

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

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Fourth Edition

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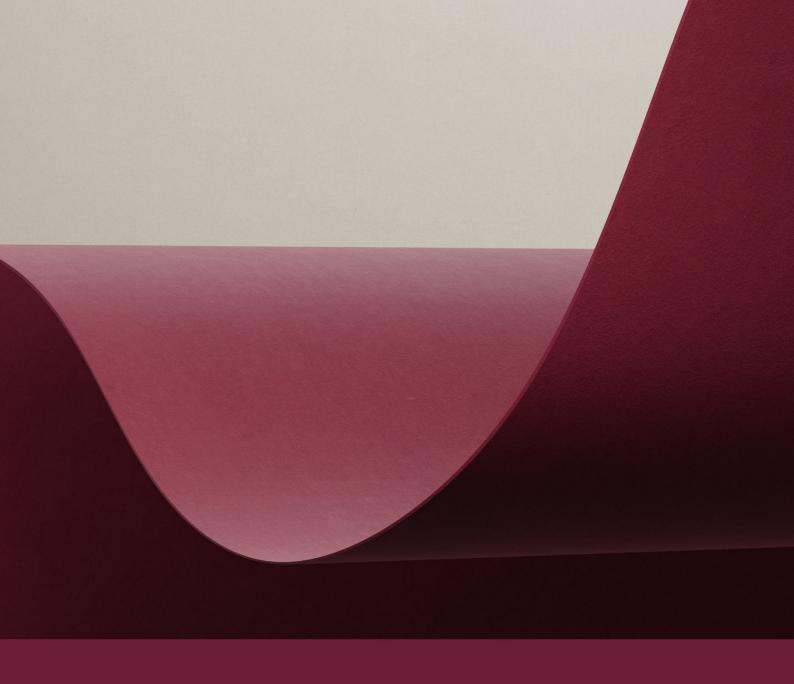
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ABBREVIATIONS AND DEFINITIONS

Abbreviation / Definition	Explanation
Affected persons	All the persons who are allegedly affected by a certain event or events
Association	Vereniging pursuant to Article 2:26 DCC
Beneficiaries	The persons entitled to compensation under a settlement agreement
Brussels I Regulation (recast)	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, <i>OJ L 351</i> , 20 December 2012
Claim Code	Dutch Claim Code 2019
CJEU	Court of Justice of the European Union
Constituency	The affected persons that have joined or are affiliated with a claim organisation
Damages Directive	Directive (EU) 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union, <i>OJ L</i> 349, 5 December 2014
DCC	Dutch Civil Code
DCCP	Dutch Code of Civil Procedure
ECHR	European Convention on Human Rights
Foundation	Stichting pursuant to Article 2:285 DCC
GDPR	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, <i>OJ L</i> 119, 4 May 2016
Injunctions Directive	Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJL 110, 1 May 2009

Lugano Convention	Convention on jurisdiction and recognition and the enforcement of judgments in civil and commercial matters, <i>OJ L</i> 339, 21 December 2007
Lugano Convention (old)	Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJL 319, 25 November 1988
Narrowly defined group	The group of persons that will be bound to the outcome of WAMCA proceedings if they do not opt out (or only if they opt in, as applicable), as defined by the court pursuant to Article 1018e(2) DCCP
NCC	Netherlands Commercial Court
NGO	Non-governmental organisation
RAD	Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, <i>OJ L</i> 409, 4 December 2020 – also known as Collective Redress Directive or CRD
Rome I	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJL 177, 4 July 2008
Rome II	Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, OJL 199, 31 July 2007
TFEU	Treaty on the Functioning of the European Union, <i>OJ C</i> 326,47, 26 October 2012
Unfair Contract Terms Directive	Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, <i>OJ L</i> 95, 21 April 1993
WAMCA	Resolution of Mass Damage in Collective Actions Act, <i>Bulletin of Acts and Decrees</i> 2019, 130
WCAM	Collective Settlement of Mass Damage Act, <i>Bulletin of Acts and Decrees</i> 2005, 340
3:305a DCC	Collective action provision generally applicable as of 1 January 2020, as amended by the WAMCA
3:305a (old) DCC	Collective action provision generally applicable until 1 January 2020



1 — INTRODUCTION

Chapter 1

INTRODUCTION

Collective actions and collective settlements continue to rise throughout Europe. The Netherlands has proven to be an attractive jurisdiction for claimants seeking collective redress. That appeal has been enhanced by the introduction of the Resolution of Mass Damage in Collective Action Act (*Wet afwikkeling massaschade in collectieve actie*; WAMCA) on 1 January 2020. 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.

Over five years since its introduction, and with the first government evaluation pending, the WAMCA continues to provide a popular way to resolve mass claims. It has resulted in dozens of court judgments and decisions that are reshaping the Dutch collective action regime. At De Brauw, we are honoured to be at the forefront of this development by assisting defendants in actions for damages and claim organisations in idealistic actions. 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 138.

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

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

This guide contains references to numerous WAMCA provisions, judgments and decisions. However, it is not intended to be exhaustive. We have chosen to focus on the elements of the WAMCA and related case law that we consider to be the most relevant in practice.

We have also included an English translation of the WAMCA as an Annex starting on page 146. This translation, along with all the other content in this guide, is for general information purposes only. The information in this guide does not constitute legal advice.

Please do not hesitate to contact us if you have any questions after reading this guide or if you would like to discuss how we can assist with a collective action or settlement.

Dennis Horeman and **Machteld de Monchy** (editors)

Research for the 4th edition was concluded on 1 August 2025.



2 - WHY WAMCA

Dennis Horeman

2.1 The drivers for the WAMCA

- 1. The 2020 legislative amendment to the collective action regime, known as the WAMCA, amended the pre-existing collective action mechanism in the Netherlands. There were several reasons why the legislature decided to change the Dutch collective action regime by introducing the WAMCA.
- 2. A first reason 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 reason was the desire to streamline collective litigation. Prior to the introduction of the WAMCA, there was no specific mechanism to deal with parallel collective actions and to prevent 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 (the narrowly defined group, which US lawyers would refer to as the 'certified class'). This results in a more efficient mechanism whereby the court consolidates all the collective actions relating to the same event and selects one claim organisation as the Exclusive Representative of all the affected persons.
- 4. A third reason 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 following 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 Origins of reinforcing collective legal protection (1960s onwards)

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.³ 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.⁴ 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.⁵ 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 the limitation period for the entire class under Dutch law. Importantly, Dutch law in general applies a low-key mechanism for interrupting limitation periods, with unilateral notice by letter sufficing. The Dutch Supreme Court accepted that this also extends to a claim organisation, so it can interrupt the limitation period for the entire class by a simple letter. ⁷ 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)

- 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. 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 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. 227);
- (b) proceedings were streamlined by combining multiple actions and by only allowing one collective action per event (chapters 4.2 and 4.3);
- (c) a summary review of the merits of the claim at an early stage of the proceedings was introduced to eliminate unfounded claims (chapter 5.7);
- (d) settlement is encouraged at several steps of the process (chapters 4.4 and 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. 178-179).
- 16. The government has commissioned an evaluation of the WAMCA, which was due to be carried out in 2024-25. In June 2025, academic researchers published an initial report focusing almost exclusively on the representativeness requirement in idealistic actions. The researchers found that the application of the representativeness requirement to idealistic claims varied from case to case, leading to uncertainty. They also found that courts in several other jurisdictions test the representativeness of claimants in idealistic actions. However, the content of these tests varies from one jurisdiction to another. The government has informed the House of Representatives and the Senate that it will respond to the report at a later date. A second academic report, including an evaluation of the application of the WAMCA in collective actions for damages, is expected to be published later in 2025.



3 - ACTORS IN A COLLECTIVE ACTION

Chapter 3

ACTORS IN A COLLECTIVE ACTION

Eelco Meerdink & Remco Kloppenburg

3.1 Introduction

17. This chapter discusses the roles of the actors in a collective action: the affected persons (3.2); the claim organisation (3.3); the third-party funder (3.4); the defendant (3.5); the technical expert (3.6); and the judiciary (3.7).

3.2 Affected persons

- 18. 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. If the court finds the claim organisation and its claims admissible, it establishes the narrowly defined group of persons that will be bound by the outcome of the WAMCA proceedings unless they opt out (or, with respect to persons in the narrowly defined group who are based abroad, opt in – nos. 76-80). 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.
- 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 their interests 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. 137-144). 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 affected parties. ¹¹
- 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 (chapter 7).
- 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 interests of a very broad group of affected persons more effectively.

3.3 | Claim organisation

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 (chapters 5.3 and 5.4). 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 claim organisations initiate collective actions about the same event or events with similar factual and legal questions. In that case, the different proceedings are treated as one case and in principle one of the claim organisations 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 (nos. 65-72).

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. 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 Milberg, 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. 13

- 25. When discussing third-party funders, legislative history refers to the upside as well as the downside of commercial litigation funding. 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.
- The legislature seems to acknowledge both the positive and the negative potential of 3:305a(2)+(3) DCC 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 (as amended following the RAD) and the Claim Code (Principle III relating to external financing). The safeguards relate to, for instance, limiting the influence of the thirdparty funder and preventing that a collective action underprotects the interests of the
 - 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.

Commission to regulate third-party funding at the EU-level (no. 169).

constituency and overprotects the interests of the third-party funders. In a resolution adopted on 13 September 2022, the European Parliament called on the European

3:305a(2) DCC 3:305a(2)(c) DC 26.

28. When determining a return on its investment, the third-party funder should take into account that the 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 the WAMCA proceedings against TikTok, the Amsterdam District Court announced in an obiter how it intended to deal with the funder's fee if the proceedings reach the compensation stage. The court stated that the funder's fee would be deducted from the distributed damages and that it would cap the total funder's fee at a maximum of five times the amount invested. The court also provided

conditions it intends to impose on the distribution of any compensation and ruled that any undistributed compensation would flow back to or remain with the defendant. Finally, courts have considered on several occasions that claim organisations may retain up to 25% of the compensation paid per person to pay their funder. 16

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 actions (except for summary proceedings), shows that this is also true under the WAMCA.
- 30. The WAMCA's focus on protecting the interests of affected persons and providing effective remedies creates risks for potential defendants. In contrast to individual actions, the WAMCA provides an attractive regime for smaller amounts of damages. These are damages that might not otherwise have been sought in individual actions. The possibility to claim for damages in an opt-out collective action also makes it attractive for claim organisations and funders to bring claims. The WAMCA thus increases the potential exposure for defendants.

1018i DCCP

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 (chapter 7).

1018I DCCP

- 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 manifestly unfounded, 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 a summary of the writ of summons and most court decisions and judgments are published in the central register for collective actions, which can easily be accessed online.¹⁷

1018d(1) DCCP 1018k DCCP 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. As a result, the defendant can only be confronted with one WAMCA collective action relating to the same event or events. 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. The court's approval of a collective settlement is followed by an opt-out opportunity that applies to all beneficiaries.

1018e(3) DCCP 1018c(5) DCCP 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 and claim organisations. The appointment of an Exclusive Representative means that the defendant faces streamlined proceedings in which it responds to the claim as defined by the court (nos. 65-72). 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 manifestly unfounded (chapter 5.7). These formal and substantive requirements provide the defendant with safeguards against manifestly unfounded claims (and the time and costs involved).

3.6 Technical expert

As in regular court proceedings, either party or the court may appoint technical experts to provide specialised knowledge relevant to the claims at hand. Their expertise can be instrumental in addressing complex issues that require detailed understanding beyond the typical scope of legal proceedings. Depending on the nature of the collective action, experts in fields such as environmental science, data analysis, competition economics, engineering, or financial auditing may be called upon to assist in the evaluation of evidence, the assessment of damages, or the clarification of technical matters. These experts can prepare reports, conduct analyses, and present findings that inform the court's understanding of the case. While not a primary actor like the claim organisation or defendant, technical experts contribute to the proceedings by offering insights that support the legal arguments and facilitate the court's decision-making process. Their involvement is determined by the specific requirements of the case and the discretion of the parties and the court.

3.7 Judiciary

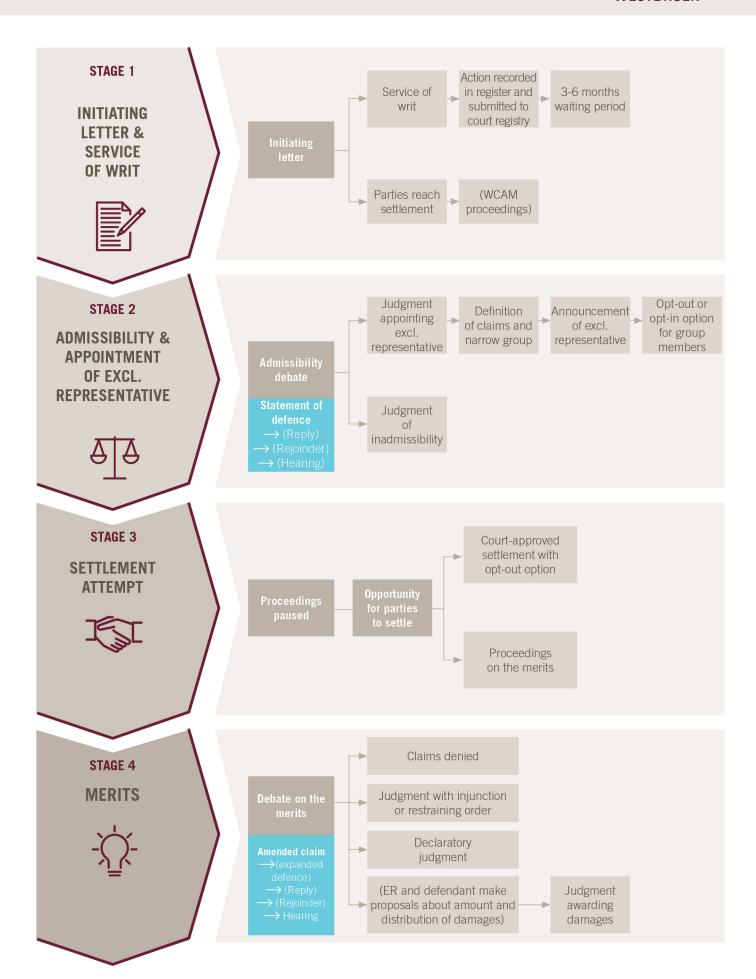
- 37. Collective actions can be initiated at any district court in the Netherlands. This will usually be the district court for the place where the defendant is domiciled (Article 4(1) Brussels I Regulation (recast)). There is no specialised court with exclusive jurisdiction over WAMCA claims. However, some judges are seen to specialise in WAMCA matters. 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.
- 38. 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 8th out of 141 countries in the World Justice Project Rule of Law Index 2024.

30r DCCP

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 jointly 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. WAMCA proceedings could arguably also take place before the NCC. Proceedings before the Dutch Supreme Court are in principle conducted entirely in Dutch.²⁰



4 - WAMCA PROCEEDINGS



Chapter

WAMCA PROCEEDINGS

Tim Kluwen

4.1 Introduction

- 40. A collective action under the WAMCA can be divided into four stages:
 - Stage 1: initiating letter and writ of summons (4.2);
 - Stage 2: admissibility, Exclusive Representative and opt-out (4.3);
 - Stage 3: settlement attempt (4.4);
 - Stage 4: proceedings on the merits and damages (4.5).
- 41. This chapter discusses the procedural rules that apply to all four stages in WAMCA proceedings in first instance, it will then discuss the temporal scope of the WAMCA (4.6) and appeal and Supreme Court appeal (4.7). This is followed by a discussion of joinder, third-party intervention and third-party proceedings (4.8) and the courts' approach to parallel proceedings (4.9). The chapter concludes with some brief remarks on summary proceedings and provisional claims (4.10) and default proceedings (4.11).
- 42. In practice, courts often deviate from procedural rules. This chapter therefore also highlights the daily practice of WAMCA proceedings, when applicable.

4.2 Stage 1: initiating letter and writ of summons

3:305a(3)(c) DCC

- 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 claims 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 and how 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. 180-182.
- 44. 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.

1018b(3) DCCP 99 DCCP

- 45. 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.²¹
- 46. In the summons, a wide range of relief can be sought, including injunctive relief, monetary or other damages, and declaratory relief.

1018c(1) DCCP

- 47. The writ of summons must comply with the general requirements applying to all writs of summons. In accordance with Article 1018c(1) **DCCP**, it should also contain:
 - (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 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.
- 48. If the writ of summons does not contain 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 or by making an additional submission. ²² The court could also declare the claim organisation inadmissible in its collective claim. ²³
- 49. The Supreme Court has ruled that Article 1018c(1) DCCP only applies to the writ of summons in first instance. Therefore, the writs in appeal and Supreme Court proceedings do not need to contain the elements of Article 1018c(1) DCCP.²⁴ The Court of Appeal of The Hague had previously come to the same conclusion.²⁵
- 50. Notably, the Court of Appeal of The Hague ruled that Article 1018c(1) DCCP does not allow the group of persons on whose behalf the claim organisation is acting, to be fundamentally changed after the summons in first instance has been issued. ²⁶ Arguably, the same goes for the other elements listed in Article 1018c(1) DCCP.

Similarly, the District Court of The Hague ruled that there is only limited room for an amendment of claim in WAMCA proceedings.²⁷

1018b(1) DCPP

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. See chapter 4.10 for more on summary proceedings.

