UNLOCKING THE WAMCA
A PRACTICAL GUIDE TO THE NEW COLLECTIVE ACTION REGIME IN THE NETHERLANDS

Dennis Horeman and Machteld de Monchy (eds.)

Second Edition
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<tr>
<td>Affected persons</td>
<td>All the persons who are allegedly affected by a certain event or events</td>
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<tr>
<td>Association</td>
<td><em>Vereniging</em> pursuant to Article 2:26 DCC</td>
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<tr>
<td>Beneficiaries</td>
<td>The persons entitled to compensation under a settlement agreement</td>
</tr>
<tr>
<td>Claim Code</td>
<td>Dutch Claim Code 2019</td>
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<tr>
<td>Constituency</td>
<td>The affected persons that have joined or are affiliated with a claim organisation</td>
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<td>DCC</td>
<td>Dutch Civil Code</td>
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<td>DCCP</td>
<td>Dutch Code of Civil Procedure</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECJ</td>
<td>Court of Justice of the European Union</td>
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<td>Foundation</td>
<td><em>Stichting</em> pursuant to Article 2:285 DCC</td>
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<tr>
<td><strong>Narrowly defined group</strong></td>
<td>The group of persons that will be bound to the outcome of WAMCA proceedings if they do not opt out, as defined by the court pursuant to Article 1018e(2) DCCP</td>
</tr>
<tr>
<td><strong>NCC</strong></td>
<td>Netherlands Commercial Court</td>
</tr>
<tr>
<td><strong>NGO</strong></td>
<td>Non-governmental organisation</td>
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<td><strong>TFEU</strong></td>
<td>Treaty on the Functioning of the European Union, <em>OJ C 326</em>, 47, 26 October 2021</td>
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<tr>
<td><strong>3:305a DCC</strong></td>
<td>Collective action provision generally applicable as of 1 January 2020 (see nos. 90-93), introduced through the WAMCA</td>
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1 — INTRODUCTION
Collective actions and collective settlements are on the rise throughout Europe. The Netherlands has proven to be an attractive jurisdiction for claimants seeking collective redress. That appeal has grown further through the introduction on 1 January 2020 of the Resolution of Mass Damage in Collective Action Act (Wet afwikkeling massaschade in collectieve actie; WAMCA). The WAMCA has transformed the Dutch collective action regime by allowing claims for monetary damages, introducing stricter admissibility requirements for claim organisations and amending collective action procedure.

Three years after its introduction, the WAMCA has proven to be much more popular than the legislature anticipated. Already it has resulted in tens of court judgments and decisions reshaping the Dutch collective action regime. At De Brauw we are honoured to be at the forefront of this development by assisting both claim organisations and defendants. We have indicated the collective actions and collective settlements in which De Brauw has been involved in the list of case law starting on page 115.

This guide outlines the key elements of the WAMCA and related developments, including those relating to the transposition of the EU's Representative Actions Directive (RAD). As such, it serves as an introduction to the Dutch collective action regime and may provide you with a useful tool in your day-to-day practice.

WAMCA proceedings can relate to all fields of law. In addition to the more general outline of the WAMCA, the chapters at the end of this guide specifically address mass claims relating to consumer law; competition law; data protection; and ESG.

This guide includes references to numerous WAMCA provisions, judgments and decisions. Yet this guide is not and was not intended to be exhaustive, as we have chosen to focus on those elements of the WAMCA and the case law based on it that, in our view, carry significance in practice.

We have also included an English translation of the WAMCA as an Annex starting on page 120. This translation, as well as all other content in this guide, is for general informational purposes only. The information in this guide does not constitute legal advice.

Please feel free to reach out to us, if after reading this guide you have any questions or if you would like to discuss how we could assist in a collective action or settlement.

Dennis Horeman and Machteld de Monchy (editors)

Research for this guide was concluded on 1 November 2022.
2 — WHY WAMCA
Chapter 2 | WHY WAMCA

Dennis Horeman

2.1 The drivers for the WAMCA

1. With the 2020 legislative amendment to the collective action regime, known as the WAMCA, the pre-existing collective action mechanism in the Netherlands was amended. There were several reasons why the legislature decided to change the Dutch collective action regime by introducing the WAMCA.

2. A first key element was the legislature’s desire to introduce a form of collective redress that was not permitted previously: claiming payment of monetary damages. The desire for allowing that type of collective redress had been expressed at earlier occasions by means of parliamentary motions.

3. A second element was the desire to streamline collective litigation. Prior to the introduction of the WAMCA, there was no specific mechanism for dealing with parallel collective actions and for preventing several collective actions from being brought sequentially. The new regime precludes parallel or overlapping national collective actions relating to the same event, and any judgment will be binding on the group of affected persons as narrowly defined by the court (which US lawyers would refer to as the ‘certified class’). This results in a more efficient mechanism whereby the court combines all the collective actions regarding the same event and selects one claim organisation as the Exclusive Representative of all the affected persons.

4. A third key element was the need for more stringent admissibility criteria. With ‘entrepreneurial litigation’ on the rise, concerns about group representatives and their governance and funding were becoming more prominent. The WAMCA and the soft-law instrument of the Claim Code address this.

5. These and other elements will be discussed in more detail in the substantive discussion of the WAMCA regime in the subsequent chapters. Before turning to that discussion, this chapter first describes the rise of collective litigation prior to the introduction of the WAMCA below.

2.2 Long history of reinforcing collective legal protection

6. Collective actions in the Netherlands go back many decades. Their origin lies in case law, rather than in legislation. Since the 1960s, there had been calls for collective litigation instruments. In an environmental case in 1986, the Dutch Supreme Court found – in line with earlier lower court decisions – that claim organisations may bring a claim on behalf of others. The Supreme Court
emphasised that not allowing environmental organisations, being NGOs, to bring suit would significantly complicate efficient legal protection. In particular, the Supreme Court did not require the claim organisation to have a specific interest of its own. With that decision, collective actions through a claim organisation were fundamentally accepted.

7. After the judiciary had accepted this principle, the legislature created a specific statutory basis. In 1994, legislation was enacted allowing non-profit organisations to bring collective actions for injunctive or declaratory relief to protect similar interests of other persons. The aim of the new legislation was to achieve effective collective redress to further certain interests the protection of which is difficult to realise within the system of individual dispute resolution. Examples of the interest groups envisaged by the legislature are organisations representing the interests of the environment, consumers or persons under threat of discrimination.

8. The legislature explicitly accepted the result that companies would be held liable more often, noting that substantive liability law as such was left unaffected. Collective claims for monetary damages were not allowed at the time (which was changed by the WAMCA in 2020), and the main reason given at the time was that this would inherently require individual determinations. Significantly, the legislature explicitly considered whether allowing collective actions would risk society becoming more polarised and juridical. The legislature found that deciding ethically sensitive matters in court could actually depolarise these issues, because it would allow for a proper way of expressing discontent. Also, whether or not the claims brought would be allowed was considered an issue for the courts and substantive law.

9. In 1999, the government reported on a perceived increase in "claim culture." It considered that facilitating claims would reinforce the economic effect of liability law of internalising costs. However, there were also examples from the United States showing clear downsides, such as stifling of innovation and claimants trying to bankrupt companies by bringing expensive lawsuits in multiple jurisdictions.

10. Meanwhile, the challenge collective litigation posed to defendants was increased by the fact that collective litigation interrupts time bar for the entire class under Dutch law. Importantly, Dutch law in general applies a low-key mechanism for interrupting time bar, with unilateral notice by letter sufficing. The Dutch Supreme Court accepted that this also extends to a claim organisation, so it can interrupt time bar for the entire class by a simple letter. As a result, finality was hard to achieve for defendants.
2.3 A step towards finality: collective settlement (WCAM, 2005)

11. In 2005, the WCAM was enacted to facilitate collective settlement. Under that mechanism, a paying party and claim organisations can jointly petition the Amsterdam Court of Appeal to declare a settlement binding on a group of persons, subject to an opt-out mechanism. This will be discussed in more detail in chapter 6.3.

12. The WCAM was introduced when a group of pharmaceutical companies and their insurers encountered difficulty in resolving a matter they wanted to settle. Rather than creating a legal arrangement for this matter only, the legislature designed generally applicable legislation. A collective settlement mechanism was deemed to be in the interest of both the affected persons and the defendant. Affected persons would be spared long and emotionally taxing proceedings, while the defendant would quickly achieve certainty about its financial exposure, at lower costs.8

2.4 Increased legal protection and additional safeguards (WAMCA, 2020)

13. Over the years, several Dutch and EU legislative initiatives sought to ensure compensation for consumers, specifically in the case of damage caused by a competition infringement. In 2011, Dutch Parliament called on the government to realise a more efficient and effective redress of mass damage claims and to strike a balance between better access to justice and the protection of the justified interests of persons held liable.9 In 2014, a draft bill was presented for public consultation and in 2019, after a number of revisions, a legislative proposal was adopted. On 1 January 2020, the WAMCA finally came into force. The WAMCA is in principle applicable to collective actions in any field of law filed after 1 January 2020 in relation to events giving rise to damage that took place after 15 November 2016 (chapter 4.6).

14. As set out above, key features of the WAMCA are that it allows collective actions seeking monetary damages and that parallel or overlapping national collective actions for the same event are no longer possible. Additionally, a WAMCA judgment binds the group of affected persons as defined by the court. The WAMCA also amended collective action procedure, while qualification and admissibility criteria became more stringent.

15. In the legislative process, the legislature sought to balance broader access to collective relief with safeguards to prevent excesses and facilitate finality. That is why:

(a) benefits of litigation funding were accepted, but with additional safeguards aiming to secure autonomy for claim organisations. Shortly before the legislation came into effect, a soft law claim code was revised to address similar concerns. Earlier, the Amsterdam Court of Appeal had strongly
criticised the way some claim organisations had favoured their direct constituents and bargained for large compensation for themselves in a collective settlement (chapter 3.4 and no. 190);

(b) proceedings were streamlined by combining multiple actions and by only allowing one collective action per event (nos. 5-5 and 68);

(c) a summary review of the merits of the claim at an early stage of the proceedings was introduced to eliminate unfounded claims (chapter 5.4);

(d) settlement is encouraged at several steps of the process (chapter 6); and

(e) a ‘scope rule’ was introduced aimed at preventing that the mere fact that the defendant is domiciled in the Netherlands would allow for a collective action (nos. 143-144).
3 — ACTORS IN A COLLECTIVE ACTION
Chapter 3  

ACTORS IN A COLLECTIVE ACTION

Eelco Meerdink & Eline van de Langerijt

3.1 Introduction

16. This chapter discusses the roles of the actors in a collective action: the affected persons (or persons allegedly affected) (3.2); claim organisation (3.3); third-party funder (3.4); defendant (3.5); and judiciary (3.6).

3.2 Affected persons

17. The protection of the interests of affected persons is at the heart of allowing collective litigation. In WAMCA proceedings, the composition of the group of affected persons is not always the same. All the persons who are allegedly affected by a certain event or events are referred to as the affected persons. The affected persons that have joined or are affiliated with a claim organisation are the constituency of a claim organisation. In the admissibility phase, the court defines the group of persons that will be bound to the outcome of the WAMCA proceedings if they do not opt out. This is the narrowly defined group. Dependent on the court’s definition, not all the affected persons will necessarily be part of the narrowly defined group. And since it is highly unlikely that all the affected persons are affiliated with a claim organisation, the total number of affected persons will always be bigger than the constituencies of the claim organisations. Finally, if the parties reach a settlement, the affected persons entitled to compensation under the settlement agreement are referred to as the beneficiaries.

18. It is characteristic of the WAMCA that the collective action affects all persons domiciled or resident in the Netherlands and belonging to the narrowly defined group of persons whose interests are being represented, regardless of whether they signed up with the relevant claim organisation. Nevertheless, these persons may opt out from the WAMCA proceedings or the collective WAMCA settlement (see nos. 65-68 and 197-199).

19. Collective actions carry the risk that the interests of affected persons are not adequately represented. Among affected persons, circumstances may vary significantly, raising the question of whether cases can be meaningfully combined. A preliminary question to be answered here is whether the affected persons’ claims are suitable to be brought in a collective action. A prerequisite is that the affected persons’ interests are aligned (the so-called ‘similarity requirement’, which will be explained in nos. 115-119). In 2010, the Dutch Supreme Court held – with regard to Article 3:305a (old) DCC – that the similarity requirement implies that the interests for which protection is sought by the legal action must lend themselves to aggregation in order
to promote efficient and effective legal protection for the benefit of the interested
parties.\textsuperscript{10}

20. The similarity requirement does not entail that the affected persons’ factual positions
should be exactly the same. To the contrary, the court might – where possible –
establish categories of injured parties in respect of issues such as the amount of
damages, causality, attribution and own fault (see chapter 7). Furthermore, the court
may uphold a collective action to protect similar interests even if a significant number
of the affected persons whose interests that action is intended to protect disagrees
with the action or takes an opposing view.\textsuperscript{11}

21. The group of affected persons can be very large. Collective actions aimed at protecting
a public interest (such as the environment or public health) affect an unlimited number
of people within one or multiple jurisdictions. In these types of cases, actions to further
the public interest may be brought, which makes it possible to address the interest of
a very broad group of affected persons more effectively.

3.3 Claim organisation

\textsuperscript{3.305a(1) DCC} 22. A foundation or association with full legal capacity may initiate an action seeking to
protect similar interests of other persons, provided those interests are advanced in
accordance with its articles of association and are sufficiently safeguarded.
Throughout this guide, these organisations are referred to as claim organisations.
A colourful collection of claim organisations could potentially initiate WAMCA
proceedings, including ad hoc organisations, NGOs, trade unions and shareholder
organisations.

23. The requirements for claim organisations are laid down in the WAMCA and the Dutch
Claim Code. The Claim Code is a code of conduct for claim organisations, which offers
courts guidance on how to assess whether a claim organisation satisfies the
requirements for being allowed to bring a claim. The Claim Code consists of seven
comply-or-explain principles, dealing with governance and third-party funding. The
WAMCA has incorporated a large part of the Claim Code, while courts may still apply
the requirements that have not been incorporated. The WAMCA imposes strict
requirements on claim organisations, for instance with regard to their governance,
representativeness and expertise (chapter 5.2). The governance requirements in
particular are stricter under the WAMCA than under the previous collective actions
regime. In addition, the WAMCA contains rules in case two or more claimants initiate
class actions. In that case, one claim organisation will be appointed by the court as
Exclusive Representative and perform acts of procedure. The other claim
organisations continue to be parties to the proceedings (no. 62).
3.4 Third-party funder

24. Given the complexity and scale of collective actions, they can be a costly and risky undertaking. The claimant in lengthy collective proceedings will easily incur millions in costs.\(^\text{12}\) Claim organisations often lack the financial or professional resources to bear the risk of a collective action. Attracted by the potentially substantial return on investment, commercial litigation funders seem to have jumped into this gap in recent years. Reference is made to, for instance, the increasing number of third-party funders and US claimant law firms such as Scott + Scott and Hausfeld, which opened offices in the Netherlands in recent years. The market for third-party litigation funding is expected to grow rapidly. The size of the EU market was estimated at EUR 1 billion in March 2021 and is expected to grow to at least EUR 1.6 billion over the next years.\(^\text{13}\)

25. When discussing third-party funders, legislative history refers to the upside as well as the downside of commercial litigation funding.\(^\text{14}\) It indicates that third-party funders can increase access to justice, for example in cases where the damage is spread, as proceedings can be financed or prefinanced more easily. However, it is also noted that an abundant availability of financing options could lead to excessive litigation and to the possibility that the affected persons actually hardly benefit from the results of a collective action. Reference is made to the possible conflict of interests between the third-party funders and the constituency, for example when the claim organisation’s constituency wants to settle, while the third-party funders want the proceedings to continue, or the other way round.

3:305a(2)+(3) DCC 26. The legislature seems to acknowledge both the positive and the negative potential of commercial litigation funding by allowing it under certain circumstances. Accordingly, the claim organisation must provide certain safeguards in its relationship with the third-party funder for it to be allowed to bring a collective action. These safeguards have been developed over the last decades and are now codified in the WAMCA, the Claim Code (Principle III relating to external financing) and the RAD, which will be implemented in the existing WAMCA (see nos. 69 and 311-324). The safeguards relate to, for instance, limiting the influence of the third-party funder and preventing that a collective action underprotects the interests of the constituency and overprotects the interests of the third-party funders. In the future, new safeguards may be introduced at EU level following a resolution adopted by the European Parliament on 13 September 2022 (see no. 137).

27. Current WAMCA practice shows several ways in which third-party funders are aiming to make a return on their investment. To reimburse and remunerate their funder, claim organisations often seem to claim for a percentage of or in addition to the compensation potentially awarded, by way of a judgment or in a settlement, to either all affected persons or to the constituency of the claim organisation. Since there are
no precedents under the WAMCA, it is still unclear how courts view these financing arrangements.

28. When determining a return on its investment, the third-party funder should take into account that reasonableness of its return is not only tested by the claim organisation (when deciding to engage a third-party funder) and by the constituency (when deciding to join a claim organisation or to opt out of the proceedings), but also by the court when assessing the financing construction and appointing an Exclusive Representative. In proceedings to which the WAMCA did not apply, the Amsterdam District Court did not seem to object to a claim organisation withholding a maximum of 25% from the final compensation to the injured person, at least partially to benefit the foreign litigation funder involved. The reasonableness of the return is of course not only dependent on the agreed percentage, but on all the circumstances of the case, such as the size of the claim and the ratio between the third-party funder’s investments and the return on them.

### 3.5 Defendant

29. Collective actions are often initiated against large corporations or the government. The central register for collective actions, in which claim organisations must register their writs of summons (except for writs in summary proceedings), shows that this is also true under the WAMCA.

30. The WAMCA being aimed at protecting the interests of the affected persons and effective redress poses risks to potential defendants. As opposed to individual actions, the WAMCA provides for an attractive regime for smaller amounts of damages. These are damages that would perhaps otherwise not have been claimed for in individual proceedings. The combination of the possibility to claim for damages and the opt-out regime, make it also attractive for claim organisations and funders to bring claims. The WAMCA thus increases the potential exposure for defendants.

31. In addition, a collective action can also result in a different amount of damages compared to individual actions. If the court holds the defendant liable and no settlement is reached, it will impose a collective compensation scheme on the parties. In doing so, the court will, where possible, establish categories of affected persons to ensure reasonable compensation and to safeguard the interests of the parties concerned in the settlement of the damages. As a result, individuals will potentially receive a different amount of damages than they would have obtained in individual proceedings.

32. Next to the higher potential exposure, the defendant also runs a financial risk in relation to the legal costs. Dutch procedural law provides that in general courts can only award a fixed amount of lawyers’ fees, which are only a small fraction of actual costs of legal representation. However, if the court imposes a collective compensation scheme on
the parties, the court may – if requested – order the defendant to pay all reasonable and proportionate court costs and other costs incurred by the claim organisation, unless reasonableness and fairness dictate otherwise. In addition, even when confronted with a collective action that the court soon finds to be without merit, the defendant will not have all its legal costs compensated. In those situations, the court may at the most quintuple the defendant’s standardised lawyers’ costs to be paid by the claim organisation, again unless reasonableness and fairness dictate otherwise.

33. In addition to the financial risks mentioned above, the defendant also runs reputational risks. These reputational risks are inherent to any proceedings before regular courts, as both the hearing and the judgment are – in principle – publicly accessible. In WAMCA proceedings this is even more apparent, because the writ of summons and most court decisions leading up to the judgment are published in a central register for collective actions, which can easily be accessed online.16

34. Despite the potential risks, the WAMCA also provides important advantages for the defendant, such as finality and efficiency. On the point of finality, claim organisations can only bring a collective action for the same event or events within three months (potentially extended up to a maximum of six months) after the publication of the first writ of summons in the central register for collective actions (see no. 51). As a result, the defendant can only be confronted with one WAMCA collective action relating to the same event or events, even though it may be faced with separate actions brought by individual claimants. Furthermore, all affected persons domiciled in the Netherlands, who have not opted out are bound by the outcome of the WAMCA proceedings, as are those residing abroad who have opted in. That outcome could be a decision approving a collective settlement agreement (chapter 6) or a judgment establishing a collective compensation scheme (chapter 7), with the former being followed by an additional opt-out opportunity.

35. From the perspective of efficiency, another advantage for the defendant in WAMCA proceedings is that it only has to defend itself against one collective instead of numerous individual claimants. The appointment of one Exclusive Representative subsequently means that the defendant faces streamlined proceedings in which it responds to the claim as put forward by that Exclusive Representative (see nos. 62-63). A further procedural advantage for the defendant is the bifurcation of WAMCA proceedings, in which the merits of the case will only be discussed if the claim organisation passes the admissibility phase. As part of the admissibility test, the court will preliminarily examine whether the claim is not without merit (see chapter 5.4). These formal and substantive requirements provide the defendant with safeguards against manifestly unfounded claims (and the time and costs involved).
3.6 Judiciary

36. Collective actions can be initiated at any district court in the Netherlands. This will usually be the district court for the place where the defendant is domiciled (Article 2(1) Brussels I Regulation (recast)). There is no specialised court with exclusive jurisdiction over WAMCA claims. In addition, most judgments in WAMCA proceedings can be appealed to a Court of Appeal. Appeals to Court of Appeal judgments can only be taken to the Dutch Supreme Court on limited grounds.

37. While there are, in principle, no specialised courts, the judges across the different courts dealing with collective actions often have a background in the field of international commercial disputes and are generally accustomed to pan-European and international cases. In principle, exhibits may be submitted in English, German and French, without a Dutch translation. Also, Dutch courts typically ensure that judges have sufficient resources and time to deal with such complex damage actions. Often, courts in collective actions also facilitate tailormade litigation, for instance by holding case management hearings and bifurcating the proceedings. With regard to the expertise of the Dutch courts, the Netherlands ranked 6th out of 139 countries in the World Justice Project Rule of Law Index 2021.

38. As for tailormade litigation: the Netherlands Commercial Court (NCC) was established in 2019 to hear international disputes relating to civil and commercial matters, if parties have explicitly agreed to proceedings before the NCC. The NCC is part of the Amsterdam District Court and the Amsterdam Court of Appeal and focuses on complex international multi-party litigation where large financial interests are at stake. If the parties choose to litigate before the NCC, the proceedings will, where possible, be tailored to the parties' preferences and take place in the English language as much as possible. The ruling of the NCC will, in principle, also be issued in English. The judges of the NCC are all experienced judges, some of whom have a specific background in follow-on and collective actions. In WAMCA proceedings before the NCC, just like in WAMCA proceedings before an ordinary Dutch court, the parties can generally appeal to the Court of Appeal and the Dutch Supreme Court on limited grounds. Proceedings before the Dutch Supreme Court are in principle conducted entirely in Dutch.
4 — WAMCA PROCEEDINGS
4.1 Introduction

A collective action under the WAMCA can be divided into four stages:

- **Stage 1**: initiating letter and writ of summons (4.2);
- **Stage 2**: preliminary issues, Exclusive Representative and opt-out (4.3);
- **Stage 3**: settlement attempt (4.4);
- **Stage 4**: proceedings on the merits and damages (4.5).

40. This chapter discusses the procedural rules that apply to all four stages in WAMCA proceedings in first instance, as well as the temporal scope of the WAMCA (4.6) and appeal and Supreme Court appeal (4.7). It concludes with a discussion of joinder, third-party intervention and third-party proceedings (4.8) and the courts’ approach to parallel individual proceedings (4.9). In practice, courts often deviate from procedural rules, which is why this chapter also highlights the daily practice of WAMCA proceedings, when applicable.

4.2 Stage 1: initiating letter and writ of summons

Before a claim organisation may start a collective action under the WAMCA, it has to make a reasonable attempt to settle its purported claim with the potential defendant. A letter proposing settlement talks allowing the potential defendant two weeks to respond is deemed to be a reasonable attempt. Mass claim matters are, however, inherently complex and the initiating letter often arrives too early in the dispute to start meaningful negotiations. In practice, the claim organisation’s letter is therefore generally construed as a letter announcing the initiation of a collective action, rather than as a sincere attempt at achieving a settlement. The potential defendant should consider on a case-by-case basis whether to reply to the letter. It is under no obligation to reply and failing to do so will generally not be held against it by way of adverse costs order or otherwise. The claim organisation, by contrast, may indeed suffer adverse consequences from failing to initiate consultations with the potential defendant, as will be discussed in nos. 145-146.

42. In the rare event that the parties do reach a settlement at this stage, they may opt to have this settlement declared binding on the affected persons through WCAM proceedings at the Amsterdam Court of Appeal (chapter 6). More often, though, the letter is soon followed by a writ of summons initiating a collective action under the WAMCA.
43. The claim organisation must summon the defendant to appear before the civil division of a district court, which will usually hear the case sitting in a panel of three judges. The rules on local jurisdiction fully apply. This means that, generally, the claim organisation should summon the defendant to appear before the district court of the place of the defendant’s seat or domicile.

44. In the summons, a wide range of relief can be sought, including injunctive relief, monetary or other damages, and declaratory relief.

45. The writ of summons needs to comply with the general requirements applying to all writs of summons. Following Article 1018c(1) DCCP, it should also include:

(a) a description of the event or events to which the mass claim relates;
(b) a description of the persons whose interests the mass claim seeks to protect;
(c) a description of the degree of commonality of the factual and legal questions to be answered;
(d) a description of how the admissibility requirements of Article 3:305a(1-3) DCC are met or of the grounds allowing for a partial exemption from these requirements according to Article 3:305a(6) DCC;
(e) information enabling the court to appoint an Exclusive Representative, in the event that one or more other claim organisations also initiate a collective action; and
(f) the claim organisation’s obligation to have the claim entered in the public register for collective actions and to state the consequences of such entry.

46. If the writ of summons fails to include these elements, the court can declare the writ null and void, if the claim organisation has not timely corrected its mistake by reissuing the writ of summons.20

47. Notably, The Hague Court of Appeal ruled that Article 1018c(1) DCCP does not allow the group of persons on whose behalf the claim organisation is acting, to be fundamentally altered after the initiating summons.21 Arguably, the same goes for the other elements listed in Article 1018c(1) DCCP.

