address this arguably disproportionate profit margin by establishing, in essence, that the minimum fee can only be charged once in six months, provided that the sum of the outstanding payments for which collection is started stays below the threshold of the higher collection charges; a lower charge of 20 euro can then be levied for following unpaid claims.[72]

This specific provision has been subject to criticism from various corners.[73] There seems to be consensus among stakeholders that the provision will be difficult to implement for providers and difficult to enforce for the competent

71 A specific provision addresses the relationship between the different supervision and enforcement bodies, see art 19 WKI proposal.

72 Art 21 of the WKI proposal, adding an eighth paragraph to art 6:96 BW.

73 See *Kamerstukken* 35733-5, 17 May 2021 (parliamentary debate records, henceforth: *Verslag*), reporting sustained criticism from the Liberals on the complexity of the rule, as well as from the Christian Democrats and the more socially oriented Christian Union on substance; all three parties are part of the governing coalition (*Verslag* section 4). Previous criticism had been expressed by various stakeholders, including the ACM, in the 2020 consultation round.

authorities, as it requires both process-tracking and frequent (re)calculations. The government explains that the WKI proposal may bring collection charges down from 240 to 140 euro over a six-month period – but fails to address the underlying possibility that this would be for a principal of close to zero significance.[74]

The most charitable interpretation of this proposal is that its complexity could provide collectors a nudge to wait a few months before initiating a collection action – which could be good to the extent that it prevents them from repeatedly charging the minimum fee, but also problematic to the extent that delayed action may let consumers inadvertently pile up higher debt. Cutting the minimum fee to a lower amount or further diversification of the allowed principal/collection fees rule would likely have been a simpler solution. However, it is quite clear from the parliamentary history that the proposal expressly does not want to undercut profit-making in consumer debt collection but just to curb abuses.[75] This approach evidently stands in the way of more far-reaching intervention on collection charges.

6.4 Conclusions

In conclusion, we would like to highlight several salient points and possible lessons learned that the Dutch experience could offer and reflect on the relationship between the WKI proposal and the 2021 Credit Servicers Directive.

First, a consumer-centred approach to abusive debt collection may require looking into the ease with which abusive claim collection can make use of judicial channels. The sanguine reaction of claim collection interest groups to the introduction of a relatively straightforward questionnaire asking them to detail the basis of their claim functions as a clear indication that the previously lax enforcement standards were essential in enabling the business to flourish – with significant negative impacts on consumer debtors. Notwithstanding all controversies, the form set up by Dutch courts could be seen as a good practice that other national judiciaries may consider adopting to increase procedural protection of consumer rights. At the same time, judicial intervention can only do so much regarding informal debt collection practices, especially if there is spill-over into out-of-court debt collection mechanisms such as arbitration.

Far-reaching enforcement interventions based on the UCPD have proven possible and were only partially facilitated by the existence of fee caps and other

74 See *Memorie van Toelichting* section 4 ('Undesired cumulation of charges'), p 34. At p 32, the *Memorie* expressly rejects an alternative rule for excessively limiting the allowed charges, reflecting the government's concern with not interfering with the business model as such.

75 See also *Memorie van Toelichting* section 2.2., explaining the advantages of debt collection services for small service providers (such as, in the government's example, care professionals), who are relieved of administrative concerns and can better concentrate on their core tasks. Next to justifying the existence of claim collection services, this argument is indirectly used by the government, in the same document and section, to dismiss proposals to allow consumers to 'buy back' their claims from credit purchasers.

Netherlands-specific rules.[76] The ACM has intervened on the assumption that both misleading and aggressive actions could be identified when consumers were, respectively, asked to fulfill unsubstantiated or inflated claims or intimidated by the use of unnecessarily harsh language. This proactive attitude and comprehensive approach on the side of the Dutch Authority could be again of interest to other regulators. Next to its actions targeted to creditors, collectors, and consumers, commissioning research on the relevant market has probably also helped persuade the government to propose new legislation targeted at cleaning up the market.

Second, despite the developments above, and even in a country which relies heavily on self-regulation, it ultimately appeared that regulation was necessary: on the one hand, the uptake of self-regulation by legitimate traders was disappointing; on the other, perhaps more importantly, self-regulation is by its nature inadequate to target rogue traders, while in a non-regulated system consumers have no way to tell whether the trader is or is not a *bona fide* undertaking. The register should make it easier for consumers to identify scammers, whilst also leveling the playing field for honest traders.

From a consumer debt perspective, the WKI proposal has limited potential to end the effect of debt collection on overall indebtment. While the proposal has been criticized for the fact that only private debt collection agencies are covered, its contents suggest that an extension to public collectors would not make much difference: it seems unlikely that personnel requirements would be relevant to public agencies and requiring a form of self-regulation can probably be achieved without legislation.

Debt collection charges are in fact one of the main problems with debt collection as a business model – something which the proposal has been very reluctant to address. This problem, one may add, is made even worse in light of the envisioned growth of markets for non-performing loans: if the claim is bought for a fraction of the original amount, the profit margins can be huge, creating a huge incentive for companies to go after distressed debtors. In the Dutch debate, some voices have proposed allowing consumer debtors to buy back their debt at the same rate that factoring agencies would pay.[77] This suggestion has not met particular favor with the government, and it seems unlikely to be taken up[78] – in par-

76 For instance, the requirement that consumers are put on a 14-day payment notice before any collection costs are charged – this requirement is seen as a consequence of article 6:96(6) BW, under which the notice is a prerequisite for claiming any pecuniary damages – see M.K.M. Enderink, A. al Mansouri, 'Nieuwe regeling buitengerechtelijke kosten', *Tijdschrift voor de Procespraktijk* 2014/5, 134.