1018c(2) DCCP

52. The claim organisation must file the writ of summons with the court registry within two days after the date of the writ of summons. It must simultaneously submit a summary of the writ to the public register for collective actions. The parties' names should, in principle, be visible in the register, as this information is crucial for other claim organisations to assess whether they want to bring their own collective action for the same event.²⁸

1018c(2) DCCP

- 53. Failure to timely submit the writ to the court registry and record a summary of 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.²⁹ If not, the court is likely to disregard a claim organisation's error in filing the writ.
- 54. The Supreme Court has ruled that the obligation to submit the writ to the court registry and publish a summary in the public register only applies to collective actions in first instance.³⁰

1018c(3) DCCP 1018d(2) DCCP 55. Registration in the public register for collective actions is a useful tool for informing both the persons the claim organisation claims to represent, as well as the general public, about the collective action. Registration also marks the start of a three-month period during which competing claims relating to the same event or events may be brought by other claim organisations. Claim organisations should be aware of this, as the WAMCA allows only one collective action per harm-causing event (no. 76). The three-month waiting period is mandatory; courts cannot set a different period. The Rotterdam and The Hague District Courts have ruled that the mandatory nature of the waiting period means that the court cannot hear motions during that time.³¹ However, the Midden-Nederland District Court did hear a motion for a temporary injunction before the waiting period had elapsed.³²

1018d(2) DCCP

56. A claim organisation may request the court to extend the three-month waiting period by a maximum of three months in order to file its own claim.³³ 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 only requested the extension in order to have more time to consider bringing an action, its request will be denied.³⁴ If the claim organisation requesting an

extension does not sufficiently substantiate why it needs more time, the court may refuse the extension request. 35 A request for an extension can also be refused if the court finds that the claim organisation applying for the extension has not yet done sufficient preparatory work for the action ³⁶ or that it does not yet meet the admissibility requirements of Article 3:305a DCC. 37 The court may also grant an extension shorter than three months.³⁸ Furthermore, in line with legislative history, the Amsterdam District Court on several occasions ruled that an extension only applies to the claim organisation that requested it. 39 The Amsterdam Court of Appeal reached a different conclusion. It ruled that the extension also applies to claim organisations who have not applied for an extension. 40 However, the Supreme Court confirmed one of the decisions of the Amsterdam District Court, ruling that the extension only applies to the claim organisation that requested it.41 The claim organisation that issues the summons after the applicable deadline has expired, is deemed inadmissible. The Amsterdam District Court ruled that this also applies if it is later established that the WAMCA does not apply. ⁴² In appeal, the Amsterdam Court of Appeal disagreed: a claim organisation cannot be deemed inadmissible in its claim on the basis of a provision that did not apply. 43

1018d(3) DCCP

57. The claim organisation that brings a competing claim must summon the defendant to procedurally appear in court four weeks after the potentially extended three-month period has expired. It is unclear whether this provision applies to all actions or only to competing actions. Current practice seems to suggest the latter; however, some claim organisations that were the first to bring an action regarding a certain event did summon the defendant to procedurally appear in court four weeks after the expiry of the waiting period. 44 If another provision of Dutch law prescribes a longer summons period, the four weeks period does not apply. 45

1018d(3) DCCP

58. If several claim organisations bring a collective action relating to the same event or events, these collective actions (including the first one⁴⁶) 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 (chapter 4.8).⁴⁷

1018d(1) DCCP

59. The court will only consolidate cases that relate to the 'same event or events' and that raise 'similar factual and legal questions'. Whether this is the case, needs to be assessed ex officio on a case-by-case basis. 48 In a collective action for damages, the Supreme Court ruled that the court must answer the question of whether the actions concern 'the same event or events' and relate to 'similar factual and legal issues' against the background of the objective of the WAMCA, which – in actions for damages – is to promote the efficient and effective collective resolution of mass damage. It ruled that a collective claim that is partly directed against other legal entities or is brought on behalf of a (partially) different group of affected persons than the first

collective claim, may still relate to 'the same event or events' and 'similar factual and legal issues'.⁴⁹

4.3 Stage 2: admissibility, Exclusive Representative and opt-out/opt-in

Admissibility

1018c(5) DCCP

- 60. To avoid a lengthy and costly debate on the merits of a claim that will ultimately not be upheld, Article 1018c(5) DCCP allows the defendant to initially defend only against the admissibility of the claim organisation and its claims. As a result, WAMCA proceedings usually consist of a separate admissibility phase followed by a substantive phase. ⁵⁰ In practice, the admissibility phase can be preceded by a party debate and judgment on the court's jurisdiction. ⁵¹ It may also be the case that the court must first decide on the applicability of the WAMCA itself, if it is unclear whether the alleged wrongdoing took place within the temporal scope of the WAMCA. In the admissibility phase the court will subsequently assess whether:
 - (a) the claim organisation meets the 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) the collective claim after summary examination does not appear to be manifestly unfounded at the time the proceedings were initiated.

The admissibility requirements will be discussed in detail in chapter 5.

Claim organisations must comply with the admissibility requirements on an ongoing basis. However, it is subject to debate as of when they must do so. From the system of the WAMCA and some case law, it seems to follow that the claim organisation has to comply with the admissibility requirements at least from the date of the summons. This would indeed allow the defendant to effectively defend against the claim organisation's admissibility. However, many courts including the Amsterdam Court of Appeal, have held that claim organisations only have to comply with the admissibility requirements at the end of the admissibility phase of the proceedings in first instance, or even in appeal. On the other hand, an *obiter* from the Supreme Court seems to suggest that the admissibility requirements should indeed be met at the time the writ of summons is served. The Supreme Court is likely to rule on this issue definitively in late 2025 or early 2026.

1018c(1) DCCP 1018c(4)-(5) DCCP 62. The claim organisation must set out (and, if contested with reasons by the defendant, prove) that the admissibility requirements are met. 55 This also follows from the court's ex officio review of the admissibility requirements. The claim organisation must address these preliminary issues in its writ of summons, while the defendant may address the admissibility of the claim organisation and its claims in a statement of defence. The regular period for filing a statement of defence is six weeks, subject to alternative directions from the court and one or potentially more extensions. In regular proceedings, this period usually starts to run from the date of the defendant's procedural appearance in court. However, Article 1018c(4) DCCP provides that the court shall give the defendant a period of six weeks from the day the waiting period or extended waiting period has expired to submit its defence. If the date set by the claim organisation for the defendant's first appearance is after the expiry of the waiting period (this could happen for example if a defendant is domiciled outside the EU or on the basis of Article 1018d(3) DCCP if multiple claim organisations bring an action for the same event), the court will postpone the date on which the period for lodging a statement of defence starts to run. In its defence, the defendant is not required to respond to the merits of the case and may limit its defence to the admissibility of the claim organisation and its claims. If more than one claim organisation has instituted proceedings, the defendant may choose to file a single statement of defence responding collectively to the writs of summons of all the claim organisations. ⁵⁶ The defendant may attach exhibits to its defence and may generally submit additional exhibits up to two weeks before an oral hearing.

1018c(1) DCCP 1018l(1) DCCP

- The rules of procedure provide that following the statement of defence, the court may allow for a reply and rejoinder. By default, the court will then schedule an oral hearing to discuss admissibility and potentially the appointment of an Exclusive Representative. This can be weeks to months after the final written submission. After that oral hearing, the court will usually render a judgment on admissibility in which it can declare all or some of the claims inadmissible. ⁵⁷ Such judgment is often rendered a few months after the oral hearing. If the court finds claims inadmissible because they are manifestly unfounded, 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 unfounded claims. ⁵⁸ 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.
- 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 admissibility 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. ⁵⁹ 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). Moreover, a procedural order may also be established without a prior hearing.⁶⁰

Appointment of the Exclusive Representative

1018e(1) DCCP

- 65. If the court finds the claim organisation and its claims admissible, it will appoint the claim organisation as Exclusive Representative. If more than one claim organisation brings a claim for the same event and complies with the admissibility 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.
- 66. In the first collective action with multiple claim organisations in which the court had to appoint an Exclusive Representative, the Amsterdam District Court found that the circumstances mentioned in Article 1018e(1) DCCP are not exhaustive. With respect to the claim organisations in this data protection action, the court also considered: inhouse knowledge of and experience with data protection laws and regulations; other work for the individuals on whose behalf the foundations advocate; support from civil society organisations; funding; independence; specialist knowledge and experience of the lawyers; and knowledge of and experience with the WAMCA.⁶¹
- 67. 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. 62 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. Practice so far indicates that all parties to the proceedings are generally given the opportunity to present their views on the selection of the Exclusive Representative.

1018e(2) DCCP

68.

In addition to appointing the Exclusive Representative, the court will determine the content of the claim and the narrowly defined group of persons whose interests the Exclusive Representative will represent. 63 It will also consider whether another court is geographically better placed to hear 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 will be binding on all persons within that group - except for those domiciled in the Netherlands who have opted out, and only with respect to those domiciled abroad if they have opted in (as explained in nos. 73-77). In defining the group, the courts appear to be careful to avoid open-ended or forward-looking class definitions. In the collective action against Temper on issues of labour law, the Amsterdam District Court limited the narrowly defined group to persons who worked or had worked through Temper before the date of the judgment in which the court established the narrowly defined group, thus excluding those who used Temper after that date. 64 The Amsterdam District Court in TikTok also limited the relevant period for persons to qualify as members of the narrowly defined group. 65 In *Dieselgate* proceedings under Article 3:305a (old) DCC, the Amsterdam District Court did not allow the claim organisation to act on behalf of the interests of yet unknown potential future affected persons. Proceedings for an undefined group would be too complicated and would hinder a proper debate on the claims. 66

1018e(3) DCCP

69. In the remainder of the proceedings, the Exclusive Representative acts on behalf of all the persons in the narrowly defined group and on behalf of the other claim organisations. Although 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 submissions. Relevant factors in the court's assessment in this regard include the number of claim organisations and whether they represent the interests of persons similar to those originally represented by the Exclusive Representative.⁶⁷

1018e(4) DCCP

70. The court may appoint more than one Exclusive Representative if the nature of the collective action or of 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 intention of the legislature is to allow for two Co-Exclusive Representatives. ⁶⁸ Co-Representatives could be appointed, for example, 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 *Temper*, the Amsterdam District Court jointly appointed two large Dutch labour unions as Exclusive Representatives because the unions had submitted the same claims in a single writ of summons and were assisted by the same lawyers. ⁶⁹ The Oost-Brabant District Court made the same decision in another case brought by these unions. ⁷⁰ In the action against TikTok, the Amsterdam District Court appointed one claim

organisation as Exclusive Representative of underage TikTok users and another claim organisation as the Exclusive Representative of adult TikTok users.⁷¹

1018e(1) DCCP

- 71. The WAMCA provides that the court's decision designating an Exclusive Representative cannot be appealed. Further guidance on this appeal ban is expected from the Amsterdam Court of Appeal in 2025, when it delivers its judgment on the collective actions against TikTok.
- 72. Courts in practice do not always or only partially apply Article 1018e DCCP. This is particularly the case in collective actions with an idealistic purpose. ⁷² See for example the collective action about noise pollution from Schiphol Airport before the District Court of The Hague. In this case, the court found the claim organisation and its claims admissible, but did not establish a narrowly defined group, because it found that (i) there was no clear-cut group of residents consistently experiencing a particular noise level, (ii) reducing noise exposure for one group could potentially result in an increase for another group (waterbed effect), and (iii) the claim organisation also advocated for the interests of residents facing potential disturbances. Considering the nature of the claim, the court also saw no reason to allow opt-out. ⁷³

Opt-out and opt-in for persons in the narrowly defined group

1018f(1) DCC

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 – opting out in advance is not possible. They can do so by submitting an opt-out notice to the court registry within a period set by the court. Surprisingly, in a collective action against Vattenfall the Amsterdam District Court ordered that those wanting to opt-out had to prove to be part of the narrowly defined group. The opt-out period will be at least one month starting from the date of the announcement. In practice, courts often set a period of two to four months. 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, these persons can interrupt the limitation period for their claims individually, within six months after their opt-out.

1018f(1) DCCP

74. 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 – like the Amsterdam District Court did with regard to some of the claims in the collective action against Temper. ⁷⁶

1018f(5)-(6) DCCP

75. 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, because 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. There is case law denying these requests⁷⁷ and case law granting these requests.⁷⁸ For proceedings brought on or after 25 June 2023 to which the RAD applies, courts can no longer apply an opt-out regime for persons in the narrowly defined group who are based abroad (chapter 9). Those persons can only opt in to the proceedings and in doing so are obliged to state that they are not individually or collectively engaged in similar proceedings in another EU/EEA Member State.

1018f(4) DCCP 1018k DCCP

- 76. 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 and that persons who opt out from a collective action may later only pursue legal action against the defendant on an individual basis.
- 77. When courts do not apply Article 1018e DCCP (no. 72), they often also refrain from applying Articles 1018f and 1018g DCCP.⁷⁹ Sometimes the parties explicitly agree to this.⁸⁰ If the court does not offer the possibility of opting out or opting in, the judgment is arguably not binding on the persons on whose behalf the claim organisation is acting.

Notification

After the court has declared the claim organisation and its claims admissible, it determines the contents of the claim and the narrowly defined group, appoints the Exclusive Representative and sets the opt-out (or opt-in) period – as discussed before. Since the outcome of the proceedings will be binding on all group members domiciled in the Netherlands unless they have opted out and on all group members domiciled abroad who have opted in, every effort must be made to inform them of the proceedings and their opportunity to opt out or opt in at this stage. The WAMCA therefore contains several notification and publication requirements, which the court may further flesh out.

1018f(2) DCCP

79. The relevant judgment will be made available at the court registry. The Exclusive Representative must arrange for the entry of these judgments in the public register for collective actions (in practice the registry of the court sometimes takes care of this). 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

80. 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. Courts often offer guidance by suggesting the text of the notification.⁸¹ Additionally, there may also be an opportunity to include a concise overview of the defendant's position regarding the claim.⁸²

1018f(3) DCCP

- 81. 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.
- 82. In *Vattenfall*, the Amsterdam District Court prohibited Vattenfall from contacting persons in the narrowly defined group about the proceedings or the subject of the proceedings during the opt-out period. 83 The Oost-Brabant District Court, on the other hand, saw no grounds for imposing a communication ban on the defendant. The court considered that the persons in the narrowly defined group would be informed in a clear and neutral manner about the proceedings and their choice to participate or not in the letter addressed to them and in the general announcement. The court ruled that the parties were free to communicate further with these persons. 84 Not much later, the Amsterdam District Court reached the same conclusion in another case and rejected a request for a communication ban because there was no legal basis for granting it. 85

4.4 Stage 3: settlement attempt

1018g DCCP

After appointing the Exclusive Representative, the court will stay the proceedings for a "short break" to give the Exclusive Representative and the defendant the opportunity to test a settlement. 86 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. 87 In idealistic actions too, courts sometimes refrain from staying the proceedings because these cases are generally unlikely to settle. 88 If the court does stay the proceedings, it would be sensible for the settlement stay period not to run in parallel with the opt-out/opt-in period. If this period only begins once the extent to which the opt-out/opt-in option has

been used is clear, the parties can take this into account in their settlement consultations by considering, amongst other things, whether the proceedings are expected to continue and how any opt-outs or opt-ins could affect the scope of a settlement.⁸⁹

1018h(1) DCCP 7:907(3)(b) DCC 1018h(2) DCCP 1018h(3) DCCP 1018h(4) DCCP 84.

If the parties reach a settlement that is supposed to bind affected persons on an optout basis, they are obliged to submit their settlement agreement to the court for
approval. The settlement agreement must in that case 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 also needs to publish the
refusal of the court to approve the settlement on its website. 90

1018h(5) DCCP

85. If the court approves the settlement agreement, the claim organisation, the defendant and the members of the narrowly defined group who have not opted out or who have opted in after the appointment of the Exclusive Representative, are bound to the agreement. However, the members of the narrowly defined group have the right to optout of the settlement agreement. This also applies to those residing abroad who have opted in after the appointment of the Exclusive Representative. The relevant provisions governing the opt-out opportunity after the appointment of the Exclusive Representative, including the notification requirements, apply.

1018h(6) DCCP

- The legislature intended to derogate from the ordinary rules for appeals, only allowing an appeal against the court's refusal to approve the settlement, brought directly to the Supreme Court and only by the petitioners jointly. However, the wording of the appeal ban in Article 1018h(6) DCCP does not appear to align with the legislature's intent. It fails to explicitly deny the possibility of appealing to a Court of Appeal. Also, with regard to the limited Supreme Court appeal, it refers to 'parties', where it should probably refer to 'parties to the settlement' or 'petitioners'
- 87. The WAMCA settlement will be discussed in more detail in chapter 6.

| Stage 4: proceedings on the merits and damages

1018g DCCP

4.5

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.

- 89. Following the defendant's statement of defence on the merits, 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 two to six months after the last written submission. At the hearing, which usually lasts one day, the parties will be allowed to present their case and reply to the other party. The court will be active in posing questions.
- 90. The rules of procedure provide that the court shall deliver its judgment six weeks after the oral hearing. In practice, this is usually three to six months after the hearing or even later. The judgment is likely to be a final judgment.

1018i DCCP

91. If the collective claim pertains to damages and the court sees reason to award the claim, it will need to determine the amount of damages. To do so, the court may order one or more experts to report on relevant matters and order 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.

1018k(1) DCCP

92. 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 court judgment. The affected persons may include persons who have not necessarily suffered harm themselves, but who have obtained the claim for damages.

1018k(2) DCCP

93. If a person in the narrowly defined group that would be bound by the court decision is not aware of its damage at the time of the announcement of the opt-out 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.

1018j DCCP

94. Unless the court decides otherwise, notice of the judgment awarding or refusing damages (or approving or refusing a settlement) must be given as soon as possible by ordinary mail to the known persons for whose benefit the collective damages have been awarded or refused. This notice must also be announced as soon as possible in one or more newspapers designated by the court and be published on the website of the claim organisation and in the public register for collective actions. The content of this notice should enable persons to easily find out whether they are eligible for compensation and, if so, how they can claim it.

1018I(2) DCCP

95. Finally, if the court has established a compensation scheme, its judgment may include a cost award deviating from the ordinary rules by ordering the defendant to pay more than the standardised costs.

4.6 Temporal scope

- 96. 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. 91 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. 92 In the "theoretical situation" that 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. 93 For determining the temporal scope, the Amsterdam Court of Appeal decided that one should refer to the initial summons in the first instance. 94
- 97. The application of the temporal scope of the WAMCA has raised questions in many cases. Claim organisations tend to interpret the provisions on the WAMCA's temporal scope in such way that the WAMCA applies to all their claims so that they can claim damages, while defendants often seek the opposite. As a result, the temporal scope of the WAMCA is a hotly debated issue. In assessing the temporal scope of the WAMCA, courts have taken the events as alleged by the claim organisation as a starting point. However, the alleged events must be disregarded if a summary assessment shows that they did not take place or cannot give rise to liability. In making the assessment that must be made in this context, the court must take into account not only the arguments of the claim organisation, but all relevant aspects of the case available at this stage, including the defendant's objections. 95
- 98. Extensive debates in many cases have led to divergent case law. Two elements of the WAMCA's temporal scope are key to this debate and the case law resulting from it: (i) the definition of 'the event or events giving rise to damage' and (ii) the definition of a 'series of events.'
- 99. On 11 March 2022, the Supreme Court handed down a decision on the temporal effect of the WAMCA. 96 It was held that the WAMCA applied to the intended collective action in the case at hand, because the collective action itself was not filed before 1 January 2020 and there was no indication that the collective claim (exclusively) relates to an event or events that took place before 15 November 2016.

The interpretation of "(exclusively)" is unclear and the decision is silent on what the precise relevant acts are and when there is a relevant "series of events".