48. In summary proceedings, too, the writ of summons must include the elements listed in (a)-(f) above. This is, however, the only WAMCA-specific DCCP provision that applies in summary proceedings. The following paragraphs are therefore not applicable to summary proceedings, in the sense that the court is not obliged to apply these procedural provisions. In practice, courts in summary proceedings will nonetheless be inclined to follow the procedural provisions as much as practically feasible.

49. The plaintiff must file the writ of summons with the court registry within two days after the date of the writ of summons. It must simultaneously send a copy of the writ to the public register for collective actions. Following guidance on the website of the
judiciary, the claim organisation usually sends a PDF version of the writ as it was sent to the bailiff. The parties’ names should, in principle, be visible in the register, as this information is crucial for other interested groups to assess whether they want to bring their own collective action for the same event. From 25 June 2023, the plaintiff does not have to publish the entire writ, but can suffice with a summary.

1018c(2) DCCP 50. Failure to timely submit the writ to the court registry and record it in the public register should result in non-admissibility by operation of law. Legislative history and practice suggest, however, that courts will assess whether the submission error has adversely affected the interests of the parties or potential parties involved. If not, the court is likely to disregard a claim organisation’s error in filing the writ.

1018d(2) DCCP 51. Registration in the public register for collective actions has a clear purpose, because the time of registration marks the start of a three-month period in which other claim organisations may bring competing claims based on the same or related events. It is important for claim organisations to be aware of this, as the WAMCA allows only one collective action per harm-causing event (see no. 68). The three-month waiting period is mandatory; courts may not deviate from statute by setting a different period. A claim organisation may, however, request the court to extend this period with another three months to allow it to bring its own suit.

52. It must be clear from the claim organisation’s extension request that it has already decided to bring its own collective action, but needs more time to prepare. If it appears that the claim organisation has merely requested the extension to gain more time to consider bringing an action, its request will be denied. Furthermore, in line with legislative history, the Amsterdam District Court ruled that an extension only applies to the claim organisation that requested it.

53. The claim organisation that brings a competing claim must summon the defendant to procedurally appear in court four weeks after the expiry of the potentially extended three-month period. Although the text of the law is unclear and current practice for the most part seems to suggest otherwise, the first claim organisation must arguably also summon the defendant to procedurally appear in court four weeks after the expiry of the three-month period, as some claim organisations indeed have done. If another provision of Dutch law prescribes a longer summons period, the four weeks period does not apply.

54. If several claim organisations bring a collective action relating to the same event or events, these collective actions (including the first one) will be consolidated and treated as one case. Although the WAMCA does not directly invalidate DCCP provisions allowing for other ways to join an action (such as voluntary intervention or joinder), it follows from the system of the WAMCA that other claim organisations may
only join pending WAMCA proceedings by bringing their own action within the WAMCA procedure of Article 1018d DCCP (see 4.8). \(^{31}\)

### 4.3 Stage 2: preliminary issues, Exclusive Representative and opt-out/opt-in

#### Preliminary issues

1018c(5) DCCP 55. To prevent a lengthy and costly debate on the merits of a claim that will after all not be upheld, WAMCA proceedings consist of a preliminary admissibility phase and a substantive phase. \(^{32}\) In practice, the admissibility phase can be preceded by a party debate and judgment on the court’s jurisdiction. \(^{33}\) It also happens that the court first needs to rule on the applicability of the WAMCA itself, if it is unclear whether the alleged wrongdoing took place within the WAMCA’s temporal scope. In the admissibility phase the court will subsequently assess whether:

(a) the claim organisation meets the qualification and admissibility requirements of Article 3:305a DCC;

(b) the collective action is more efficient and effective than bringing an individual claim, because:
   - the questions of law and fact are sufficiently similar;
   - the class of affected persons is sufficiently large; and
   - in a damages action, the class members individually and jointly have a sufficiently large financial interest;

(c) after summary examination the collective action does not appear to be without merit at the time the proceedings were initiated.

1018c(4)-(5) DCCP 56. The claim organisation needs to address these preliminary issues in its writ of summons, while the defendant will be allowed to address these issues in a statement of defence. According to statute, the defendant will be given a period of six weeks to submit its defence, which starts to run on the day the waiting period or extended waiting period expired. It may however happen, especially when multiple collective actions are brought for the same event, that a writ of summons sets the time for the defendant’s procedural appearance in court at a date before the expiration of the waiting period. Furthermore, multiple writs of summons may result in different dates on which the period to submit the statement of defence starts running. In both situations, an alternative to the statutory rule is required. The regular term to submit the defence is six weeks, but this is subject to alternative directions by the court and one or potentially more extensions. In its defence, the defendant is not required to reply to the merits of the case and may limit its defence to the preliminary issues. If multiple claim organisations have instituted proceedings, the defendant may choose to submit one statement of defence collectively replying to the writs of summons of all the claim organisations. \(^{34}\) The
defendant may attach exhibits to its defence and may generally submit additional exhibits up until two weeks before an oral hearing.

57. The rules of procedure provide that following the statement of defence, the court may allow for a reply and rejoinder. It will then usually summon the parties to an oral hearing to discuss the preliminary issues of standing and admissibility and potentially the appointment of an Exclusive Representative. In practice, it is not unusual for courts to deviate from normal procedural order by first inviting the parties to an oral hearing that serves as a case management conference that takes place immediately after the defendant has submitted its defence on the preliminary issues or even earlier in the process. During this hearing, the court will allow the parties to present their views on the procedural order and potential phasing of the proceedings. Practice has shown, however, that the court will not necessarily deviate from the phasing of the proceedings as stated in the law (even if the proposal was made unanimously by the parties).

1018l(1) DCCP 58. Several months after the substantive oral hearing, the court will render a judgment on the preliminary issues. If the court finds that the claim organisation does not qualify or that the claim is inadmissible, it will dismiss the action. Recently, the Amsterdam District Court indeed dismissed the collective action against Oracle and Salesforce, as it found that the claim organisation did not qualify to bring its claim, mostly since it was not representative of the affected persons (see nos. 127-128). If the court dismisses the action because it is without merit, it may order the claim organisation to pay five times the standardised fees of the defendant’s lawyers. The legislature deviated from the ordinary rules on cost awards to discourage claims without merit. The standardised lawyers’ fees, however, are nowhere near the actual costs, so quintupling these minimal fees is unlikely to have any effect on claim organisations’ willingness to initiate a collective action.

1018e(1) DCCP 59. If the court finds that the action is admissible and that the claim organisation qualifies to bring a claim, it will appoint the claim organisation as Exclusive Representative. If multiple claim organisations bring a claim and comply with the admissibility and qualification requirements, the court will generally appoint one of the organisations as Exclusive Representative. In doing so, it should consider the following circumstances:

(a) the size of the group of persons on whose behalf the claim organisation is acting;
(b) the size of the financial interest represented by that group;
(c) any other activities performed by the claim organisation for the persons for whom it is acting in or out of court; and
(d) any previous activities performed by the claim organisation or any collective actions brought by it.
There does not seem to be an obligation for the court to ask the parties for their views on the selection of an Exclusive Representative, but the parties are free to include their views in the writ of summons or statement of defence (on the preliminary issues). If the court allows for a reply and rejoinder, claim organisations can use the statement of reply to present arguments why they should be appointed as Exclusive Representative rather than any of the other claim organisations. If the court does not allow a reply and rejoinder, claim organisations may find other ways to argue why they should come out on top in the 'beauty contest' among competing claim organisations. In practice, claim organisations can be seen doing so through letters to the court. Another way would be to submit a separate statement at the time the defendant submits its statement of defence. Since the WAMCA does not explicitly accommodate for this type of debate among claim organisations, it remains to be seen to what extent courts will actually consider those letters and statements.

Next to appointing the Exclusive Representative, the court will determine the contents of the claim and the narrowly defined group of persons whose interests the Exclusive Representative will represent. It will also examine whether a different court is geographically better suited to take on the claim. The court’s definition of the narrowly defined group of persons represented by the Exclusive Representative is a crucial step in collective actions, since the outcome of the proceedings is binding on all persons within that group, except for those who have opted out, as explained in nos. 65-68.

The Exclusive Representative acts on behalf of all the persons in the narrowly defined group and on behalf of the other claim organisations. Whereas the claim organisations that are not appointed as Exclusive Representative remain parties to the proceedings, in principle only the Exclusive Representative may perform acts of procedure. The court may, however, allow another claim organisation to file a procedural document. Relevant factors in the court’s assessment include the number of claim organisations and whether they represent the interests of persons similar to those originally represented by the Exclusive Representative.

The court may appoint several Exclusive Representatives, if the nature of the collective action or the claim organisations, or the interests of the persons for whom they act, so warrant. Although the statutory wording seems to allow for an unlimited number of Exclusive Representatives, the legislature’s intent is to allow for two Co-Exclusive Representatives. Co-Representatives might for example be appointed if one of the eligible claim organisations has a very specific constituency whose interests are not aligned at all levels with the rest of the affected persons. In a collective action on issues of employment law, the Amsterdam District Court appointed two large Dutch labour unions jointly as Exclusive Representative, since the unions submitted the same claims in a single writ of summons and are assisted by the same lawyers.
The WAMCA provides that the court's decision designating an Exclusive Representative cannot be appealed. This provision does not affect the possibility of an appeal being admissible if one of the extraordinary grounds for appeal as developed in case law applies. One example of such ground is a violation of the right to be heard.

**Opt-out and opt-in for affected persons**

Members of the narrowly defined group who are domiciled or resident in the Netherlands are bound to the outcome of the collective action. They may however opt out of the proceedings as soon as the court has appointed the Exclusive Representative. They can do so by submitting an opt-out notice to the court registry within a period set by the court. This period will be at least one month starting from the date of announcement. By choosing to opt out, any previous collective interruption of the limitation period for the claim for damages will cease to apply to those who have opted out. To prevent their claim from becoming time-barred, those who have opted out can interrupt the limitation period for their claims individually, within six months after their opt-out.

If the number of persons who opt out is so large that there is no longer any mass to the claim, the court may discontinue the proceedings.

Members of the narrowly defined group who are not domiciled or resident in the Netherlands are not automatically bound by the outcome of the collective action, hence the opt-out regime does not apply to them. Instead, they may opt in to the action by submitting a written statement to the court registry within a period set by the court of at least one month from the date of the announcement of the judgment appointing the Exclusive Representative. The court may, however, deviate from the opt-in rule at the request of a party to the proceedings by extending the opt-out regime to all affected persons, whether domiciled or resident in the Netherlands or abroad. A District Court denied such a request in September 2022, mainly because the addresses of some of the affected persons based abroad were known (so they could be adequately informed about their opt-in opportunity) and because the court did not know how many affected persons were based abroad. It would hence be unclear who would eventually be bound by the proceedings and their outcome, while some of the affected persons would be bound without knowing of the existence of the collective action. As of June 2023, courts can no longer apply an opt-out regime for affected persons based abroad in collective actions within the scope of the RAD (see chapter 9).

No new collective action can be initiated on behalf of the persons who have opted out of the WAMCA proceedings. This effectively means that there can be only one collective action against the same defendant or defendants for the same or similar events that gave rise to mass damage, and that persons who opt out from a collective action may later only pursue legal action against the defendant on an individual basis.
69. The transposition of the RAD will result in a few amendments to the WAMCA (including Article 1018f DCCP on the opt-out), which are due to enter into force on 25 June 2023. The outcome of the proceedings will, for instance, not apply to members of the narrowly defined group who are party, individually or collectively, to similar proceedings against the same defendant in another EU/EEA Member State. Furthermore, when opting in to the proceedings, members of the narrowly defined group who are not domiciled or resident in the Netherlands will be obliged to state that they are not individually or collectively engaged in similar proceedings in another EU/EEA Member State. See chapter 9.3 for more on the RAD.

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70. In its admissibility judgment, the court determines the contents of the claim and the narrowly defined group, appoints the Exclusive Representative and sets the opt-out (or opt-in) period. Since the outcome of the proceedings is binding on all group members, every effort must be made to inform them of the proceedings and their opportunity to opt out at this stage. The WAMCA therefore contains several notification and publication requirements, which the court may further flesh out.

1018f(2) DCCP

71. The judgment will be made available at the court registry for review by any affected person. The Exclusive Representative must arrange for the entry of the court’s decision in the public register for collective actions. The court may also order that the judgment and, if necessary, a translation is published on one or more designated websites, including the website of the Exclusive Representative.

1018f(3) DCCP

72. The Exclusive Representative must inform the known persons whose interests it represents about its appointment, the collective action and the narrowly defined group as soon as possible by letter, unless the court determines otherwise. This announcement must also be published in one or more newspapers designated by the court. The letter to the members of the narrowly defined group as well as the newspaper announcement must contain a description, in a manner to be specified by the court, of how those persons may opt out of the collective action (or opt in, where it concerns affected persons residing abroad). The letter should also explain how the judgment may be reviewed or a copy obtained, and include any other information as required by the court. The court may also designate other means of publication and notification.

1018f(3) DCCP

73. The court may determine that instead of the Exclusive Representative, another party, such as the defendant, will be responsible for the required notifications and announcements and that the required information be disclosed by other or additional means. Also, if there are group members who are not domiciled or resident in the Netherlands and no means of publication is prescribed by any international or European Union regulations binding on the Netherlands, the court will order publication.
in a manner to be determined by it for the benefit of those members in one or more languages other than Dutch, if necessary.

74. Since the disclosure and publication requirements are rather extensive, the parties in practice tend to engage service providers to assist them in satisfying these requirements.

### 4.4 Stage 3: settlement attempt

75. During the opt-out/opt-in period, the court will stay the proceedings for a "short break" to give the Exclusive Representative and the defendant the opportunity to test a settlement. The legislature considered that since the defendant now knows who "to do business with," it would be opportune to pause the proceedings after the court’s designation of the Exclusive Representative. In practice, parties are unlikely to settle at this stage of the proceedings. This is reflected in case law, which shows that some courts will only stay the proceedings if the parties deem it useful.

76. If the parties do reach a settlement, they are obliged to submit their settlement agreement to the court to have it approved and declared binding. The parties that will be bound by the settlement are the claim organisation, the defendant and the members of the narrowly defined group who have not yet opted out of the proceedings.

77. The settlement agreement must comply with the substantive requirements of Article 7:907 DCC, which also apply to WCAM agreements. A key consideration in the court’s assessment of the settlement agreement is whether the amount of compensation that is awarded is reasonable. Most procedural WCAM rules also apply. Consequently, the parties may, for instance, only jointly present an agreement to the court and the court may order expert reports to be prepared on certain points of the agreement. Furthermore, the WCAM publication and notification rules also apply accordingly to the court-approved settlement agreement between the parties. Additionally, the Exclusive Representative needs to publish the agreement on its website and have it recorded in the register for collective actions. Following the transposition of the RAD, the Exclusive Representative will also need to publish the refusal of the court to approve the settlement on its website.

78. Once the court has approved the settlement agreement, the WAMCA allows for a second opt-out opportunity (next to the option after the appointment of the Exclusive Representative). The relevant provisions governing the first opt-out possibility, for example those relating to the announcement and publication of the judgment, equally apply to the opt-out following the court-approved settlement.

79. Derogating from the ordinary rules for appeals, the parties may only jointly take an appeal from the court’s decision on the agreement to the Dutch Supreme Court, if the
The court has refused to approve the agreement. The court’s decision to approve the agreement cannot be appealed.

80. The WAMCA settlement will be discussed in more detail in chapter 6.

4.5 Stage 4: proceedings on the merits and damages

81. If no settlement is reached, the proceedings will continue and move to the merits stage. Since the merits are always case-specific, this guide will refrain from any substantive discussion and this paragraph will discuss the procedural steps of the merits stage in general terms only. One topic concerning the merits that does lend itself to some general discussion is damages, which will be addressed in chapter 7.

82. Once the settlement period has expired unsuccessfully, the court will allow the Exclusive Representative to expand the grounds of its claim, for instance to incorporate grounds that were included in the writs of summons of other claim organisations, but not in its own. If the defendant had previously limited its statement of defence to the preliminary issues, the court will now allow it to submit a defence on the merits.

83. Following the defendant’s expanded statement of defence, the court may allow both parties to submit a second written submission concerning the merits of the case. The claim organisation will then submit a statement of reply, which will be followed by a statement of rejoinder by the defendant. Generally, an oral hearing will then be scheduled for a date that is two to six months after the submission of the rejoinder. At the hearing, which will last from one to several days, the parties will be allowed to present their case and reply to the other party. The court will be active in posing questions.

84. Three to six months after the hearing, but possibly later, the court will deliver its judgment, which is likely to be a final judgment.

85. If the collective action pertains to damages, the court will need to determine the amount of damages. To do so, the court may not only order one or more experts to report on relevant matters, but may also request both the claim organisation and the defendant to submit a proposal for a collective compensation scheme. The court may use these proposals to devise its own scheme. This process is further discussed in chapter 7.

86. If the collective action ends in a judgment awarding collective damages, everyone in the narrowly defined group who has not opted out (or indeed has opted in) will be entitled to compensation in accordance with the judgment. The affected persons may include persons who have not necessarily suffered harm themselves, but who have obtained the claim for damages.
87. If an affected person that would be bound by the court decision is not aware of its damage at the time of the announcement of the opt-out/opt-in possibility (for example when a medical condition only manifests itself at a later stage), this person will still be granted the possibility to opt out and pursue separate legal proceedings against the defendant.

88. Unless determined otherwise by the court, notice of the judgment awarding damages (or approving a settlement) must be given as soon as possible by ordinary mail to the known persons for whose benefit the collective damages have been determined. This notice must also be announced as soon as possible in one or more newspapers designated by the court. It must also be published on the website of the claim organisation and in the public register for collective actions kept by the court. The content of this notice should enable individuals to easily find out whether they are eligible for compensation and, if so, how they can claim it. Following the transposition of the RAD, the Exclusive Representative will also need to announce the court’s refusal to award damages on its website, register the judgment in the public register and inform the members of the narrowly defined group.  

89. Finally, if the court has determined a compensation scheme, its judgment may include a cost award deviating from the ordinary rules by ordering the defendant to pay (significantly) more than the standardised costs. This is an incentive for the defendant to settle, because a court judgment will now no longer result in a cost award that is lower (due to the standardised fees) than the costs a defendant would normally commit to reimburse under a settlement.

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<th>4.6</th>
<th>Temporal scope</th>
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<td>90.</td>
<td>The initial bill introducing the WAMCA did not include any provisions limiting the temporal scope of the WAMCA. If left unamended, the WAMCA would have applied to all collective actions, both actions pending on the basis of the pre-WAMCA statute and all future actions. After some back and forth between Parliament and the minister, an amendment was accepted that limits the temporal scope of the WAMCA. As it now stands, the WAMCA does not apply to collective actions brought prior to its entry into force on 1 January 2020 or collective actions brought after 1 January 2020, but relating to events giving rise to damage that (allegedly) took place prior to 15 November 2016. If an action concerns not a single event, but a series of events, and these events took place partly before 15 November 2016 and partly on or after this date, the law in force on the date of the last event of the series is applicable.</td>
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<td>91.</td>
<td>On 11 March 2022, the Supreme Court handed down a decision on the temporal effect of the WAMCA. It was held that the WAMCA applied to the intended collective action, because the collective action itself was not filed before 1 January 2020 and there was no indication that the collective claim (exclusively) related to events that took place before 15 November 2016. It remains to be seen what the use of &quot;(exclusively)&quot; reflects</td>
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precisely. The decision is, for example, silent on what the precise relevant acts are and when there is a relevant "series of events."

92. In two judgements of 30 March 2022, the Amsterdam District Court did provide some guidance on the meaning of the term "event" in applying the provisions establishing the WAMCA's temporal scope. It held that the law refers to the event causing damage. The occurrence of a harmful consequence of an event should not also be considered to be an event itself. These judgments are under appeal.

93. In cases that are being decided under the pre-WAMCA statute, courts may take some guidance from the subsequent WAMCA. This was specifically held by the Amsterdam District Court in its Dieselgate judgment. Since the claim had been brought under Article 3:305a (old) DCC, the court could not award damages. Nevertheless, in its judgment the court ruled by way of declaratory relief that (i) persons who had bought a new car from a dealer were entitled to a price reduction of EUR 3,000 and (ii) persons who had bought a used car were entitled to a price reduction of EUR 1,500. The declaratory relief cannot be enforced, but affected persons can invoke it in any follow-on proceedings for the assessment of damages. In justifying why the court had included a concrete entitlement to price reduction in its declaratory relief, it stated that although the legislature previously objected to awarding damages in collective actions, the WAMCA now allows for them, so that this objection is no longer valid. Since the pre-WAMCA statute, which applied in these proceedings, is fundamentally based on the undesirability of awarding damages, the court's approach is remarkable.

### 4.7 Appeal and Supreme Court appeal

94. The admissibility phase of WAMCA proceedings results in either a judgment declaring that the claim organisation qualifies and that its claim is admissible or a judgment dismissing the action because the claim organisation does not qualify or its claim is inadmissible. If the collective action is dismissed, the judgment qualifies as a final judgment. A final judgment of a District Court can be appealed to a Court of Appeal. If the Court of Appeal agrees with the District Court, its judgment qualifies as a final judgment, which can in principle be appealed to the Supreme Court for a review on limited grounds only. It may happen that multiple claim organisations file WAMCA proceedings and the court rules that some organisations qualify and others do not. Such judgment qualifies as a final judgment for the dismissed claim organisation. The claim organisation can therefore appeal this judgment immediately. It is unclear whether, in the meantime, the District Court will allow the qualifying organisations to continue the proceedings on the merits, or whether it will stay the proceedings to account for the possibility that a Court of Appeal overturns the District Court's disqualification of the claim organisation.

95. If the District Court finds that the claim organisation qualifies and that its claim is admissible, its judgment will qualify as an interim judgment. This interim judgment can be appealed directly only with the District Court's permission. If the District Court does
not allow an interim appeal, the interim judgment can be appealed at the same time as the final judgment. The appointment of the Exclusive Representative cannot be appealed at all (see no. 64).

The merits phase of WAMCA proceedings will generally result in a final judgment granting or dismissing the claim or a decision approving or refusing to approve a collective settlement. If the court grants or dismisses the claim, both parties can appeal to a Court of Appeal. The court’s decision to approve a settlement cannot be appealed. Its decision to refuse approval can only be appealed to the Supreme Court by both parties jointly (see no. 207).

The WAMCA itself and legislative history are mostly silent on the design of the proceedings before the Courts of Appeal and the Supreme Court. The legislature might introduce rules governing WAMCA appeal and Supreme Court appeal proceedings at some point in the future, but for now explicitly leaves it up to the Courts of Appeal and the Supreme Court how to apply the WAMCA. This allows the court to tailor the proceedings to the needs of the parties while safeguarding the interests of the affected persons. So far, questions have mainly arisen on the following two points.

First, Courts of Appeal seem to diverge in their application of the WAMCA. The Amsterdam Court of Appeal, for example, noted that the WAMCA’s procedural provisions should generally fully apply in appeal proceedings. The court consequently stayed the proceedings for three months, in accordance with Article 1018c(3) DCCP. This decision however shows that the WAMCA’s procedural provisions should perhaps not be applied in their entirety in appeal proceedings. After all, courts stay the proceedings for three months to allow other claim organisations to file a ‘competing’ claim. In these particular proceedings before the Amsterdam Court of Appeal, it was clear that no other claim organisation would make use of the three month period. That is because there was only one claim organisation active in first instance and it is impossible for claim organisations to first file a claim in appeal proceedings. For this reason, The Hague Court of Appeal reached a different decision from the Amsterdam Court of Appeal by ruling that it would not stay the WAMCA proceedings pending before it for three months. Both decisions were rendered in April 2022 and show that the extent to which Courts of Appeal apply the WAMCA’s procedural provisions may differ until the Supreme Court decides the issue.

Second, an issue might arise if the court in first instance rules that the claim organisation does not qualify or that its claim is inadmissible. If this judgement is appealed and the Court of Appeal reverses the District Court’s judgment, it could arguably keep the case and rule on the merits as well. Consequently, the merits of the case will only have been fully addressed by one court (since appeals to Court of Appeal judgments can only be taken to the Dutch Supreme Court on limited grounds). Considering the interests of the affected persons and the societal and financial interests at stake, this situation should be avoided. The Courts of Appeal should make
use of the discretion granted by the legislature in applying the WAMCA (see no. 97), by referring the case back to the District Court if they indeed overturn the District Court’s decision that the claim organisation does not qualify or that its claim is inadmissible.

100. As mentioned in no. 91, the Supreme Court has rendered its first judgment on a limited part of the WAMCA. The court was asked to do so in proceedings to which the WAMCA itself did not apply. Currently, no WAMCA proceedings have reached the Supreme Court yet.

4.8 Joinder, third party intervention and third-party proceedings

101. In Dutch civil procedure, parties other than the initial plaintiff and defendant may get involved in court proceedings. Three classic routes for third party involvement are joinder (voeging), voluntary third-party intervention (tussenkomst) and involuntary third-party intervention (gedwongen tussenkomst). A third-party usually joins proceedings if it is likely that the outcome of the proceedings will impact them and they want to take a position in the proceedings. A third-party may be compelled to join the proceedings if a substantive law provision requires it, or if the relationship between the parties requires the third-party to be a party to the proceedings.

102. Case law shows that joinder of a party in WAMCA proceedings is possible.54 It is probably only a matter of time before courts are called upon to allow third-party intervention. The system of the WAMCA does however limit the opportunities for joinder and intervention by claim organisations. The Amsterdam District Court denied a request for joinder by a claim organisation, because the WAMCA allows the claim organisation to bring its own collective action within the (extendable) period of three months following the registration of the first claim organisation’s writ of summons in the public register. The claim organisation that requested the joinder failed to use this opportunity. The court ruled that allowing joinder on the claimant’s side would disrupt this system purposely introduced by the WAMCA legislature, and would result in bypassing the admissibility test and the designation procedure (as well as the three-month deadline) if allowed, and denied joinder on that basis.55 Also referring to the system of the WAMCA, The Hague District Court denied a request for joinder by an affected person (see no. 107).56

103. If a party to proceedings would like to directly recover the potentially awarded damages, or part of it, from a third-party, it may summon the third-party to appear in parallel third-party proceedings (vrijwaring). This is also possible in WAMCA proceedings.