77 *Verslag*; see for a reflection of the debate Huls (note 3) p. 86, noticing how the government's coalition agreement had settled for a combination of introducing a register and addressing business models based on high cost and high interest. A similar question had emerged in the context of Spanish unfair terms control cases, where national courts had tried to suggest that the Unfair Terms Directive should be understood to entitle consumers to buy back their debt under similar conditions: see CJEU 7 August 2018, Joined Cases C-96/16 and C-94/17 *Escobedo Cortés v. Banco de Sabadell*, ECLI:EU:C:2018:643. The CJEU declared the Directive not applicable to questions of claims assignment.

78 Despite having again been raised by some groups in parliament, see the position of the Christian Union at section 2.2 *Verslag*, with reference to previous parliamentary initiatives.

ticular, it seems hardly compatible with stimulating markets for NPLs (on which see more later in these conclusions).

From a Dutch perspective, the recently adopted Credit Servicers Directive poses some implementation puzzles which can perhaps explain why adoption of the proposed legislation has somewhat been stalled. The scope of the Dutch act is at once broader – covering credit collection at large rather than credit agreements only – and more limited than the Directive's, which covers both consumer and business debt with no restrictions. In view of this choice, it is perhaps no surprise that the European proposal only seems of limited added value from the perspective of the present analysis.[79] We will now quickly explain why this is the case.

The reconstruction above has singled out, in the ongoing debate, three main points of criticism that were raised against the Dutch proposal and that seem most relevant *from the perspective of consumer protection*: the exclusion of certain actors from the scope; the lack of private law consequences for breaches of the envisaged rules; the limited willingness to question debt collection as a profitable business model and its role in furthering consumer indebtment. None of these concerns seems to be addressed by the Directive.

As concerns the first question – which actors are regulated – the Directive allows Member States to enact a differential treatment for lawyers and bailiffs and does not seem to cover businesses keeping claim collection in house or public entities.[80]

As to the second highlighted problem, namely the lack of private law consequences, the Commission's increased attention to remedies since the 2018 New Deal for Consumers may have raised the hope that it would not ignore the connection between this area of sectoral regulation and its own intervention to secure individual remedies for unfair commercial practices.[81] This expectation is readily disappointed when one reads the Directive, which does not at all address the individual position of debtors in its one provision devoted to administrative penalties and remedial measures.[82] In this respect, the Dutch proposal exempting debtors from paying to non-registered collectors seems already a step forward, notwithstanding the failure to establish further remedies.

As concerns the third and arguably most serious problem with the WKI proposal, namely the facilitation of debt collection as a profitable business model and its role in furthering consumer indebtedness, the Directive's declared aim

79 We have elsewhere argued that an intervention establishing basic principles of procedural protection, on the other hand, would be of great use. See van Duin and Leone [2019]. The Dutch debates on the form introduced by the Dutch judiciary for repeat players further shows how harmonization of *ex officio* duties would be of significance.

80 See the definition of credit servicers at art 3(8), for what is most directly relevant here: 'a legal person that, in the course of its business, manages and enforces the rights and obligations related to a creditor's rights under a non-performing credit agreement.'

81 See art 11a UCPD, introduced by the so-called Modernization Directive (as part of the New Deal for Consumers).

82 Art 23, which – somewhat bizarrely – also doesn't seem to consider it necessary to remind Member States to establish penalties for acting as a credit servicer without registering in line with art 4.

is to *foster the market for NPLs*, which suggests consumer protection is at best a side-concern.[83] It goes without saying that the Directive does little to discourage turning consumer debt into profitable collection business. Within the Directive, however, perhaps most interesting from the perspective of consumer-debtors are two provisions which may delay or reduce the deployment of debt collection as such, namely amendments to the Consumer Credit and Mortgage Credit Directives aimed at the establishment of new information obligations and, most importantly, forbearance requirements in case of payment arrears.[84] In the Netherlands, the forbearance provisions are unlikely to be implemented in the WKI proposal, which has been re-presented to Parliament, with amendments, in November 2021.

To conclude: despite all its shortcomings, the proposed Dutch WKI seems to offer consumers better targeted and more comprehensive protection in respect of collection practices strictly intended, but something can still be expected in the way of consumer protection once the forbearance requirements in the 2021 Credit Servicers Directive are implemented. Given the overlaps and differences between the national and European interventions and several open or contested issues surrounding both, it seems easy to predict that we will see more twists and turns in debt collection rules in the years to come.

Legislation

European Union

Directive 2006/123/EC on services in the internal market

Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (Text with EEA relevance)

Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU

The Netherlands

Article 6:96 BW (*Burgerlijk Wetboek, Dutch Civil Code*)
Article 21 Rv (*Wetboek van Burgerlijke Rechtsvordering, Dutch Code of Civil Procedure*)
Article 22 Rv
Article 111 Rv
Article 139 Rv

83 The proposal does specify that consumer protection rules apply and that the consumer can oppose to a purchaser/servicer all the defenses they would be able to use against the original creditor; however, little specific regulation is included in the Directive, to the exception of the exclusion of consumer credit from the extra-judicial enforcement of collaterals that the proposal seeks to introduce.

84 See Directive 2021/2167, art 27(2) and 28(2).

Wet van 11 mei 2022, houdende regels met betrekking tot de private buitengerechtelijke incassodienstverlening en wijziging van Boek 6 van het Burgerlijk Wetboek in verband met de aanpassing van de cumulatieregeling voor buitengerechtelijke incassokosten (Wet kwaliteit incassodienstverlening)

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