- 100. In several *Dieselgate* judgments, the Amsterdam District Court provided some early guidance on the meaning of the term "event" in applying the provisions establishing the WAMCA's temporal scope. ⁹⁷ It held that the creation of the alleged 'defeat device' was the event causing rise to damage. However, the Amsterdam Court of Appeal overturned the Amsterdam District Court's interpretation of the WAMCA's temporal scope. ⁹⁸ The Court of Appeal looked at the common denominator of the collective claims and ruled that the placing on the Dutch market of the vehicles with the alleged 'defeat device' was the relevant event. This ruling has been appealed to the Supreme Court.
- 101. The difference in interpretation between the Amsterdam District Court and the Amsterdam Court of Appeal in the *Dieselgate* matters is illustrative for the unpredictable outcome of the application of the WAMCA's temporal scope by lower courts. Reviewing case law on the temporal scope of the WAMCA, three things stand out next to the unpredictable and divergent outcomes. 99 First, courts generally do not hesitate to apply Article 3:305a (old) DCC to part of the claims and the WAMCA to part of the claims in the same proceedings. 100 Second, the temporal scope of the WAMCA should be assessed per claim per defendant, as the underlying events may be different. 101 Third, courts continue to struggle with collective claims relating to allegedly harmful conduct taking place over a longer period of time: is this one event or a series of events? 102
- The debate on the temporal scope of the WAMCA could continue for a while, but it could also wind down rather quickly for a number of reasons. As time passes, the cut-off date of 15 November 2016 becomes more and more distant. This makes it increasingly unlikely that the WAMCA's temporal scope will be an issue in a new collective action. Additionally, the Supreme Court may provide valuable guidance in the pending *Dieselgate* matter in which it is asked to rule on the temporal scope of the WAMCA. Last but not least, the legislature has recently amended the temporal scope of Article 3:305a DCC, as amended by the WAMCA. As of 1 July 2025, the 15 November 2016 restriction will no longer apply to collective actions within the scope of the RAD (see also no. 362). 103
- 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 a *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

337 DCCP 1018e(1) DCCP

- 104. The admissibility phase of WAMCA proceedings results in a judgment declaring the claim organisation or its claims either admissible or inadmissible. A judgment of inadmissibility can be appealed to a Court of Appeal. If the Court of Appeal agrees with the district court, its judgment can in principle be appealed to the Supreme Court for a review on limited grounds only. If the district court finds that the claim organisation and its claims are admissible, its judgment will qualify as an interim judgment. An 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 (no. 71).
- 105. Unless the claim organisation withdraws its claims (e.g. following an out-of-court settlement), the merits phase of WAMCA proceedings will result in a final judgment granting or dismissing the claim or a decision approving or refusing to approve a collective settlement. If the district court grants or dismisses the claim, both parties can appeal to a Court of Appeal. The possibilities to appeal the court's decision to approve a settlement or its refusal to do so are restricted (no. 244).
- 106. The WAMCA does not contain any provisions on appeal or Supreme Court appeal procedure, as the Supreme Court has observed. ¹⁰⁶ Legislative history is also silent on this point. While the legislature might introduce rules governing WAMCA appeal and Supreme Court appeal proceedings at some point, for now it explicitly leaves it up to the Courts of Appeal and the Supreme Court to decide how to apply the WAMCA. ¹⁰⁷ The Amsterdam Court of Appeal ruled that the ordinary appeal procedure should therefore be applied, although deviations may be necessary if required by the purpose, system and/or structure of the WAMCA procedure. ¹⁰⁸ Questions have mainly arisen on the following three issues regarding the application of the WAMCA in appeal and Supreme Court appeal proceedings.
- 107. The first issue is the extent to which the Court of Appeal or the Supreme Court should redo the work of the District court. On the admissibility of the claim organisation, the Court of Appeal of The Hague has ruled that whether a claim organisation fulfils the requirements of Article 3:305a(1)-(3) DCC, and is thus admissible in its claims concerns access to the public court and is therefore a matter of public policy. The

court must therefore always examine these requirements of its own motion, but it is not obliged to conduct a separate (factual) investigation into whether the claim organisation is (still) admissible in its claims, if there are no indications that there has been a change in relation to the proceedings in first instance. The court added that the legislative history of the WAMCA does not indicate that the legislature intended to deviate from this general rule and that the court should nevertheless always fully reexamine the admissibility of the claim organisation on appeal. The Supreme Court, however, seems to take a different approach. It noted in an *obiter* that the information for the court to rule on the admissibility of a claim organisation and its claim need only be included in the writ in first instance. The court in first instance will assess the admissibility of the claim organisation on the basis of the information in the writ, while the Court of Appeal and the Supreme Court will only review this assessment, the Supreme Court seemed to note. The court is seemed to note.

- With regard to the appointment of the Exclusive Representative in appeal proceedings, the case law of the Court of Appeal of The Hague seems to be less consistent. In one case, the court reappointed the claim organisation that had been appointed Exclusive Representative in first instance, because it found that there were no indications of changed circumstances. ¹¹¹ In another case, the Court of Appeal of The Hague and the parties agreed that there was no need to (re)appoint an Exclusive Representative, because the court submissions had already been submitted and all claim organisations were assisted by the same lawyer. ¹¹² In the same *obiter* referenced in no. 107, the Supreme Court noted that the appointment of the Exclusive Representative takes place in first instance and that no appeal is allowed against the appointment. The information necessary for the appointment of the Exclusive Representative need therefore only be provided in first instance. From this *obiter*, it can be inferred that the Court of Appeal and the Supreme Court will not appoint an Exclusive Representative.
- The second issue relating to the application of the WAMCA in appeal and Supreme Court appeal relates to Article 1018c(1), (2) and (3) DCCP. Article 1018c(1) and (2) DCCP concern the contents of the writ of summons, registration with the court registry and the publication of a summary of the writ in the public register for collective actions. Article 1018c(3) DCCP stipulates that the court should stay the proceedings for three months following the publication of the action in the central register. Case law diverged on the question whether these provisions should be applied in appeal proceedings. ¹¹³ In the *obiter* referenced above, the Supreme Court has now made clear that Article 1018c(1), (2) and (3) DCCP only apply in district court proceedings. That follows from the statutory wording and is in line with the purpose of these provisions.
- 110. A third issue concerning the WAMCA and appeal proceedings that has prompted questions arises when a case reaches the Court of Appeal before a debate on the merits has taken place at the district court level. In several WAMCA cases, the Amsterdam Court of Appeal has accepted an exception to the rule that Courts of

Appeal cannot remand a case to the District court if they have ruled that it should proceed when the district court discontinued the case. 114 In these cases, the Court of Appeal ruled that remanding the case was in line with the Supreme Court's case law in similar situations, where the court in first instance had not assessed the merits of the claim on purely procedural grounds. The Amsterdam Court of Appeal added that remanding the case to the district court is also in line with the special nature of WAMCA proceedings, which allow for a bifurcation into admissibility and merits phases. Furthermore, a debate on the merits of the case in two instances benefits the depth of the debate and offers all parties the opportunity to utilise the remedies available on appeal. According to the court, this ensures that as far as possible, all parties can accept the outcome, which is particularly important in collective actions. The court acknowledged that remanding the case to the district court would delay the proceedings and would result in additional costs for the claim organisation. However, the court found that this did not constitute a sufficiently compelling interest on the part of claim organisation to keep the case before the Court of Appeal. This decision is in line with recent case law under the previous collective action regime of Article 3:305a (old) DCC. 115

4.8 | Joinder, third party intervention and third-party proceedings

217 DCCP 118 DCCP

- 111. 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.
- 112. Case law shows that joinder in WAMCA proceedings is possible. However, the system of the WAMCA limits the possibilities for joinder on the side of the claim organisation. Several courts have rejected requests by claim organisations to join on the side of the claim organisation that brought the collective action. This has not been allowed, because the WAMCA allows claim organisations to bring their own collective action within the extendable period of three months following the registration of the collective action of the first claim organisation in the public register. Allowing joinder on the claimant's side would disrupt this deliberately established system, and would among other things result in the circumvention of the admissibility test. Also with reference to the system of the WAMCA, the District Court of The Hague rejected a request for joinder by an affected person on the side of the claim organisation. The court held that the system of the WAMCA does not allow affected persons to be parties to the proceedings in addition to the claim organisation. It cited legislative history stating that the WAMCA assumes

proceedings between a claim organisation on the one hand and a defendant on the other, in which affected persons are not parties. 117

113. Intervention and joinder on the side of the defendant seem to be less restricted. In fact, joinder on the side of the defendant has become quite common recently. Case law shows that individual persons, potentially belonging to the narrowly defined group, can be allowed to join on the defendant's side. The same applies to claim organisations. However, in addition to meeting the requirements for joining, courts have ruled that claim organisations must also meet the admissibility requirements of Article 3:305a DCC, if by joining they are seeking to protect the interests of other persons. The Supreme Court is expected to rule in late 2025 on the application of art. 3:305a DCC to requests for joinder. Intervention has also been allowed, but motions for intervention are filed less frequently.

210 DCCP

114. 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. 121

4.9 | Parallel proceedings

1015(1) DCCP 1018m(1) DCCP

- 115. 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. 122
- Practice shows a mixed picture as to the willingness of courts to stay individual proceedings (either individually brought or bundled through e.g. assignments or mandates) pending at the same time as WAMCA proceedings. For example, several district courts stayed individual proceedings to await a judgment of the Amsterdam District Court in proceedings to which the WAMCA potentially applied and which involved the same issues of fact and law, in order to determine whether the individual claimants would fall within the narrowly defined group. 123 Once the Amsterdam District Court had ruled that the WAMCA did not apply to the collective action, 124 the individual proceedings were resumed even though this decision of the Amsterdam District Court was appealed. 125
- 117. The Amsterdam District Court, on its part, refused to stay mass claim proceedings based on assignments while WAMCA proceedings with similar claims were

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. 126

- Relatedly, the Court of Appeal of The Hague¹²⁷ confirmed a decision of The District Court of The Hague¹²⁸ to allow individual claims to proceed alongside a collective action in the same proceedings. The District Court of The Hague 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. These decisions contrast with previous case law of the District Court of The Hague declaring individual co-claimants inadmissible.¹²⁹ In early 2025, the District Court of The Hague seemed to reverse course by announcing in an *obiter* that it will from now on always declare all individual claimants inadmissible in all proceedings in which a claim organisation brings collective claims under the WAMCA.¹³⁰
- 119. The Midden-Nederland District Court ruled that claims brought by individuals within the same writ of summons as a WAMCA claim were admissible, but stayed the proceedings with regard to those claims. ¹³¹ In another case, the Midden-Nederland District Court declared the claims of individual co-claimants admissible and proceeded to consider them, primarily because these co-claimants did not belong to the group of people whose interests the claim organisation sought to protect. ¹³² A sub-district court judge at the Gelderland District Court ruled that individual claims and WAMCA claims that have been brought in the same writ of summons, should be heard by the same judge. ¹³³
- 120. Parallel proceedings could also arise within the same action if the claim organisation in WAMCA proceedings were to act simultaneously on the basis of Article 3:305a DCC and as a representative on the basis of mandates or powers of attorney. However, it is clear from case law that this is not permitted: a claim organisation can either protect the interests of other persons by acting as a representative on the basis of mandates or powers of attorney or it can bring an action on the basis of Article 3:305a DCC. These litigation options cannot be combined in the same proceedings. 134

4.10 | Summary proceedings and provisional claims

1018b(1) DCCP

As mentioned in no. 48, not all WAMCA rules apply in summary proceedings. Article 1018c(2) DCPP stipulating the contents of the writ of summons is the only provision of the WAMCA's procedural framework laid down in Title 14A Book 3 DCCP that applies in summary proceedings. The admissibility requirements of Article 3:305a DCC do however apply. 135 In practice, courts indeed declare claims in summary proceedings inadmissible on the basis of Article 3:305a DCC. 136

223 DCCP 1018c(3) DCCP Instead of initiating summary proceedings, claim organisations could file a provisional claim in pending WAMCA proceedings. In a provisional claim, the claim organisation can ask the court to grant an injunction for the duration of the proceedings. It is unclear whether courts should apply the three-month waiting period to the provisional claim. The District Court of The Hague ruled that the three-month period is mandatory and that it should therefore also apply to the provisional claim. The Midden-Nederland District Court, on the other hand, waived the three-month waiting period. Considering the similarities between a provisional claim and summary proceedings, it found that the statutory regulation left room for deviation from Article 1018c(3) DCCP, which provides for the three-month waiting period. The provides for the three-month waiting period.

4.11 Default proceedings

139 DCCP

- 123. If a defendant has been duly summoned but fails to appear in the proceedings, the court will still have to assess the admissibility of the claim organisation and its claims against the absent defendant. After all, courts should apply the admissibility requirements of the WAMCA of their own motion (no. 62). Similarly, courts in default proceedings tend to appoint an Exclusive Representative, establish the claim and the narrowly defined group, and specify the opt-out/opt-in formalities. 139
- 124. If the court declares the claim organisation and its claims admissible, it will consider the merits of the claims. The court will award the claims, unless they appear to be unlawful or unfounded.



5 - ADMISSIBILITY

Chapter 5

ADMISSIBILITY

Mirjam van Dam & Tim Kluwen

5.1

Introduction

1018c(5) DCCP 3:305a DCC

- After the writ of summons in WAMCA proceedings, it is up to the defendant to defend itself against the claim. Unless otherwise directed by the court or agreed in a procedural schedule, the defendant may first file a separate motion contesting the jurisdiction of the court. This is usually followed by a statement of defence on jurisdiction by the claim organisation and a hearing. If there are still claims over which the court has jurisdiction after the subsequent judgment, the defendant is set to submit its statement of defence. The WAMCA, however, allows the defendant to limit its first statement of defence to the admissibility of the claim organisation and its claims. If the defendant makes use of this option, the court will first rule on admissibility (stage 2 as discussed in chapter 4.3). Only if the court finds one or more claim organisations admissible in their claims, will there be a phase on the merits (stages 3 and 4 as discussed in chapters 4.4 and 4.5). In the admissibility phase, the court will examine, for each claim of each claim organisation, whether: 140
 - (a) the claim organisation meets the 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) the collective claim, after summary examination, does not appear to be manifestly unfounded at the time the proceedings were initiated.
- 126. The court assesses if needed of its own motion whether the admissibility requirements listed in no. 125 are met. 141 The claim organisation should therefore provide the court with the information necessary for it to test the admissibility requirements. As explained in no. 61, it is yet unclear whether the claim organisation needs to comply with the admissibility requirements from at least the moment the writ of summons was served, or only at the end of the admissibility phase of the proceedings. While most courts seem to take the latter view, an *obiter* from the Supreme Court seems to suggest that the admissibility requirements should be met at the time the writ of summons in first instance is served. 142 The Supreme Court is likely to rule on this issue definitively in late 2025 or early 2026.

- 127. The court should strictly apply the admissibility requirements of the WAMCA. This is consistent with the purpose of the admissibility requirements, and follows from legislative history and case law. 143 The legislature considered that the admissibility requirements serve as a filter to prevent commercially driven claim organisations from putting their commercial interests ahead of the interests of the persons it claims to represent. 144 That objective can only be achieved if the admissibility requirements are strictly applied. The stricter admissibility requirements under the WAMCA not only safeguard the interests of the represented persons, but also the interest of the defendant parties to be protected from "unwarranted and frivolous mass claims". 145 Preventing a commercial litigation culture is also in the interest of society-at-large, and preventing frivolous profit-driven claims should avoid an unnecessary burden on the capacity of the judiciary. 146
- This chapter discusses the admissibility requirements that apply to collective actions under the WAMCA. In line with the general focus of this guide, the focus of this chapter is on the admissibility requirements as they apply to claims against companies, rather than to idealistic claims against the government. Where a requirement applies only to claims within the scope of the RAD (as explained in no. 350), this is indicated.

1018c(5)(a) DCCP

5.2

Admissibility requirements of Article 3:305a(1) DCC

3:305a(1) DCC

- 129. Article 3:305a(1) DCC stipulates that:
 - The claim organisation must be a foundation or association.
 - The claim must seek to protect the interests of other persons, which the claim organisation advances in accordance with its articles of association.
 - The interests the claim organisation seeks to protect must be sufficiently similar.
 - The interests the claim organisation seeks to protect must be sufficiently safeguarded.

The claim organisation must be a foundation or associatior

A collective action under the WAMCA can 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 permitted an association under Canadian law to bring a collective action. This decision was not overturned by either the Amsterdam Court of Appeal or the Supreme Court, probably because the appeal was not directed at this particular decision. The Hague in another case. The court found that Article 3:305a DCC only allows proceedings by associations or foundations that have full legal

capacity under Dutch law. The court also considered the Supreme Court's judgment in the other case brought by the same association, noting that the Supreme Court had not been asked to rule on the association's admissibility.

2:26(3) DCC 2:285(3) DCC 131. Associations and foundations may not have a profit motive, which means that their collective actions may not be aimed at making a profit.

The claim must seek to protect the interests of other persons, which the claim organisation advances in accordance with its articles of association

- Article 3:305a DCC provides a basis for claim organisations to bring a claim that seeks to protect the interests of other persons. Article 3:305a DCC and the WAMCA do not apply if a claim organisation brings a claim to protect its own interests. Article 3:305a(1) DCC therefore stipulates that the collective claim must seek to protect the interests of other persons, which the claim organisation advances in accordance with its articles of association.
- 133. It follows from case law that this 'articles of association admissibility requirement' is threefold: (i) the claim must seek to protect the interests of other persons; (ii) the objective of protecting these interests should be included in the articles of association of the claim organisation; and (iii) the claim organisation must carry out activities to protect those interests.¹⁵⁰

1018c(1)(b) DCC

- 134. The interests the claim organisation seeks to protect should always be the interests of other persons (animal rights are interests attributable to persons ¹⁵¹). It is up to the claim organisation to make clear whose interests it seeks to protect. The court can only test admissibility requirements such as the similarity, representativeness and safeguard requirements if it is clear whose interests the claim organisation seeks to protect. ¹⁵² The other persons can include individual persons or legal entities, acting in a private or professional capacity. ¹⁵³ The Supreme Court has expressly determined that it is not necessary for the claim organisation to produce a list of the names of the affected persons. ¹⁵⁴ Claim organisations are not allowed to seek to protect the interests of its members or constituency only. They should seek to protect the interests of all persons that could be affected by the outcome of the proceedings. ¹⁵⁵ If the claim organisation only seeks to protect the interests of a small part of a group of affected persons, it should bring a group claim on the basis of for example assignments or mandates. ¹⁵⁶
- 135. Courts often interpret the objectives in the articles of association broadly. ¹⁵⁷ It is however not uncommon that claim organisations are declared inadmissible if the collective action seeks to protect interests other than those mentioned in their articles of association. ¹⁵⁸ In line with the claim organisation's duty to set out that it complies with the admissibility requirements, it is up to the claim organisation to produce its articles of association. ¹⁵⁹

136. With regard to the third element of the articles of association requirement, parties to collective action proceedings often disagree about the extent of the activities that the claim organisation should carry out in addition to filing the claim. If the mere filing of the collective action would suffice the activities requirement, this third element would become redundant as it would be satisfied in any collective action. See also nos. 171-174.