4.9 Parallel individual proceedings

104. Under the WCAM, the submission of a collective settlement agreement to the court results in an automatic stay of all the individual proceedings on the same factual and
legal matters pending before Dutch courts. This is not the case under the WAMCA. The WAMCA does however provide that both parties can request a stay of individual proceedings pursued by a person who opted out of the collective action, if the individual proceedings relate to similar questions of fact and law relating to the same event or events. Furthermore, legislative history seems to indicate more broadly that a collective action should be given priority over individual proceedings concerning the same facts or points of law.57

105. Practice shows a mixed picture in terms of the willingness of courts to stay individual proceedings that are pending simultaneously with WAMCA proceedings. The Oost-Brabant District Court, for example, stayed individual proceedings to await a judgment of the Amsterdam District Court in proceedings to which the WAMCA potentially applied and that related to the same questions of fact and law, to see if the affected person in the individual proceedings would initially be part of the narrowly defined group.58 The Noord-Nederland and Noord-Holland District Courts also stayed proceedings in similar cases.59 In a later judgment, the Noord-Nederland District Court did however allow the individual proceedings to move forward, because the Amsterdam District Court had by then ruled that the WAMCA did not apply to the collective action.60 That decision by the Amsterdam District Court is currently under appeal, but the possibility of a reversal in appeal could not deter the Noord-Nederland District Court from allowing the individual proceedings to continue.

106. The Amsterdam District Court refused to stay mass claim proceedings based on assignments while WAMCA proceedings with similar claims are simultaneously pending before another district court. The court denied the request for a stay, because the proceedings based on assignment were brought prior to the WAMCA proceedings and because it assumed that the claim vehicle in the assignment proceedings would opt-out (or refrain from opting in) in the WAMCA proceedings.61

107. Relatedly, The Hague Court of Appeal62 confirmed a decision of The Hague District Court63 to allow individual claims to proceed alongside a collective action in the same proceedings. These judgments seem to deviate from previous case law on the standing of individual claimants whose interests are already represented in a collective action.64 The Hague District Court however considered that allowing the individual claimants to proceed alongside the collective action, would allow them to eventually apply to the European Court of Human Rights, which is not possible for a claim organisation. In other proceedings, The Hague District Court however denied a request for joinder by an allegedly affected individual (as mentioned in no. 102).65 The court held that the system of the WAMCA does not allow affected individuals to be parties to the proceedings in addition to the claim organisation. It cited legislative history stating that the legislative proposal for the WAMCA assumes proceedings between a
claim organisation on the one hand and a defendant on the other, in which affected individuals are not parties.
5 — PRELIMINARY ISSUES
Chapter 5
PRELIMINARY ISSUES

Mirjam van Dam

5.1 Introduction

108. The WAMCA bifurcates collective action proceedings in the sense that they consist of an admissibility assessment (stage 2 as discussed in chapter 4.3) and a substantive assessment of the claim or settlement agreement (stages 3 and 4 as discussed in chapters 4.4 and 4.5). In practice, the admissibility phase might in turn be split into two phases, both resulting in a judgment. In any event, the court examines in the admissibility phase whether:

(a) the claim organisation meets the admissibility and qualification requirements of Article 3:305a DCC (which differ, depending on whether the lighter requirements of Article 3:305a(6) DCC apply);
(b) the claim organisation has sufficiently demonstrated that a collective action is more efficient and effective than individual actions; and
(c) the collective action is not, after summary examination, without merit at the time the proceedings are initiated.

109. The court assesses – if needed of its own motion – whether the admissibility requirements listed in no. 108 are met. The claim organisation should consequently provide the court with the information necessary for it to test the admissibility requirements.

110. The defendant may limit its defence to these preliminary admissibility issues until the court has rendered a decision on them. The substantive assessment of the claim in a collective action will only take place if and after the court has ruled that the claim organisation is admissible and may therefore bring a claim.

111. This chapter discusses the admissibility requirements that generally apply for collective actions under the WAMCA. First, the admissibility and qualification requirements to be met by claim organisations in order to bring a claim will be discussed. Considering the large number of qualification requirements, they will take up most of the discussion in this chapter. The second preliminary issue to be discussed is the requirement that a collective action must be more effective and efficient than individual proceedings. Third, the court’s summary review to check if the claim is not without merit will be briefly touched upon.

112. The admissibility requirements for claims within the scope of the RAD may differ from the requirements that generally apply. The RAD’s requirements will be discussed in chapter 9.3.
5.2 Qualification and admissibility requirements for the claim organisation and its claim

The claim organisation must be a foundation or association with a specific purpose and safeguards.

Article 3:305a(1) DCC provides that "A foundation or association with full legal capacity may initiate a legal action seeking to protect similar interests of other persons, provided that it advances those interests in accordance with its articles of association and that those interests are adequately safeguarded."

Full legal capacity: a collective action based on the WAMCA must be initiated by a foundation or association which has full legal capacity. Under Dutch law, a foundation can only be incorporated by notarial deed, meaning that a foundation always has full legal capacity. An association can be established without notarial interference. However, to meet the WAMCA requirements, associations acting as claim organisations must be incorporated by notarial deed. Remarkably, in summary proceedings the Noord-Holland District Court allowed an association under Canadian law to bring a collective action.

Protection of similar interests: since collective action legislation was enacted in 1994, collective actions must serve to protect similar interests. The Dutch Supreme Court has ruled that: "This requirement is satisfied if the interests that the claim seeks to protect are eligible for being combined, thus promoting an efficient and effective legal protection of the interested parties." In other words, the similarity requirement means that it must be possible to combine the interests which the legal action seeks to protect. Only if the interests can be combined can the rights be said to be protected more efficiently and/or effectively on behalf of the interested parties. The latter requirement is laid down in the WAMCA separately and will be discussed in chapter 5.3.

When considering whether interests can be combined, the court assesses whether the questions of fact and questions of law concerned must be answered in the same way with respect to each party concerned. It is not sufficient that these parties concerned have the same complaint. As such, it must be possible to abstract from the specifics of individual cases to such an extent that the outcome would not be different, if the cases were brought individually. Only if the factual questions and legal questions related to a complaint must be answered in the same way for each individual party can that complaint be raised in a collective action. This means that if these questions need to be answered differently, no collective action may be brought.

These criteria have been further clarified in case law. It follows from the Supreme Court judgment in Clara Wichmann et al. v. SGP that general interests ("algemeen belang") can be represented as similar interests, even if a specific group of the represented persons does not support the proceedings. It followed from the claimant’s articles

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of association that it was protecting the general interests of all Dutch citizens in enforcing the right to equal treatment following state actions to combat gender discrimination. The claims in the proceedings were focused on enforcing this general and fundamental right.

118. In a more recent judgment, the Oost-Brabant District Court found that the claim organisation did not qualify, because the similarity requirement had not been met. The court interpreted the combination requirement by assessing the impact of personal characteristics ("the personality of the customer"), the number of claims ("all those thousands of interest swap cases"); the period covered by the claims ("during all those years") and the organisational structure of the defendant ("the various local Rabobank branches") to determine whether the defendant’s actions were sufficiently "similar and uniform" to allow a "general" assessment of those actions towards the plaintiffs.

119. In another case, The Hague District Court ruled that the collective action "may only be assessed on the basis of the actual circumstances of each case, which may be different for each party." Since the claim organisations had omitted to assert these actual circumstances and an "inseparable connection" existed between these circumstances and the claims, the court found that it involved an interest that could not be sufficiently generalised to a similar interest within its statutory meaning.

120. Articles of association: the claim organisation initiating an action seeking to protect similar interests of other persons must advance those interests in accordance with its articles of association. The representation of interests may not only relate to its own members or affiliated constituencies, but must also relate to other persons. If not, the claim organisation should opt for the proxy method. On the other hand, the definition of its objects in the articles of association may be interpreted broadly. Although legislative history refers to the fact that the provision was introduced primarily with a view to interests that are small per individual, as is often the case with consumers, the Dutch Supreme Court has ruled that a collective action may also be instituted in the interest of professional or commercial persons or legal entities. The Supreme Court has expressly determined that it is not necessary for the claim organisation to know the names of the affected persons.

121. Sufficiently safeguarded interests: this requirement plays a central role within the qualification requirements. The interests of the persons the claim organisation is representing are thought to be sufficiently safeguarded if the claim organisation is sufficiently representative and fulfils various other requirements concerning governance and transparency. These requirements feature in the following sections.
The claim organisation must be sufficiently representative

For the court to assess the representativeness of the claim organisation, the claim organisation must first make clear which parties it represents by describing that group with sufficient precision. The court will then examine whether the claim organisation does indeed represent these affected persons. The court will intensively test the representativeness of the claim organisation.

Legislative history gives two examples of a sufficiently precise description of the affected persons: (i) "all consumers who bought product X from company Y on date Z", or (ii) "all people who live at location X and who suffered damage due to a fire that happened at company Y on date Z." What these examples have in common is that the description of the group contains sufficiently specific details to define the group and understand who belongs to it and who does not.

If the claim organisation has properly defined the affected persons, it must make clear that its action is supported by a sufficiently large part of the group of affected persons. The court will thus look at the size of the claim organisations’ constituency and the size of their claims relative to the total number of affected persons and their claims for damages, and examine whether the constituency does in fact support the action. According to legislative history, what is ‘sufficiently large’ depends on the situation and can only be determined in relation to the total number of affected persons.

Following case law, this quantitative aspect of the requirement of sufficient representativeness constitutes an important element when assessing whether the claim organisation qualifies. The Oost-Brabant District Court, for example, noted that it was unknown whether there even were any affected persons that would benefit from the collective action at all. Likewise, The Hague District Court found that since the claim organisation had insufficiently substantiated how many affected persons had joined or supported its collective action, there was insufficient basis for the proceedings to continue.

Lack of evidence of a constituency of sufficient size led the Amsterdam District Court, too, to rule that Stichting Volkswagen Car Claim had no cause of action with the claims it had brought on behalf of lease drivers, since it had failed to show that any lease drivers had joined its action.

The Amsterdam District Court dismissed another collective action by ruling that the claim organisation was not representative of the affected persons in its action against Oracle and Salesforce. Referring to legislative history, the court described the ratio of the representativeness criterion: “The requirement of representativeness prevents a foundation or association from bringing an action without the support of a constituency. Not every random organisation can stand up for the interests of affected persons. It
must be clear from the outset that the organisation represents a sufficiently large part of the group of affected persons."86

128. It is up to the claim organisation, the court notes, to provide factual evidence of how many affected persons actually support its action.87 In this case, the claim organisation failed to do so since the constituency it presented merely consisted of persons who clicked on a like-button on its website, while it was unclear what was being 'liked'. Simply clicking on a support button does not mean that a statement of support has been obtained as intended by the representativeness requirement, the court ruled.88 The claim organisation has appealed the judgment of the Amsterdam District Court.

| 3:305a(2)(a) DCC | 129. Within the claim organisation there must be internal supervision of the board.89 This is in accordance with Principles I and VI of the Claim Code. The advantage of having separate supervision is that there is a separation of functions between the board and the supervisory board. This promotes sound internal supervision of the board's performance.90 This requirement can be met by setting up a supervisory board as a separate body of the legal person. The Claim Code provides additional rules in this regard. |
| 3:305a(2)(b) DCC |

130. A separate supervisory board is not needed when the claim organisation has a one-tier board pursuant to Article 2:44a(1) or 2:291a(1) DCC.91 In this case non-executive directors must be appointed who are tasked with supervising the executive directors.

131. In addition to a supervisory board, there must be appropriate and effective mechanisms for participation or representation in decision-making by affected persons. It is up to the claim organisation itself to determine how it wishes to interpret this provision.92 If the claim organisation is organised as an association, representation in decision-making can be arranged through the members' meeting. A foundation does not have such a meeting and will thus need to find another way of ensuring that affiliates have sufficient say in the decision-making process. One possibility is to give affiliates the opportunity to express their views on certain decisions. It seems to follow from the legislative history that if a claim organisation is organised in accordance with the Claim Code, this requirement may be presumed to be met.93 It is difficult to see how the mere satisfaction of the Principles of the Claim Code by the organisation could lead to the satisfaction of the requirement, especially because the Claim Code does not stipulate anything about mechanisms allowing affected parties to be involved in the decision-making process.

132. In the proceedings against Oracle and Salesforce mentioned in nos. 127-128, the Amsterdam District Court noted in its judgment that the claim organisation did not have contact details of the persons who clicked on the like-button on its website. The
claim organisation could hence not communicate with its constituency, making it impossible or almost impossible for the represented persons to participate or be represented in decision-making.\textsuperscript{94}

The claim organisation must have sufficient resources and control over the action

A claim organisation must have sufficient control over the legal action to prevent abuse by third-party funders (although this admissibility requirement also applies in cases where there is no external litigation funding).\textsuperscript{95} Some of the arguments for and objections to commercial litigation funding were already discussed in chapter 3.4, where it was observed that there are concerns about an increased influence of third-party funders. After all, far-reaching decision-making power by the third-party funder may conflict with the careful representation of interests.

The requirement of sufficient control and resources, in combination with the general requirement that the claim organisation must sufficiently safeguard the interests of its constituency, allows the court to look at the claim organisation’s funding construction. This may mean that the court will test, possibly of its own motion, the contents of, for example, the financing agreement.\textsuperscript{96} Unlike the court, the defendant may not be entitled to review the financing agreement, as this could expose the claim organisation’s strategy in the proceedings.

In reviewing the financing agreement, the court can test whether a third-party funder has any unjust influence on the proceedings, the claim organisation or the way in which a settlement agreement is reached. In addition, the court can test whether the third-party funder does not charge excessive and non-transparent costs for the financing.\textsuperscript{97} In \textit{Fortis/Ageas}, the court requested the parties to provide information regarding costs and financing and rather intensively tested the financing agreements between the claim organisation and the third-party funder.\textsuperscript{98} Although \textit{Fortis/Ageas} concerned WCAM proceedings, it is expected that WAMCA courts will be no less assertive when it comes to claim organisations’ relationship with commercial litigation funders.

Furthermore, the Claim Code includes a new principle relating to the relationship between a claim organisation and a third-party funder (Principle III of the Claim Code 2019). It further elaborates on the relationship between the claim organisation and the funder. The entity can enter into an agreement with a solid third-party funder. However, the funding conditions cannot conflict with the collective interest of the affected persons. It is still unknown how Dutch courts will apply this principle.

Finally, on 13 September 2022, the European Parliament adopted a resolution on the regulation of third-party litigation funding.\textsuperscript{99} The Parliament requests the European Commission to closely monitor and analyse the development of third party litigation funding in the Member States. It further requests the European Commission, after the expiry of the deadline for the application of the RAD on 25 June 2023, and taking into...
account the effects of that Directive, to submit a proposal for a directive to establish common minimum standards at EU level on commercial third party litigation funding. Among other elements, the parliament proposes the directive to introduce: (i) a system of authorisation and supervision of litigation funders; (ii) a fiduciary duty of care requiring litigation funders to act in the best interests of a claimant; and (iii) a rule establishing that the share available to the claimant and the intended beneficiaries should generally be at least 60% of the gross settlement or awarded damages.

The claim organisation must publish information on its internet page

3:305a(2)(d) DCC 138. The claim organisation must publish information on its internet page about, for example, its governance structure, objects, working method and articles of association, along with information on how to join the claim organisation. Also, the internet page should provide information on the calculation of the contribution sought from the persons whose interests the action seeks to protect.

The claim organisation must have sufficient expertise and experience

3:305a(2)(e) DCC 139. This requirement codifies the elaboration of Principle II.2 of the Claim Code 2011, but is formulated less stringently. Under Article 3:305a (old) DCC, this requirement fell under the general requirement that the interests of the affected persons are adequately safeguarded. The provision allows the court to test the claim organisation’s expertise. The requirement that the claim organisation must have sufficient expertise means that it must either have demonstrable expertise that is relevant to the legal action, or have access to it. Which expertise is needed will differ from case to case, according to the legislature. The degree of expertise and professionalism required may also vary depending on the size of the group whose interests are being represented. The larger the group of affected persons, the more expertise and professionalism the claim organisation may be required to have.

The legislature has specifically stipulated that this does not mean that the court, under the WAMCA, may not permit ad hoc claim organisations. These organisations will, however, have to demonstrate that they have sufficient experience, for example by engaging persons with specific expertise to their entity. The requirement of sufficient experience may be evidenced by previous activities in the field of collective actions for the group whose interests are being represented. This evidence may consist of, for instance, collective actions brought previously or participation in the board of persons who have this experience.

The claim organisation’s directors may not have a profit motive

3:305a(3)(a) DCC 141. The directors involved in the formation of the legal entity, and their successors, may not be directly or indirectly motivated by profit which is realised through the claim organisation. This is one of many governance requirements in the WAMCA and has been included with the aim of preventing impermissible influence and conflicts of
interest. Founders or board members must be prevented from possessing and disposing of the claim organisation’s funds as if they were their own funds.\footnote{104} It must be ensured that a positive liquidation balance is applied in a responsible manner, for example by distribution to the participants or to a charity.\footnote{105}

142. In proceedings before The Hague District Court, the board members of the claim organisation consisted of executives or shareholders of companies represented in the collective action, who have an interest in a favourable outcome (for their own companies) of the proceedings. The court held that this does not mean that the board members have a profit motive. Their financial interest in the outcome of the proceedings does not mean that they can dispose of the claim organisation’s funds as if they were their own or that there is an increased risk of financial mismanagement or conflict of interest.\footnote{106}

The claim must be sufficiently closely connected with the Dutch legal system

\textbf{3:305a(3)(b) DCC} 143. The collective action must have a sufficiently close connection with the Dutch legal system, the so-called ‘scope rule’. This connection exists if:\footnote{107}

\begin{enumerate}
\item the majority of the represented persons are resident in the Netherlands; or
\item the defendant has its seat in the Netherlands and additional circumstances indicate a sufficiently close connection with the Netherlands; or
\item the unlawful act occurred in the Netherlands.
\end{enumerate}

144. The claim is declared inadmissible, if the court finds that the relationship with the Netherlands is insufficient. From the preceding paragraph it follows that, contrary to the general rules on jurisdiction, including the Brussels I Regulation (recast), the fact that the defendant has its statutory seat in the Netherlands does not in itself indicate a sufficiently close link with the Dutch legal sphere for the purpose of filing a collective action. In fact, it has been suggested during Parliamentary debate and in case law that the requirement entails an illicit limitation of the Brussels I Regulation (recast).\footnote{108} A referral to \textbf{ECJ} for a preliminary ruling is expected, if the circumstances of a case so allow. In the meantime courts may declare claim organisations or some of their claims inadmissible if their claim is insufficiently connected with the Dutch legal system – as the District Courts in Rotterdam and Amsterdam have done.\footnote{109}

The claim organisation must have attempted negotiations

\textbf{3:305a(3)(c) DCC} 145. To be admissible, the claim organisation must have made a reasonable attempt to settle the case – as touched upon in no. 41. Considering the specific circumstances of the case, the claim organisation must sufficiently try to achieve the desired result of the claim by conducting consultations or negotiations with the prospective defendant. The claim organisation will be deemed to have met this condition, if two weeks have lapsed since it sent a letter to the prospective defendant requesting
consultations and stating the claim. If, however, the prospective defendant responds within those two weeks and is open to consultation, the court is unlikely to consider the mere expiry of the two-week period after the delivery of the letter sufficient to constitute the required efforts to achieve the claim's object in negotiations. In these circumstances, the claim organisation may be expected to meaningfully engage with the defendant.

146. In the end, it is up to the court to decide whether this requirement has been met. Case law affirms that if the claim organisation has shown no initiative whatsoever to enter into consultations, it might not qualify to bring a collective action. If, on the other hand, it is clear that consultations will not produce the desired result or if the consultations have already been going on for years, the claim organisation may bring its action.

147. It follows from the judgment of the Amsterdam District Court in the proceedings against Oracle and Salesforce that if the claim organisation merely asks the prospective defendant a question about a claim, this does not qualify as a sufficient consultation attempt.

### The claim organisation must prepare a management report and annual accounts

3:305a(5) DCC

148. Article 3:305a(5) DCC stipulates that claim organisations must prepare a management report and annual accounts in accordance with the provisions for associations and foundations in Title 9 of Book 2 DCC and Articles 2:49 and 2:300 DCC. The claim organisation should publish the management report on its publicly accessible internet page within eight days of its adoption. This ensures that stakeholders and affiliates can gain an up-to-date understanding of the claim organisation's situation through its website.

149. It is not entirely clear when this admissibility requirement applies. Article 1018c(5)(a) DCCP suggests that the admissibility requirements of Article 3:305a DCC are limited to Article 3:305a(1)-(3) DCC. This would render the requirement of Article 3:305a(5) DCC moot. Article 3:305a(6) DCC, however, suggests that a claim organisation should actually comply with Article 3:305a(5) DCC if the exemption of Article 3:305a(6) DCC does not apply (see nos. 150-151). The Midden-Nederland District Court indeed confirmed that courts have to review whether the claim organisation meets this requirement if the exemption of Article 3:305a(6) DCC does not apply.

### Exemption for certain claims

3:305a(6) DCC

150. The court may waive some of the qualification requirements, if (a) the purpose of the claim is idealistic in nature and the financial interest is very limited; or (b) the nature of the claim or the affected persons gives rise to do so. Furthermore, this waiver is permitted only if the claim is not for damages. A request for a court to apply this exception must be included in the writ, but it is ultimately for the court to assess of
its own motion whether the exemption applies. Proceedings with an idealistic intent
generally concern claims seeking an injunction or restraining order and requests for
declaratory judgments.

The exemption of Article 3:305a(6) DCC is not limited to NGOs bringing idealistic
claims. The legislature stated, for instance, that the exemption applies if an
organisation defending intellectual property rights brings a claim solely seeking an
injunction in reaction to a copyright infringement for the benefit of those it represents.
This is one of the reasons why the Midden-Nederland District Court applied the
exemption to Stichting Brein, a foundation that aims to protect the intellectual property
rights of creators. In its judgment, the court referred to legislative history, including
the notion that the WAMCA’s more stringent qualification requirements were not
intended to make it unnecessarily difficult for organisations which already play an
important role in upholding collective interests in collective actions (and which, by
definition, are not aiming for compensation) to continue their work. It will be interesting
to see in case law exactly how broad the exemption of Article 3:305a(6) DCC will turn
out to be.

Exactly which requirements are waived if the exemption applies was not immediately
clear. The wording of Article 3:305a(6) DCC and that of Article 1018c(5)(a) DCCP
appeared to be inconsistent. The legislature has clarified this issue by amending the
text of Article 1018c(5)(a) DCCP so that it is clear that if Article 3:305a(6) DCC applies,
the qualification requirements mentioned in that provision should be followed. This
means that the requirements discussed in nos. 113-121 (foundation or association;
articles of association; purpose), 122-128 (representativeness), 141-142 (no profit
motive), 143-144 (Dutch connection) and 145-146 (negotiation attempt) continue to
apply. This includes the representativeness requirement mentioned in the preamble to
Article 3:305a(2) DCCP, which is sometimes overlooked, but is unambiguously clear
from legislative history and has been interpreted correctly by the Arnhem-Leeuwarden
Court of Appeal. Indeed, the Minister for Legal Protection confirmed in a debate in
the Dutch Senate that also in regard to “idealistic claims” courts should test the
representativeness of the claim organisation “intensively.”

The exemption of Article 3:305a(6) DCC does not fully apply to claims within the scope
of the RAD (see no. 319).

The claim organisation must sufficiently demonstrate that a collective action is more
efficient and effective than instituting individual claims. To do so, the claim
organisation must show that:

(a) the legal and factual questions to be answered by the court are sufficiently
common;
(b) the number of persons whose interests the claim is seeking to protect is sufficiently large; and

(c) if the claim organisation seeks payment of damages, the affected persons have a sufficiently large financial interest (either individually or collectively).

The claim organisation will have to meet all three criteria. The law leaves little to no room for a claim organisation to argue that its collective action is more efficient and effective than an individual action on grounds other than those set out above.

### Common legal and factual questions

155. The legal and factual questions of the affected persons should be sufficiently common. A key question for all the affected persons is whether the defendant acted unlawfully towards them, that is how did the defendant act (factual question) and was this act unlawful (legal question)?

156. The circumstances of the defendant’s potentially unlawful act in relation to the affected persons will of course differ per person. Yet these differences do not mean that the criterion of common legal and factual questions will not be met. In assessing whether this criterion is met, the court may abstract from the specific circumstances on the part of the affected persons. These circumstances will only become relevant when questions such as the damage (or its extent), causal relationship and own fault need to be considered.  

157. Notable in this regard is a judgment by The Hague District Court dismissing WAMCA proceedings brought by the main Dutch organisation representing hospitality businesses. The claim was brought on behalf of the organisation’s members, including businesses such as restaurants, hotels and nightclubs, and related to the restrictive measures taken by the Dutch government in response to the Covid-19 pandemic. Among other claims, it was claimed that the government in taking some of the measures acted unlawfully against hospitality businesses and that it should pay damages. The court, however, was quick to dismiss the collective action, finding that the legal and factual questions raised by the claims were not sufficiently common. The court ruled that, even if it is assumed that the government’s restrictive measures were identical for all the different types of hospitality businesses represented in this action, the impact of the measures was not. After all, the court held, the impact of the measures was different for a fast food joint or ice cream shop, than for a restaurant, hotel or nightclub. To illustrate: during the lockdown periods, nightclubs were mostly entirely closed, while restaurants could open with restricted capacity or could offer take-out. According to the court, such differences make it impossible to review the lawfulness of the government’s measures and conduct vis-à-vis the Dutch hospitality industry as a whole.
There seems to be some overlap between the requirement of common legal and factual questions of Article 1018c(5)(b) DCCP and part of the qualification requirement of Article 3:305a(1) DCC, which requires that the claim seeks to protect similar interests. It is not clear if these requirements are materially the same. Both requirements do seem to concern the question whether the affected persons have legal and factual questions in common.

The number of potentially affected persons must be sufficiently large, but how large exactly will need to be determined on a case-by-case basis. The legislature did not set a minimum and case law on this subject is still limited, but the Amsterdam District Court found that a claim organisation representing “hundreds, if not thousands of persons” represents a sufficiently large number of affected persons.

If the claim organisation seeks damages, the affected persons (individually or collectively) must have a sufficiently large financial interest. Again, the legislature did not set a minimum for the amount of individual or collective damages to be claimed. Whether this requirement has been satisfied is therefore dependent on the specific circumstances of the case.

Pursuant to Article 1018c(5)(c) DCCP, the court must summarily examine whether the collective claim is not without merit at the time the proceedings are initiated. The claim may not be manifestly unfounded. Since the court can review this of its own motion, it is up to the claim organisation to provide the information showing that its claim has merit.

A primary objective of this preliminary review is to ensure that nonsense or unfounded claims (which the legislature expected to be rare) are dismissed at an early stage to prevent long and costly proceedings on the merits. As such, the preliminary review of the merits of the claim fits within the legislature’s aim to create a balance between guaranteeing access to justice and preventing an undesirable claim culture. To further deter nonsense or unfounded claims, the court may, moreover, order the claim organisation to pay five times the defendant’s standardised lawyers’ fees, if the claim is ruled to be without merit. Five times the standardised lawyers’ fees is, however, still not very much and will not even come close to the actual costs incurred, so this provision is unlikely to have any significant effect.

Legislative history gives little concrete guidance on the precise test the court must apply. The Explanatory Memorandum merely notes that the preliminary merits test
is only known in Dutch attachment law and that the provision bears a resemblance to the motion to dismiss known in US law.

164. In some of the first WAMCA judgments dealing with the preliminary issues, the courts seem to apply a rather low standard when reviewing whether the claim is not without merit. In two judgments, The Hague District Court limited its review to just one sentence. The Midden-Nederland District Court quoted the Explanatory Memorandum in saying that its preliminary review will only result in the dismissal of the case in exceptional situations, which it ruled not to be present in the case before it. The Amsterdam District Court, too, was rather short and stated that the debate on the merits would take place later during the proceedings.

165. A more substantive preliminary review would, however, be beneficial for all the parties involved. It would result in fewer cases moving to the merits stage, so defendants would be spared the resources of long and costly proceedings. Claim organisations would also benefit, since the court's admissibility judgment is not a substantive judgment and does thus not carry res judicata effect. This means that if the court dismisses the claim after preliminary review, the claim organisation could improve and resubmit its claim. This would of course also be favourable for the affected persons, since all the affected persons are bound by the final judgment. If the claim is poorly worded or litigated and results in a final dismissal, the affected persons will have lost their claim. A more substantive preliminary review will help them in preventing them from being bound to a negative outcome on the merits while simultaneously nudging claim organisations to submit high-quality claims. Finally, fewer collective actions moving to the merits stage would save the judiciary significant resources.

166. It remains to be seen how the courts will apply the preliminary merits test. In the meantime, defendants would be well-advised to stress the importance of the preliminary review in their submissions, while claim organisations should provide sufficient information to demonstrate that their claim is well-founded.
6 — SETTLEMENT
STEP 1
Court stays proceedings for settlement attempt

STEP 2
Parties reach settlement

STEP 3
Parties petition the court and submit their settlement agreement

STEP 4
Pre-trial hearing of petitioners only

STEP 5
Notification of the petition to all beneficiaries

STEP 6
Potential statements of defence

STEP 7
Hearing on the merits

STEP 8
Court requires amendments or approves the settlement

STEP 9
Notification of the court’s approval

STEP 10
Opt-out for all beneficiaries

STEP 11
Distribution of settlement relief
6.1 Introduction

167. Although the WAMCA introduced the possibility of a court awarding damages in a collective action, the desired outcome of a collective action could be that the matter is settled amicably and collectively between the parties. That is why the WAMCA provides for a collective settlement on an opt-out basis with court approval. This is not a new feature in the Dutch legal system. Court-approved collective settlements have been possible for many years under the WCAM. The WCAM allows parties to a collective settlement agreement to jointly petition the Amsterdam Court of Appeal to declare their settlement binding on a defined group of affected persons, who may opt out. Through their WCAM experience, Dutch courts are unique in Europe in their expertise of collective settlement proceedings.

168. The WAMCA settlement procedure builds on this expertise by mostly incorporating WCAM provisions, which renders the court’s assessment almost identical and the proceedings very similar to those pursuant to the WCAM. This chapter first discusses the WAMCA settlement, after which the WCAM settlement is briefly touched upon and the most relevant procedural differences are highlighted.

6.2 WAMCA settlement

Statutory settlement attempt

169. Following the appointment of the Exclusive Representative and during the opt-out period, the court stays the proceedings for a short period to give the Exclusive Representative and the defendant the opportunity to test a settlement. The legislature considered that since the defendant now knows who to "do business with", it would be opportune to pause the proceedings. If the parties reach a settlement, once the proceedings are paused or at any other time during the proceedings, they need to submit their agreement to the WAMCA court for approval to make the settlement binding on all the members of the narrowly defined group who have not yet opted out. The WAMCA settlement procedure is largely based on WCAM provisions, but there are some important differences with regard to both the substantive requirements for the agreement and the procedure. Since the WAMCA has only been in force for just over two years, the first petition initiating a WAMCA settlement procedure has yet to be submitted.
Petition to the court

170. The WAMCA settlement procedure commences with the submission by the claim organisation and the defendant of their joint petition to the court requesting approval of their settlement agreement. By submitting the petition, the parties change their procedural identity from claimant and defendant to co-petitioners. Furthermore, since a settlement will usually not include an admission of liability, the defendant can now materially be referred to as the paying party. Likewise, the allegedly affected persons become beneficiaries.

171. The petition must contain: (i) the names and addresses of the petitioners; (ii) a description of the event or events to which the agreement relates; (iii) a short description of the settlement agreement and; (iv) a clear description of the request and its grounds. The settlement agreement must be attached to the petition. The procedural rules of the courts set a number of additional requirements.

172. After submission of the petition, courts are likely to order the petitioners to appear at a pre-trial hearing to discuss the settlement procedure and the notification requirements.

Notification requirements

173. Since the beneficiaries may submit a statement of defence and will be bound by the settlement agreement if they do not opt out, they should be made aware of the petition and the settlement agreement. Other interested parties, such as claim organisations that are not party to the settlement, should also be notified. Unless the court determines otherwise, it is up to the petitioners to actively notify the beneficiaries. The notification requirements mostly follow from WCAM provisions, the EU Notification Regulation 2020 and the Service Convention. Different notification requirements apply, depending on whether beneficiaries are known or unknown. These include announcements in newspapers and on websites, service by bailiff, registered mail, regular mail and email. The court decides exactly how the beneficiaries should be notified in a specific case. Notification can be an extensive task: in the Shell WCAM proceedings, more than 110,000 notices in 22 different languages were sent out to beneficiaries in 105 different countries. In addition, a notice was published in 44 different newspapers worldwide. In practice, petitioners tend to engage service providers to execute the notification requirements.

174. Furthermore, the court may order that the petition and other relevant documents, and possibly a translation, must be published on the internet. The court may also order that beneficiaries may request copies of relevant documents from the petitioners.

175. Once all the beneficiaries have been properly notified, the court orders an oral hearing to discuss their assessment of the settlement agreement.
All the requirements for court approval of the settlement agreement follow from WCAM provisions. However, the court in the admissibility phase of WAMCA proceedings has already tested the qualification requirements to be met by the claim organisations. These criteria are mostly codified in Article 3:305a DCC, which does not apply to WCAM proceedings – the WCAM has its own qualification and admissibility requirements. The WAMCA’s qualification and admissibility requirements are stricter than those pursuant to the WCAM. This is most conspicuous with regard to the scope rule (see nos. 143-144), stipulating that a claim organisation only qualifies if its claim is sufficiently closely connected with the Dutch legal order. This WAMCA rule does not apply in WCAM proceedings, which seems to suggest that the claims settled by way of a collective settlement under the WCAM could in theory be entirely non-Dutch, whereas under the WAMCA the claims must have some Dutch element for the claim organisation to qualify. This section will focus exclusively on the court’s assessment of the settlement agreement, since the admissibility requirements have featured elaborately in chapters 4 and 5.

The court first examines whether the settlement agreement contains certain mandatory elements, such as: (i) a description of the event or events to which the agreement relates; (ii) a description of the group or groups of beneficiaries, according to the nature and seriousness of their loss; (iii) an indication, as precise as possible, of the number of beneficiaries belonging to such group or groups; (iv) the compensation awarded to those beneficiaries; (v) the conditions which the beneficiaries must satisfy in order to qualify for that compensation; (vi) the way in which the amount of compensation is established and can be obtained; and (vii) the names and addresses of the persons to whom the opt-out notices must be sent. The court also checks whether the agreement applies to all the members of the narrowly defined group, as legislative history indicates that courts will not approve a partial settlement.

The court then scrutinises the substance of the agreement. It will ask the parties to amend or expand the agreement and may eventually refuse to declare the agreement binding if:

(a) the agreement does not contain the information listed in no. 177;
(b) the amount of compensation awarded is not reasonable, taking into account the extent of the damage, the ease and speed with which the compensation can be obtained and the possible causes of the damage;
(c) it is insufficiently certain that the rights ensuing from the agreement can be exercised by its beneficiaries;
(d) the agreement does not provide for the possibility of an independent settlement of disputes that may arise from the agreement by a court other than the one that would be competent according to the law;
the interests of the beneficiaries are not sufficiently safeguarded in any other way;
(f) the claim organisations are not sufficiently representative with regard to the interests of the beneficiaries;
(g) the group of beneficiaries is insufficiently large to justify that the agreement is declared binding;
(h) there is a legal entity that will distribute the compensation pursuant to the agreement and this legal entity is not a party to the agreement.

179. The main elements of the court's assessment are the reasonableness of the compensation and the representativeness of the claim organisation or organisations. Proper notification of beneficiaries is another aspect the court will closely consider.

Element 1: reasonableness of the compensation

180. It is not in itself unreasonable if the settlement agreement does not provide for full compensation of the losses as originally presented by the claimants. In its assessment of the reasonableness of the compensation, the WCAM court has consistently taken into account that the outcome of legal proceedings regarding the claims covered by the settlement agreement might be uncertain and that such proceedings could be time-consuming and costly. The collective settlement, by contrast, provides relief which can be obtained relatively easily and speedily. As such, the court has repeatedly ruled that the settlement agreement is the outcome of negotiations in which each party makes concessions based on the perceived strength of its legal position and the perceived interest in having the matter resolved out of court.

181. The extent of the damage, the ease and speed with which the compensation can be obtained and the possible causes of the damage are factors the court should take into account in assessing the reasonableness of the compensation. The court does not limit its reasonableness review to these elements. Broad support among beneficiaries and lack of substantial opposition may indicate that the amount of compensation provided for in the settlement agreement is not unreasonable. The court may also take an expert opinion into account.

182. Furthermore, in Dexia and Vie d'Or, the WCAM court ruled that the amount of compensation provided for in the settlement agreement was not unreasonable considering, among other things, that the alleged damage had not been caused solely by the paying parties.

183. A settlement agreement may still be reasonable if it differentiates between different groups of beneficiaries based on the expected strength of their claims in court. This could mean that some beneficiaries do not receive any or only limited compensation under the settlement agreement. It also means that a settlement agreement may differentiate between beneficiaries in different countries, on the basis that their claims
have a different value under the laws that apply to their claims. This is not problematic for the court’s review, as Dutch courts frequently apply foreign law. The WCAM court has specific experience in the international assessment of relative claim strength. In *Converium*, for example, the court had to compare the strength of the claim of the entire group of beneficiaries under the WCAM agreement, consisting of non-US shareholders, with the claim strength of the US shareholders who had previously entered a US class action settlement in relation to the same event. The compensation for US shareholders turned out to be higher, but the court ruled that this did not make the WCAM settlement for the non-US shareholders unreasonable, because under US law the US shareholders’ claims were simply stronger than those of the non-US shareholders.¹⁴³

Moreover, when assessing relative claim strength and also more generally, Dutch courts apply the law, Dutch or foreign, as it stands at the moment of its assessment. So if, for example, the Dutch Supreme Court gives a judgment after submission of the petition, but before the court has rendered its final decision, the court will take the Supreme Court judgment into account in assessing claims under Dutch law – as it did in the WCAM DSB proceedings.¹⁴⁴

The court can also review whether the criteria determining whether a person is a beneficiary under the agreement are not “incomprehensible.”¹⁴⁵ After all, even if the total amount of compensation in itself is reasonable, it may still be unreasonable if certain beneficiaries receive no or less compensation than others for no good reason. Another aspect the court might assess is the fees payable to the claim organisations, which may not be unreasonably high.

Mainly on the basis of the reasonableness criterion, the WCAM court required the parties in *DSB* and *Fortis/Ageas* to amend the settlement agreement, which eventually resulted in an increased amount of compensation.¹⁴⁶

Another important criterion in the court’s review of the settlement is whether the claim organisations are sufficiently representative of the interests of all the beneficiaries. In testing this requirement, the court looks at the statutory objects of the foundations or associations involved. It also tests whether the claim organisations are in fact representative regarding the interests of the beneficiaries. It mainly considers (i) their activities other than filing the petition; (ii) the number of their participants or members; (iii) the acceptance of the representative by the beneficiaries; and (iv) the extent to which the representative has actually acted on behalf of the beneficiaries and has presented itself as a representative in the media.

For international cases, it is particularly relevant that the WCAM court in *Dexia* held that not every claim organisation has to be representative of all the beneficiaries.
According to the court, it is sufficient if the joint claim organisations are sufficiently representative regarding all the beneficiaries' interests, provided that each of them is sufficiently representative for a sufficiently large group of interested persons. In *Converium*, however, the court found that there was no need to impose the extra requirement that each representative is sufficiently representative for a sufficiently sized group of beneficiaries.

In *Shell* and *Converium*, which both followed from a US class action, a Dutch foundation had been established whose sole purpose was to represent the interests of all the beneficiaries. This foundation sought and obtained the support of participants and supporters in relevant foreign countries. Since a clear majority of the beneficiaries in *Shell* were domiciled outside of the Netherlands, the Court required broad and geographically widespread support for the settlement agreement. This did not necessarily seem to entail support from the parties from every single country home to a beneficiary. In both *Shell* and *Converium*, the Court refrained from scrutinising the actual activities of the claim foundations.

*Fortis/Ageas* proved that the representativeness criterion is not hollow. The court mainly relied on a lack of representativeness when it required the parties to amend the settlement agreement to strike out, for the purpose of the damage compensation, the distinction between beneficiaries that were affiliated with a claim organisation and those who were not. The court also intervened in the fees payable to some claim organisations. It ultimately found one organisation to be inadmissible, because it was insufficiently representative in material terms of the interests of its constituency as a whole due to the unjustifiably high compensation it would receive under the agreement.

As mentioned in no. 176, the court has already tested if the claim organisation complies with the qualification criteria in the admissibility phase of the WAMCA proceedings. One of these criteria is the representativeness criterion (see nos. 122-128). It is unclear how the WAMCA’s representativeness criterion relates to that of the WCAM, which applies to the WAMCA settlement procedure. Courts might well decide to refrain from a second representativeness test.

**Element 3: Notification of the beneficiaries**

Notification of the beneficiaries must take place at two stages in the process. First, the beneficiaries must be notified of the filing of the petition and the public oral hearing to enable them to file a statement of defence, among other things. Second, the beneficiaries must be notified of the court’s approval of the agreement to allow them to opt out within the period set by the court.

Notification of the beneficiaries is crucial, since the binding effect of the settlement agreement is only acceptable if the beneficiaries have had an opportunity to object and
opt out. The court will therefore diligently review whether the parties have complied with the notification requirements (see nos. 173-174 and 198). Since the notification of the court’s approval decision takes place after the court has rendered its judgment, it will not be able to check the actual execution of the second round of notifications.

### Applicable law

194. The applicable law in collective settlement proceedings remains largely undecided. There are no specific choice-of-law rules for this type of requests and the issue has been largely ignored by the legislature.¹⁵²

195. One could argue that the question of who is bound by a settlement agreement is a substantive legal question governed by the law applicable to the settlement agreement. In that case, the statutory substantive legal requirements only apply if Dutch law applies to the agreement. This approach implies that if not Dutch law, but other law applies to the settlement agreement and if that law does not provide for the possibility to make the settlement agreement binding, the Dutch courts cannot grant the request to approve the settlement agreement. This is not the approach taken by the Amsterdam Court of Appeal in WCAM proceedings. So far, also in cases with a foreign element, the Amsterdam Court of Appeal has applied the WCAM criteria to determine whether or not it could declare the settlement agreement binding. The court is not expected to change its course, and WAMCA courts are likely to follow the approach of the Amsterdam Court of Appeal.

196. Following the RAD – in particular Article 11 on redress settlements – more and more countries will introduce laws to declare settlement agreements binding for persons who have suffered damage. The RAD explicitly provides that the Rome I and Rome II Regulations apply to representative actions, including redress settlements.

### Opt-out

197. If the court in its assessment of the settlement agreement objects to certain parts of the agreement, it will likely render an interim decision allowing the parties to amend the agreement – as is practice in WCAM proceedings. If the court approves the settlement, it declares the settlement binding on all beneficiaries, subject to opt-out.

198. This second opt-out opportunity is based on the same provisions as the first opt-out opportunity following the appointment of the Exclusive Representative, including the publication and notification requirements (see nos. 65-74). The legislature seems to have thought it prudent to allow for an opt-out, since the settlement agreement may deviate from mandatory law. The drawback of allowing persons to opt out after court approval is that it introduces uncertainty in negotiating a settlement, as none of the parties will know how many people will eventually be bound by the settlement.
199. If a beneficiary could not be aware of their damage at the time of this opt-out opportunity, the beneficiary is not bound under the settlement agreement if they indicate in writing to the claims administrator (which could be the paying party) that they do not wish to be bound. A paying party may set such beneficiary a period of at least six months in which the beneficiary should express their wish not to be bound. In setting this period, the paying party should inform the beneficiary of the name and address of the claims administrator.

### Consequences of approval

199. Almost all the WCAM provisions regarding the consequences of the court's approval of the settlement apply directly to the WAMCA settlement.

200. Once the court approves the settlement, the agreement between the claim organisation and the paying party has the effect of a settlement agreement to which each beneficiary is a party. It thus grants the beneficiaries - as parties to the agreement - a claim for performance.

201. After court approval, neither the claim organisation nor the paying party may invoke fraud or error to annul the agreement. Additionally, beneficiaries may not rely on a violation of reasonableness and fairness to annul the agreement.

202. The settlement agreement will provide for a mechanism for beneficiaries to claim and receive compensation. This entails that the paying party or a designated body decides whether the person requesting compensation satisfies the eligibility requirements. This decision is, in principle, binding - while allowing the person requesting compensation to file a notice of objection to the decision with an independent dispute resolution body or person. If, however, the final decision, or the way it was made, is unacceptable according to standards of reasonableness and fairness, the competent District Court is authorised to decide on the compensation. The court is also authorised to decide in cases where no decision is taken within a reasonable period. Compliance with the decision can, in principle, also be enforced by the claim organisation. Beneficiaries may not be better off as a result of the compensation received by them, in the sense that their total compensation may not exceed their total damage.

203. A settlement agreement may be concluded on the basis of a maximum amount for payments, so that the paying party is released from any further obligation towards the beneficiaries. If during the distribution of payments it turns out that the total amount available for compensation is insufficient, the paying party is allowed to proportionally lower the remaining payments. The agreement may, however, provide for a different procedure. Conversely, if a surplus remains once the paying party has fulfilled its obligations, it may request the court to order the person administering those funds to pay that balance to the paying party, or, if there are several paying parties, to each
party in proportion to each of their contributions. Other options would be to distribute the remaining funds among the beneficiaries that did claim compensation or to allocate any remaining funds to charitable causes (so called cy-près distribution), such as consumer or patient interest bodies or organisations supporting collective actions. Neither the WAMCA nor the WCAM provides for cy-près awards or supervision by the courts, but the parties are free to include a form of cy-près distribution in their settlement agreement.

205. If not otherwise agreed, the settlement agreement will prevent the paying party from having to pay the same compensation twice in the case of multiple parties that are jointly and severally liable. If a beneficiary claims compensation from a liable party that did not commit to the agreement, but that is jointly and severally liable together with the paying party, the WCAM agreement will oblige the beneficiary to reduce its claim by the amount which could have been claimed as contribution by the uncommitted party from the paying party.

206. Any WAMCA settlement proceedings only commence after the first opportunity to opt out has passed. This means that the WAMCA settlement only binds those who have not previously opted out. If the parties want to allow all the affected persons to take part in their settlement, they should initiate WCAM proceedings at the Amsterdam Court of Appeal instead.153

207. If the court eventually renders a decision refusing to approve the settlement agreement, the petitioners may only jointly take an appeal from the court’s decision to the Dutch Supreme Court directly. The court’s approval of the settlement cannot be appealed. These appeal restrictions follow directly from the WCAM and are meant to take account of the common interests of the petitioners and to prevent delays in the compensation of beneficiaries. It is, however, noteworthy that the legislature has chosen to apply these WCAM restrictions to the WAMCA directly, as WCAM proceedings take place before the Amsterdam Court of Appeal in first instance. Appeal proceedings before a Court of Appeal would thus not fit in WCAM proceedings. This is not the case for WAMCA proceedings, however, which are held in first instance at District Court level. The legislature nonetheless decided to apply the same appeal restrictions. Just like the parties’ opportunities for appeal, the revocation of the court’s decision is also subject to restrictions.

208. The international recognition and enforcement of a WCAM decision declaring the collective settlement binding will be discussed in nos. 219-222. The considerations discussed there apply accordingly to the WAMCA court’s decision to approve a collective settlement.
If the parties fail to reach a collective settlement during the WAMCA proceedings, the court will resume the proceedings and eventually render a judgment on the claim organisation’s claim.\textsuperscript{154}

### 6.3 WCAM settlement

#### Introduction

The WCAM allows parties to a collective settlement agreement to jointly petition the Amsterdam Court of Appeal to declare their settlement binding on a defined group of beneficiaries, who may opt out. At the time of its introduction in 2005, the WCAM was unique in Europe in facilitating court-approved collective settlements on an opt-out basis. The Netherlands has been at the forefront of the development of collective settlements ever since. By allowing parties to litigate in Dutch or English (see no. 38), the Amsterdam Court of Appeal remains uniquely capable of approving large international collective settlements.

The WCAM has been used relatively successfully in several settlements, including the predominantly international settlements in *Shell, Converium and Fortis/Ageas*.\textsuperscript{155} The total compensation in all settlements varied from EUR 4.25 million to EUR 1.3 billion.\textsuperscript{156} De Brauw has been involved in most major WCAM cases, including *Shell, Converium* and *Fortis/Ageas*.

Although the WAMCA also provides for a collective settlement procedure, the WCAM continues to be available as a separate avenue to have collective settlements declared binding. Moreover, in some situations the WCAM remains the only way for court approval of collective settlements. That is because the WAMCA does not apply to collective actions brought prior to 1 January 2020 or to collective actions brought after 1 January 2020, but relating to events that took place prior to 15 November 2016 (see chapter 4.6). The WCAM therefore remains the only means available to end a mass dispute with a large group of affected persons at once for harm-causing events beyond the temporal scope of the WAMCA. Additionally, in some situations the WCAM will be the only available avenue even if the harm-causing event falls within the WAMCA’s temporal scope. This is, for example, the case if the parties reach a settlement before WAMCA proceedings are initiated.

#### Jurisdiction

There are no specific provisions regarding the international jurisdiction of the Amsterdam Court of Appeal to declare a settlement binding. In three decisions, the court ruled that the Brussels I Regulation (recast) and the *Lugano Convention* apply to WCAM proceedings and that the beneficiaries are the persons “to be sued,” that is to say defendants.\textsuperscript{157} On that basis, the court first assumed jurisdiction with regard to the beneficiaries domiciled in the Netherlands. The court then assumed jurisdiction with
regard to the beneficiaries domiciled outside the Netherlands but within the EU, Switzerland, Iceland or Norway. It did so on the basis that the claims arising from the legal relationship between the paying party and those beneficiaries were deemed so closely connected with the claims arising from the relationship between the paying party and the beneficiaries domiciled in the Netherlands, that it was expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings (Article 8(1) Brussels I Regulation (recast) and Article 6(1) Lugano Convention).

Finally, the court assumed jurisdiction with regard to the beneficiaries domiciled outside the Netherlands or any other EU Member State, Switzerland, Iceland or Norway. This ground for jurisdiction is based on the Dutch rule that courts have jurisdiction in these types of proceedings if at least one of the petitioners is domiciled in the Netherlands. As discussed in no. 189, in Shell and Converium, which both followed from a US class action, Dutch foundations had been established representing the interests of all the beneficiaries. The court accepted these foundations as petitioner and could thus assume international jurisdiction, since one of the petitioners had its seat in the Netherlands.

Furthermore, the court in Converium held, as a separate and autonomous ground for jurisdiction regarding beneficiaries domiciled in the Member States of the EU and the Lugano Convention, that the settlement agreement, if declared binding, would be executed in the Netherlands (Article 7(1) Brussels I Regulation (recast) and Article 5(1) Lugano Convention). It is undecided whether it is possible to create international jurisdiction for the Amsterdam Court of Appeal by inserting a choice-of-court clause in the settlement agreement.

Procedure

Since the WAMCA settlement procedure is largely based on the WCAM, only two differences will be highlighted here. First, WCAM proceedings take place before the Amsterdam Court of Appeal, whereas WAMCA proceedings are held at the competent District Court. Second, any ongoing proceedings before Dutch courts on disputes for the termination of which the agreement provides are automatically stayed during WCAM proceedings. This is not the case for WAMCA settlement proceedings. Furthermore, following the first WCAM proceedings, the legislature in 2013 introduced the possibility for a pre-petition hearing to increase the parties’ willingness to negotiate and to facilitate a collective settlement. At the request of a claim organisation or the allegedly liable party, the competent District Court (and not the Amsterdam Court of Appeal) may order these parties to appear at a hearing. The pre-petition hearing offers the parties and the court the opportunity to examine whether a collective settlement can be reached or to prepare or structure a potential collective action. At least one pre-petition hearing has been ordered, while at least two requests have been denied due
to an unwilling counterparty and the claim organisation’s failure to provide the court with sufficient information.\(^{159}\) The pre-petition hearing is not exclusive to the WCAM in the sense that it can only be ordered if a requesting party explicitly considers WCAM proceedings. It may therefore also be of use prior to WAMCA proceedings.