The interests the claim organisation seeks to protect must be sufficiently similar

- 137. Since collective action legislation was enacted in 1994, collective actions must serve to protect similar interests. The similarity requirement is one of the most fundamental admissibility requirements, if not the most fundamental. It is therefore often the subject of extensive debate between the parties to a collective action, resulting in a large body of case law. The application of the similarity requirement is often case-specific, but case law provides some general guidance. As the WAMCA has not amended the similarity requirement as included in Article 3:305a(1) DCC, case law rendered in proceedings under Article 3:305a (old) DCC remains relevant.
- 138. The Dutch Supreme Court has ruled that the similarity requirement is met if the interests that the action is intended to protect can be combined, thereby promoting efficient and effective legal protection for the affected persons. ¹⁶⁰ In other words, the similarity requirement means that it must be possible to combine the interests that the action seeks to protect. Only if the interests can be combined can it be said that these rights will be protected more efficiently and/or effectively. The latter part of the requirement is laid down separately in the WAMCA and will be discussed in chapter 5.6.
- 139. When considering whether interests can be combined, the court assesses, per claim, ¹⁶¹ whether the relevant questions of fact and questions of law are sufficiently common with respect to the affected persons. ¹⁶² While it is not necessary for the questions of fact and law to be identical, it is also not sufficient for the affected persons to merely have the same complaint. There must be sufficient commonality of questions of fact and law to enable the specifics of individual cases to be abstracted from to such an extent that the outcome would not differ if the claims were brought individually. ¹⁶³ As has been established in case law under Article 3:305a (old) DCC, a collective claim does not meet the similarity requirement if an assessment of individual circumstances is needed to award or reject the claims. ¹⁶⁴
- 140. Claims for damages are more likely to require an individual assessment than claims for declaratory relief. For this reason, collective claims for monetary damages were initially not allowed. It is not surprising, therefore, that in some WAMCA cases, district courts have ruled that claims for damages are inadmissible. These cases include the following.

- 141. In summary proceedings against the Dutch State, two unions sought an advance for damages suffered by healthcare workers who had contracted Long COVID. The court held that these claims could not be considered in a collective action, because they could not be assessed in a general sense, independently of the specific circumstances of each individual, as to whether and to what extent the damage suffered by the affected persons has been caused by the acts or omissions of the State. The court therefore dismissed the claims. 165 In the action against TikTok for alleged privacy infringements, the Amsterdam District Court held that the claims for non-material damages were not sufficiently similar because they depended so much on the individual situation of the persons in whose interests the claim organisation claimed to be acting, that these claims could not be brought in a collective action. ¹⁶⁶ The court made a preliminary ruling that the claims for material damages were sufficiently similar, but noted that the final answer to the question of the similarity of these claims could only be given during the merits. 167 In a collective action against ABN AMRO, that included claims for damages, the Amsterdam District Court ruled that the claim organisation was inadmissible because all of its claims were insufficiently similar. 168 The court found that the assessment of the claims would require the interpretation of agreements between ABN AMRO and its customers. To interpret the agreements, the court ruled that it would need to consider individual circumstances of the parties involved – the legal and factual questions were insufficiently common.
- However, in several collective actions for damages District Courts have found the interests the claim organisation seeks to protect to be sufficiently similar. These collective actions include claims for non-material damages in two personal injury cases. The first case relates to alleged personal injury from allegedly defective breast implants. The second case relates to alleged personal injury of women who had Essure implanted in their fallopian tubes as a method of sterilisation. In both cases, the court held that the individual circumstances of the affected persons could be sufficiently objectified and abstracted for the purpose of assessing the claim for damages and determining the amount of damages. In this regard, the courts noted that the nature and seriousness of the events giving rise to liability means that the adverse consequences relevant in this context are so obvious for a particular group, that the damages suffered by that group will be at least of a certain amount. To
- In the first collective action for damages resulting in a Court of Appeal judgment on admissibility, the Amsterdam Court of Appeal ruled that the claims for damages were sufficiently similar even though it acknowledged that some of the affected persons may not have suffered any damages at all. The court seemed to find the following factors relevant in reaching this conclusion: (i) from legislative history it follows that not all affected persons need to have suffered the same damages; (ii) affected persons can be categorised in determining damages; (iii) the claim organisation had, in the alternative, asked the court to refer its claims for damages to separate follow-on proceedings to establish damages; (iv) combining claims for damages with other claims on the same event is efficient; and (v) including the claims for damages in the

debate on the merits rather than declaring them inadmissible is in line with the purpose of the WAMCA.¹⁷¹ Supreme Court proceedings are pending in this case, with a Supreme Court judgment expected in late 2025 or early 2026.

When assessing the similarity requirement, the District Court of The Hague has, on several occasions, drawn a distinction between group actions and general interest actions. The court has found a collective action to be a general interest action, if: (i) the claim organisation seeks to protect the interests of a (very) large group of persons; (ii) the action has an idealistic purpose; (iii) the claims are not for damages; and (iv) the claim organisation does not seek to establish a legal relationship between the defendant and the persons whose interests it seeks to protect. ¹⁷² It appears that the court is quick to find similarity of interests when it deems an action to be a general interest action.

The interests the claim organisation seeks to protect must be sufficiently safeguarded

This requirement plays a central role within the admissibility requirements. It was already included in Article 3:305 (old) DCC, but has now been fleshed out in Article 3:305a(2) DCC, as discussed in chapter 5.3 below. The admissibility requirements listed in Article 3:305a(2) DCC are not exhaustive. Courts can still interpret the general safeguard requirement as included in Article 3:305a(1) DCC, for example with reference to the Claim Code.

Admissibility requirements of Article 3:305a(2) DCC

5.3

- 146. Article 3:305a(2) DCC lists the requirements that the claim organisation must in any event fulfil in order for the interests of the persons it seeks to protect to be considered sufficiently safeguarded:
 - The claim organisation must be sufficiently representative with regard to its claims.
 - Within the claim organisation there must be internal supervision and mechanisms for participation or representation.
 - The claim organisation must have sufficient resources and control over the action.
 - The claim organisation must publish certain information on its internet page.
 - The claim organisation must have sufficient expertise and experience.
 - In case the RAD applies: the collective action must not be funded by a funder who is a competitor of or dependent on the defendant.

The claim organisation must be sufficiently representative with regard to its claims

3:305a(2) (preamble) DCC 147.

- Of all the admissibility requirements under the WAMCA, the representativeness requirement is probably the most discussed in parliament and literature. The representativeness of the claim organisation has, to a greater or lesser extent, been a factor in the admissibility assessment in collective actions ever since courts began to allow general collective actions in the 1980s. It is a statutory factor in the Amsterdam Court of Appeal's assessment when a claim organisation and a paying party apply to have their settlement declared binding in WCAM proceedings (chapter 6.3). Since the introduction of the WAMCA, Article 3:305a(2) DCC stipulates that as part of the safeguard requirement, the claim organisation must set out that it is "sufficiently representative, given its constituency and the size of the represented claims." The court should intensively test the representativeness of the claim organisation. 173
- 148. From legislative history, it is clear that to comply with the representativeness requirement, the claim organisation must first define who it represents by describing that group with sufficient precision. 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."¹⁷⁴ These examples have in common that the description of the group contains sufficiently specific details to define the group and understand who belongs to it and who does not. ¹⁷⁵ Importantly, as in these definitions, a proposed narrowly defined group cannot be open-ended (no. 68). ¹⁷⁶
- 149. If the claim organisation has properly defined the affected persons whose interests it seeks to protect, it must make clear that its action is supported by a sufficiently large proportion of the group of affected persons.¹⁷⁷
- 150. Case law shows that courts struggle to apply the representativeness requirement general interest claims. The statutory requirement and its explanation in legislative history seem to be aimed at collective actions for damages. ¹⁷⁸ The researchers who conducted the government-commissioned evaluation of the representativeness requirement concluded that Article 3:305a DCC and the associated legislative history only provide limited guidance on how the representativeness requirement should be interpreted in relation to general interest claims. 179 In those cases, it appears that courts still look at the number of statements of support from the persons it claims to represent or the size of the claim organisation's membership, 180 but that they also consider whether the claim organisation can be regarded as an adequate spokesperson of the group on whose behalf it is acting. 181 Relevant factors in that respect include: other activities of the claim organisation; 182 support from other interest groups; 183 and the financial support it receives from charities. 184 In a case about children's right to potable water, the Court of Appeal of The Hague found that a quantitative application of the representativeness requirement to idealistic claims is

virtually impossible. What important is, the court ruled, is that there is a certain constituency and that the claim organisation has actually carried out activities on behalf of that constituency. 185

- 151. From legislative history and case law, it appears that the representativeness requirement and the relevant factors included in Article 3:305a(2) DCC ("its constituency and the size of the represented claims") are easier to apply in collective actions for damages.
- 152. District court level case law seems rather consistent on how courts apply the requirement to collective claims for damages. In the first admissibility judgment in a collective action for damages (which was appealed, no. 155), the court found the claim organisation in its action against Oracle and Salesforce inadmissible for not being representative. 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." 186 It is up to the claim organisation, the court noted, to provide factual evidence of how many affected persons actually support its action. 187 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. 188
- 153. In most of the subsequent collective actions for damages, courts continued to require claim organisations to substantiate that their action is supported by a sufficiently large number of the affected persons whose interests they seek to protect. The Amsterdam District Court generally required the claim organisation to submit third-party verification, for example by an auditor, of the number of persons who have supported its action and the way in which they have expressed their support. That the action should be supported by affected persons rather than other parties, can also be derived from a recent Supreme Court judgment.
- The number of persons whose support qualifies as sufficient seems to depend on the circumstances of the case. In the action against TikTok, the Amsterdam District Court held that that the percentage of affiliated affected persons ranged from around 1% to 8.7% between the claim organisations. This was sufficient, the court ruled, given the relative and absolute number of affected persons who joined the claim organisations, the way in which they were able to register for the claim and the information provided to them by each of the claim organisations in each case. ¹⁹² In the collective action against Airbus, the District Court of The Hague found one claim organisation to be insufficiently representative, while the other passed this test (but was declared

inadmissible on other grounds). The court found that the constituency of claim organisation AIRS consisted of 420 retail investors (well below 0.1% of the total number of investors) and less than ten institutional investors. These numbers were considered to be so small in relation to the total size of the Airbus shareholding and the total number of investors that it could not be considered that there was a sufficiently representative constituency. ¹⁹³ The court found that SILC, the other claim organisation in this case, was sufficiently representative because it was found to represent 157 institutional investors that would have suffered 5% of the total damages. The court considered this percentage to be sufficient for SILC to be deemed sufficiently representative. ¹⁹⁴

- 155. The judgment of the Amsterdam Court of Appeal of 18 June 2024 in the collective action of TPC against Oracle and Salesforce seems to have upended the consistent case law of the District Courts. The Amsterdam Court of Appeal overturned the Amsterdam District Court's decision holding that the claim organisation was not sufficiently representative. The Court of Appeal first noted that (i) a numerical criterion cannot be derived from law or legislative history; (ii) it is not necessary to determine exactly who belongs to the claim organisation's constituency; and (iii) the claim organisation does not have to demonstrate the support of the entire group of persons whose interests it seeks to protect. It then held that it is sufficient that the claim organisation does have a constituency, i.e. that its action is supported by a nonnegligible number of the persons whose interests the claim organisation seeks to protect. In that regard the court found it relevant that consumer organisations and other claim organisations support TPC's action. Moreover, the court concluded, the 'likes' TPC gathered indicate that a not very large yet considerable number of individuals agree with its action. 195
- 156. Although this judgment is currently the subject of a Supreme Court appeal, District Courts are already applying an arguably looser interpretation of the representativeness requirement by (i) not setting any numerical criteria for the size of the support base; (ii) not requiring third-party verification of the support and (iii) considering support of others than the affected persons. However, the Rotterdam District Court still applied a numerical criterion, considering a claim organisation insufficiently representative because at most 9.421 persons signed up for its action for damages against Adobe, while the claim organisation sought to protect the interests of up to 10 million persons. 197
- 157. The Supreme Court will likely provide guidance on the application of the representativeness requirement in collective actions for damages when it delivers its judgment in the action against Oracle in Salesforce, which is expected in late 2025 or early 2026. Considering the mixed picture of the case law regarding the application of the representativeness requirement, such guidance is welcome.

Within the claim organisation there must be internal supervision and mechanisms for participation or representation

3:305a(2)(a) DCC 158.

Within the claim organisation there must be a supervisory body. Internal supervision of the management board is also in accordance with the Claim Code. 198 A supervisory board promotes sound internal supervision of the board's performance. 199 The supervisory board should be composed in such a way that its members are independent of each other and of the management board so that they can act critically with regard to the interests the claim organisation seeks to protect. 200 Principle VII.3 of the Claim Code allows any external funder to recommend the appointment of a member (not the chair) of the supervisory board. In an apparent deviation from the Claim Code, the Amsterdam District Court permitted a shareholder and board member of a funder, with a clear personal interest in the outcome of the proceedings, to serve on the supervisory board of a claim organisation. 201 The District Court of The Hague took a stricter approach and considered a supervisory board member of a claim organisation insufficiently impartial because of her own and her father's interests in the outcome of the collective action. 202

- 159. A separate supervisory board will no longer be required once the proposed Articles 2:44a(1) and 2:291a(1) DCC, providing for a one-tier board, have entered into force. When that happens, non-executive directors must be appointed who are tasked with supervising the executive directors.
- 160. 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. ²⁰³ 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. 204 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. In practice, courts may look beyond the Claim Code to test this requirement. 205
- 161. In the proceedings against Oracle and Salesforce, 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. 206 However, in squashing the District Court's judgment, the Amsterdam Court of Appeal ruled that the claim organisation's participation mechanisms were sufficient at the time of the admissibility assessment in the appeal proceedings. A registration requirement, which would bear strong similarities to an opt-in system, goes beyond what is required by law, according to the court. 207 The court ruled that it is sufficient for the claim organisation to keep its supporters informed via its website, newsletters and AMA sessions and to maintain contact with its supporters via the sounding board group and the organisations who have expressed their support for this action. It is important that those organisations also have their own supporters, who, for example, in the case of the main consumer organisation in the Netherlands, consist of a large number of easily accessible members, the court added. 208

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

- A claim organisation must have sufficient resources to bear the costs of the collective action and sufficient control over the action. The control requirement is mainly aimed at preventing abuse of the collective action right by third-party funders (although this admissibility requirement also applies in cases where there is no external litigation funding). 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, combined with the general 163. requirement that the claim organisation must sufficiently safeguard the interests of its constituency, allows the court to examine the claim organisation's funding structure. District courts often order claim organisations to produce their litigation funding agreements in order to assess the funding requirements. In light of the defendant's right to be heard, 210 claim organisations should also provide the defendant with their funding agreement to enable a defence on this point. While the District Court of The Hague granted the claim organisations' request in Airbus to redact all commercial agreements and passages relating to the relationship between the foundations and their lawyers, ²¹¹ a similar reguest was rejected by the Amsterdam District Court in the TikTok case. 212 With regard to the allegedly privileged information, the court held that the funding agreement was between the claim organisation and its funder and that it is therefore impossible to see what information in that agreement about the relationship between the claim organisation and its lawyer would be privileged. Only the claim organisation's budget may be kept secret from the defendant, the court concluded. 213 If multiple claim organisations have initiated an action, they must be able to inspect each other's funding agreements. 214 The Amsterdam District Court has by now frequently ordered the production of funding agreements under these conditions. ²¹⁵ The court

- did not find this necessary in a case by a well-established claim organisation that was partly funded by legal aid insurers. ²¹⁶
- 164. In the collective action against Oracle and Salesforce, the Amsterdam Court of Appeal deviated from the Amsterdam District Court's case law. It ruled that the claim organisation was not required to submit the funding agreement, because "at this stage of the proceedings" the court found it sufficiently plausible that the interests of the funder and the claim organisation are entirely parallel. However, the court left the door open to reach a different conclusion at a later stage of the proceedings. 217 While a Supreme Court appeal is pending in the case against Oracle and Salesforce, the Rotterdam District Court in a collective action against Adobe followed the approach of the Amsterdam Court of Appeal. 218
- In reviewing the funding agreement, the court can test whether the claim organisation has sufficient resources and whether the 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 funding.²¹⁹
- 166. Courts have now reviewed provisions of funding arrangements in several cases. These reviews have led courts to order claim organisations to amend clauses in their litigation funding agreements that (i) require the consent of the funder if the claim organisation wants to replace its lawyers;²²⁰ (ii) allow premature termination of the funding agreement; 221 (iii) could result in the claim organisation being tied to another funder against its will;²²² (iv) restrict the claim organisation from taking actions that may be prejudicial to the funder's interests;²²³ (v) restrict the claim organisation from making certain decisions regarding settlements, material concessions or procedural steps without having received advice from its lawyers that it is reasonable to do so; 224 and (vi) oblige the claim organisation to endeavour to ensure that the court issues a judgment or that a settlement is agreed in which the funder is permitted to recover its costs from any undistributed damages. ²²⁵ In Airbus, the District Court of The Hague reviewed the funding arrangements between claim organisation SILC and its funder and took issue with the following provisions: (i) a power of attorney outsourcing essential activities to one of its funders; (ii) a provision requiring SILC to inform and consult with its funders in advance when considering strategic and legal decisions or a settlement; and (iii) a provision resulting in double costs for the claim organisation if it were to replace one of the funders. Partly based on these provisions, the court found that SILC insufficiently safeguarded the interests of the persons it claimed to represent and declared SILC inadmissible in its collective action (see also no. 169). 226 In another case, the District Court of The Hague ruled that the claim organisation had insufficient control over the action, because the funder was the chair of the claim organisation's management board. This could result in the situation of the management board of the

- claim organisation making decisions that could ultimately benefit the funder at the detriment of the affected persons. ²²⁷
- 167. However, courts appear inconsistent in which arrangements between the claim organisation and its funders they allow. To illustrate: in the collective action against Vattenfall the Amsterdam District Court allowed a provision that required the claim organisation to follow the advice of its lawyer and allowed deviation only if the claim organisation had taken advice from another lawyer approved by the funder. It also allowed a provision that the claim organisation could replace its lawyer or instruct an additional lawyer only after the funder's consent. ²²⁸
- With regard to the funder's fee, courts have considered on several occasions that claim organisations may retain up to 25% of the compensation paid per person to pay their funder. 229 However, in several obiters the Amsterdam District Court has considered that a 25% share could still lead to an excessive fee for the funder. The court therefore announced its intention to cap the total funder's fee at a maximum of five times the amount invested, which would be deducted from the distributed damages. The court has also provided conditions it intends to impose on the distribution of any compensation and ruled that any undistributed compensation would flow back to or remain with the defendant. 231 In the Essure case, the Midden-Nederland District Court allowed a funder's fee of 28,75% of the damages. The court held that it could allow a fee of more than 25% because the claim organisation had adequately substantiated the fee. The court will however again review the amount of the funder's fee if the proceedings result in a collective compensation scheme or a settlement. 232
- Finally, the European Parliament on 13 September 2022 adopted a resolution on the 169. regulation of third-party litigation funding. 233 The Parliament requested the European Commission to closely monitor and analyse the development of third-party litigation funding in the Member States. It further requested 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 proposed 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. In response to the resolution, the European Commission ordered an external study.²³⁴ The study Mapping Third Party Litigation Funding in the European Union was published in March 2025. 235 The study maps out the regulation of litigation funding and makes a number of recommendations. EU-wide regulation of third-party litigation funding appears unlikely for the time being.