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**Review of the settlement by the Amsterdam Court of Appeal**

218. The court will only approve the settlement agreement if it complies with the statutory requirements. Since the WAMCA incorporates the WCAM’s approval requirements, reference is made to the discussion of these requirements in nos. 177-193. The same goes for the discussion of the applicable law in nos. 194-196.

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**International recognition and enforcement**

219. For the WCAM procedure in international settlements, it is relevant to consider whether foreign courts recognise and enforce the court’s decision declaring the settlement binding. Recognition and enforcement criteria differ from country to country. If the foreign court is a court of an EU Member State, a solid argument can be made that the decision to declare a settlement binding is a judgment as referred to in Article 2(a) Brussels I Regulation (recast). Some main reasons for this include: (i) the court’s control over the content of the settlement; (ii) the court hearing objections from interested parties; and (iii) the court’s power to require amendments and to refuse to approve the settlement. Courts of other Member States are obliged to recognise such a judgment, unless one of the narrow grounds to refuse recognition applies.

220. The court that must decide on recognition may not review the WCAM court’s decision as to its substance, unless it is manifestly contrary to public policy in the Member State in which recognition is sought. The public-policy exception must be applied restrictively. Considering the possibility for beneficiaries to object by submitting a statement of defence and appearing at an oral hearing, a WCAM settlement decision is unlikely to violate their right to be heard or the right to a fair trial (Article 6 ECHR), which is a violation that could potentially be contrary to public policy.

221. In *Shell*, the court implied that its decision should normally be recognised by the courts of other EU Member States.\(^{160}\) Whether courts outside the EU will recognise the decision approving a collective settlement will ultimately depend on the local laws of these countries.

222. In practice, no issues have emerged relating to the recognition and enforcement of a decision of the WCAM court declaring a collective settlement binding. This may be due to the broad support for the settlement agreements in *Shell, Converium* and *Fortis/Ageas* among claim organisations and claimant lawyers. The relatively high amount of compensation in these settlements might also play a role. Furthermore,
most of the beneficiaries who do not agree with the settlement are likely to opt out rather than contest the effect of the binding declaration in court.

Further reading

223. Please refer to the De Brauw chapter *International Class Action Settlements in the Netherlands* in the International Comparative Legal Guides: Class and Group Actions for more details on the WCAM. Clicking on this link or scanning the QR code on the right will guide you there.
7 — DAMAGES
Chapter 7

DAMAGES

René van Tricht

7.1 Introduction

224. This chapter describes the powers that courts have to award monetary compensation in collective actions under the WAMCA. It also explores how these powers may be used in practice. Given the relatively recent introduction of the WAMCA, there is no case law yet in which the courts have applied the WAMCA to award monetary compensation.

7.2 Background to the collective compensation scheme

225. From the inception of the collective action in the Netherlands, it has been an issue of debate whether it should be possible to claim monetary compensation in a collective action. When Article 3:305a DCC was first introduced, the legislature explicitly rejected the option of claiming monetary compensation in collective actions. The legislature cited the legal complications to be expected when damages would need to be assessed for groups of affected persons. The need for the option to claim monetary compensation in collective actions was at least in part alleviated by the WCAM. Often, a collective action based on Article 3:305a DCC would be used to obtain declaratory relief stating that a party was liable and would ultimately culminate in a settlement on damage compensation. That settlement would subsequently be declared binding through the WCAM (see chapter 6.3).

226. When the legislature found that the time had come to allow claims for monetary compensation in a collective action, it introduced that option in the WAMCA. The legislature's change of heart was inspired by the experiences gained with the WCAM. In the legislature's view, the WCAM regime had shown that it is possible to settle damages collectively by making a subdivision into categories of affected persons and in that way differentiating between affected persons in respect of issues such as the amount of damages, causality, attribution and own fault.

227. Although the legislature's observation is correct, it does not fully acknowledge that damage settlement through the WCAM is based on a settlement agreement, and hence the result of contractual negotiations. As with every agreement, the parties are basically free to agree as they wish, provided that the agreement can pass the reasonableness test under the WCAM for declaring the agreement binding. The point of departure is therefore different. The courts are bound to apply the law, instead of reaching agreements. When assessing and deciding on damage claims, courts are generally not in the same position as the parties when they negotiate a settlement agreement.
228. It is also important to mention that the legislature emphasised that the rules that apply to establishing a collective compensation scheme in WAMCA proceedings are the same as those that apply to the assessment of damages in ordinary proceedings. This includes the general provisions on the assessment of damages in title 6.10 DCC as well as the DCCP, except where the WAMCA deviates from the provisions of the DCCP. When assessing damages, the court’s task in general is to ensure that the affected person is put in the position it would have been in but for the event that gave rise to the liable party’s liability. The legislature emphasised that the courts have the same possibilities to determine damages as they have in regular proceedings, which gives them sufficient room to establish a collective compensation scheme that is both legal and reasonable (the reasonableness requirement will be discussed in nos. 231 and 236).162

6:97 DCC

229. According to the legislature, Article 6:97 DCC (the central provision on damage assessment) allows for the determination of damages on the basis of categories; in a collective action, this Article allows for damage assessment on the basis of damage categories, also referred to as damage scheduling. In determining the categories, the court has “the possibility to take into account, as far as possible, the different circumstances which are important for different groups of affected persons.” The legislature also explicitly mentioned that the bill is intended to make it easier for affected persons to claim damages, but without adversely affecting the position of the defendant. The legislature also mentioned that the bill was not intended to change the law on liability and damage assessment.163

230. The legislature provided some examples of cases in which damage scheduling could take place.164 In respect of investment damages, for example, categories could be related to the time of purchase and sale of the shares. In respect of Dieselgate, the legislature considered that a damages settlement for car owners should also take into account the type of car in addition to, for example, its year of manufacture and year of purchase. In the legislature’s view, the compensation can also be in kind and take the form of a reduction in the future payment of premiums or subscription fees, if the affected person owes such payments to the liable party.165

7.3 Substantive requirements for awarding damages

1018i(2) DCCP

231. When establishing a collective compensation scheme, the court needs to comply with the following requirements, which will be successively discussed in more detail below.

(a) the compensation must be determined in categories of parties where possible;
(b) the compensation scheme must in any event satisfy the WCAM provisions of Article 7:907(2)(a)-(f) DCC;
(c) the amount of the compensation awarded must be reasonable and the interests of the persons involved must be sufficiently safeguarded otherwise.
The court, where possible, needs to determine the damages in categories. The legislature considered that in view of the large number of parties in a collective compensation scheme, it is impractical and inefficient to assess the individual damage of each affected person separately.\textsuperscript{166}

A collective compensation scheme must include the following elements:

1. a description of the event or events to which the collective compensation scheme relates;
2. a description of the group or groups of persons for whose benefit the collective compensation scheme has been established, in accordance with the nature and the degree of seriousness of their damage;
3. a description, as accurate as possible, of the number of natural persons belonging to such group or groups;
4. the compensation to be awarded to these persons;
5. the conditions which these persons need to comply with in order to be eligible for such compensation; and
6. the manner in which this compensation is determined and can be obtained.

The requirement included under (f) allows the court to rule that a third party will determine the actual compensation that an affected person is entitled to. It is not uncommon in WCAM settlements that a claims administrator is tasked with determining the amount of damages an individual is entitled to, considering the settlement agreement, for example by determining to which category an affected persons belongs. There is no reason why the same could not also be done in a collective compensation scheme, as the legislature also pointed out with reference to cases where the damages are relatively big. A different approach would be where the court would not determine the amount of compensation for each of the affected persons in a certain category, but would fix the further procedures for determining the compensation.\textsuperscript{167}

The legislature also considered as a possibility that a court determines the overall damages amount and orders the liable party to pay that amount into a fund, which will probably be administered by a claims administrator. Again, a parallel can be drawn with the WCAM, which allows for a settlement agreement with a maximum amount for the overall compensation. However, it seems unlikely that this provision allows the court to delegate the establishment of the collective compensation scheme as such to a third party.
Compensation must be reasonable and interests also sufficiently safeguarded otherwise.

236. The court needs to ensure that the amount of compensation is reasonable and that the interests of the affected persons "are also sufficiently safeguarded otherwise." The legislature noted that it is at least as important for affected persons that they can claim compensation easily and speedily. This means, for example, that the mechanism for awarding compensation must be set up in such a way that affected persons can easily present their claims, that it is predictable and easy to determine the compensation category to which they belong and that this determination is made by a sufficiently independent organisation. The court may consult one or more experts about issues that are relevant for the content of the collective compensation scheme. The court may also make use of the option that is generally available in civil proceedings to refer preliminary questions on issues of law to the Dutch Supreme Court, if deemed necessary in order to arrive at a proper collective compensation scheme.

7.4 Procedural steps

Proposals from the parties

237. Before deciding on a collective compensation scheme, the court may consider proposals from the parties and order them to submit proposals for a collective compensation scheme. Such a proposal must in any event satisfy the provisions of Article 7:907(2)(a) to (f) DCC relating to:

(a) the persons belonging to the narrowly defined group of persons whose interests are represented for purposes of this collective action who have not opted out;

(b) the persons belonging to the narrowly defined group of persons whose interests are represented for purposes of this collective action who are not domiciled in the Netherlands and who have opted in.

238. If a party fails to comply with an order to submit a proposal, the court may draw such adverse inferences as it considers appropriate. Furthermore, the court is not bound by the parties' proposals. According to the legislature, proposals from the parties need to address how the affected persons covered by the collective compensation scheme will be categorised in light of the nature and seriousness of their damage, how many persons belong to each of these categories and the amount of compensation that persons in each category are entitled to.

239. The law does not specify who needs to submit a proposal for a collective compensation scheme first. From a strictly procedural point of view, it may be up to the claim organisation to file a proposal first, with the defendant either filing a separate proposal or responding to the claim organisation's proposal. However, the courts will likely determine on a case-by-case basis what the order for filing proposals should be.
and the parties could also agree on the order among themselves. Also, nothing seems to prevent the courts from reviewing the proposals they have received, providing feedback to the parties and then requesting (or ordering) them to improve and resubmit their proposals.

To the extent the parties have presented joint proposals, the court’s eventual ruling may bear more resemblance to a ruling in which a collective settlement is declared generally binding. Where the parties have reached agreement, and provided that this agreement is reasonable, it seems unlikely that the court will assess the damages in a different way.

### Publication of a collective compensation scheme

1018(1) DCCP 241. Known persons for whose benefit the compensation scheme is established need to be notified of the judgment determining the compensation scheme as soon as possible and by regular mail, unless the court decides otherwise.

1018(1) DCCP 242. The judgment must also be announced as soon as possible in one or more newspapers designated by the court. The announcement should include a brief description of the compensation scheme as directed by the court, in particular of how compensation may be obtained from the defendant or how the collective compensation scheme may otherwise be invoked. If the collective compensation scheme so determines, the announcement must also include the time limit within which a claim must be made. The announcement also needs to state how the judgment determining the compensation scheme may be inspected or a copy may be obtained. The court may also order other information to be included.

1018(1) DCCP 243. Unless the court decides otherwise, the defendant is required to arrange for the notification and announcement of the judgment, although the court may order that the information referred to above must be published in another manner.

1018(1) DCCP 244. If there are parties for whose benefit the collective compensation scheme has been established, but who are not domiciled in the Netherlands and who do not fall within the scope of any binding international or European regulations prescribing a method of announcement, the court should give directions as to how the announcement in respect of these persons should be made. If necessary, the announcement must be made in one or more languages other than Dutch.

1018(2) DCCP 245. The Exclusive Representative must also ensure that the judgment is announced on its webpage and is recorded in the public register for collective actions.

### Enforcement of a collective compensation scheme

1018k(1) DCCP 246. As soon as a judgment is no longer subject to appeal, it is binding on each of the parties and on the members of the narrowly defined group. From the time the judgment is no
longer subject to appeal, these parties may claim compensation in the manner and under the conditions specified in the judgment determining the collective compensation scheme. If the judgment has been given immediate effect, the parties may claim compensation immediately after the judgment has been rendered.

For a person in the narrowly defined group who has not issued an opt-out declaration because they could not yet be aware of their damage at the time of the announcement of the appointment of the Exclusive Representative, a judgment has no effect if they do not wish to be bound by it. If the judgment establishes a collective compensation scheme in accordance with Article 1018i DDCP, that person is required to notify the defendant in writing that it does not wish to be bound to the judgment after becoming aware of its damage. Article 1018k(2) DCCP suggests that this notification should not be directed to the defendant, but to a party specifically designated for that purpose. In a collective compensation scheme such person is however not necessarily designated and Article 1018k(2) seems to be incorrect on this point. An opt-out notification to the defendant should therefore be valid, but courts will surely provide clarity on this issue in the future. The defendant may, by written notice, set a time limit of at least six months within which the potential opt-out may declare that it does not wish to be bound. If a judgment is given determining a collective compensation scheme, the defendant must also inform the allegedly affected persons to whom the opt-out notification should be submitted.

### Categorisation in light of general principles of damage assessment

The legislature has encouraged the courts to assess the damages by categorising the affected persons as much as possible, and the test that must be satisfied is that the compensation must be "reasonable" (see no. 231).

Categorising affected persons in a collective action will generally be easier if the factual and legal issues are straightforward and are the same for the affected persons. The more complex or the more diverse the factual and legal issues are, the more difficult it will likely be to categorise the affected persons. Depending on the complexity and diversity of the factual and legal issues, the question may arise whether the mass claim is suitable for a collective compensation scheme at all. It is not inconceivable that because of the specific circumstances of a mass damage event, the categorisation of affected persons as envisaged by Article 1018i DCCP will simply not work in practice. However, it is not a scenario that the legislature seems to have contemplated, perhaps because this situation should not arise in the first place. If the factual and legal questions are so diverse that damage scheduling does not work, the collective action should not have been allowed to proceed due to lack of similar interests of the affected persons (Article 3:305a(1) DCC) and the action not being more efficient and effective than individual proceedings (Article 1018c(5)(b) DCPP). It remains to be seen whether courts will choose not to apply Article 1018i DCCP if they believe that it is not possible or practicable to do so. Alternatively, the courts could
apply a higher degree of abstraction from individual circumstances to ensure that the
application of the categorisation is effective and practicable, but in this case the courts
would potentially further depart from the application of the general principles of
damage assessment.

6:97 DCC

250. It is a topic of discussion whether the general provisions on damage assessment can
in fact be applied when establishing a collective compensation scheme. It has been
pointed out that the collective compensation scheme must be reasonable, but that
reasonableness as such is not a criterion when assessing damages on the basis of
Article 6:97 DCC. The overall objective of the general provisions on damages is to
ensure that the affected person is brought as much as possible in the position it would
have been in but for the event causing the damage. It has been accepted that in certain
circumstances the courts may deviate from the principle that they should assess the
damages concretely and may apply certain abstractions, but these cases are generally
considered to be limited exceptions to the general rules.

251. Given the scope of a collective action and the high number of affected persons, the
courts will generally not be able to avoid applying a certain degree of abstraction from
the circumstances that may be relevant for a particular affected person when
assessing the damages. If the consideration of individual circumstances as part of the
categorisation of affected persons would lead to numerous different categories with
subtle differences between them, the purpose of Article 1018i DCCP would be largely
defeated. The consequence of abstraction is that no account is taken of all the
circumstances that would be considered if a claim by an affected person were
assessed on a stand-alone basis, that is to say the situation in which an affected
person filed a claim against the liable party in separate proceedings. The potential
implication is that affected persons are either undercompensated or
overcompensated, neither of which is attractive.

252. There is a clear tension between on the one hand ensuring that affected persons are
fully compensated for the damage they suffered and that the liable party is not held
liable for more than the damage it has caused, and on the other hand ensuring that
affected persons actually receive compensation for the damage they suffered in an
effective and efficient way and that none of the parties involved are faced with costs
of litigation that may even exceed the actual damages. However, the mere fact that a
case concerns mass damage in itself does not provide sufficient justification for
abstraction (to a high degree) from individual circumstances.

253. The legislature has not explained how the system enshrined in Article 1018i DCCP can
be reconciled with the general provisions on the assessment of damages. It is subject
to debate how big an issue that actually is. The legislature has introduced the option
to award damages in a collective action and that would serve no purpose if the courts
must still consider all the relevant circumstances of each individual party when
assessing damages. Furthermore, following a collective compensation scheme, both
the affected person and the liable party will avoid the costs and time associated with potentially lengthy litigation in separate cases. Especially in cases where the amount of damages is relatively low, this is likely to be beneficial for all parties involved, and may mitigate the consequences of the potential difference between the compensation awarded through a collective compensation scheme and the compensation awarded in separate proceedings between an affected person and the liable party.

254. One other aspect to consider is that the affected person can opt out of the collective action after the appointment of the Exclusive Representative. In that way the affected person can ensure that its case is decided in separate proceedings and on the basis of all the relevant circumstances. The option of opting-out is of course not available to the defendant in a collective action. The fact that the liable party cannot opt-out of a collective action while an affected person can is one argument to say that the collective compensation scheme may not be detrimental to the liable party in comparison with the assessment of damages in separate proceedings.

255. To conclude, when applying Article 1018i DCCP, the courts should be mindful of overcompensation or undercompensation, and the categorisation of the affected persons should probably be carefully considered. The courts are tasked with striking the right balance between assessing the damages as concretely as possible and categorising affected persons in such a way that any collective compensation scheme is effective and practicable.

7.6 How will the collective compensation scheme be applied in practice?

256. Given that the WAMCA was introduced relatively recently, there are not yet any examples of the establishment of a collective compensation scheme. It therefore remains to be seen how the courts will apply the provisions on the collective compensation scheme and deal with the issues discussed above in practice. Nevertheless, two examples of recent cases will be highlighted which may give some guidance on how the courts could deal with collective compensation schemes.

257. The Amsterdam District Court in July 2021 delivered its ruling in a collective action against car manufacturers belonging to the Volkswagen group and their dealers in the Dieselgate affair. In this collective action, Volkswagen and other group companies had been sued for producing and selling cars with diesel engines containing software that made it look as if the engine was meeting certain emissions standards when, in fact, the engine’s emissions exceeded what was legally allowed. The Amsterdam District Court ruled that the car manufacturers had acted unlawfully, because they had deliberately misled the regulator and the buyers of their cars with the software. As a result of that deception, the buyers of the cars had paid too much for the car. The claim was brought under Article 3:305a (old) DCC, so the Amsterdam District Court was unable to award damages. Nevertheless, the Amsterdam District Court ruled by way of declaratory relief that persons who had bought a new car from a dealer were entitled
to a price reduction of EUR 3,000 and persons who had bought a used car were entitled to a price reduction of EUR 1,500. The declaratory relief cannot be enforced, but affected persons can invoke it in any follow-on proceedings for the assessment of damages.

258. Whether it will come to any follow-on proceedings remains to be seen: if the District Court's ruling becomes final, it seems more likely that the dealers will compensate the affected persons in accordance with the judgment, as they will very likely be ordered to do so in any follow-on proceedings. In its ruling, the District Court also hinted at a collective settlement. The Dieselgate ruling is therefore an example of where the District Court considered itself able to assess the damages for a large group of affected persons, as the ruling concerns approximately 150,000 cars, according to the District Court. As follows from the above, the compensation for all car owners is the same. Although it is not apparent from the ruling, it seems likely that the ruling concerns different types of cars with different sales prices. It seems equally likely that the impact of the software on the car's value may differ, depending on the type of car and the original sales price. The District Court did not explain why, despite those apparent differences, all car owners were entitled to the same amount of compensation in its view.

259. An example of a different form of damage scheduling can be found in the ruling of the Arnhem-Leeuwarden Court of Appeal, even though that was not a collective action, but a mass claim. More than 100 individual affected persons had claimed compensation for the monetary and non-monetary damage they had suffered as a result of earthquakes caused by gas production in the north of the Netherlands. The Court of Appeal found that it did not need to examine all the facts of every individual person, because there was a common denominator allowing it to determine whether the persons were entitled to compensation: the number of times the affected person’s house had been physically damaged by earthquakes. In cases where the house had been damaged once, the person was entitled to monetary damages. In cases where the house had been damaged twice or more, the person was entitled to non-monetary damages amounting to a minimum of EUR 2,500 and an additional EUR 1,250 for every case of additional physical damage. An appeal from the appellate judgment was taken to the Dutch Supreme Court, which dismissed the complaints and confirmed the approach taken by the Court of Appeal.

260. The Dieselgate and earthquake judgments seem to deviate from the compensation principle by awarding damages to individuals whose harm suffered is unlikely to correspond with the amount of damages awarded. The same applies to the application of the Consumer Rights Directive by Dutch courts. Following the ECJ's Tiketa judgment and a Supreme Court judgment, all District Courts have jointly adopted a uniform guideline for the sanction of partial annulment in case of a breach of essential information duties by traders. The guideline provides that serious breaches of essential information duties are sanctioned with either a 25%
or 50% reduction of the principal amount, depending on the number of breaches. This guideline again shows that courts seem increasingly inclined to disregard individual circumstances when awarding damages (in mass claim situations), resulting in damages that do not reflect the actual harm suffered.
8 — INTERNATIONAL CONSIDERATIONS
## Chapter 8
### INTERNATIONAL CONSIDERATIONS

**Kees Saarloos**

### 8.1 Introduction

261. Collective actions often contain an international element, for example because the events giving rise to the dispute occurred abroad or because all or some of the parties involved are established abroad. In these circumstances, the question arises whether the Dutch courts have international jurisdiction and which law will apply to the claim.

262. There is no specific private international law governing collective actions or collective settlement agreements. The application of private international law to collective actions or collective settlement agreements may, however, give rise to specific questions. This chapter discusses the specific issues that come up regarding the international jurisdiction of the court (8.2); applicable law (8.3); and international recognition and enforcement of judgments (8.4).

### 8.2 International jurisdiction in collective actions

263. The international jurisdiction of Dutch courts is determined by the Brussels I Regulation (recast), if the dispute is a civil or commercial matter and if the defendant is domiciled in the European Union (except for Denmark, to which the Regulation does not apply). In cases where the Brussels I Regulation (recast) does not apply, the international jurisdiction of Dutch courts is determined either by other international instruments (for example the Lugano Convention) or by the rules on international jurisdiction in the DCCP. In Dutch legal practice, the jurisdiction rules of the Brussels I Regulation (recast) (and their interpretation by the ECJ) are the most important. There are two reasons for this: defendants in collective actions in the Netherlands are often domiciled in the European Union and Dutch courts use the ECJ case law on the interpretation of the Brussels I Regulation (recast) to interpret corresponding jurisdiction rules in the Lugano Convention and the DCCP.

264. The main rule of the Brussels I Regulation (recast) is that international jurisdiction lies with the court of the Member State where the defendant is domiciled. In addition, the Brussels I Regulation (recast) provides for a number of special rules of jurisdiction. In collective actions, the following heads of jurisdiction are relevant in particular: (i) jurisdiction based on a close connection with the claim against the defendants domiciled in the Netherlands, (ii) jurisdiction based on tort and (iii) jurisdiction of the court chosen by the parties. Dutch courts investigate, if needed of their own motion, their international jurisdiction before they consider the claim on the merits. In cases where the claimant argues that the Dutch court has jurisdiction on the basis of the close connection between the claims against the Dutch anchor defendant and the
defendants established abroad, only a high-level examination of the claims will be performed by the court at the jurisdiction stage. The question of international jurisdiction is primarily determined on the basis of the claimants’ allegations in the writ of summons. The following paragraphs explain this in more detail and also discuss international jurisdiction for collective claims based on a violation of European consumer law and the GDPR, because of the specific jurisdictional issues arising in these areas.

### International jurisdiction based on the defendant’s domicile and closely connected matters

265. In the case of proceedings against a number of defendants, the Brussels I Regulation (recast) provides that all defendants can be sued in the courts of the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. Similar provisions are available in the Lugano Convention and in the DCCP in cases where a defendant is not domiciled in a Member State of the European Union. These basic rules of international jurisdiction also apply in collective actions. In other words, the Dutch court has international jurisdiction if the claim organisation can identify a so-called ‘anchor defendant’ in the Netherlands and if the claims against the other defendants domiciled outside the Netherlands are closely connected.

266. For competition cases, the ECJ has ruled that claims against addressees of a binding decision of the European Commission for compensation of loss caused by a competition law infringement are, in principle, so closely connected that they can all be sued in the country where one of them is domiciled.\(^{178}\) Although Dutch courts recognise that the jurisdictional rule over co-defendants is an exception to the general rule of jurisdiction of the domicile of the defendant, they generally apply a low bar when assessing the connectivity requirement. In general, courts concluded that claims are closely connected when they are (largely) based on the same set of facts; difference in legal basis for the claims against the different defendants appears to be less relevant.\(^{179}\) In follow-on damages cases for breaches of competition law, a sufficient connection between the claims against the various participants is generally given and jurisdiction upheld.\(^{180}\)

267. If the Dutch court has international jurisdiction based on the domicile of the defendants (or one or more of them), the court is competent to hear claims relating to all damage caused by the defendants and not, for example, only with regard to damage caused in the Netherlands. It should, however, be noted that even if the Dutch courts have jurisdiction with regard to damage caused abroad, the possibility to bind affected persons to a WAMCA judgment is restricted: Article 1018f(5) DCCP provides that affected persons who do not live in the Netherlands are in principle only bound by the decision of the Dutch court, if they opt in as provided in that Article; affected persons
who reside abroad and do not opt in are not bound by that court’s decision (see no. 67).

**International jurisdiction in tort matters**

268. The Brussels I Regulation (recast) has a special jurisdiction rule for tort-related claims. In tort-related matters, a person domiciled in an EU Member State may be sued in the courts for the place where the harmful event occurred or may occur. Similar provisions are available in the Lugano Convention and in the DCCP where a defendant is not domiciled in an EU Member State.

269. It is settled case law of the ECJ that the place of the harmful event includes both the place of the event giving rise to the damage (the *Handlungsort*) and the place where the damage occurred (the *Erfolgsort*). Hence, Dutch courts have international jurisdiction in matters relating to tort, if either the *Handlungsort* or the *Erfolgsort* is in the Netherlands. The determination of the *Handlungsort* and the *Erfolgsort* for the purpose of establishing international jurisdiction is the subject of extensive and often fact-specific case law of the ECJ.

270. Regarding the *Handlungsort*, for example, the ECJ has held that for claims following an infringement of Article 101 TFEU, the *Handlungsort* is the place where the cartel was concluded or where the particular agreement that caused the loss claimed for was made. In the case of an infringement of Article 102 TFEU, the ECJ localised the event giving rise to the damage at the place where the anti-competitive conduct was implemented.

271. In the case of investment claims, the ECJ has suggested that the *Handlungsort* is the place where the issuer made the decisions regarding the arrangements for the investments and the contents of the relevant prospectuses. For claims following the Volkswagen emissions scandal, the ECJ held that the *Handlungsort* is the country in which the cars at issue were equipped with the software that manipulated data relating to exhaust gas emissions. For claims made by creditors against a director of an insolvent company who had allegedly breached its legal obligations in the area of monitoring that company’s financial situation, the place of the harmful event is the seat of the insolvent company.

272. The localisation of the *Erfolgsort* also continues to be the subject of ongoing controversies, in particular in cases where the damage is caused purely by financial or economic loss, which is not uncommon in mass claim proceedings. Regarding claims following an Article 101 TFEU infringement, the ECJ localised the *Erfolgsort* forum at the court of the affected market or, in the case of purchases made in several places, the court within whose jurisdiction the company that suffered the loss has its registered office. In cases regarding investor claims, the ECJ localised the *Erfolgsort* in the country of the domicile of the affected person in circumstances where the
financial loss occurred directly in that person’s investment account and the issuer distributed the incorrect or misleading investor information in that country. For claims following the Volkswagen emissions scandal, the ECJ held that the Erfolgsort is the country where the consumer purchased the car.

273. In VEB/BP, the ECJ specified that the country where the affected person’s investment account is situated does not qualify as an Erfolgsort, if in that country the issuing company is not subject to statutory reporting obligations. Only the courts of the Member States in which a listed company has complied, for the purposes of its listing on the stock exchange, with the statutory reporting obligations can have jurisdiction for investor claims based on the place where the damage occurred.

274. In CDC/Akzo, the ECJ held with regard to both the Handlungsort and the Erfolgsort that “the location of the harmful event must be assessed for each claim for damages independently of any subsequent assignment or consolidation.” The ECJ in that case also held that the place of damage in follow-on competition cases is the place of establishment of the purchaser of the cartelised product. Hence, based on CDC/Akzo the claim vehicle would have to identify the place of establishment of the purchasers of the cartelised product in order to substantiate that the court has international jurisdiction as the court of the place of the harmful event.

275. Determining international jurisdiction on the basis of factors specific to the injured persons does not sit well with the overall aim of collective actions to abstract from the specific circumstances of each individual claimant and to establish liability solely on the basis of what the represented persons have in common. This issue arises not only in follow-on competition cases. For example, as mentioned above, in Volkswagen, the ECJ ruled that the place of damage for claims based on defective emission software in passenger cars is the place where the consumer bought the car.

276. Dutch courts asked the ECJ how to establish jurisdiction on the basis of the place of the harmful event in collective actions. So far the ECJ has ruled in the cases VEB/BP and ZK/BMA that the position and procedural prerogatives of a claim vehicle do not affect international jurisdiction. In VEB/BP the ECJ established that jurisdiction for investor claims lies with the courts of the Member States of listing of the securities in question. In that case, the place of listing was not in the Netherlands. Therefore, there was no jurisdiction in the Netherlands anyway. ZK/BMA concerned a collective proceedings against a German shareholder for breach of its duty of care towards creditors after the Dutch subsidiary of the German shareholder went bankrupt. The ECJ confirmed that the place of the harmful event in this case was the place of establishment of the insolvent Dutch subsidiary. The place of the insolvent company is completely independent from the injured parties.

277. In sum, the ECJ has not given much guidance so far on how to deal with international jurisdiction in collective proceedings. If confronted with issues of international
jurisdiction, one should also note the admissibility requirement of a sufficiently close connection to the Dutch legal system,\textsuperscript{196} as discussed in nos. 143-144 and 297-299.

### International jurisdiction in collective consumer actions

278. Under EU law, qualified consumer organisations are authorised to initiate collective actions to protect consumer interests. According to the Injunctions Directive, the main power of qualified consumer organisations is to apply for an injunction requiring the cessation or prohibition of infringements of EU consumer protection directives (as implemented in national law). The RAD expands the available actions for qualified consumer organisations. For example, it also provides them with the possibility to claim damages on behalf of consumers that have suffered a loss caused by an infringement of EU consumer protection directives. Both Directives are without prejudice to the rules of private international law. Hence, the international jurisdiction of Dutch courts to hear a claim from a qualified consumer organisation is determined by the Brussels I Regulation (recast) (or any other set of applicable jurisdiction rules). Under Dutch law, such claims are collective actions based on Article 3:305a DCC.

279. Under the Brussels I Regulation (recast), Dutch courts have international jurisdiction if the defendant is domiciled in the Netherlands. Alternative grounds for jurisdiction may be available depending on whether the claim is contractual or non-contractual in nature.

280. If the claim is contractual in nature, the Dutch court has jurisdiction if the place of performance of the contract is in the Netherlands. The general rules on the determination of the place of performance apply also in collective proceedings.

281. Brussels I (recast) provides for special jurisdiction rules in matters relating to consumer contracts. Under certain circumstances, a consumer can sue in the place of his domicile if the claim is based on a consumer contract. The ECJ held that neither a consumer organisation nor a person to whom consumer claims have been assigned can use the specific jurisdiction rules for consumer contracts under the Brussels I Regulation (recast).\textsuperscript{197} This is based on the fact that the special jurisdiction rules for consumer contracts (i) are an exception to the general jurisdiction rules of the Brussels I Regulation (recast) and must therefore be interpreted narrowly and (ii) are intended to protect the consumer and such protection should not be extended to persons for whom that protection is not justified.

282. If the claim is non-contractual in nature, Dutch courts can have international jurisdiction if the harmful event occurred in the Netherlands. In \textit{Henkel}, the ECJ ruled that an injunction sought by a consumer organisation prohibiting the use of certain general terms in contracts with consumers must be considered a claim based on tort and not a contractual matter for the purpose of establishing jurisdiction.\textsuperscript{198} That means that Dutch courts have international jurisdiction for such claims, if the place of
the harmful event is in the Netherlands. The decision in *Henkel* suggests that the place of the harmful event is the place where the trader concludes contracts with the consumers.

### International jurisdiction for data protection claims

The GDPR stipulates that "data subjects" have a right to an effective judicial remedy when their rights under the GDPR are infringed. The GDPR has its own set of jurisdiction rules. Proceedings against a controller or a processor shall be brought before the courts where the trader concludes contracts with the consumers. Alternatively, proceedings may be brought before the courts where the data subject has his or her habitual residence. These provisions give rise to various questions in mass claim litigation. For example, how do the jurisdiction rules in the GDPR relate to those in the Brussels I Regulation (recast)? Are the jurisdiction rules under the GDPR exclusive or alternative? Also, how do the jurisdiction rules in the GDPR work in case the claim is brought by a claim vehicle; can the claim vehicle sue in the place of the court of the habitual residence of the data subjects that it represents?

Recital 147 to the GDPR provides that general jurisdiction rules such as those of the Brussels I Regulation (recast) should not prejudice the application of the specific rules of the GDPR. The Amsterdam District Court ruled that in a situation where both the Brussels I Regulation (recast) and the GDPR are applicable, the GDPR rules apply in addition to the general jurisdictional rules of the Brussels I Regulation (recast), and the rules of Brussels I Regulation (recast) cannot remove any jurisdiction conferred by the GDPR. It is uncertain whether this conclusion will stand.

It is undecided whether a claim organisation that pursues a collective action based on an infringement of the GDPR can avail itself of the possibility to sue in the court of the habitual residence of the data subjects it represents. As mentioned in no. 281, the ECJ held that neither a consumer organisation nor a person to whom consumer claims have been assigned can use the specific jurisdiction rules for consumer contracts under the Brussels I Regulation (recast). Whether the same applies to Article 79 GDPR has not been decided by courts yet.

### Choice-of-court clauses in collective actions

There are no separate rules for choice-of-court clauses in collective actions. That means that in collective actions questions may arise about the substantive and formal validity of the choice-of-court clause and whether the dispute is actually governed by the choice-of-court clause.

Specifically for collective actions, it is relevant that the starting point under the Brussels I Regulation (recast) is that only the parties that validly concluded the choice-of-court clause are bound to it. Only when a third party that is not a party to the choice-of-court agreement has succeeded to the original party’s rights and obligations will
that third party also become bound to the choice-of-court clause.\textsuperscript{201} Thus, if affected persons assign their claims to a claim foundation, the claim foundation becomes bound by the choice-of-court clauses if the law applicable to the assignment so provides. In a collective action, the claims are not transferred to the claim foundation; Article 305a DCC provides the conditions under which the claim foundation is entitled to collect the claims of the affected persons. It is therefore uncertain whether the ECJ’s case law regarding the succession to a choice-of-court clause also applies in the case of collective actions. Dutch courts have accepted a broad interpretation of the ECJ’s case law and ruled that the third party becomes bound to the choice-of-court clause as soon it becomes authorised to collect the claim.\textsuperscript{202}

\textbf{Jurisdiction of the Netherlands Commercial Court}

\textsuperscript{30}r DCCP 288. The Netherlands Commercial Court and the Netherlands Commercial Court of Appeal (see no. 38) have jurisdiction, if, according to the rules of local jurisdiction or based on a choice-of-court clause, the Amsterdam District Court or the Amsterdam Court of Appeal have jurisdiction. The dispute must be a civil or commercial dispute with an international aspect that has arisen or will arise from a specific legal relationship freely determined by the parties and that is not subject to special jurisdiction. The parties must have expressly agreed to conduct the proceedings in the English language.

\textbf{Coordination of proceedings following the same event}

289. Collective actions are on the rise, not in the last place because of the promotion of the private enforcement of EU law by the European Commission. The RAD, which obliges every Member State to provide for a regime for collective actions in the case of infringement of European consumer law, is also expected to increase the number of collective actions in Europe.

290. If more than one claim organisation starts litigation in different Member States pursuant to the same event, the question arises if and how these proceedings should be coordinated. The answer to this question depends partially on the area of law involved. The general \textit{lis pendens} rules are laid down in the Brussels I Regulation (recast). Article 29 Brussels I Regulation (recast) provides that if proceedings involving the same cause of action between the same parties are brought in the courts of different Member States, the second court seized shall decline jurisdiction if the first court has established that it has jurisdiction. If the proceedings do not involve the same cause of action or the same parties, but the proceedings are still related, Article 30 Brussels I Regulation (recast) provides that the second court seized can stay proceedings or refer the case to the first court seized if the cases can be consolidated there. These provisions can also apply in collective actions. For example, if two or more claim organisations represent the same affected persons, the question arises whether the proceedings are about the same cause of action and between the same parties. If two or more claim organisations start litigation for different groups of
affected persons, the question may arise whether the different proceedings are related within the meaning of Article 30 Brussels I Regulation (recast).

Sector legislation may contain specific provisions on coordination in addition to or instead of the general rules in the Brussels I Regulation (recast). For example:

(a) The GDPR has, in Article 81, its own regime for the suspension and consolidation of proceedings concerning the same subject matter as regards processing by the same controller or processor. The regime of Article 81 is similar to that of Article 30 Brussels I Regulation (recast). The main difference is that Article 81 imposes an explicit duty on the court to contact other courts that are handling related proceedings.

(b) The Damages Directive provides in Article 15 that in case of actions for damages before different national courts by claimants from different levels in the supply chain, Member States must ensure that these national courts are able to take account of proceedings before and judgments from other courts. The objective is to avoid that actions for damages by claimants from different levels in the supply chain lead to a multiple liability or an absence of liability of the infringer.

(c) The RAD is arguably less concerned with coordination and more with enhancing proceedings. Article 6 RAD provides that Member States shall ensure that where the alleged infringement of European consumer law affects consumers in different Member States, the collective action can be brought before the court of a Member State by several Qualified Entities from different Member States in order to protect the collective interests of consumers in different Member States. The meaning of this provision is unclear, but it hints at the concentration of different cases with one court. Similarly, according to the preamble to and the text of Article 7 of the RAD, Qualified Entities from different Member States should be able to proceed together within a single collective action in a single forum, however subject to the relevant rules on jurisdiction. This should be without prejudice to the right of the court seised to examine whether the representative action is suitable to be heard as a single representative action.

8.3 Applicable law in collective actions

This paragraph discusses the application of the Rome I and Rome II Regulations in collective actions. Specific attention is paid to the law applicable to the admissibility of the claim foundation to start a collective action before a Dutch court. Although Dutch courts in general do not hesitate to apply foreign law, they do not shy away from pragmatic solutions. For example, in the Air Cargo follow-on litigation, the Amsterdam Court of Appeal considered in an interim judgment dated 6 July 2021 that the strict application of the applicable choice-of-law rule would lead to a large
number of applicable laws. Because, in brief, the court considered this unworkable, it ruled that Dutch law applied to all claims.²⁰³

Choice-of-law rules in collective actions

²⁹³. There are no specific choice-of-law rules for claims brought in collective actions. Dutch courts apply the Rome I Regulation to determine the law applicable to contractual obligations and the Rome II Regulation to determine the law applicable to non-contractual obligations (provided the claim is within the temporal scope of these Regulations). Whether an obligation is contractual or non-contractual for the purpose of Rome I and Rome II is a matter of EU law and depends on the autonomous interpretation of the concepts used in these Regulations.

²⁹⁴. For example, it has been explained above that a claim by a consumer organisation seeking an injunction to prohibit a trader from using certain contract terms is a non-contractual claim/tort-based claim for the purpose of establishing jurisdiction. For determining the applicable law, the situation is more nuanced. In VKI/Amazon,²⁰⁴ which also concerned an injunction to prohibit the use of certain contract terms in consumer contracts, the ECJ essentially held that the law applicable to the action is determined by Rome II, but that the law applicable to the assessment of a particular contractual term is determined by Rome I. In the same case, the ECJ stressed that this rule is not affected by the collective nature of the action. Also in cases where the qualified consumer organisation is not claiming on the basis of individual contracts, the law applicable to the review of the standard terms is determined in the abstract on the basis of the Rome I Regulation.

The law applicable to the admissibility of the claim organisation

²⁹⁵. Rome I and Rome II determine the law applicable to substantive legal issues (also referred to as the lex causae). The Regulations do not determine which law applies to procedural issues. These issues are governed by the law of the place of the court (also referred to as the lex fori). Rome I and Rome II both contain Articles that provide which substantive legal issues are governed by the law that applies according to these Regulations. The exact demarcation of what is substantive and what is procedural is ultimately a matter of EU law, because it concerns the scope and the interpretation of EU Regulations.

²⁹⁶. In collective actions, both The Hague Court of Appeal and the Amsterdam Court of Appeal ruled on the distinction between issues governed by the lex causae and the lex fori.²⁰⁵ According to both courts, a collective action has both a substantive and a procedural side. The substantive side of the claim concerns the question of whether the claim exists and is a matter of the lex causae; the procedural side of the claim concerns the question how the claim can be enforced and is a matter of the lex fori. Both courts have ruled that the admissibility of a claim foundation is a procedural matter. This admissibility is therefore governed by the lex fori (Dutch law), more in
particular Article 3:305a DCC, according to the Courts of Appeal. Whether this
demarcation of substantive and legal issues is in accordance with the Rome II
Regulation has not yet been decided.

297. Under the WAMCA, the Dutch legislature expanded the list of admissibility criteria for
claim organisations under Article 3:305a DCC. These criteria have been discussed in
chapter 5. One of the admissibility requirements will also be discussed here. The
WAMCA provides that a claim organisation is only admissible, if the claim is
sufficiently closely connected with the Dutch jurisdiction, either because the majority
of the represented persons habitually reside in the Netherlands, or because the liable
party is established in the Netherlands and additional factors indicate a sufficiently
close connection with the Netherlands, or because the facts on which the claim is
based occurred in the Netherlands. This criterion means that even if the Dutch courts
have international jurisdiction according to, for example, the Brussels I Regulation
(recast), the collective action is not available to a claim foundation which does not
meet the requirement of the sufficiently close connection of that Article.

298. With the requirement of a sufficiently close connection, the Dutch legislature has
wanted to avoid that the Dutch judicial system is burdened with cases that have no
connection whatsoever with the Netherlands206 and that Dutch businesses are faced
with collective damage claims from all over the world.207 For that reason, the mere fact
that the defendant is established in the Netherlands is not sufficient for a claim
foundation to be admissible in a collective action. The claim foundation needs to
demonstrate that "additional factors indicate a sufficiently close connection with the
Netherlands." It is still undecided whether the requirement of a close connection
is compatible with EU law, in particular the Brussels I Regulation (recast) (see nos.
143-144).

299. According to the Dutch legislature, the requirement of a close connection is not a rule
of international jurisdiction, but an admissibility requirement and the requirement of a
close connection does not impair the effectiveness of the Regulation.208 Whether the
ECJ will be convinced by this remains to be seen.

8.4 | International recognition and enforcement

| Recognition and enforcement of a WAMCA judgment |

300. The question regarding the recognition of a WAMCA judgment abroad may come up in
different contexts. An affected person may try to enforce the WAMCA judgment in the
Member State of establishment of the defendant. The defendant may also want to
invoke a Dutch WAMCA judgment in proceedings brought by an affected person
abroad to argue that the claimant has no claim, because the matter has already been
decided by a Dutch court.
The recognition of Dutch judgments in civil and commercial matters in other Member States is regulated by chapter III of the Brussels I Regulation (recast). Judgments given in one Member State are recognised and enforceable in other Member States without any procedure being required. The party that wants to oppose the recognition and enforcement has to apply for a declaration in the Member State where the recognition and enforcement are sought. According to Article 45, recognition and enforcement can be refused (a) if it is contrary to the public policy of the Member State addressed, (b) if the judgment is given in default of appearance and if the defendant was not served with the documents instituting the proceedings, (c) if the judgment is irreconcilable with other judgments, or (d) if it conflicts with certain jurisdiction rules.

From the perspective of the defendant, the WAMCA proceedings and the judgment are largely the same as any regular judgment. Therefore, if the WAMCA judgment is invoked in another Member State against the defendant, its recognition and enforcement are unlikely to be refused on the sole basis that it is a WAMCA judgment. However, the enforcement may give rise to questions if the authorities addressed in the Member State are not familiar with the WAMCA and need to determine whether the person invoking the judgment against the defendant is actually a beneficiary of the judgment.

The main peculiarity of a WAMCA judgment is that under certain conditions the judgment binds the affected persons, even if they did not participate in the proceedings. If the defendant invokes the WAMCA judgment against claimants in proceedings in another Member State, the question could in theory arise whether the Dutch judgment violates the public policy of the Member State addressed. It is believed that this question will not easily arise in practice. First, injured parties residing outside the Netherlands can generally only be bound by a WAMCA judgment if they opt in. It is not to be expected that, for example, affected persons residing in Greece will opt in on a large scale to proceedings conducted in the Netherlands. Second, the RAD forces Member States to introduce WAMCA-like proceedings in their national laws. The higher the number of Member States with WAMCA-like regimes, the less likely it will be that a Dutch WAMCA judgment violates local public policy.

Next to a court judgment ruling on the claim organisation’s claim, WAMCA proceedings could also end with a court decision approving a settlement. Reference is made to nos. 219-222 for a discussion of the international recognition and enforcement of the decision of the Amsterdam Court of Appeal to declare a settlement binding pursuant to the WCAM. These considerations apply accordingly to the decision of the WAMCA court to approve a settlement agreement.
9 — COLLECTIVE ACTIONS AND CONSUMER LAW
Mass claims on behalf of consumers usually concern infringements of EU consumer law or national law originating in EU law. Various European consumer law directives contain provisions that oblige Member States to implement procedural mechanisms for the protection of the collective interests of consumers. A notable example is the Unfair Contract Terms Directive. Since 1993, it provides that Member States must allow organisations that have a legitimate interest under national law to take action before the courts or competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair. More in general, the Representative Actions Directive (RAD) and its predecessors have provided since 1998 that the national laws of the Member States must allow Qualified Entities to apply for collective remedies in the case of infringements of European consumer law, including the Unfair Contract Terms Directive. This chapter briefly explains the Dutch legislation transposing the Unfair Contract Terms Directive and the RAD and their relationship with the WAMCA.

Pursuant to Article 6:240 DCC, certain representative organisations can apply for a court judgment declaring that a provision in general terms and conditions is unreasonably onerous. These organisations may institute this type of action without there being any concrete dispute, resulting in an abstract review of the general terms and conditions. Furthermore, the law allows for preventive review in the sense that general terms and conditions that are not yet in use may also be subjected to review.

In its action, a representative organisation can apply for three ancillary remedies: (a) a prohibition to use the unreasonably onerous provision; (b) an order to revoke any recommendation to use the unreasonably onerous provision in general terms and conditions; and (c) an order to publish the judgment. If the court prohibits the use of a certain provision in general terms and conditions, that provision can be annulled, if despite the prohibition it is included in subsequent agreements.

Only The Hague Court of Appeal is competent to hear these actions. Appeals from the judgment of The Hague Court of Appeal can be taken to the Supreme Court.

The collective action regimes of Article 3:305a DCC and Article 6:240 DCC have developed in their own ways and the relationship between them has shifted over time. Currently, Article 6:240 DCC essentially serves as a ‘light’ version of the...
collective action and is aimed solely at the abstract review of general terms and conditions.

310. Some of the actions relating to general terms and conditions may also be brought in a collective action under Article 3:305a DCC. A claim organisation may bring an action for the annulment of a clause in general terms and conditions on the ground that it is unreasonably onerous. It may also seek a declaration that provisions in general terms and conditions are unreasonably onerous and hence voidable. These actions cannot be pursued in a collective action based on Article 3:305a DCC if the general terms and conditions are not yet in use. Preventive review is only possible in an action based on Article 6:240 DCC.

9.3 Collective actions relating to infringements of European consumer law

311. The RAD enhances the European framework for collective actions. It mainly requires Member States to amend or introduce collective action legislation that provides for: (i) an action for damages on behalf of consumers; (ii) the possibility for claim organisations from other Member States to bring such action; and (iii) a list of organisations which may initiate collective actions in other Member States. Since the RAD was partly inspired by the WAMCA, only minor amendments to the WAMCA have been required.

312. The RAD applies to consumers and its material scope is limited to infringements related to the European directives and regulations contained in Annex I to the RAD (data protection, travel and tourism, financial services, energy, telecommunications and health and the environment). Competition law-related claims are thus excluded from its scope.

313. The predecessor of the RAD, the Injunctions Directive, only obliged Member States to provide for collective actions requiring the cessation or prohibition of infringements. It only contained high-level requirements to be satisfied by a Qualified Entity wishing to bring an action. In the RAD, this framework has been expanded, as Member States must provide not only for injunctive measures, but also for collective redress actions (including actions for financial compensation).

314. In addition, the RAD offers a more detailed framework for the designation of organisations as Qualified Entities entitled to bring collective actions. The Injunctions Directive left it to the national laws of the Member States to determine which requirements Qualified Entities must fulfil in order to bring collective actions. The RAD distinguishes between domestic actions and cross-border actions. A representative action is "domestic" when a Qualified Entity brings a representative action in the Member State in which it was designated, even if that representative
action is brought against a trader domiciled in another Member State and even if consumers from other Member States are represented within that representative action. If, on the contrary, a Qualified Entity brings a representative action in a Member State other than that in which it was designated, that representative action should be considered a "cross-border" representative action.

The Member States themselves may determine the requirements to be met by Qualified Entities that bring domestic actions as long as the criteria used are consistent with the objectives of the RAD in order to make the functioning of such representative actions effective and efficient. For Qualified Entities that bring cross-border actions, the RAD harmonises the criteria for being recognised as a Qualified Entity. The organisation must:

(a) be a legal person that is constituted in accordance with the national law of the Member State of its designation, and demonstrate twelve months of actual public activity in the protection of consumer interests prior to its request for designation;
(b) show that its statutory purpose demonstrates that it has a legitimate interest in protecting consumer interests;
(c) have a non-profit-making character;
(d) not be the subject of insolvency proceedings and not be declared insolvent;
(e) be independent and have procedures preventing (i) influence by third parties with an economic interest in bringing representative actions and (ii) conflicts of interests between itself, its funding providers and consumers; and
(f) publicly disclose information (on its website) that demonstrates that the entity complies with the criteria listed.

The amended legislation includes these criteria. Also, Member States must create a publicly accessible list of entities that meet the above mentioned criteria. Only listed entities may bring an action in another Member State. The amended WAMCA allows claim organisations that satisfy these requirements to be placed on the list following their request for designation as a Qualified Entity.

Like the Injunctions Directive, the RAD makes clear that in the case of injunctive measures, individual consumers are not required to express their wish to be represented by the qualified entity. The RAD does not provide that individual consumers become "bound" by the decision ordering the cessation or prohibition of a certain practice. For redress measures (for example a collective damages claim), Member States must provide in their national rules how and when individual consumers can express the wish to be represented or not by the Qualified Entity in that collective action, and to be bound or not by the outcome of the action. Member States can choose, for example, between an opt-out system (like in the Netherlands) or an opt-in system. It is expected that most Member States will introduce an opt-in system. Individual consumers that live in Member States other than the Member
State where the proceedings are taking place can only be represented and are only bound by the decision if they opt in (see no. 76). The amended WAMCA only allows for an opt-in mechanism to apply to members of the narrowly defined group who are domiciled abroad in collective actions falling within the scope of the RAD. Furthermore, if affected persons based abroad opt in, they should declare that their interests are not represented in a collective action or individual action, based on similar issues of fact and law for the same event or events and against the same defendant in another EU or EEA Member State. 212

The RAD provides that consumers who have explicitly or tacitly expressed their wish to be represented in a collective action cannot be represented in any other collective action with the same cause of action and against the same trader. Nor can consumers in such a case bring an individual action with the same cause of action against the same trader. Dual representation in multiple collective actions before the Dutch courts is not possible, since the WAMCA only allows for one collective action per event.

Court review of qualification and admissibility requirements

It is not entirely clear from the statutory text and legislative history, but additional requirements seem to apply to domestic claims within the scope of the RAD. These requirements apply in addition to the requirements the WAMCA generally imposes. The most relevant additional requirements are the following: (i) a third-party funder of a claim for redress measures may not be a competitor of the defendant or be dependent on the defendant; and (ii) if the lighter requirements of Article 3:305a(6) DCC apply, the claim organisation still needs to show that it has sufficient resources and control over the action and publish on its internet page an overview of the status of pending proceedings and, if applicable, insight into the calculation of the contribution requested from the affected persons.