The claim organisation must publish information on its internet page

3:305a(2)(d) DCC 170.

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 171.

- 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.
- 172. The legislature has specifically stipulated that this does not mean that the court, under the WAMCA, may not permit ad hoc claim organisations. 237 These organisations will, however, have to demonstrate that they have sufficient expertise and experience, for example by employing persons with specific expertise. The requirement of sufficient experience may be demonstrated by previous activities in the field of collective actions for the group whose interests are being represented. Such evidence may, for example, consist of previous collective actions or participation in the board of persons with such experience. In practice, courts tend to scrutinise expertise and experience quite closely. 238 In Airbus, the District Court of The Hague tested the expertise and experience of claim organisation SILC on two levels. First, with respect to SILC itself, the court found that it lacked expertise and experience, because it has hardly any activities of its own (later referring to SILC as an "empty shell" 239). 240 Second, the court assessed whether SILC's board members had sufficient experience and expertise. With regard to three current board members, the court found that it had not been stated or shown that they had experience and expertise in collective actions. Two members of the supervisory board were deemed to have sufficient experience and expertise, but were considered to be too closely linked to the funders to be sufficiently independent of them.²⁴¹ This judgment has been appealed.
- 173. Multiple courts have referred to the expertise of the lawyers of the claim organisation in assessing this admissibility requirement.²⁴²
- 174. The RAD does not encourage ad hoc organisations, but does not prohibit Member States from allowing them to bring domestic representative actions. However, ad hoc organisations cannot bring cross-border representative actions. ²⁴³

The collective action must not be funded by a funder who is a competitor of or dependent on the defendant

3:305a(2)(f) DC 175.

Transposing Article 10(2)(b) RAD, Article 3:305a(2)(f) DCC stipulates that a collective action to which the RAD applies, cannot be brought against a defendant who is a competitor of the funder or against a defendant on which the funder is dependent. This means that the claim organisation should provide the court with the information necessary to be able to assess this requirement. The Amsterdam District Court found that a funder who had received reimbursements for legal costs by the defendant in other proceedings, was not dependent on the defendant.

5.4 | Admissibility requirements of Article 3:305a(3) & (5) DCC

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

3:305a(3)(a) DCC 176.

- 6. 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. ²⁴⁶ 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. ²⁴⁷ 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. ²⁴⁸
- 177. In proceedings before the District Court of The Hague, the board members of the claim organisation consisted of executives or shareholders of companies represented in the collective action, who had 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.²⁴⁹ The Midden-Nederland District Court ruled that the board members of a claim organisation did not have a direct or indirect profit motive, because they were reasonably remunerated.²⁵⁰

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

3:305a(3)(b) DCC 178.

The collective action must have a sufficiently close connection with the Dutch legal system, the so-called 'scope rule'. This connection exists if:²⁵¹

- (a) the majority of the represented persons are resident in the Netherlands; or
- (b) the defendant has its seat in the Netherlands and additional circumstances indicate a sufficiently close connection with the Netherlands; or
- (c) the unlawful act occurred in the Netherlands.

179. 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). ²⁵² A referral to the CJEU 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. ²⁵³

The claim organisation must have attempted negotiations

3:305a(3)(c) DCC 180.

- To be admissible, the claim organisation must have made a reasonable attempt to settle the case as touched upon in no. 43. 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. Sending a demand letter is not enough. 254 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.
- 181. Ultimately, it is for the court to decide whether this requirement has been met in the circumstances of the case. ²⁵⁵ 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. ²⁵⁶ 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. ²⁵⁷
- 182. WAMCA case law seems to make clear that the claim organisation should attempt negotiations for every claim. Simply asking the prospective defendant a question about a claim, does not qualify as a sufficient consultation attempt and could result in inadmissibility. When bringing an action against several defendants, the consultation requirement applies to each defendant separately. This means that the claim organisation may be deemed to have satisfied the consultation requirement with respect to only some of the defendants. However, in the proceedings brought by ASC against Alphabet and others, the Amsterdam District Court found that, although ASC had not attempted negotiations with some of the defendants, but that the consultation requirement was still met as all of the defendants were part of the same

group of companies and were represented by the same lawyers. Furthermore, the court found that involving the entities that were not part of the consultation attempt would not have changed its outcome. ²⁶⁰

The claim organisation must prepare a management report and annual accounts

3:305a(5) DCC

183.

- 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. ²⁶¹ 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.
- 184. 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. The Midden-Nederland District Court indeed found that courts have to review whether the claim organisation meets this requirement if the exemption of Article 3:305a(6) DCC does not apply. ²⁶² The Amsterdam District Court reached the opposite conclusion. ²⁶³

5.5 Exemption of Article 3:305a DCC requirements for certain claims

3:305a(6) DCC 118c(1)(d) DCCP

- The text of Article 3:305a(6) DCC stipulates that a court may waive some of the admissibility 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 of the affected persons gives rise to do so. Furthermore, this waiver is permitted only if the claim is not for damages. By extension, the exemption may also not be applied to claims that are not for damages but form a prelude for a damages action. ²⁶⁴ A request for a court to apply this exception must be included in the writ, ²⁶⁵ but it is ultimately for the court to assess of its own motion whether the exemption applies. ²⁶⁶ 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. ²⁶⁷ 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. ²⁶⁸ In its judgment, the court referred to legislative history, including

the notion that the WAMCA's more stringent admissibility 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.

187. If the purpose of the claim is idealistic, the financial interest must also be 'very limited' for courts to be able to apply the exemption. The District Court of The Hague has held on several occasions that this requirement does not mean that the financial consequences for the defendant from granting of the claim must be taken into account. ²⁶⁹ The Court of Appeal of The Hague has confirmed this interpretation. ²⁷⁰

1018c(5)(a) DCCP 188.

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. ²⁷¹ 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 admissibility requirements mentioned in that provision should be followed. ²⁷² This means that the requirements discussed in nos. 130-136 (foundation or association; articles of association; purpose), 147-157 (representativeness), 176-177 (no profit motive), 178-179 (Dutch connection) and 180-182 (negotiation attempt) continue to apply. This includes the representativeness requirement mentioned in the preamble to Article 3:305a(2) DCCP, which is sometimes overlooked, ²⁷³ but is unambiguously clear from legislative history and has been interpreted correctly by the Arnhem-Leeuwarden Court of Appeal. ²⁷⁴ 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". ²⁷⁵

3:305a(6) DCC

The exemption of Article 3:305a(6) DCC does not fully apply to claims within the scope of the RAD (no. 357). Those claims always need to meet the requirement that the claim organisation must have sufficient resources to sustain the claim and sufficient control over the action. The claim organisation must also have a generally accessible internet page which contains an overview of the status of pending legal actions and information on the calculation of any contribution sought from the persons whose interests the legal action seeks to protect.

1018c(5)(b) DCCP

5.6 Collective action more efficient and effective

- 190. 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, if applicable. 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. However, when applying this requirement, the Amsterdam Court of Appeal added that the threshold for bringing individual proceedings in the case at hand was high. The collective action would therefore provide effective and efficient judicial protection that would otherwise be lacking. ²⁷⁶

Common legal and factual questions

- 191. 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)?
- 192. 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.²⁷⁷
- 193. Notable in this regard is a judgment by The Hague District Court dismissing WAMCA proceedings brought by the main Dutch organisation representing hospitality businesses. 278 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 guick 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 restaurant 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.

194. There seems to be overlap between the requirement of common legal and factual questions of Article 1018c(5)(b) DCCP and part of the admissibility 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 seem to concern the question whether the affected persons have legal and factual questions in common. See therefore also nos. 137-144.

Sufficiently large group of affected persons

- 195. 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. ²⁷⁹
- 196. The court will also consider the total number of potentially affected persons when it assesses the representativeness of the claim organisation (nos. 147-157).

Sufficiently large financial interest

197. 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. ²⁸⁰

1018c(5)(c) DCCP

5.7 Claims not manifestly unfounded

198. Pursuant to Article 1018c(5)(c) DCCP, the court must summarily examine whether a collective claim is not manifestly unfounded at the time the proceedings are initiated. Since the court can review this of its own motion,²⁸¹ it is up to the claim organisation to provide the information showing that its claim has merit.

1018I(1) DCCP

199. 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 manifestly unfounded. However, five times the standardised lawyers'

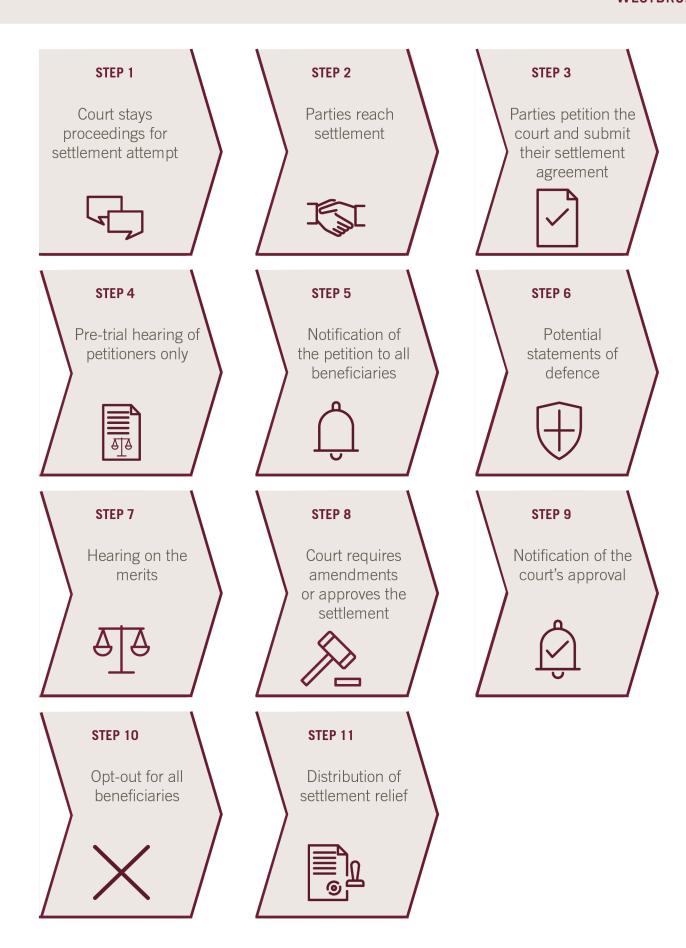
fees is, however, still not very much and will not even come close to the actual costs incurred. This provision is therefore unlikely to have any significant effect.

- 200. 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. ²⁸³ In practice, the manifestly unfounded provision has only a marginal role and a different function from the US motion to dismiss.
- 201. Courts have found entire actions and separate claims to be manifestly unfounded on several occasions. The District Court of The Hague found the action against the State in relation to certain COVID-19 regulations to be manifestly unfounded because the regulations had already been withdrawn, rendering the claims moot.²⁸⁴ In a case against AbbVie and others about allegedly defective breast implants, the Amsterdam District Court held that the claims against the Dutch AbbVie entities on behalf of Women who had received their implants outside the Netherlands were manifestly unfounded because the claim organisation had not explained how these women could have received an implant distributed by these Dutch entities. These claims therefore lacked any factual basis, the court ruled. 285 In the case of ICAM against the State and others regarding a data breach relating to COVID-19 testing, the Amsterdam District Court dismissed two claims as manifestly unfounded. The rulings concerned (i) claims based on the GDPR against defendants who had not processed any data through the administrative systems in question and (ii) claims for material and non-material damages based on merely the fear of a GDPR infringement. 286
- 202. Courts could arguably apply a stricter 'manifestly unfounded' test. A more substantive preliminary review would benefit all the parties involved. This would result in fewer claims reaching the merits stage, sparing defendants the lengthy and costly proceedings associated with claims that will eventually be dismissed. 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.
- 203. It remains to be seen how this admissibility requirement will develop. 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



Chapter

SETTLEMENT

Machteld de Monchy & Jan-Willem Meijer

6.1

Introduction

- 204. 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. ²⁸⁷ 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.
- 205. 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

206.

WAMCA settlement

Statutory settlement attempt

1018g DCCP

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. ²⁸⁸ 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. The first petition initiating a WAMCA settlement procedure has yet to be submitted.

Petition to the cour

207. 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.

1018h(2) DCCP 1013(1) DCCP 1013(2) DCCP

- 208. 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.
- 209. 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

1018h(2) DCCP 1013(5) DCCP

210. 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. 289 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.

1018h(2) DCCP 1013(4) DCCP

- 211. 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.
- 212. Once all the beneficiaries have been properly notified, the court orders an oral hearing to discuss their assessment of the settlement agreement.

Requirements for approva

1018h(2) DCCP 3:305(a) DCC 213.

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 admissibility 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 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 (nos. 178-179), 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.

1018h(2) DCCP 3:305(a) DCC 214.

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.²⁹⁰

7:907(3) DCC

215.

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. 208;
- (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;

- (e) 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.
- 216. The main elements of the court's assessment are the reasonableness of the compensation (Element 1) and the representativeness of the claim organisation or organisations (Element 2). Proper notification of beneficiaries is another aspect the court will closely consider (Element 3).

Element 1: reasonableness of the compensation

- 217. 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. ²⁹¹ 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.
- 7:907(3)(b) DCC
- 218. 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. ²⁹² The court may also take an expert opinion into account. ²⁹³
- 219. 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. ²⁹⁴
- 220. 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.²⁹⁵ 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.²⁹⁶

- 221. Moreover, when assessing relative claim strength and also more generally, Dutch courts apply the law (Dutch or foreign) as its 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. ²⁹⁷
- 222. The court can also review whether the criteria determining whether a person is a beneficiary under the agreement are not "incomprehensible." 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.
- 223. 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.²⁹⁹

Element 2: Representativeness of the claim organisation or organisations

7:907(3)(f) DCC 224.

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.

- 225. 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. 300 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. 301
- 226. 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. ³⁰² In both *Shell* and *Converium*, the Court refrained from scrutinising the actual activities of the claim foundations.
- 227. 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. 303 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. 304
- As mentioned before 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 (nos. 147-157). It is unclear how the WAMCA's representativeness requirements 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

1018h(2) DCCP 1013 DCCP 1018h(5) DCCP 1018f(1)-(4) DCCP

229.

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.

230. 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 (nos. 210-211). 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

- 231. 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. 305
- 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.
- 233. 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.

Ont-out

7:907(4) DCC 1018h(2) DCCP 7:907 DCC 1018k(1) DCCP 234. 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.

1018h(5) DCCP 1018f(1)-(4) DCCP 235.

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 (nos. 78-81). 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.

1018h(3) DCCP 7:908(3) DCC

236.

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. If such beneficiary comes forward, the paying party may set 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 approva

1018h(3) DCCP

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

7:908(1) DCC

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.

7:908(5) DCC 3:44(3) DCC 6:228 DCC 7:904(1) DCC 7:907(3)(d) DCC 7:909(1)-(4) DCC

239. 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.

240. 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.

7:909(5) DCC 7:910(2) DCC

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.

7:910(1) DCC

- 242. 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.
- 243. If the WAMCA settlement proceedings only commence after the first opportunity to opt out has passed, the settlement will only bind 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. 306

1018h(6) DCCP 1018(2) DCCP

- The legislature intended to restrict the right to appeal against the court's decision on the settlement approval petition. While the wording of the statute is unclear, legislative history suggests that the court's decision to approve the settlement cannot be appealed and that the court's refusal to approve the settlement can only be appealed by the petitioners jointly, and only directly to the Supreme Court. These appeal restrictions stem directly from the WCAM and are intended to safeguard the petitioners' common interests and to prevent delays in the compensation of beneficiaries.
- 245. The international recognition and enforcement of a WCAM decision declaring the collective settlement binding will be discussed in nos. 253-256. The considerations discussed there apply accordingly to the WAMCA court's decision to approve a collective settlement.
- 246. 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.³⁰⁷

6.3

WCAM settlement

Introduction

- 247. 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 (no. 39), 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*. ³⁰⁸ The total compensation in all settlements varied from EUR 4.25 million to EUR 1.3 billion. ³⁰⁹ 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 (chapter 4.6) unless the RAD applies (no. 362). 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

3(a) DCCP

250.

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. 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).

- 251. 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. 226, 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.
- 252. 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). 311 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

1013(3) DCCP 1015(1) DCCP 253. 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.

1018a DCCP

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. 312 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.

Review of the settlement by the Amsterdam Court of Appea

255. 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. 213-230. The same goes for the discussion of the applicable law in nos. 231-233.

International recognition and enforcement

- 256. 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.
- 257. 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.
- 258. In *Shell*, the court implied that its decision should normally be recognised by the courts of other EU Member States. 313 Whether courts outside the EU will recognise the decision approving a collective settlement will ultimately depend on the local laws of these countries.
- 259. 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

260. 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

261. 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. 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

- 262. 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 (chapter 6.3).
- 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.³¹⁴
- 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.

265. 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. 268 and 273).³¹⁵

6:97 DCC

- 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. 316
- 267. The legislature provided some examples of cases in which damage scheduling could take place.³¹⁷ 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.³¹⁸

7.3 Substantive requirements for awarding damages

1018i(2) DCCP

- 268. 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.

Determination in categories where possible

1018i(2) DCCP

269.

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. In the collective action against AbbVie and others relating to allegedly defective breast implants, the claim organisation divided the affected persons into four main categories and six subcategories. In its judgment on admissibility, the Amsterdam District Court held that this categorisation should allow for sufficient objectification and abstraction from the individual circumstances of the affected persons to assess both a claim for compensation and the amount of compensation, but that this could only be finally determined in the merits phase of the proceedings. 320

The compensation scheme must satisfy the WCAM provisions

1018i(2) DCCP 7:907(2)(a)-(f) DCC 270. A collective compensation scheme must include the following elements:

- (a) a description of the event or events to which the collective compensation scheme relates;
- (b) 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;
- (c) a description, as accurate as possible, of the number of natural persons belonging to such group or groups;
- (d) the compensation to be awarded to these persons;
- (e) the conditions which these persons need to comply with in order to be eligible for such compensation; and
- (f) the manner in which this compensation is determined and can be obtained.
- 271. 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 person 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. 321
- 272. 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

1018i(2) DCCP

273.

274.

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

1018i(1) DCCP 7:907(2)(a)-(f) DCC 1018(f) DCCP 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.
- 275. 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. 323

- 276. 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.
- 277. 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 the court's judgment regarding a collective compensation scheme

1018j(1) DCCP

Any known persons for whom a compensation scheme has been established, or who have been refused such a scheme, must be notified of the court's judgment as soon as possible and by regular mail, unless the court decides otherwise.

1018j(1) DCCP

The judgment must also be announced as soon as possible in one or more newspapers designated by the court. If the court establishes a collective compensation scheme, 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 order that the information referred to above must be published in another manner or that other information must be included.

1018j(1) DCCP

280. Unless the court decides otherwise, the defendant is required to arrange for the notification and announcement of the judgment. If the court has refused to establish a collective compensation scheme, it will probably instruct the Exclusive Representative to arrange the notification and announcement. This would be in line with Article 13(4) RAD.