In cross-border actions, a Qualified Entity brings a representative action in a Member State other than that in which it was designated. If a Qualified Entity brings a cross-border action in the Netherlands, the Dutch courts may in principle not test the WAMCA’s admissibility requirements that relate to the organisation of the Qualified Entity. The defendant may however express doubts as to whether the organisation has actually met the designation requirements. 213 If the defendant expresses these doubts in pending proceedings, the court will have to examine those doubts and reach a decision. This may ultimately result in the inadmissibility of the Qualified Entity. 214

Dutch courts must still review whether the Qualified Entity’s claim complies with certain requirements set in Article 3:305a DCC. The court will hence continue to review if the Qualified Entity (i) has sufficient resources and control over the action; (ii) has published on its internet page an overview of the status of pending
proceedings and, if applicable, insight into the calculation of the contribution requested from the affected persons; (iii) has sufficient expertise and experience with regard to bringing and pursuing the action; (iv) has attempted negotiations to resolve the conflict. Furthermore, the claim should comply with the scope rule, as discussed in nos. 143-144. The additional requirement that a third-party funder of a claim for redress measures may not be a competitor of the defendant or be dependent on the defendant, also applies. Additionally, the Qualified Entity should comply with most of the provisions included in Articles 1018b-1018m DCCP, including the requirements that a collective action is more efficient and effective than individual proceedings (see chapter 5.3) and that the claim is not manifestly unfounded (see chapter 5.4). Finally, the Qualified Entity should mention in its writ of summons that it has been designated as such.

Other requirements

322. The RAD further obliges Member States to allow for court-approved collective settlements. Member States must also lay down certain specific rules on limitation periods, disclosure of evidence and the evidential value of decisions of a court or administrative authority of any Member State concerning the existence of an infringement harming the collective interests of consumers. Furthermore, Member States need to ensure that the unsuccessful party in a representative action for redress measures is required to pay the costs of the proceedings borne by the successful party, in accordance with conditions and exceptions provided for in national law. These requirements have warranted no or only minor amendments to the WAMCA.

323. The RAD provides that it should not make it possible to impose punitive damages on the infringing trader, in accordance with national law.

Temporal scope of the RAD

324. The RAD must be transposed by the Member States by 25 December 2022. The Netherlands has transposed the RAD by law of 2 November 2022. The amended WAMCA will apply to proceedings instituted after 25 June 2023. With regard to the litigious event, there is no limitation of the RAD’s temporal scope. The temporal scope of the WAMCA is however clearly and statutorily restricted to events that took place on or after 15 November 2016. Since conforming interpretation of an EU directive is not permitted contra legem, the RAD’s temporal scope should not affect the deliberate restriction of the temporal scope of the WAMCA.
10 — COLLECTIVE ACTIONS AND COMPETITION LAW
# COLLECTIVE ACTIONS AND COMPETITION LAW

*Machteld de Monchy & Marieke Bredenoord-Spoek*

## 10.1 Introduction

325. In the past ten years, the Netherlands has developed into one of the major jurisdictions in Europe for competition follow-on litigation, meaning claims for the compensation of damage caused by a competition law infringement established by a competition authority. Notable examples are claims following infringements in the markets for gas-insulated switchgear, prestressing steel, air cargo, hydrogen peroxide, lifts and escalators, sodium chlorate, paraffin wax and trucks. As a result of this extensive experience, Dutch case law provides ample guidance on a large number of legal issues relating to follow-on litigation, which allows for efficient dispute resolution. This chapter briefly touches upon some of the issues relating to claims based on assignments.

## 10.2 Claims based on assignments

326. Although the WAMCA and the WCAM do not exclude competition-related follow-on claims from their scopes of application, in practice they have rarely been used in this specific field of law so far. In most follow-on cases in the Netherlands, either the alleged victim directly sued the competition law infringers or a claim vehicle bundled the claims by means of an assignment of claims, powers of attorney or mandates. One reason for this is arguably that when follow-on actions started to emerge ten years ago, the collective actions regime only allowed claims seeking a declaration of liability; at the time it was not yet possible to claim compensation for the loss caused by the competition law infringement. Therefore, under the old rules on collective actions, it was probably less attractive for claim organisations to initiate a collective action than, for example, start proceedings based on assigned claims. Moreover, the currently pending competition-related follow-on claims often relate to events that ended before 15 November 2016, placing the claim outside the temporal scope of the WAMCA (see nos. 90-93). For future cases, based on more recent events, the WAMCA might be used more often.

327. Several mass claims judgments in the last couple of years seem to have complicated the use of the assignment model by requiring claim organisations to provide a large amount of information. Claim organisations must provide sufficiently detailed information with regard to the claims assigned to them and demonstrate that the claim has indeed been properly assigned. In the *Trucks* case, for example, the Amsterdam District Court ruled that the claim organisations should indicate for each underlying buyer: (i) which trucks they had purchased, rented, leased and/or used in the relevant period, (ii) when, how and from whom they had
purchased, rented, leased and/or used them, and (iii) if the ownership, rent, lease or mere use of the trucks had ended during the period of the infringement or during the relevant period following the infringement, how and when this had happened.\textsuperscript{218}

328. The judgment of the Amsterdam District Court in the Trucks case is in line with an earlier judgment of the Arnhem-Leeuwarden Court of Appeal in an action brought against manufacturers of elevators. In that case, too, the court ruled that the claim organisation should provide sufficiently detailed information regarding the claims assigned to it.\textsuperscript{219} The claim was dismissed, because the claim organisation had failed to properly provide this information. At the same time, not all recent judgments require the claim organisation to provide large amounts of information in order to establish the liability of the defendant(s) with regard to all claims assigned to the claim organisation. Reference is made to the judgments of the Rotterdam District Court in proceedings against certain manufacturers of elevators.\textsuperscript{220} In an interlocutory judgment, the court ruled it sufficient for the claim organisation to provide information showing that the parties it represents had been financially involved in transactions concerning elevators and/or escalators with a manufacturer during a certain period.\textsuperscript{221} However, it is unclear whether this judgment will stand, as it is currently under appeal.

329. Regarding the validity of the assignments, the Amsterdam Court of Appeal ruled that it is up to claim organisations to establish and, if needed, prove that the assignments can be relied on against the debtor (that is the defendant in a collective action). Claim organisations can substantiate the assignments by notifying the debtor of the assignments, and by providing extracts of the title and the instrument in which the claim is described with sufficient clarity.\textsuperscript{222} In a recent Trucks judgment, which followed the judgment mentioned in no. 327, the Amsterdam District Court similarly discussed the burden of proof of the validity of the assignments. The court ruled that if the documentation produced by the claimants for each affected person includes the assignment agreement (title) and the assignment deed and if it is clear that these are signed or provided by the assignor, it is sufficiently established that the claim vehicles are the beneficiaries of the claims. It is then up to the defendants to provide concrete indications that nevertheless no legally valid assignment took place.\textsuperscript{223}

330. These examples show that the assignment model puts an administrative burden on the claim organisation. That burden could be a reason for claim organisations to rely on the WAMCA model in future cases. At the same time, it could also very well be that claim organisations wait for more guidance in WAMCA case law and clarity under these rules, before they depart from the guidance and predictability they have obtained under the assignments model.

331. As a final remark, the Amsterdam District Court ruled that the WAMCA’s qualification requirements do not apply to claims based on assignments.\textsuperscript{224} In
support of this decision, the court among other reasons held that the WAMCA does
not prescribe that collective actions can only be brought on the basis of Article
3:305a DCC. Furthermore, the court noted that the affected persons in the Trucks
case are professional parties, whereas the qualification and admissibility
requirements of the WAMCA are mostly intended to protect the interests of non-
professional parties, often consumers. It is debatable whether the WAMCA
requirements are indeed mostly aimed at protecting the interests of non-
professional parties. In any case, it could be inferred from the court’s reasoning that
it might have ruled differently in this case if the affected persons had been
consumers.

10.3 Claims based on assignments and the WAMCA

332. The question arises whether the assignment model that is currently used by most
claim organisations in this field can co-exist with the WAMCA regime. The assignment
model allows a large number of claim organisations to act on the basis of the same
competition law infringement, each for their own group of affected persons that
assigned their claims to them. For example, following the European Commission’s
finding of the infringement in the trucks market, a large number of claim organisations
acquired claims from different truck purchasers and other allegedly injured parties.
Every claim organisation started separate proceedings, including in the Netherlands.
As a result, tens of separate, parallel proceedings are pending before the same Dutch
court. Under the WAMCA this is not possible. Chapter 4.3 explained that if more than
one claim organisation starts litigation on the basis of the WAMCA, the court will select
one claim organisation as the Exclusive Representative through what is also known as
a ‘beauty contest’ (see no. 60).

333. Dutch law does not prohibit the assignment of claims after WAMCA proceedings
have been initiated and, possibly, an Exclusive Representative has been appointed.
Affected persons may, after all, opt out of the WAMCA proceedings and assign their
claim to a claim organisation. However, if claim organisations that lost (or did not
even participate in) the beauty contest under the WAMCA start to acquire claims
and opt out of the WAMCA regime, this may undermine the purpose of the Exclusive
Representative as well as the legislature’s aim to restrict proceedings relating to
the same event to one collective action. Even though that would in principle be
allowed, practice will show whether courts will intervene in those tactics, for
example by staying those later claims.
11 — COLLECTIVE ACTIONS AND DATA PROTECTION LAW
11.1 Introduction

334. With the rapid growth of collective actions generally, the enforcement of the European data protection rules codified in the GDPR has increased. This point is illustrated by recent collective actions following alleged violations of the GDPR alone, or violations of the GDPR in conjunction with European consumer law.

335. Since its entry into force in May 2018, the GDPR has given rise to several collective enforcement actions. In particular, this Regulation has introduced a broad right of access to information about how personal data is collected and used; a possibility to claim damages for GDPR violations; and provisions on the representation of individuals affected by these violations. Reasons for the increased popularity of collective actions under the GDPR could also be found outside of the Regulation’s text. These include the inadequacy of public enforcement by supervisory authorities, which often lack financial and human resources and are obliged to engage in lengthy EU-wide cooperation and coordination mechanisms. Additionally, commercial litigation funders are increasingly seen to participate in data-related collective actions.

11.2 GDPR

336. Article 80(1) GDPR grants individuals a right to mandate a not-for-profit organisation which has been properly constituted in accordance with the law of an EU Member State, has statutory objectives which are in the public interest and is active in the field of data protection to:

(a) exercise their right to lodge a complaint with a supervisory authority and to sue this authority or a natural or legal person responsible for a GDPR violation, and
(b) where provided for by Member State law, exercise the right to receive compensation under Article 82 GDPR.

337. Four qualification criteria can be derived from Article 80(1) GDPR. The claim organisation must:

(a) be a not-for-profit body, organisation or association;
(b) be properly constituted in accordance with the law of a Member State;
(c) have statutory objectives which are in the public interest; and
(d) be active in the field of the protection of data subjects’ rights and freedoms with regard to the protection of their personal data.
The criterion of being 'active' under (d) was added by the Council of the European Union, which stated that these criteria collectively aim to avoid the development of a commercial claims culture in the field of data protection. It is not entirely clear how courts should assess whether a claim organisation has been active in the field of data protection. From legislative history it is clear that this requirement should bar ad hoc organisations from bringing collective actions on GDPR grounds. Additionally, it is implied that the claim organisation should present some sort of track record. In a collective action under Article 3:305a (old) DCC instituted by an ad hoc claim organisation against Facebook, the Amsterdam District Court, however, ruled that the data protection activities referred to in Article 80 GDPR do not have to meet stringent requirements in order to ensure the effective exercise of enforcement powers. The key factor, according to the court, is whether the claim organisation is carrying out any activities in actual fact. In its decision declaring the ad hoc claim organisation admissible, the court did nonetheless take into account the claim organisation's cooperation with and support of the main Dutch consumer interest organisation, which is, according to the court, a not-for-profit interest group that has been defending the interests of consumers in the Netherlands for many years. It is unclear whether the ad hoc claim organisation would have qualified to bring its claim if it were not for this cooperation.

In addition to the representative actions that do require the data subject's mandate, Article 80(2) GDPR provides that Member States may allow for a not-for-profit organisation to exercise certain data subject's rights without their mandate. These rights include the right to (i) lodge a complaint with a supervisory authority; (ii) sue this authority; and (iii) bring proceedings against a natural or legal person responsible for a GDPR violation. In proceedings against Facebook, the Amsterdam District Court indeed ruled that the GDPR in those proceedings (in which the claim organisation only requested a declaratory judgment, rather than compensation) did not require a data subject's mandate.

### Relationship between the WAMCA and the GDPR

In the Netherlands, the WAMCA provides procedural grounds on the basis of which a claim organisation may initiate a collective action following a GDPR violation. Claims based on GDPR violations are not excluded from the scope of application of the WAMCA. These claims must, however, meet the requirements of the GDPR and specific legal provisions in the Dutch law on collective claims for data protection violations.

Article 37 of the Dutch GDPR Implementation Act provides that it is not possible to base a collective action on a specific data processing operation, if the person whose rights are affected objects to the collective action. This provision suggests that claim organisations cannot start collective actions without the consent of the persons they represent. This is at odds with the WAMCA's opt-out mechanism.
an obiter dictum in the proceedings against Oracle and Salesforce, the Amsterdam
District Court noted that the parties in those proceedings disagreed on the
interpretation of Article 80 GDPR, in particular as to whether the provision allows
claim organisations to claim damages without an explicit mandate from the
represented individuals.\textsuperscript{230} The court noted that Article 80(2) GDPR does not refer
to the right to receive compensation (Article 82 GDPR), as a right that can be
exercised without the data subject’s mandate.\textsuperscript{231}

342. Since the court declared the claim organisation inadmissible on other grounds (as
discussed in 127-128), it did not rule on the matter, but merely noted that the
controversy could be relevant for future cases.

3:305a(2)(e) DCC 343. Another issue of conflict or potential conflict between the GDPR and the WAMCA is
the GDPR’s requirement that the claim organisation is active in the field of the
protection of data subjects’ rights and freedoms with regard to the protection of
their personal data. This qualification criterion is stricter and more specific than the
WAMCA’s criterion in Article 3:305a(2)(e) DCC, which requires the claim
organisation to have sufficient expertise and experience to bring the collective
action (see 139-140). Since the GDPR has direct effect and Dutch courts should
interpret national law in accordance with EU law, the GDPR’s stricter qualification
requirement should prevail over the WAMCA’s qualification requirement.
12 – COLLECTIVE ACTIONS AND ESG
Chapter 12

COLLECTIVE ACTIONS AND ESG

Dennis Horeman & Davine Roessingh

12.1 Introduction

344. Litigation on ESG-related issues is on the rise across the globe. Such litigation highlights the practical implications of allowing collective litigation in deciding broad societal questions.

345. ESG stands for environment, social and governance. It is a broad term that arguably encompasses many issues such as environmental pollution, climate change, equal treatment, child labour, and workers’ rights.

3.305a(6) DCC

346. In the Netherlands, collective litigation in support of the general interest and idealistic claims has been considered and allowed by the legislature. Courts are specifically allowed to waive some of the qualification requirements that generally apply to claim organisations, if (a) the purpose of the claim is idealistic in nature and the financial interest is very limited or (b) if the court finds that the exemption should apply due to the nature of the collective claim or the affected persons. In any case, the claim may not be for monetary damages (see nos. 150-153).

12.2 Practical application

347. The cases that have been brought before the courts under the WAMCA and the previous collective action regime cover the entire spectrum of ESG-related issues.

348. On environmental issues, collective litigation instruments have widely been used. It was the subject of the groundbreaking case in which the Dutch Supreme Court allowed collective litigation even prior to (procedural) legislation on point having been enacted (see chapter 2.2). Specifically in relation to climate change the courts took an active role in two cases under the collective litigation regime preceding WAMCA. First, Urgenda was successful in obtaining an injunction against the State of the Netherlands to reduce greenhouse gas emissions from its territory. This groundbreaking claim was allowed in all three instances, including by the Supreme Court, and courts in several jurisdictions have since taken a similar approach.232 Second, the District Court of The Hague issued an injunction ordering Shell to reduce CO₂ emissions, including an efforts obligation to reduce emissions created by its business relations.233 That judgment is subject to appeal.

349. On social issues too, a wide range of cases has been presented to the courts. For example, in its 2010 Clara Wichmann v. SGP decision, the Supreme Court confirmed that the NGO could sue in the general interest of all Dutch citizens in enforcing the right to equal treatment following state actions to combat gender discrimination.
The claims in the proceedings were focused on enforcing this general and fundamental right (see no. 117). Under the WAMCA, several social issues have been presented to the courts as well. In July 2022, the Amsterdam District Court ruled that two labour unions are admissible in bringing claims against an online platform company which connects individual contractors with principals for a job to be done, with a payment system through which the platform effectively takes EUR 1 for every worked hour. The claimant sought declarations to secure protection under certain labour legislation. The court found the unions admissible not only because they made a claim in the interest of a group of workers, but also because they were bringing the claim in the general interest of a fair labour market.

There are many other examples of collective claims on social issues brought against companies (e.g. to secure workers’ rights, including in relation to other platforms), and against the Dutch State and public utilities (e.g. for protection of the right of access to contraceptives for women above the age of 18, and access for children to potable water).

12.3 Future outlook

350. The role of collective litigation instruments such as the WAMCA in resolving ESG-related disputes cannot be seen in isolation. It is part of an increased level of legal action in pursuit of wide societal interests. The developing legislation in the field of ESG is one example of that: the law on ESG-related obligations of companies is rapidly developing in the Netherlands and in the EU more broadly, both in terms of substantive obligations and in terms of disclosure and reporting requirements. Also, there is significant funding available from non-commercial sources in the context of ESG-related actions. This is both because of the general funding of established organisations able to bring a claim (such as the above-mentioned unions and for example Client Earth) and because of very significant funding initiatives taken by ideological funders such as the Children’s Investment Fund Foundation. This is in addition to the role commercial funders have, as discussed in chapter 3.4. Furthermore, regulators and other authorities across the world are closely monitoring reporting, disclosures and actual conduct in relation to many ESG-related topics. Their actions will have significant bearing on initiating and conducting litigation on ESG-related topics.

351. The law has always developed in ways that allow for protecting societal interests, on substance, but also through procedural mechanisms allowing for enforcing rights, such as collective litigation (see chapter 2). ESG-related litigation often presents broad societal questions. As a result, cases of this nature present important legal questions that are highly relevant in that specific context. We give two examples.

352. The first issue is whether collective litigation can be initiated that demands a course of action that the claimants want, but which is not supported by some or all of the
persons directly implicated by the conduct at issue. In the SGP case referred to in no. 349, decided before WAMCA was enacted, the Supreme Court held that a claim can successfully be brought that demands that women must be able to stand in parliamentary elections for a conservative Christian party. This claim was brought in the general interest that all people in the Netherlands have in equal treatment. There was therefore sufficient similarity of interests. The Supreme Court held that, in view of that, it is irrelevant that the women within the party that may want to stand for election in that party, do not actually support the claim. 239 That ruling came on the back of a precedent which held that the relevant criterion for determining similarity was whether the cases could be adjudicated jointly to protect efficient and effective legal protection. The Supreme Court factored in that (i) the legislature pre-WAMCA had decided not to have a test of representativeness for the claim organisation and (ii) that under that pre-WAMCA statute individuals in the group could indicate that they do not wish to be bound even after judgment. 240 In the previously discussed Shell judgment, the District Court of The Hague held that the interests of all people across the world in combating climate change was not sufficiently similar, because of the many differences between countries. However, the interests of current and future generations in the Netherlands for such claim were held to be sufficiently similar, despite there being differences in the impact of climate change within the Netherlands. 241 It remains to be seen how this will be dealt with in such cases now that WAMCA as introduced (i) contains a requirement of representativeness (see nos. 122-128) and (ii) provides for a more rigid mechanism for binding group members than the preceding legislation (see nos. 65-69). 242

The second issue is that some ESG-related issues raise fundamental questions on the route society should take. This is because ESG is a particularly broad theme, addressing many of the fundamental challenges society poses, and legislation is frequently absent (albeit that this is developing as stated above). In adjudicating such issues, the courts are faced with a question of demarcating their own role in developing the law versus the role of other branches of government. An older example of such issue was a case decided in 2001, where two NGOs sought a prospective injunction against the State to prohibit it facilitating use of nuclear weapons. The NGOs were not admissible, on the basis that the relief sought was too generic because it could not be ruled out that the conduct to be prohibited would not be unlawful in all circumstances, and that it is then not for the court to intervene because that would require a weighing of circumstances that cannot be done because of the nature of a prospective injunction. 243

Another example can be found in the contrast between how New Zealand courts in first instance and on appeal dismissed a claim about establishing companies’ legal obligations in relation to climate change and found that this was a systemic question that courts are not equipped to answer (which is being appealed to the New Zealand Supreme Court), 244 versus the judgment of the District Court of The
Hague against Shell where the court did articulate specific obligations (which is also under appeal). Although these are ultimately related to substantive legal issues, they are particularly relevant in the context of collective actions about ESG. This is because the nature of such issues presented to the court is such that threshold questions arise, such as about the representativeness of the claims organization, similarity of interests, and whether the claim is sufficiently specific to be adjudicated. Such issues affect the extent to which wide societal questions are decided by courts, as opposed to the democratic process.
13 — CONCLUSION AND FUTURE DEVELOPMENTS
Chapter 13

CONCLUSION AND FUTURE DEVELOPMENTS

This guide has shown how the WAMCA reshapes the Dutch collective action and settlement regime. It was observed in the introduction that the WAMCA is particularly innovative in that it allows claims for damages, introduces stricter qualification requirements for claim organisations and amends collective action procedure. From the discussion of the WAMCA and its application in practice, it follows that these elements are firmly grounded in statute, but they are really taking shape in case law. Since the WAMCA has only been in force for three years, there is still a lot to be fleshed out.

This includes, for example, the expanding role of third-party funders. A further influx of commercial litigation funding is expected. It remains to be seen how this will translate into numbers and types of collective actions and how courts will deal with this. A partially related development on the claimants’ side is the increasing competition between claim organisations. In practice, the ‘beauty contest’ between claim organisations wishing to be appointed as Exclusive Representative can be seen to intensify.

Appeal and Supreme Court proceedings will be another topic to watch out for. The WAMCA is mostly silent on the procedure before the Courts of Appeal and the Supreme Court. The so far limited case law of the Courts of Appeal looks patchy. It therefore remains to be seen what WAMCA proceedings will look like in second and third instance.

In first instance, discussions will arise with regard to the application of the new WAMCA provisions transposing the RAD. These provisions are set to apply in proceedings initiated from June 2023 onwards. It will be interesting to see how courts will apply these provisions.

Another aspect with an EU law angle is the conjugation of the WAMCA and specialist EU law, which will surely result in some noteworthy judgments. A case in point are the admissibility requirements that apply to claim organisations bringing a collective action for a GDPR violation. This will be a salient issue in upcoming collective actions. Issues like these are likely to feature more frequently in the future, since claim organisations are bringing more and more collective actions, while EU and national legislation in specific fields of law is only expanding. Additionally, collective actions have become increasingly international in nature and scope. Consequently, the overlap of two or more legal regimes and legal systems applying to a collective action will become more widespread and will likely result in lengthy debates on the applicability of specific legal provisions.

In sum, the Dutch collective action and settlement regime is vibrantly advancing, with developments following each other in rapid succession. We will continue to keep an eye out for you and again update this guide in due course.
CITED CASE LAW
### CITED CASE LAW

*Cases in which De Brauw has been involved are marked with an asterisk (*).*

#### WAMCA

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ANNEX: ENGLISH TRANSLATION OF WAMCA PROVISIONS
ANNEX: ENGLISH TRANSLATION OF WAMCA PROVISIONS

ARTICLE 3:305A DCC [ADMISSIBILITY]

1. A foundation or association with full legal capacity may initiate a legal action seeking to protect similar interests of other persons, provided that it advances those interests in accordance with its articles of association and that those interests are sufficiently safeguarded.

2. The interests of the persons whose interests the legal action seeks to protect are sufficiently safeguarded, if the legal entity referred to in the first paragraph is sufficiently representative, given its constituency and the size of the represented claims, and has:
   a. a supervisory body, unless article 2:44a(1) or article 2:9a(1) DCC has been implemented;
   b. appropriate and effective mechanisms for participation or representation in decision-making by the persons whose interests the legal action seeks to protect;
   c. sufficient resources to bear the costs of bringing a legal action, with the legal entity having sufficient control over the legal action;
   d. a publicly accessible internet page on which the following information is available:
      1°. the articles of association of the legal entity;
      2°. the governance structure of the legal entity;
      3°. the last adopted annual outline account of the supervisory body regarding the supervision performed by it;
      4°. the most recently adopted report of the board of directors;
      5°. the remuneration of the directors and members of the supervisory body;
      6°. the objects and working methods of the legal entity;
      7°. an overview of the status of pending legal actions;
      8°. if a contribution is sought from the persons whose interests the legal action seeks to protect: information on the calculation of this contribution;
      9°. an overview of how the persons whose interests the legal action seeks to protect may join and how they may leave the legal entity;
   e. sufficient experience and expertise in the area of initiating and pursuing the legal action.

3. A legal entity as referred to in the first paragraph will be admissible only if:
   a. the directors involved in the formation of the legal entity, and their successors, have no direct or indirect profit motive which is realised via the legal entity;
   b. the legal action is sufficiently closely connected with the Dutch legal system. A sufficiently close connection with the Dutch legal system will exist where:
      1°. the legal entity sufficiently demonstrates that the majority of the persons whose interests the legal action seeks to protect are habitually resident in the Netherlands; or
      2°. the person against whom the legal action is brought is domiciled in the Netherlands and additional circumstances indicate a sufficient connection with the Dutch legal system; or
      3°. the event or events to which the legal action relates took place in the Netherlands;
   c. in the circumstances, the legal entity has made sufficient efforts to realise the relief sought by conducting consultations with the defendant. A period of two weeks after the defendant’s receipt of a request for consultations in which the relief sought is set out is in any event sufficient for this purpose.
4. In a legal action within the meaning of paragraph 1 an order may be sought requiring the defendant to publish or cause to be published the judgment in a manner to be directed by the court and at the expense of the party or parties designated by the court.

5. A legal entity within the meaning of paragraph 1 must prepare a management report and annual accounts in accordance with the provisions for associations and foundations in articles 2:49 and 2:300 and in title 9 of Book 2 DCC respectively. Without prejudice to the provisions of title 9, the management report must be published on the publicly accessible internet page of the legal entity within eight days of its adoption.

6. The court may declare a legal entity within the meaning of paragraph 1 admissible, without the need to satisfy the requirements of paragraph 2(a) to (e) and paragraph 5, if the legal action is brought for an idealistic purpose and the financial interest is very limited, or if the nature of the claim of the legal entity as referred to in the first paragraph or of the persons whose interests the legal action serves to protect warrants this. If this paragraph is applied, the claim may not be for monetary damages.

7. There will be a central register for collective actions as referred to in this article. This register will be kept by a body to be designated by general order in council.

**ARTICLE 1018B DCCP [SCOPE]**

1. This title will apply to proceedings concerning a claim within the meaning of articles 3:305a and 3:305c DCC. With the exception of article 1018c(1), this title will not apply to cases within the meaning of article 254.

2. Title 2 of Book 1 will apply, unless provided otherwise in this title.

3. Article 93 will not apply.

**ARTICLE 1018C DCCP [INITIATING A COLLECTIVE ACTION AND NEXT STEPS]**

1. Without prejudice to article 111(2), the writ of summons initiating the collective action within the meaning of article 3:305a DCC must include:
   - (a) a description of the event or events to which the collective action relates;
   - (b) a description of the persons whose interests the collective action seeks to protect;
   - (c) a description of the degree of commonality of the factual and legal questions to be answered;
   - (d) a description of how the admissibility requirements of article 3:305a(1) to (3) DCC are met or of the grounds allowing the sixth paragraph of that article to be applied;
   - (e) the information enabling the court to appoint an exclusive representative for this collective action in the event that other collective actions for the same event are initiated under article 1018d;
   - (f) the claimant’s obligation to have the case entered in the register referred to in the second paragraph and to state the consequences of such entry under this article.

2. On pain of inadmissibility, the writ of summons must be filed, in derogation from article 125(2), with the court registry within two days of the date of the writ of summons, with a simultaneous entry of the writ of summons in the central register for collective actions within the meaning of article 3:305a(7) DCC. The entry must be accompanied by a copy of the writ of summons.

3. Except where the court immediately declares the claimant inadmissible in accordance with the second paragraph, it must stay the case until a period of three months after the entry in the register referred to in the second paragraph has expired. Except where this period has been extended under article 1018d(2) or another collective action has been brought in respect of the same event or events, the examination of the case will continue after the expiry of the period in the state in which it is.
4. The court calendar date for the submission of the statement of defence within the meaning of article 128(2) is set at six weeks after the period referred to in the third paragraph has expired.

5. The collective claim will only be dealt with on its merits, if and after the court has decided that:
   (a) the claimant meets the admissibility requirements of article 3:305a (1) to (3) DCC or that these requirements do not have to be met on the basis of the sixth paragraph of this article;
   (b) the claimant has sufficiently demonstrated that bringing such a collective action is more efficient and effective than bringing an individual action, because the factual and legal questions to be answered are sufficiently common, the number of persons whose interests the legal action seeks to protect is sufficient and, in the case of a claim for damages, their financial interest is sufficiently large, individually or jointly;
   (c) the collective claim, after summary examination, does not appear to be without merit at the time the proceedings are initiated.

In derogation from article 128(3), the defendant may elect to raise only the defences that relate to the matters referred to under (a) to (c) until they have been decided on.

6. If a collective action is initiated for the same event or events after the collective action referred to in paragraph 1 was brought, but before the time limit referred to in article 1018d has started to run, the case will, if necessary after referral, be joined with the collective action that is already pending as referred to in paragraph 2(a).

**ARTICLE 1018D DCCP [MULTIPLE COLLECTIVE ACTIONS]**

1. Within three months of the entry in the register as referred to in article 1018c(2), a legal entity as referred to in article 3:305a DCC may bring a collective action for the same event or events as the one or ones to which the collective action referred to in article 1018c(1) relates, regarding similar factual and legal questions, while referencing the entry. The collective action must be brought before the same court as the one before which the collective action previously entered in the register was brought. Article 1018c(1) is applicable.

2. The court may extend the time limit referred to in the previous paragraph by no more than three months if, within one month after the entry, a legal entity as referred to in article 3:305a DCC has notified the court registry that it wishes bring a collective action for the same event or events as the one or ones to which the collective action referred to in article 1018c(1) relates, referencing the entry in the register, but that the three-month period is not sufficient.

3. For the purposes of Book 1, collective actions brought in accordance with this article must be jointly examined as one case after being entered on the court calendar. The court calendar date stated in the writ of summons must be four weeks after the expiry of the time limit pursuant to the first and second paragraphs.

**ARTICLE 1018E DCCP [EXCLUSIVE REPRESENTATIVE]**

1. From the claimants who have brought a collective action in accordance with article 1018c or article 1018d and who meet the admissibility requirements of article 3:305a(1) to (3) DCC, the court must designate the most suitable claimant as exclusive representative, taking into account the following circumstances:
   (a) the size of the group of persons on whose behalf the claimant is acting;
   (b) the size of the financial interest represented by that group;
   (c) any other activities performed by the claimant for the persons for whom it is acting in or out
of court;

(d) any previous activities performed by the claimant or collective actions brought by the claimant. This decision is not subject to any legal remedy.

2. The court must also assess the precise substance of the collective action, for which narrowly defined group of persons the exclusive representative is looking after the interests in that collective action and whether the nature of the collective action, if tied to a specific place, justifies that the case is heard by another court.

3. In these proceedings, the claimant that is appointed as exclusive representative must act in the interests of all the persons in the narrowly defined group as referred to in the second paragraph, and as representative of the claimants not appointed as exclusive representatives. Claimants that are not appointed as exclusive representatives continue to be parties to the proceedings. The exclusive representative will carry out the acts of procedure. The court may direct that the non-designated claimants may also carry out acts of procedure.

4. If the nature of the collective claim or of the claimants or the interests of the persons they represent so warrant, the court may elect to designate multiple exclusive representatives in a collective action.

5. The exclusive representative must arrange that the judgment given under this article is entered in the register referred to in article 1018c(2).

**ARTICLE 1018F DCCP [OPT-OUT AND OPT-IN]**

1. Proceedings on a collective action will not have any consequences for or be binding on persons belonging to the narrowly defined group of persons whose interests are represented in this collective action, if they have notified the court registry in writing, within a period to be determined by the court of at least one month after the announcement referred to in the third paragraph of the court’s decision referred to in article 1018e(1) and (2), that they wish to opt out of the representation of their interests in this collective action. Any previous collective interruption of the limitation period for the action will only interrupt the limitation period in respect of these persons, if they perform an individual act of interruption for this action within six months after opting out of the representation of their interests in the collective action under this article. If the number of persons who have opted out of the representation of their interests in the collective action under this article is too large to justify the continuation of the proceedings, the court may decide not to move forward with the proceedings.

2. The judgment designating the exclusive representative and describing the collective action and the narrowly defined group of persons whose interests are served by the exclusive representative in this collective action must be available at the court registry for review by these persons. An entry of this judgment must also be made in the register referred to in article 1018c(2). The court may order that the judgment and, if necessary, its translation into one or more languages other than Dutch, must be placed in such a manner on one or more websites to be designated by the court, including the internet page of the exclusive representative as referred to in article 3:305a(2)(d) DCC, that they can be stored by the above-mentioned persons for the purpose of later review.

3. The known persons whose interests are represented by the exclusive representative in this collective action must be notified as soon as possible of the appointment of the exclusive representative and the collective action and the narrowly defined group of persons whose interests are represented by the exclusive representative in this collective action by ordinary letter, unless the court directs otherwise. This must also be announced as soon as possible in one or more newspapers designated by the court, each time indicating, in the manner to be directed by the court, how these persons can opt out of the
representation of their interests in this collective action in accordance with the first paragraph, or opt in to the representation of their interests in this collective action in accordance with the fifth paragraph. It must also be explained how the judgment can be reviewed or a copy obtained. The court may order that information other than that referred to in this paragraph is also notified. Unless the court directs otherwise, the exclusive representative must arrange for the notification and announcement referred to in this paragraph. The court may order that the information referred to in this paragraph is also disclosed in a different way. If the narrowly defined group of persons includes persons whose interests are served by the exclusive representative in this collective action who are not domiciled or resident in the Netherlands and no method of announcement is prescribed by any international or EU regulations that are binding on the Netherlands, the court will order that the announcement must be made for the benefit of these persons in the manner directed by it in one or more languages other than Dutch, if necessary.

4. For persons who have opted out of the representation of their interests in the collective action under this article, no action as referred to in article 3:305a DCC can be brought which is based on similar factual and legal questions regarding the same event or events.

5. The proceedings on the collective claim will have consequences for and be binding on persons who belong to the narrowly defined group of persons whose interests are represented in this collective action and who are not domiciled or resident in the Netherlands, if they have informed the court registry in writing, within a period to be determined by the court of at least one month after the announcement referred to in the third paragraph of the judgment referred to in article 1018e(1) and (2), that they opt in to the representation of their interests this collective action. At any party’s request, the court may direct that, in derogation from this paragraph, the first paragraph will apply to persons belonging to the narrowly defined group of persons whose interests are represented in this collective action and who are not domiciled or resident in the Netherlands.

ARTICLE 1018G DCCP [SETTLEMENT AGREEMENT]

After the appointment of an exclusive representative as referred to in article 1018e, the court will set a time limit for testing an agreement, which must in any case include what article 7:907(2)(a) to (f) DCC provides, and, if no agreement as referred to in this provision is reached, for expanding the grounds of the claim and the defence, to the extent that the defendant has made use of its power under article 1018c(5), last sentence.

ARTICLE 1018H DCCP [APPROVAL OF SETTLEMENT AGREEMENT]

1. If the parties conclude a settlement agreement as referred to in article 7:907(2) DCC, this agreement must be submitted to the court for approval.

2. Articles 1013(1) and (2) and (4) to (8), article 1014, 1016 and article 7:907 DCC apply accordingly to the approval of the agreement.

3. Article 1017(2) to (4) and articles 7:908(1), (3) and (5), 909 and 910 DCC apply accordingly to an approved agreement. The court may give further directions for the notifications and announcements referred to in article 1017.

4. The exclusive representative must arrange for the announcement of the approved agreement on the internet page as referred to in article 3:305a(2)(d) DCC and for its entry in the register referred to in article 1018c(2).

5. Article 1018f(1) to (4) applies accordingly to the approved agreement.
6. Only the refusal of approval can be appealed. Such an appeal can only be taken to the Dutch Supreme Court by the parties jointly. Article 1018(2) applies accordingly.

ARTICLE 1018I DCCP [COLLECTIVE COMPENSATION SCHEME]

1. If the collective action concerns a claim for monetary damages, the court, before establishing a collective compensation scheme, may order the exclusive representative and the defendant to submit a proposal for a collective compensation scheme. This proposal must in any event include what article 7:907(2)(a) to (f) DCC provides with regard to:

(a) the persons belonging to the narrowly defined group of persons whose interests are represented in this collective action who have not opted out of the representation of their interests in the proceedings in accordance with article 1018f; and

(b) the persons belonging to the narrowly defined group of persons whose interests are represented in this collective action who are not domiciled or resident in the Netherlands and who have opted into the representation of their interests in this collective action in accordance with article 1018f.

The court will set the time limit within which a proposal must be submitted by the parties. If this obligation is not complied with, the court may make such inference from this as it sees fit.

2. The court must establish, partly on the basis of the proposals referred to in paragraph 1, a collective compensation scheme serving to have the persons referred to in paragraph 1(a) and (b) compensated by the defendant for the damage suffered by them. For the purposes of Book 6, Section 10, Title 1 DCC, the court must ensure that the damages for these persons are assessed in categories, where possible, that the collective compensation scheme in any event includes what article 7:907(2)(a) to (f) DCC provides, that the amount of the damages awarded in it is reasonable, and that the interests for whom the collective compensation scheme is established are also sufficiently safeguarded otherwise. Article 7:907(1), last sentence, and (6) DCC apply correspondingly.

3. Before establishing a collective compensation scheme as referred to in the second paragraph, the court may order one or more experts to prepare a report on the issues relevant to the substance of the collective compensation scheme.

ARTICLE 1018J DCCP [NOTIFICATION OF COLLECTIVE COMPENSATION SCHEME]

1. Known persons for whose benefit the collective compensation scheme is established must be notified as soon as possible of the judgment establishing the scheme by ordinary letter, unless the court directs otherwise. The judgment must also be announced as soon as possible in one or more newspapers designated by the court in which a brief description is given each time of the collective compensation scheme in the manner directed by the court, in particular of how compensation can be claimed from the defendant or the collective compensation scheme can be otherwise invoked and, if so determined by the collective compensation scheme, the period within which the compensation must be claimed. The notification must also state how the judgment establishing the collective compensation scheme may be reviewed and a copy obtained. The court may order that information other than that referred to in this paragraph is also notified. Unless the court directs otherwise, the defendant must arrange for the notification and announcement referred to in this paragraph. The court may order that the information referred to in this paragraph is also disclosed in a different manner. If there are persons for whose benefit the collective compensation scheme has been established who are not domiciled or resident in the Netherlands and no method of announcement is prescribed in any international or EU regulations binding
on the Netherlands, the court must direct that the announcement is made for the benefit of these persons in the manner determined by it, in one or more languages other than Dutch, if necessary.

2. The exclusive representative must arrange that the judgment referred to in the preceding paragraph is announced on the internet page referred to in article 3:305a(2)(d) DCC and is placed in the register referred to in article 1018c(2).

**ARTICLE 1018K DCCP [ENFORCEMENT]**

1. As soon as a judgment under this title becomes final and irrevocable, it will be binding on each of the parties and on the persons referred to in article 1018i(1)(a) and (b). Except where the judgment has been declared immediately enforceable, these persons are entitled, from the time the judgment became final and irrevocable, to claim compensation in the manner and under the conditions specified in the judgment establishing the collective compensation scheme.

2. A judgment under this title will have no effect in respect of a person as referred to in article 1018i(1)(a) who, at the time of the announcement referred to in article 1018f(3), could not be aware of its damage, if that person, after becoming aware of its damage, has notified the defendant, or if a compensation scheme has been established: the person referred to in article 7:907(2)(g) DCC, in writing that it does not wish to be bound. For a person referred to in the first paragraph, the defendant may, by means of a written notification, set a time limit of at least six months for declaring that this person does not wish to be bound. In the case of a judgment under this title establishing a collective compensation scheme in accordance with article 1018i, the defendant must also give notice of the person referred to in article 907(2)(g).

**ARTICLE 1018L DCCP [COSTS]**

1. If, after summary examination, the action appears to be without merit, the court may, for the application of Book 1, Title 2, Section 12, paragraph 2, increase the fees of the successful party's lawyer by a maximum of 500% at the expense of the unsuccessful party in its judgment, unless reasonableness and fairness dictate otherwise.

2. A judgment under article 1018i must also include an order for costs, in which the court may, if necessary, order the unsuccessful party, in derogation from Book 1, Title 2, Section 12, paragraph 2, upon an application to that effect, to pay reasonable and proportionate legal costs and other costs incurred by the successful party, unless reasonableness and fairness dictate otherwise.

**ARTICLE 1018M DCCP [RELATED ACTIONS]**

1. Proceedings between the defendant or defendants against whom the collective action has been brought under this title and a person for the protection of whose interests the proceedings on the collective action are being conducted who has opted out of the representation of its interests in the proceedings and of the judgment in accordance with article 1018f can be stayed at the request of the party first ready to act, if the proceedings concern similar factual and legal questions for the same event or events, even if the date on which the judgment, decision or order is to be rendered or issued has already been set.

2. The stayed proceedings will be resumed in accordance with article 227(1):
   (a) if the proceedings have been stayed for more than one year and the party first ready to act has requested that the stay be lifted;
   (b) if a judgment has been given in the proceedings on the collective action and this judgment has become final and irrevocable.
END NOTES
END NOTES

10 Supreme Court of the Netherlands 26 February 2010, ECLI:NL:HR:2010:BK5756 (Stichting Baas in Eigen Huis v. Plazacasa), paras. 4.1-4.2.
11 Supreme Court of the Netherlands 26 February 2010, ECLI:NL:HR:2010:BK5756 (Stichting Baas in Eigen Huis v. Plazacasa), para. 4.2; Supreme Court of the Netherlands 9 April 2010, ECLI:NL:HR:2010: BK4549 (Clara Wichmann et al. v. SGP), para. 4.3.2.
12 See e.g. the WCAM proceedings in Amsterdam Court of Appeal 13 July 2018, ECLI:NL:GHAMS:2018:2422 (Fortis/Ageas), para. 5.15, in which several claim organisations indicated to the court that their costs were between EUR 4 million and EUR 12.9 million.
17 Supreme Court of the Netherlands 15 January 2016, ECLI:NL:HR:2016:65, para. 3.4.4.
23 (Commentary to the) Collective Actions (Register) Decree, Bulletin of Acts and Decrees 2019, 446.
26 The Hague District Court 8 September 2021, ECLI:NL:RBDHA:2021:9892, para. 3.8; Amsterdam District Court 28 July 2021, 702849 / HA ZA 21-526, recorded in the public register for collective actions.
28 See e.g. the writs of summons against Oracle (and others), Airbnb and Apple as published in the public register for collective actions.
29 Amsterdam District Court 13 October 2021, C/13/702849 / HA ZA 21-526 (docket decision).
30 Amsterdam District Court 15 December 2021, 702519 / HA ZA 21-500, para. 2.3.
31 Amsterdam District Court 3 March 2021, ECLI:NL:RBAMS:2021:5174, para. 5.13.
33 See e.g. Amsterdam District Court 3 march 2021, C/13/681190 / HA ZA 20-299 (docket decision).
35 Amsterdam District Court 29 December 2021, ECLI:NL:RBAMS:2021:7647.
36 Parliamentary Documents II 2018-2019, 34 608, No. 22 (Groothuizen Amendment).
37 See e.g. Amsterdam District Court 21 April 2021, C/13/686493 / HA ZA 20-697, para. 2.15.
40 Amsterdam District Court 13 July 2022, ECLI:NL:RBAMS:2022:4035.
41 Oost-Brabant District Court 14 September 2022, ECLI:NL:RBOBR:2022:3931, para. 2.15.2.
47 Article 119a Transition Law new DCC.
48 Supreme Court of the Netherlands 11 March 2022, ECLI:NL:HR:2022:347.
49 Amsterdam District Court 30 March 2022, ECLI:NL:RBAMS:2022:1541; Amsterdam District Court 30 March 2022, ECLI:NL:RBAMS:1542.
50 Amsterdam District Court 14 July 2021, ECLI:NL:RBAMS:2021:3617, paras. 18.30 and 28.3.
51 Parliamentary Documents II 2022-2023, 36 212, No. 3 (Explanatory Memorandum), p. 4.
52 Amsterdam Court of Appeal 29 April 2022, 200.308.490/01 (docket decision).
62 The Hague Court of Appeal 5 April 2022, ECLI:NL:GHDHA:2022:1316, para. 3.4.3.
64 See e.g. The Hague District Court 6 October 2021, ECLI:NL:RBDHA:2021:10737 (Clara Wichmann et al./State of the Netherlands).
66 See e.g. Amsterdam District Court 3 March 2021, C/13/681190 / HA ZA 20-299.
69 Supreme Court of the Netherlands 26 February 2010, ECLI:NL:HR:2010:BK5756 (Stichting Baas in Eigen Huis v. Plazacasa), para. 4.2. See also Supreme Court of the Netherlands 9 April 2010, ECLI:NL:HR:2010:BK4549 (Clara Wichmann et al. v. SGP), para. 4.3.2; Supreme Court of the Netherlands 28 March 2014, ECLI:NL:HR:2014:766, paras. 3.4.1 and 3.8.
70 Parliamentary Documents II 2017-2018, 34 608, No. 6, p. 18.
72 Supreme Court of the Netherlands 9 April 2010, ECLI:NL:HR:2010:BK4549, (Clara Wichmann et al. v. SGP), para. 4.3.2.
73 Oost-Brabant District Court 29 June 2016, ECLI:NL:RBOBR:2016:3383, para. 5.31.
119 Amsterdam District Court 28 October 2020, ECLI:NL:RBAMS:2020:5271, paras. 5.4-5.5; Midden-Nederland District Court 2 June 2021, ECLI:NL:RBMNE:2021:2142, paras. 2.8-2.9.
120 Parliamentary Documents II 2021-2022, 36 034. No. 3 (Explanatory Memorandum), p. 5.
121 Amsterdam District Court 28 October 2020, ECLI:NL:RBAMS:2020:5271, paras. 5.4-5.5; Midden-Nederland District Court 2 June 2021, ECLI:NL:RBMNE:2021:2142, paras. 2.8-2.9.
123 Minutes of the Senate 2022/21, nr. 35925-VI, p. 64.
124 Amsterdam District Court, 28 October 2020, ECLI:NL:RBAMS:2020:5271, paras. 5.23 and 5.24 referring to Supreme Court of the Netherlands 27 November 2009, ECLI:NL:HR:2009:BH2162 (WorldOnline), para. 4.8.1
125 The Hague District Court 14 April 2022, ECLI:NL:RBDHA:2022:3182.
129 Parliamentary Documents II 2016-2017, 34 608, No. 3 (Explanatory Memorandum), pp. 11, 12, 16.
134 See inter alia, Parliamentary Documents II 2016-2017, 34 608, No. 3 (Explanatory Memorandum), pp. 4, 10 and 48.
137 Parliamentary Documents II 2017-2018, 34 608, No. 6, p. 22 and No. 9, p. 7.
143 Amsterdam Court of Appeal 17 January 2012, ECLI:NL:GHAMS:2012:BV1026 (Converium), paras. 6.4.1-6.4.5.
144 Amsterdam Court of Appeal 13 May 2014, ECLI:NL:GHAMS:2014:1690 (DSB interim decision), para. 7.4.
147 Amsterdam Court of Appeal 17 January 2012, ECLI:NL:GHAMS:2012:BV1026 (Converium), para. 10.2.
149 Amsterdam Court of Appeal 16 June 2017, ECLI:NL:GHAMS:2017:2257 (Fortis/Ageas interim decision).
150 Amsterdam Court of Appeal 13 July 2018, ECLI:NL:GHAMS:2018:2422 (Fortis/Ageas), paras. 5.35-5.60.
152 Parliamentary Documents II 2016-2017, 34 608, No. 3 (Explanatory Memorandum), pp. 10 and 49.


158 Amsterdam Court of Appeal 12 November 2010, ECLI:NL:GHAMS:2010:BO3908 (Converium) interim decision), para. 2.9.


161 Parliamentary Documents II 2016-2017, 34 608, No. 3 (Explanatory Memorandum), pp. 5-6.

162 Parliamentary Documents II 2017-2018, 34 608, No. 6, pp. 15 and 16.


164 Parliamentary Documents II 2017-2018, 34 608, No. 6, p. 16.

165 Parliamentary Documents II 2017-2018, 34 608, No. 6, p. 16.

166 Parliamentary Documents II 2017-2018, 34 608, No. 6, p. 16.

167 A. Verheij, De Wet afwikkeling massaschade in collectieve actie en de begroting van personenschade, VR 2020/179, para. 4.2.


173 European Court of Justice 24 February 2022, ECLI:EU:C:2022:112 (Tiketa).

174 European Court of Justice 5 July 2018, ECLI:EU:C:2018:533 (FlyLAL), para. 43.


176 European Court of Justice 21 May 2015, ECLI:EU:C:2015:335 (CDC/Akzo), para. 24.

177 European Court of Justice 21 May 2015, ECLI:EU:C:2015:335 (CDC/Akzo), para. 50; European Court of Justice 5 July 2021, ECLI:EU:C:2021:604 (Volvo et al), para. 43.

178 European Court of Justice 12 September 2018, ECLI:EU:C:2018:701, paras. 32 and 33; European Court of Justice 28 January 2015, ECLI:EU:C:2015:37, para. 56.
personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016, C-159/83, para. 9.2.

228 Amsterdam District Court 30 June 2021, ECLI:NL:RBAMS:2021:3307, para. 7.28.
229 Amsterdam District Court 30 June 2021, ECLI:NL:RBAMS:2021:3307, para. 7.32.
231 Supreme Court of the Netherlands 20 December 2019, ECLI:NL:HR:2019:2006 (Urgenda/State of the Netherlands). See e.g. also the unanimous judgment of the German Bundesverfassungsgericht of 24 March 2021 (Neubauer/Germany).
235 See e.g. a similar claim brought by a union against a platform, but under the old regime, that is now pending in the Supreme Court: Advocate-General opinion to Supreme Court 17 June 2022, ECLI:NL:PHR:2022:578 (FNV/Deliveroo).
237 See e.g. the proposed Corporate Sustainability Due Diligence Directive (COM (2022) 71 final) and the Corporate Sustainability Reporting Directive (on which the co-legislatures of the EU recently reached political agreement and that is due to be published in final form shortly).
238 See e.g. https://ciff.org/priorities/climate-change/ (status as at 25 October 2022: USD 83.6 million in multi-year investment in litigation).
239 Supreme Court of the Netherlands 9 April 2010, ECLI:NL:HR:2010:BK4549, (Clara Wichmann et al. v. SGP), para. 4.3.2.
240 Supreme Court of the Netherlands 26 February 2010, ECLI:NL:HR:2010:BS5756 (Stichting Baas in Eigen Huis/Plazacasa), para. 4.2.
241 The Hague District Court 26 May 2021, ECLI:NL:RBDHA:2021:5339 (M浔edefensie et al./Royal Dutch Shell), para. 4.2.
243 Supreme Court of the Netherlands 21 December 2001, ECLI:NL:HR:2001:ZC3693 (Vereniging Juristen voor de Vrede et al./State of the Netherlands), para. 3.3.
244 See http://climatecasechart.com/non-us-case/smith-v-fonterra-co-operative-group-limited/ (reviewed on 25 October 2022).