1018j(1) DCCP

281. 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.

1018j(2) DCCP

282. 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

283.

As soon as a judgment is no longer subject to appeal, it is binding on the parties to the proceedings and on the members of the narrowly defined group who have not opted out or who have opted in. From the time the judgment is no longer subject to appeal, these persons 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 pending an appeal, the parties may claim compensation immediately after the judgment has been rendered. However, it is unlikely that the courts will give immediate effect to a judgment establishing a compensation scheme, as the mass distribution of compensation is difficult to reverse.

In an *obiter* in the *TikTok* case, the Amsterdam District Court announced how it intends to organise the distribution of compensation, if the case reaches that stage. Among other things, the court held that: (i) the persons entitled to compensation should present themselves to the claim organisation they have joined; (ii) their compensation will be reduced by the fee agreed with the claim organisation, subject to a maximum percentage to be determined by the court; (iii) persons entitled to compensation who have not joined a claim organisation will be entitled to the same compensation as the registered persons who receive the lowest amount of compensation after deduction of the claim organisation's fee; (iv) the persons entitled to compensation should receive the full compensation to which they are entitled (less the claim organisation's fee); (v) the defendant should not have to pay more than the actual damages and the costs incurred in paying the compensation; and (vi) unclaimed compensation should remain with the defendant.

1018k(2) DCCP 1018f(3) DCCP 285. 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-outer 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.

7.5

Categorisation in light of general principles of damage assessment

1018i DCCP

286.

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" (nos. 268 and 273).

3:305a(1) DCC 1018c(5)(b) DCCP 287.

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. 324 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

288.

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.

- 289. Given the scope of a collective action and the large 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.
- 290. 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.
- 291. 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.
- 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.

293. 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?

1018i DCCP

- The first collective compensation scheme has yet to be established. 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.
- 295. 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. 325 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.
- 296. 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.

- 297. 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. 326 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. 327
- 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 CJEU'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

INTERNATIONAL CONSIDERATIONS

Kees Saarloos

8.1

8

Introduction

- 299. 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.
- 300. 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

- 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 CJEU) 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 CJEU case law on the interpretation of the Brussels I Regulation (recast) to interpret corresponding jurisdiction rules in the Lugano Convention and the DCCP.
- 302. 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

- 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 with those against the anchor defendant(s).
- 304. 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 close connection 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. 332 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. 333 For competition cases, the CJEU 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. 334 Jurisdiction of the Dutch courts is also easily established when the Dutch anchor defendant and other group companies are part of the same undertaking within the meaning of competition law. 335 A Dutch court was more critical in a case where the Dutch claim organisation represented (also) foreign claimants in proceedings against Dutch and foreign defendants established outside the Netherlands. In such a case, the question arises whether the jurisdiction of the Dutch court for the claims of foreign claimants is sufficiently foreseeable for the foreign defendants. 336
- 305. 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 (nos. 73-77).

International jurisdiction in tort matters

- 306. 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.
- 307. It is settled case law of the CJEU 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 CJEU.
- 308. Regarding the *Handlungsort*, for example, the CJEU 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.³³⁷ In the case of an infringement of Article 102 TFEU, the CJEU localised the event giving rise to the damage at the place where the anti-competitive conduct was implemented.³³⁸
- 309. In the case of investment claims, the CJEU 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 CJEU 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.³³⁹ 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.³⁴⁰
- 310. 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 CJEU localised the *Erfolgsort* forum at the court of the affected market³⁴¹ 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.³⁴² In cases regarding investor claims, the CJEU 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.³⁴³ For claims following the Volkswagen emissions scandal, the CJEU held that the *Erfolgsort* is the country where the consumer purchased the car.³⁴⁴

- 311. In *VEB/BP*, the CJEU 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.³⁴⁵ 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.³⁴⁶
- 312. In *CDC/Akzo*, the CJEU 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 CJEU 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.
- In a WAMCA action for damages against Apple, the Amsterdam District Court has referred preliminary questions to the CJEU on the interpretation of the place of the harmful event in case of sales through Apple's App Store. The court has asked the CJEU, among other questions, what the *Handlungsort* should be if the anti-competitive conduct was implemented through an online platform aimed at an entire Member State without the operator being registered there and how to interpret the *Erfolgsort*, if the precise place of a online purchase cannot be determined and the online platform is operated from outside the Netherlands. With regard to its local jurisdiction, the court has asked the CJEU, in a nutshell, whether there is a possibility of applying a national referral rule despite the fact that Article 7(2) Brussels I Regulation (recast) seeks to designate directly and immediately the relative competent court. 350
- 314. 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

CJEU 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. 351

- 315. Dutch courts asked the CJEU how to establish jurisdiction on the basis of the place of the harmful event in collective actions. So far, the CJEU has ruled in the cases VEB/BP³⁵² and ZK/BMA³⁵³ that the position and procedural prerogatives of a claim vehicle do not affect international jurisdiction. In VEB/BP the CJEU 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 CJEU 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.
- 316. In sum, the CJEU has not given much guidance so far on how to deal with international jurisdiction in collective tort matters. If confronted with issues of international jurisdiction, one should also note the admissibility requirement of a sufficiently close connection to the Dutch legal system, 354 as discussed in nos. 178-179 and 336-337.

International jurisdiction in collective consumer actions

- 317. Under EU law, qualified consumer organisations are authorised to initiate collective actions to protect consumer interests. They can apply for an injunction requiring the cessation or prohibition of infringements of EU consumer protection directives (as implemented in national law). Since the RAD qualified consumer organisations can also claim damages on behalf of consumers that have suffered a loss caused by an infringement of EU consumer protection directives. The RAD is 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.
- 318. 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.
- 319. 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 CJEU ruled that, in the case of a contract for the development and ongoing operation of software, the place of performance is where the customer consults and uses the software. ³⁵⁵ The Court of Appeal of The Hague held that the place of performance of the contract between Airbnb and Dutch consumers is Ireland, where the Airbnb platform is operated and

managed.³⁵⁶ The general rules on the determination of the place of performance apply also in collective proceedings.

- 320. 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 CJEU 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). 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.
- 321. If the claim is non-contractual in nature, Dutch courts can have international jurisdiction if the harmful event occurred in the Netherlands. In *Henkel*, the CJEU 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. 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

79 GDPR 322

- 322. 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 controller or processor has an establishment. 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. ³⁵⁹ It is uncertain whether this conclusion will stand.

324. It is still 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 before the CJEU 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. Dutch district courts have ruled that this limitation does not apply under Article 79 GDPR. These judgements are currently being appealed.

Choice-of-court clauses in collective actions

- 325. 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.
- 326. 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. 362 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. The Court of Appeal of The Hague held that a claim organisation could not rely on the choice-of-court agreement in the general terms and conditions of Airbnb, because the clause was directed at consumers and the general terms did not allow the transfer of claims. 363

Jurisdiction of the Netherlands Commercial Court

30r DCCP

327. The Netherlands Commercial Court and the Netherlands Commercial Court of Appeal (no. 39) 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.

Coordination of proceedings following the same event

- 328. 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.
- 329. 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. For civil and commercial matters 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).

81 GDPR 15 RAD 6 RAD

- 330. 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 GDPR is similar to that of Article 30 Brussels I Regulation (recast). The main difference is that Article 81 GDPR 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 seized to examine whether the representative action is suitable to be heard as a single representative action.

8.3 | Applicable law in collective actions

331. This paragraph discusses choice-of-law rules in collective actions and the law applicable to the admissibility of the claim organisation.

Choice-of-law rules in collective actions

- 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 material and 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.
- 333. 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*, ³⁶⁴ which also concerned an injunction to prohibit the use of certain contract terms in consumer contracts, the CJEU 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 CJEU 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

334. 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.

- 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*. 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), in particular by 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.
- 336. 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.
- 337. With the requirement of a sufficiently close connection, the Dutch legislature wanted to avoid that the Dutch judicial system is burdened with cases that have no connection whatsoever with the Netherlands³⁶⁶ and that Dutch businesses are faced with collective damage claims from all over the world.³⁶⁷ 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."
- 338. 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.³⁶⁸ Whether the CJEU will be convinced by this remains to be seen.

8.4 International recognition and enforcement

Recognition and enforcement of a WAMCA judgment

- 339. 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.
- 340. 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.
- 341. 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.

1018k DCCP

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 or established 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.

Recognition and enforcement of a WAMCA settlement decision

343. 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. 256-259 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

Chapter

9

COLLECTIVE ACTIONS AND CONSUMER LAW

Marieke Bredenoord-Spoek & Johan Valk

9.1 Introduction

344. Mass claims on behalf of consumers usually concern infringements of EU consumer laws or national laws that have their origin in EU law. Several European consumer law directives contain provisions requiring Member States to put in place procedural mechanisms to protect the collective interests of consumers. One notable example is the **Unfair Contract Terms Directive**. Since 1993, it has required Member States to allow organisations with a legitimate interest under national law in protecting consumers to bring actions before the courts or competent administrative bodies for a decision on whether contractual terms drawn up for general use are unfair. More generally, 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 bring collective actions for infringements of European consumer law, including the Unfair Contract Terms Directive. This chapter briefly explains how the Unfair Contract Terms Directive and the RAD have been transposed into Dutch legislation, and how this legislation relates to the WAMCA.

9.2 | Collective actions regarding general terms and conditions

6:240 DCC

- 345. 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.

6:241(1) DCC

- 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.
- 348. 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. 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. Turthermore, the admissibility requirements of art. 3:305a DCC and art. 1018c(5) DCCP, particularly the similarity and representativeness requirements, may also preclude a collective action regarding general terms and conditions based on Article 3:305a DCC.

9.3 | Collective actions relating to infringements of European consumer law

349. 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 were required. 371

Key elements of the RAD

- 350. The RAD applies to consumers and its material scope is limited to infringements relating to the European directives and regulations listed in Annex I to the RAD. These instruments mainly concern general consumer protection, data protection, travel and tourism, financial services, energy, telecommunications and health and the environment. Competition law claims are not included in the scope of the RAD, but the Digital Markets Act is included in Annex I. 372
- 351. 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).
- 352. 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

4(3) RAD 3(6) RAD 3(7) RAD 3:305c DCC 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.

4(3) RAD 4(4) RAD 3:305e DCC 353. 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.

5 RAD 3:305e DCC 354. 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 meet these requirements to be placed on the list upon application for designation as Qualified Entity. Several claim organisations have been placed on the Dutch list.

8(3) RAD 9 RAD 1018f(6) DCCP 355.

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. Most Member States have introduced 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 (no. 75). 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. 373

9(4) RAD

356.

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 admissibility requirements

3:305a(2)(f) DCC 3:305a(6) DCC 357.

The RAD has led to some additional admissibility requirements under Dutch law for domestic actions 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.

3:305c(2) DCC 5(4) RAD 358.

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. 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. The defendant expresses the examine those doubts and reach a decision.

3:305c(2) DCC 1018n DCCP 359.

Dutch courts in cross-border actions must still review whether the Qualified Entity's claim complies with certain requirements set in Article 3:305a DCC. The court will

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. 178-179. 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 (chapter 5.6) and that the claim is not manifestly unfounded (chapter 5.7). Finally, the Qualified Entity should mention in its writ of summons that it has been designated as such. The status of the status of the provisions included in Articles and the summons that it has been designated as such.

Other requirements

10 RAD 360. 11 RAD 15 RAD 16 RAD 18 RAD

12 RAD

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 warranted no or only minor amendments to the WAMCA.

Recital (10)+(42) RAD 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

22(1) RAD 362.

361.

The Netherlands implemented the RAD by law of 2 November 2022.³⁷⁸ The statutory provisions transposing the RAD apply to collective claims within the material scope of the RAD brought on or after 25 June 2023. The temporal scope of the RAD is not limited with regard to the event that gave rise to the dispute. However, WAMCA proceedings can only be brought for events causing damage if they took place on or after 15 November 2016. Initially, the Dutch legislature failed to amend the temporal scope of the WAMCA for proceedings to which the RAD applies. Consequently, in proceedings under the RAD, claims for damages were only possible for events causing damage that occurred on or after 15 November 2016, despite the RAD not containing a general temporal limitation with regard to the litigious event. The Dutch legislature intended to correct this situation by removing the limitation to events that took place after 15 November 2016 in the temporal scope of Article 3:305a DCC for proceedings to which

the RAD applies, with effect from 1 July 2025. The WAMCA's procedural provisions in Title 14A of Book 3 DCCP remains unchanged. This means that a collective action under Article 3:305a DCC as amended by the WAMCA could be brought, without the WAMCA's procedural framework applying. This is impractical and appears not to be intended by the legislature. Therefore, it is expected that courts will apply Title 14A Book 3 DCCP when Article 3:305a DCC as amended by the WAMCA applies.



10 - COLLECTIVE ACTIONS AND COMPETITION LAW

Chapter 10

COLLECTIVE ACTIONS AND COMPETITION LAW

Machteld de Monchy & Marieke Bredenoord-Spoek

10.1 Introduction

In the past fifteen 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

- In the Netherlands, competition-related follow-on claims have traditionally been brought through direct action by either the allegedly injured party or by a claim vehicle that has bundled claims through means of assignment, power of attorney or mandate. Relatively few competition follow-on claims have been brought as a collective action on the basis of Article 3:305a DCC. One reason for this may be that when follow-on actions first emerged fifteen years ago, the collective action regime only allowed claims for a declaration of liability. At that time, it was not yet possible to claim compensation for the damage caused by infringements of competition law. Therefore, under the old collective action legislation, it was probably less appealing for claim organisations to bring a collective action than, for example, proceedings based on assigned claims. Moreover, many of the current competition-related follow-on claims relate to events that occurred before 15 November 2016, meaning they fall outside the temporal scope of the WAMCA (chapter 4.6). However, the tide may be slowly turning, as more competition follow-on actions have now been filed under the WAMCA.
- 365. Several mass claims judgments in the last couple of years have clarified which substantiation is needed when using the assignment model. 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.³⁸⁰

- 366. 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. 381 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. 382 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. 383 This judgment was confirmed in appeal.
- 367. Regarding the validity of the assignments, the Amsterdam Court of Appeal ruled that it is up to claim organisations to set out 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. ³⁸⁴ In a *Trucks* judgment, which followed the judgment mentioned in no. 365, 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. ³⁸⁵
- As a final remark, the Amsterdam District Court ruled that the WAMCA's admissibility requirements do not apply to claims based on assignments. 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 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.

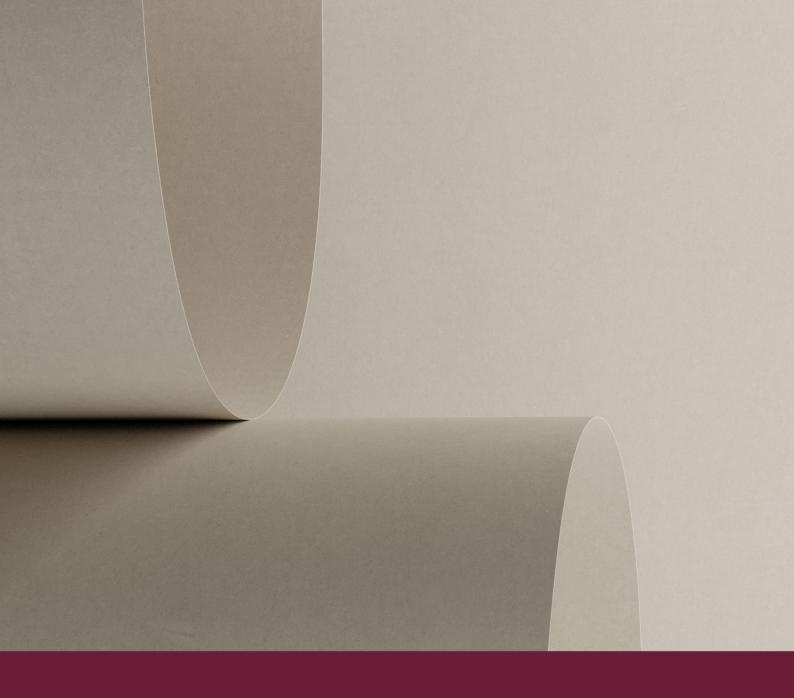
10.3 | Claims based on assignments and the WAMCA

369. The question arises as to 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 initiated 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' (nos. 65-72). It is debatable to what extent proceedings based on assignments or mandates can continue if they relate to an event that is also the subject of WAMCA proceedings (Chapter 4.9). This is not only an issue where both sets of proceedings are brought on behalf of persons at the same level of the supply chain, but also where, for example, proceedings based on assignments are brought on behalf of direct customers and WAMCA proceedings are brought on behalf of the end user or buyer. Parallel proceedings in such situations could lead to conflicting rulings on, for example, pass-on.

1018m DCCP

- 370. 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 from persons who have opted out, 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. Practice will show whether courts will intervene in those tactics, for example by staying those later claims (in accordance with Article 1018m DCCP).
- 371. So far, there has only been one judgment explicitly addressing the interplay between WAMCA proceedings and a group claim based on assignments. The Amsterdam District Court refused to stay mass claim proceedings against Airbus based on assignments while WAMCA proceedings with similar claims relating to the same facts against the same defendant were pending before the District Court of the Hague. The court denied the request for a stay, because the proceedings based on assignments were brought prior to the WAMCA proceedings and because it

assumed that the claim vehicle in the assignments proceedings would opt-out (or refrain from opting in) in the WAMCA proceedings. $^{\rm 387}$



11 - COLLECTIVE ACTIONS AND DATA PROTECTION LAW

Chapter 11

COLLECTIVE ACTIONS AND DATA PROTECTION LAW

Geert Potjewijd & Axel Arnbak

11.1 Introduction

- 372. The rapid growth of collective actions has led to an increase in the enforcement of the European data protection rules codified in the GDPR. Recent collective actions following alleged GDPR violations, either alone or in conjunction with European consumer law, illustrate this point.
- 373. The prevalence of collective actions under the GDPR can be explained by reference to the text of the Regulation itself. The GDPR grants data subjects extensive rights and provides several ways for them, as well as claim organisations, to enforce these rights. For instance, the Regulation has introduced a broad right of access to information about the collection and use of personal data, the possibility to claim damages for GDPR violations, and provisions for the representation of individuals affected by these violations. Reasons for the increased popularity of collective actions under the GDPR can also be found outside of the text of the Regulation. These include the perceived inadequacy of public enforcement by supervisory authorities, which are often said to lack financial and human resources and are obliged to engage in lengthy EU-wide cooperation and coordination mechanisms. In addition, commercial litigation funders are increasingly interested in data-related collective actions. Furthermore, the GDPR is listed in Annex I of the RAD, which allows the initiation of representative actions for GDPR infringements in EU Member States. Finally, the increasing use of AI raises questions about GDPR compliance (Chapter 13).

11.2 | GDPR

80(1) GDPR

- Article 80 GDPR is the Regulation's key provision with respect to collective actions.

 Article 80(1) GDPR gives individuals the right to mandate a not-for-profit organisation that has been properly constituted in accordance with the law of an EU Member State, whose 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.
- 375. Four qualification or admissibility 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.

80(2) GDPR

376. In addition to the representative actions that 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. Actions in the sense of (iii) are construed broadly. According to the CJEU, consumer protection associations may initiate legal proceedings related to consumer protection law under Article 80(2) GDPR if the data processing concerned affects the rights of data subjects. ³⁸⁸ Also, the CJEU confirmed that no mandate is required for such proceedings. ³⁸⁹ In the pre-WAMCA proceedings against Meta, the Amsterdam District Court 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. ³⁹⁰

11.3 | Relationship between the WAMCA and the GDPR

- 377. In the Netherlands, claims based on alleged GDPR violations are frequently pursued through WAMCA collective actions for damages. Such claims arguably need to meet the requirements of the WAMCA, the GDPR and specific legal provisions in the Dutch law on collective claims for data protection violations. In practice, three questions have arisen regarding the interaction between the WAMCA and the GDPR.
- 378. The first question is whether the data subjects on whose behalf a claim organisation brings a collective action for damages, must have mandated the organisation to do so. 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. Similarly, Article 37 of the Dutch GDPR Implementation Act states that a collective action cannot be based on a specific data processing operation if the person whose rights are affected objects to the collective action. These provisions suggest that claim organisations cannot bring collective actions for damages without the mandate of the data subjects on whose behalf they claim to be acting. This seems to be at odds with the WAMCA's opt-out mechanism. However, in the collective action against TikTok, the Amsterdam District Court allowed opt-out WAMCA proceedings for damages in relation to alleged GDPR infringements. The court ruled that the Dutch legislature had expressly chosen to allow opt-out collective actions for damages under Article 80(1) GDPR.³⁹¹ The court rejected TikTok's argument that the Dutch legislature had misapplied the GDPR by doing so. In the collective action for

damages following alleged GDPR infringements by Oracle and Salesforce, the Amsterdam Court of Appeal left open the question of whether a mandate is required. ³⁹²

- 379. In a similar action against Amazon, the Rotterdam District Court ruled that it is unclear whether Article 80(2) GDPR allows WAMCA actions for damages without mandates from the data subjects. The court therefore referred the following preliminary questions to the CJEU in July 2025.³⁹³
 - Does the concept of mandate in Article 80(1) GDPR and/or the requirements of Article 80(2) GDPR preclude a rule of national law under which a claim organisation, which meets the requirements of Article 80(1) GDPR, can bring a collective action for damages on behalf of data subjects against a controller or processor because of violations of the GDPR, when that claim organisation does not have a mandate from the data subjects?
 - To what extent is it relevant when answering the previous question, regarding the interpretation of the mandate requirement of Article 80 GDPR, that under rules of national law (the WAMCA) the data subject does not have to make explicit up front whether he wants to be bound by the collective claim for damages? The data subject does (where applicable) have the opportunity twice to choose in writing not to make use of the claim organisation's representation and not be bound by the action, namely (i) within a period to be determined by the court from the moment the claim organisation is appointed by the court as the Exclusive Representative (Article 1018f(1) DCCP) and (ii) within a period to be determined by the court in case the parties reach a settlement agreement (Article 1018h(5) DCCP).
- 380. The second question relates to the admissibility requirements that the GDPR and the WAMCA set. In the collective action against *Amazon*, the Rotterdam District Court found that the admissibility requirements of the GDPR and the WAMCA are largely parallel, but not entirely identical. The court referred to the representativeness requirement: this is included in the WAMCA, but not in the GDPR. This begs the question, according to the court, if it can still apply the representativeness requirement in GDPR collective actions. In several cases, the Amsterdam District Court applied both the WAMCA and the GDPR requirements. ³⁹⁴ The Rotterdam District Court, however, questioned this approach and referred preliminary questions to the CJEU in July 2025 to clarify to what extent it can apply the WAMCA's admissibility requirements in a collective action on alleged GDPR infringements. The court referred the following questions. ³⁹⁵
 - Article 80(1) GDPR lists requirements to organisations as listed in that article.
 Does EU law allow that the Netherlands in the WAMCA has included further admissibility requirements for claim organisations seeking to bring actions on behalf of data subjects as referred to in Articles 77, 78, 79 and 82 GDPR?

- Are the admissibility requirements in the WAMCA, in particular regarding similarity and representativeness, for claim organisations who wish to bring a class action for damages on behalf of data subjects against a controller or processor because of violations of the GDPR, permissible in light of Article 80(1) GDPR?
- 381. The third question concerns the 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. The criterion of being 'active' was added by the Council of the European Union,³⁹⁶ which stated that these criteria collectively aim to avoid the development of a commercial claims culture in the field of data protection.³⁹⁷ This admissibility requirement is stricter and more specific than the WAMCA's admissibility requirements relating to the claim organisation's factual activities and its expertise and experience. Since the GDPR has direct effect and Dutch courts should interpret national law in accordance with EU law, the GDPR's stricter requirement should prevail over the WAMCA requirement.
- 382. However, it is not entirely clear how courts will 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 Meta, 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. 398 The key factor, according to the court, is whether the claim organisation is carrying out any activities in actual fact. The court did nonetheless take into account the claim organisation's cooperation with and support of the main Dutch consumer interest organisation. 399 In TikTok, the Amsterdam District Court followed the decision in the pre-WAMCA proceedings against Meta. The Court reiterated that there is no need to adopt a high threshold for the criterion in the GDPR of being 'active' in the field of data protection. 400 The Rotterdam District Court in Amazon ruled that it sees no reason to assume that the GDPR requires a foundation that meets the WAMCA's admissibility requirements regarding the management of the claim organisation, representativeness and articles of association to also have a track record. However, the court found that this cannot be sufficiently grounded in CJEU case law. It therefore referred the following preliminary question to the CJEU in July 2025:401
 - Does the requirement in Article 80(1) GDPR that an organisation must be active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data, require more or different things than the national requirement that the organisation must have sufficient experience and knowledge regarding the proceedings to be conducted (Article 3:305a(1) DCC),

in combination with the requirements to the articles of association (Article 3:305a(1) DCC)? Does the activeness requirement in Article 80(1) GDPR require the organisation to have a track record?

383. In anticipation of the preliminary questions in Amazon, the Rotterdam District Court stayed the WAMCA action for damages against Adobe to have clarity on the questions discussed above. 402



12 - COLLECTIVE ACTIONS AND ESG

Chapter 12

COLLECTIVE ACTIONS AND ESG

Dennis Horeman & Davine Roessingh

12.1

Introduction

- 384. Litigation on ESG-related issues is on the rise across the globe, specifically in the area of climate change. Such litigation highlights the practical implications of allowing collective litigation in deciding broad societal questions.
- 385. 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

386. 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 admissibility 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 (chapter 5.5).

12.2 Practical application

- 387. The cases that have been brought before the courts under the WAMCA and the previous collective action regime cover the entire spectrum of ESG.
- 388. On environmental issues, collective litigation instruments have been used extensively. 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 (chapter 2.2). Specifically in relation to climate change the courts took an active role in two cases under the collective litigation regime preceding the 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 admissible and allowed in all three instances, including by the Supreme Court, and courts in several jurisdictions have since taken a similar approach. 403 Second, the District Court of The Hague found a Dutch NGO admissible in its claim for an injunction, ultimately ordering Shell to reduce CO2 emissions, including an efforts obligation to reduce emissions created by its business relations. 404 This judgment was overturned on appeal for substantive reasons, with the Court of Appeal of The Hague dismissing all claims against Shell. 405 The case is currently pending before the Supreme Court.

- 389. The active role of the courts in collective actions relating to the environment appears to be continuing under the WAMCA, as illustrated by recent judgments. The Amsterdam District Court ruled that environmental claims made in past advertisements by Dutch airline KLM were misleading to consumers, because they were too vague or painted an overly rosy picture of certain environmental measures. 406 In a collective action against the Dutch State concerning noise pollution from Schiphol Airport, the District Court of The Hague ruled, among other things, that the government had given priority to the interests of Schiphol over those of local residents in a way that violated the ECHR. 407 This case is currently pending before the Court of Appeal of The Hague.
- 390. In another collective action against the Dutch State, the District Court of The Hague ruled that the State had acted unlawfully by failing to prevent the deterioration of nitrogen-sensitive habitats in Natura 2000 areas, and by not meeting the statutory nitrogen reduction targets for 2025 a goal which it is also likely to miss by 2030. The State was ordered to prioritise reducing nitrogen in the most affected areas and to achieve the 2030 target of ensuring that 50% of nitrogen-sensitive nature is below critical deposition levels. Notably, the order was made subject to a penalty of EUR 10 million if the State fails to meet this target. 408 The State has lodged an appeal against this judgment.
- 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. 409 The claims in the proceedings were focused on enforcing this general and fundamental right. 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 were admissible in bringing claims against an online platform company which connects individual contractors with principals for a job to be done. 410 The unions sought declatory relief to secure protection under certain labour legislation. Although the court ultimately found that too many of the platform's users had opted out to continue the claims on their behalf, it held that the idealistic purpose of protecting a fair labour market justified continuing the proceedings on the more general claims. 411
- 392. There are many other examples of collective actions on social issues brought against companies (e.g. to secure workers' rights, including in relation to other platforms⁴¹²), and against the Dutch State and public utilities (e.g. to protect the right of access to contraceptives for women above the age of 18,⁴¹³ and concerning poverty in the Dutch special municipalities in the Caribbean⁴¹⁴). In a collective action against the State and water companies concerning children's access to potable water, the Court of Appeal of The Hague ruled that the Dutch State and water companies acted unlawfully by not doing everything reasonably possible to prevent

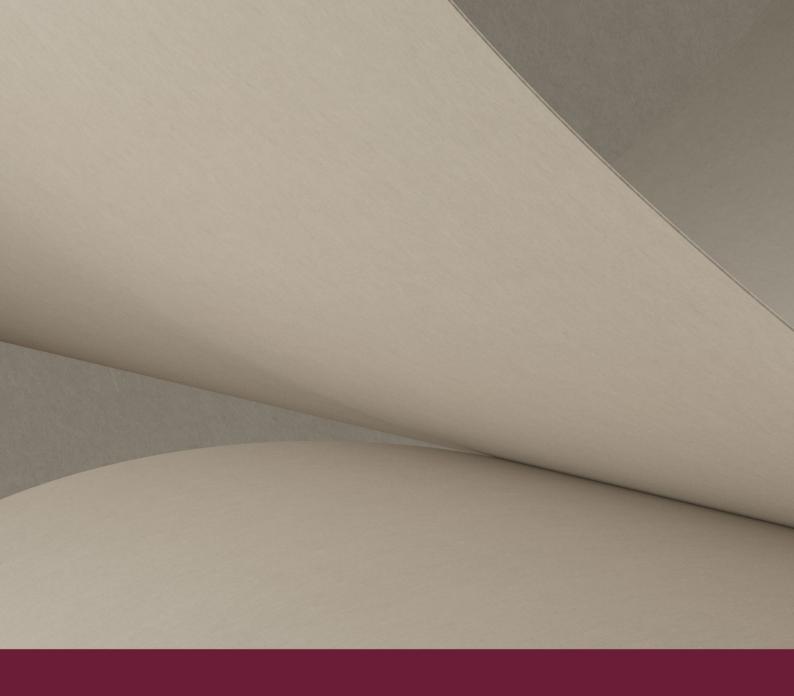
children from ending up in a situation where they do not have sufficient access to potable water. 415

12.3 Outlook

- 393. 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 sustainability is one example of that: regulation on sustainability obligations, such as reporting, due diligence, and transition planning, is rapidly developing in the EU. 416 There also seems to be sufficient funding available, even though damages are generally not claimed in these proceedings, making these proceedings less attractive for commercial funders. 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 and philanthropy, such as the Children's Investment Fund Foundation. 417
- 394. The law has often sought ways to allow for protecting societal interests, on substance, but also through procedural mechanisms allowing for enforcing rights, such as collective litigation (chapter 2). ESG-related litigation often presents such 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.
- 395. 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. 391, decided before the 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 a right to 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. 418 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. 419 In the previously discussed *Shell* judgment, the District Could 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. The Court of Appeal of The Hague confirmed this decision. It remains to be seen how this will be dealt with in such cases now that the WAMCA as introduced (i) contains a requirement of representativeness (see nos. 147-157) and no. 16 on the academic report commissioned by the government on the application of the representativeness requirement in idealistic actions) and (ii) provides for a more rigid mechanism for binding group members than the preceding legislation (nos. 73-77.)

396. The second issue is that some ESG-related issues raise fundamental questions on the preferred course of action for society. This is because ESG is a particularly broad theme, addressing many of the fundamental challenges society poses. 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. 423 A more recent example is the case brought by FTV against AbbVie regarding the pricing of its drug Humira, in which FTV sought to protect the interests of all persons who are or could potentially be entitled to statutory basic healthcare in the Netherlands. In these proceedings, FTV asked the court to rule that AbbVie had charged excessive prices for Humira, resulting in excessive profits at the expense of other necessary healthcare. The Amsterdam District Court in 2025 ruled that FTV's claims were inadmissible. Essentially, the court found that FTV was seeking a normative court ruling to set a precedent for future cases concerning the legality of pricing for patented medicines. However, obtaining a general standard applicable to future cases without having any legal effect on the relationship between AbbVie and FTV and the persons whose interests FTV seeks to protect, does not constitute a valid interest under Article 3:303 DCC, and this cannot be achieved through civil proceedings. 424



13 - COLLECTIVE ACTIONS AND IP & AI

Chapter 13

COLLECTIVE ACTIONS AND IP & AI

Robert van Hattum & Andreas Häuselmann

13.1 Introduction

397. Collective actions often relate to alleged infringements of intellectual property (IP) rights. This was the case under the pre-WAMCA regime for collective actions and persists under the current WAMCA framework (chapter 13.2). This contrasts with the enforcement landscape for infringements related specifically to the use of artificial intelligence (AI), where collective actions have yet to be initiated. Such collective actions concerning AI usage are to be expected (chapter 13.3). In this respect, it is likely that collective actions will be brought addressing alleged IP infringements arising from AI applications, a development already observed in other jurisdictions (chapter 13.4).

13.2 | IP collective actions

- 398. Collective actions have been employed in IP disputes for many years, beginning under the pre-WAMCA regime. This trend can be attributed to two main factors.
- 399. Firstly, enforcement of IP rights in the Netherlands has long been characterised by a system where in certain types of cases organisations represent the interests of a broader group of IP rights holders. These established bodies are often well-equipped to advocate on behalf of their members or affiliates in a collective action. Typically, they possess the resources to fund the proceedings independently, without relying on third-party funding. These cases often concern collecting societies enforcing copyrights or related rights.
- 400. Secondly, the pre-WAMCA regime only allowed for injunctions and declaratory relief. These types of relief are particularly suited to enforcement of IP rights. For instance, Stichting BREIN, which focuses on copyright infringements in the entertainment industry, frequently requested collective enforcement measures, sometimes resulting in injunctions or takedown orders.⁴²⁵
- 401. The WAMCA continues to allow collective actions seeking injunctions. This is evidenced by the significant number of non-damages actions under the WAMCA. Of these actions brought against others than the government, a significant number have been pursued in IP cases. 426 In these instances, the courts may apply a less stringent admissibility regime (no. 185). 427 Although collective damages actions in IP cases have not yet emerged, it is not unlikely that they will gain traction. This is especially true given the rapid advancements in the use and processing of intellectually protected material (chapter 13.4).

13.3 | Al collective actions

- 402. Following the trend of algorithm-related collective actions under the GDPR, 428 Al and the use thereof may well be the subject of collective action litigation, not only IP related (chapter 13.4) but also otherwise. Driving factors include the technology as such and legislative initiatives. Current technological deficiencies, such as Al's reasoning deficits, lack of common sense and hallucinations, may lead to inaccurate output. Air Canada's chatbot, which incorrectly advised a passenger about bereavement fares, is a case in point. Air Canada was liable for damages caused by wrong information given to the passenger by the airline's Al chatbot. 429 Legislative initiatives span from product safety and liability to 'digital fairness', covering dark patterns, addictive designs and unfair personalisation practices.
- 403. The revised product liability directive may provide new grounds for Al collective actions. 430 As a 'type' of software, Al is covered by the definition of a product. 431 In addition, 'digital services' that are integrated or interconnected with a product constitute a component of it if their absence impedes the functions of the product. 432 Using voice commands to control products with a virtual assistant is an example for Al. 433 Producers and developers of software and Al systems are treated as manufacturer and can therefore be held liable for damages. However, the scope of damages is limited and those relating to purely economic loss, privacy infringements or discrimination are specifically excluded. 434
- Whereas the EU legislature partially updated the regime for strict liability (by way of the revised product liability directive), it failed to do so for fault-based liability. Importantly, the Commission intends to formally withdraw its proposal for an Al liability directive due to 'no foreseeable agreement'. Also This directive formed part of a broader AI regulation package, aiming to establish a fault-based liability regime for AI. Also So, for now, the current Dutch fault-based liability framework controls.
- 405. Despite its nature as a product safety law, the AI Act can be relevant for fault-based liability. The AI Act may guide judges when they examine the due level of care for potential damages caused by high-risk AI systems. 437 Moreover, the AI Act could be utilised by claimants to substantiate consumer claims, for instance via the 'right to explanation' 438 granted to natural persons affected by AI-powered decision-making. The first referral to the CJEU on this new right concerns the question of how it interacts with existing rights enshrined in consumer law. 439

13.4 | IP & AI collective actions

406. With the rapid advancement of AI, IP disputes related to AI technology have begun to surface. These disputes may encompass issues such as the use of IP-protected materials for training of AI models, whether the output constitutes an infringement (or the facilitating of infringements) or even the question of whether an AI-model

can own IP rights, and as such be registered at the Copyright Office as the author of a work, among other implications. 440 Given the vast amounts of potentially IP protected data used for AI training and the widespread global application of AI models, litigation can be expected. This may include collective actions under the WAMCA.

- 407. Examples of collective proceedings can already be found in other jurisdictions. One recent example is the class action against Anthropic in the U.S., where Anthropic is being sued by authors claiming that the company used their copyrighted works without permission to train its Al model Claude and that Anthropic infringed their copyright by the unlawful acquisition of their works. 441 Another example involves two collective proceedings in Germany revolving around the question whether the results of generative Al may infringe on creators' IP rights, such as copyrights. 442
- 408. These cases highlight the growing intersection between AI development and IP law, which is expected to increase in the coming years and may give rise to collective actions in the Netherlands.



14 - CONCLUSION AND FUTURE DEVELOPMENTS

Chapter 14

CONCLUSION AND FUTURE DEVELOPMENTS

This guide has shown how the WAMCA is reshaping the Dutch collective action and settlement regime. As mentioned in the introduction, the WAMCA is innovative in that it allows claims for damages, introduces stricter admissibility requirements for claim organisations, and amends collective action procedure. The discussion of the WAMCA and its application in practice shows that, while these elements are firmly grounded in statute, they are really taking shape in case law.

However, there is still a lot to be fleshed out. This includes the growing involvement of third-party funders, as a further influx of commercial litigation funding is expected. A partially related development on the claimants' side is the increasing competition between claim organisations. In practice, the 'beauty contest' between claim organisations vying for appointment as Exclusive Representative is intensifying.

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

Another aspect that needs to be developed in case law is the conjugation of the WAMCA and specialist EU law. This will undoubtedly result in notable judgments. A case in point is the Rotterdam District Court's referral of preliminary questions to the CJEU regarding the interaction between the admissibility requirements of the GDPR and those of the WAMCA. Such potential conflicts in legal frameworks are likely to become more common in the future, as claim organisations keep bringing collective actions and EU and national legislation in specific fields of law generally continues to expand. Additionally, collective actions are becoming 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. This 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. Developments follow each other in rapid succession. The pending evaluation of the WAMCA and its reception by the government, in academia and in practice will contribute to this. We will continue to monitor relevant developments and update this guide again in due course.



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CITED CASE LAW

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- * The Hague District Court 26 May 2021, ECLI:NL:RBDHA:2021:5339 (Mileudefensie/Shell)
- * Rotterdam District Court 23 June 2021, ECLI:NL:RBROT:2021:6635
- * Amsterdam District Court 30 June 2021, ECLI:NL:RBAMS:2021:3307 (Meta)

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- * Amsterdam Court of Appeal 6 July 2021, ECLI:NL:GHAMS:2021:1940
- * Supreme Court of the Netherlands 15 October 2021, ECLI:NL:HR:2021:1534

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- * Amsterdam District Court 22 June 2022, ECLI:NL:RBAMS:2022:3586
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Amsterdam District Court 16 August 2023, ECLI:NL:RBAMS:2023:5252

* Court of Appeal of The Hague 23 January 2024, ECLI:NL:GHDHA:2024:141

Amsterdam District Court 24 January 2024, ECLI:NL:RBAMS:2024:407

Arnhem-Leeuwarden Court of Appeal 20 February 2024, ECLI:NL:GHARL:2024:1233

* Amsterdam Court of Appeal 5 March 2024, ECLI:NL:GHAMS:2024:451
Amsterdam District Court 3 July 2024, ECLI:NL:RBAMS:2024:3928
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The Hague Court of Appeal 12 November 2024, ECLI:NL:GHDHA:2024:2099
The Hague Court of Appeal 13 March 2025, ECLI:NL:GHDHA:2025:353

- * Supreme Court of the Netherlands 21 March 2025, ECLI:NL:HR:2025:414
- * Supreme Court of the Netherlands 21 March 2025, ECLI:NL:HR:2025:415
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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;
 - **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 and their outcomes;
 - 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;
 - f. funding of the legal action that does not originate from a funder who is a competitor of the party against whom the legal action is directed, or from a funder dependent on the party against whom the legal action is directed, if the legal action is for the protection of an interest as referred to in Article 2(1) of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (OJEU 2020, L 409).
 - 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. For the application of this paragraph to a legal action for the protection of an interest as referred to in Article 2(1) of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (OJEU 2020, L 409), the requirements of paragraph 2, subparagraphs c and d, introduction and under 7° and 8° must be met.
- 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 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 an excerpt 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 the admissibility requirements that must 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 manifestly unfounded 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.
- The known persons whose interests are represented by the exclusive representative in this collective 3. 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 guestions 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.
- 6. To persons belonging to the narrowly defined group whose interests are represented in this collective action for the protection of an interest as referred to in Article 2(1) of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (OJEU 2020, L 409) and who do not have domicile or residence in the Netherlands, the last sentence of the fifth paragraph does not apply. For such persons, the proceedings on the collective action shall have effect and will result in them being bound only if, in addition to the written notification referred to in the fifth paragraph, they have also informed the court registry in writing that their interests are not represented in a collective action or individual action, based on similar factual and legal issues for the same event or events and against the same defendant in another Member State of the European Union or another state party to the Agreement on the European Economic Area.

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 DCPP [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 or its refusal 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]

- Known persons for whose benefit the collective compensation scheme is established or refused must be notified as soon as possible of the judgment establishing or refusing 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. If the court has established a collective compensation scheme, 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. For persons who do not have a domicile or residence in the Netherlands and for whom 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 establishing or refusing the collective action settlement 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 manifestly unfounded, 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]

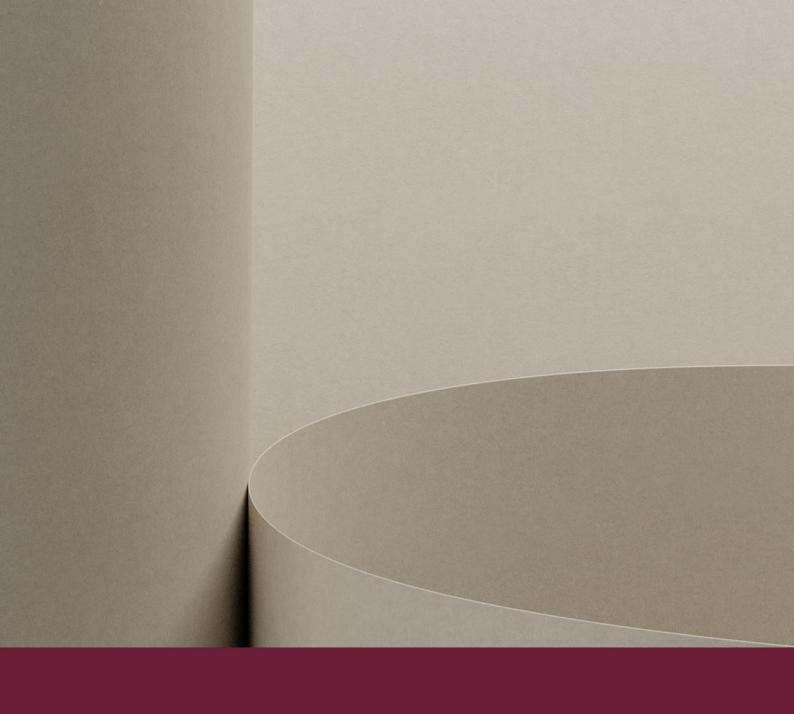
- 1. Proceedings between the defendant or defendants against whom the collective action has been brought under this title and a person for the protection of whose interests the proceedings on the collective action are being conducted who has opted out of the representation of its interests in the proceedings 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.

ARTICLE 1018N DCCP [LIST OF QUALIFIED ENTITIES]

- 1. This title shall apply mutatis mutandis to a legal action as referred to in article 3:305c(1) DCC.
- 2. Without prejudice to article 111(2) and article 1018c(1), the writ of summons by which the collective action referred to in article 3:305c(1) DCC is instituted shall state that the claimant has been placed on the list referred to in article 3:305c(1) DCC.

ARTICLE 10180 DCCP [P2B-REGULATION CLAIMS]

This title shall apply mutatis mutandis to a legal action as referred to in Article 14(1) of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation service (OJEU 2019, L 186).



END NOTES

END NOTES

- ¹ Supreme Court of the Netherlands 27 June 1986, ECLI:NL:HR:1986:AD3741; see also Parliamentary Documents II 1991-1992, 22 486, No. 3 (Explanatory Memorandum), p. 4.
- ² Parliamentary Documents II 1991-1992, 22 486, No. 3 (Explanatory Memorandum), p. 2.
- ³ Parliamentary Documents II 1991-1992, 22 486, No. 3 (Explanatory Memorandum), p. 19
- ⁴ Parliamentary Documents II 1991-1992, 22 486, No. 3 (Explanatory Memorandum), pp. 29-31.
- ⁵ Parliamentary Documents II 1992-1993, 22 486, No. 5, pp. 5-6.
- ⁶ Parliamentary Documents II 1998-1999, 26 630, No. 1.
- ⁷ Supreme Court of the Netherlands 28 March 2014, ECLI:NL:HR:2014:766.
- ⁸ Parliamentary Documents II 2003-2004, 29 414, No. 3 (Explanatory Memorandum), p. 1.
- ⁹ Parliamentary Documents II 2011-2012, 33 000-XIII, No. 14.
- ¹⁰ Parliamentary Documents II 2024-2025, 29 279, nr. 975.
- ¹¹ 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.
- 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.
- ¹³ European Parliamentary Research Service, 'Responsible private funding of litigation. European added value assessment', March 2021, p. 6.
- ¹⁴ Parliamentary Documents II 2016-2017, 34 608, No. 3 (Explanatory Memorandum), pp. 11-12; Parliamentary Documents II 2011-2012, 33 126, No. 6, p. 1.
- ¹⁵ Amsterdam District Court 25 October 2023, ECLI:NL:RBAMS:2023:6694.
- ¹⁶ Amsterdam Court of Appeal 13 July 2018, ECLI:NL:GHAMS:2018:2422; Amsterdam District Court 25 October 2023, ECLI:NL:RBAMS:2023:6694, paras. 2.68.5; Amsterdam District Court 24 January 2024, ECLI:NL:RBAMS:2024:407, para. 11.19; Amsterdam District Court 14 February 2024, ECLI:NL:RBAMS:2024:745, para. 5.85.
- ¹⁷ See: rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen.
- $^{\rm 18}$ Supreme Court of the Netherlands 15 January 2016, ECLI:NL:HR:2016:65, para. 3.4.4.
- ¹⁹ World Justice Project Rule of Law Index 2021, available at: <u>worldjusticeproject.org/sites/default/files/documents/WJP-INDEX-21.pdf</u>, p. 11.
- ²⁰ Parliamentary Documents I 2017-2018, 34 761, B, pp. 4-5.
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- ²² Noord-Nederland District Court 22 October 2020, ECLI:NL:RBNNE:2020:3583, paras. 4.2-4.6.
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- ²⁶ The Hague Court of Appeal 19 April 2022, ECLI:NL:GHDHA:2022:643, para. 6.5.
- ²⁷ The Hague District Court 8 March 2023, ECLI:NL:RBDHA:2023:2657, paras. 2.23-2.26.
- ²⁸ (Commentary to the) Collective Actions (Register) Decree, Bulletin of Acts and Decrees 2019, 446.
- ²⁹ Parliamentary Documents II 2016-2017, 34 608, No. 3 (Explanatory Memorandum), p. 38; Amsterdam District Court 1 April 2020, ECLI:NL:RBAMS:2020:2842, par. 3.6; Rotterdam District Court 21 July 2021, ECLI:NL:RBROT:2021:7940, para. 2.5.
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- ⁴² Amsterdam District Court 22 June 2022, ECLI:NL:RBAMS:2022:3586, paras. 6.3-6.8.
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- ⁴⁴ See e.g. the writs of summons against Oracle (and others), Airbnb and Apple as published in the <u>public register for collective</u> actions.
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- ⁴⁶ Amsterdam District Court 15 December 2021, 702519 / HA ZA 21-500, para. 2.3.
- ⁴⁷ Amsterdam District Court 3 March 2021, ECLI:NL:RBAMS:2021:5174, para. 5.13.
- ⁴⁸ Amsterdam District Court 25 October 2023, ECLI:NL:RBAMS:2023:6694, para. 2.13.
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- ⁵⁴ Supreme Court of the Netherlands 21 February 2025, ECLI:NL:HR:2025:321, para. 3.3.4.
- ⁵⁵ The Hague District Court 19 April 2023, ECLI:NL:RBDHA:2023:5205, para. 4.11.
- ⁵⁶ Parliamentary Documents II 2018-2019, 34 608, No. 3 (Explanatory Memorandum), pp. 38-39.
- ⁵⁷ See e.g. Amsterdam District Court 29 December 2021, ECLI:NL:RBAMS:2021:7647 and The Hague District Court 20 September 2023, ECLI:NL:RBDHA:2023:14036.
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- ⁶⁰ Amsterdam District Court 20 July 2022, C/13/705132 / HA ZA 21-687 712754 / HA ZA 22-71 and 712812 / HA ZA 22-72 (docket decision); Amsterdam District Court 22 June 2022, 705132 / HA ZA 21-687, 712754 / HA ZA 22-71 and 712812 / HA ZA 22-72 (docket decision).
- ⁶¹ Amsterdam District Court 10 January 2024, ECLI:NL:RBAMS:2024:83, para. 2.13.
- ⁶² See e.g. Amsterdam District Court 21 April 2021, C/13/686493 / HA ZA 20-697, para. 2.15.
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- ⁷¹ Amsterdam District Court 10 January 2024, ECLI:NL:RBAMS:2024:83, paras. 3.1-3.2.
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- 75 Amsterdam District Court 17 January 2024, ECLI:NL:RBAMS:2024:412, para. 2.5.
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- ⁸⁶ Parliamentary Documents II 2016-2017, 34 608, No. 3 (Explanatory Memorandum), p. 48.
- ⁸⁷ See e.g. The Hague District Court, 9 February 2022, ECLI:NL:RBDHA:2022:939, para. 1.7 and The Hague District Court 10 August 2022, ECLI:NL:RBDHA:2022:8059.
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- ¹⁴⁰ Amsterdam District Court 25 October 2023, ECLI:NL:RBAMS:2023:6694, para. 2.35.
- ¹⁴¹ Parliamentary Documents II 2016-2017, 34 608, No. 3 (Explanatory Memorandum), p. 39; Parliamentary Documents II 2018-2019, No. 44, item 6, p. 14.
- ¹⁴² Supreme Court of the Netherlands 21 February 2025, ECLI:NL:HR:2025:321, para. 3.3.4.
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- ¹⁴⁷ Noord-Holland District Court 12 November 2021, ECLI:NL:RBNH0:2021:10269, paras. 5.5-5.8.
- ¹⁴⁸ Amsterdam Court of Appeal 7 July 2023, ECLI:NL:GHAMS:2023:1589; Supreme Court of the Netherlands 12 July 2024, ECLI:NL:HR:2024:1061.
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- ¹⁵² The Hague District Court 28 May 2025, ECLI:NL:RBDHA:2025:9010, paras. 4.11-4.11.6.
- 153 Supreme Court of the Netherlands 27 November 2009, ECLI:NL:HR:2009:BH2162 (WorldOnline), para. 4.8.3.
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- ¹⁵⁶ Amsterdam District Court 25 April 2014, ECLI:NL:RBAMS:2018:2693, para. 4.4; see also Parliamentary Documents II 1991-1992, 22 486, No. 3 (Explanatory Memorandum), p. 22.
- 157 The Hague District Court 16 April 2004, ECLI:NL:RBSGR:2004:A07725, para. 4.5; Amsterdam Court of Appeal 25 October 2007, ECLI:NL:GHAMS:2007:BB6504, paras. 3.2.4 and 3.10.
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- ³⁵⁵ European Court of Justice 28 November 2024, ECLI:EU:C:2024:985, para. 22 and 23.
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- ³⁶⁵ Amsterdam Court of Appeal 14 April 2020 ECLI:NL:GHAMS:2020:1157 (*Trafigura*); The Hague Court of Appeal 18 December 2015, ECLI:NL:GHDHA:2015:3586. See also: Rotterdam District Court 29 January 2020, ECLI:NL:RBROT:2020:614 (*Petrobas*).
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- ³⁷⁷ Parliamentary Documents II 2022-2023, 36 212, No. 3 (Explanatory Memorandum), p. 39.

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- ⁴¹³ Supreme Court of the Netherlands 21 February 2025, ECLI:NL:HR:2025:321.
- ⁴¹⁴ https://http://www.rechtspraak.nl/SiteCollectionDocuments/dagvaarding-collectievevordering-vereniging-De-Staat-der-Nederlanden.pdf.
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- ⁴¹⁶ 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).
- ⁴¹⁷ 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).
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- ⁴¹⁹ Supreme Court of the Netherlands 26 February 2010, ECLI:NL:HR:2010:BK5756 (*Stichting Baas in Eigen Huis/Plazacasa*), para. 4.2.
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- ⁴²¹ The Hague Court of Appeal 12 November 2024, ECLI:NL:GHDHA:2024:2099, paras. 6.1-6.6.9.
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- ⁴²³ 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.
- ⁴²⁴ Amsterdam District Court 9 July 2025, ECLI:NL:RBAMS:2025:4738.
- ⁴²⁵ See e.g.: Noord-Holland District Court 12 May 2004, ECLI:NL:RBHAA:2004:A09318, The Hague District Court 5 January 2007, ECLI:NL:RBSGR:2007:AZ5678, Noord-Holland District Court 9 February 2011, ECLI:NL:RBHAA:2011:BP3757, Amsterdam District Court, 28 September 2011, ECLI:NL:RBAMS:2011:BU6271, Amsterdam District Court 4 November 2011,
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- ⁴²⁶ See e.g.: Midden-Nederland District Court 24 May 2023, ECLI:NL:RBMNE:2023:2375; The Hague District Court 3 May 2023, ECLI:NL:RBDHA:2023:6324; The Hague District Court 5 July 2023, ECLI:NL:RBDHA:2023:9399.
- ⁴²⁷ See e.g.: Rotterdam District Court 24 March 2022, ECLI:NL:RBROT:2022:2518, para. 4.2, Rotterdam District Court 7 September 2022, ECLI:NL:RBROT:2022:7546, para. 4.6.
- ⁴²⁸ The collective actions against Amazon and Match allege a violation of Article 22 GDPR (see the summaries of the writs of summons included in the central register for collective actions).
- 429 Moffatt v. Air Canada, 2024 BCCRT 149 (CanLII): 2024 BCCRT 149 (CanLII) | Moffatt v. Air Canada | CanLII
- ⁴³⁰ Revised Product Liability Directive ('RPLD') 2024/2853. According to Article 5(2) lit b RPLD, collective actions can be brought under the WAMCA regime.
- ⁴³¹ Article 4(1) and Recital 13 RPLD.
- ⁴³² Article 4 (3) and (4), see also recital 17 RPLD.
- 433 Recital 17 RPLD.
- ⁴³⁴ Article 6 RPLD; Recital 24 RPLD.
- 435 https://commission.europa.eu/document/download/7617998c-86e6-4a74-b33c-
- <u>249e8a7938cd_en?filename=COM_2025_45_1_annexes_EN.pdf</u>
- ⁴³⁶ Explanatory memorandum of the Commission on the Al Liability Directive COM(2022) 496 final 2022/0303(COD).
- 437 Article 6 and Annex III Al Act.
- ⁴³⁸ Article 86 Al Act.
- 439 Case C-806/24, YETTEL BULGARIA lodged on 25 November 2024 EUR-Lex 62024CN0806 EN EUR-Lex.
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- ⁴⁴¹ See e.g.: https://www.reuters.com/legal/government/us-authors-suing-anthropic-can-band-together-copyright-class-action-judge-rules-2025-07-17/
- ⁴⁴² See e.g.: <u>GEMA files model action to clarify AI providers' remuneration obligations in Europe Fair remuneration demanded:</u> <u>GEMA files lawsuit against Suno Inc.</u>

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