

## The Netherlands takes collective redress to a next level An introduction to the Collective Redress of Mass Damages Act 2019

*In the last decade, the Netherlands attracted widespread attention with its successful 2005 Act ('WCAM') which facilitates collective voluntary settlement of mass damage. Now, the Dutch are about to take collective redress to a 'next level'. A new piece of legislation will introduce, on top of the existing framework, a procedure for compulsory mass damages compensation. But is it really an improvement?*

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Zivilprozessrecht

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### A. The developments until the present

[133] The practice of representative group actions and collective settlement of consumer and capital market claims has mushroomed in the last twenty years in the Netherlands.<sup>1</sup> There are three factors that have helped this development. Firstly, Dutch law traditionally [134] allows *voluntary aggregation* of individual claims on the basis of voluntary joinder or consolidation of claims by appointing a lead plaintiff and assigning all claims to him or by giving him a power of attorney to litigate the individual claims. Such aggregation can be troublesome if the individual claims pertain to *damages* because the principle of Dutch law of damages is that as far as quantum is concerned, each claim must be assessed individually. However, the aggregation can be efficient because Dutch courts will try to answer questions of wrongfulness, protective scope of the rule, fault and causation (to the extent possible) in the abstract so that the questions common to the entire group of claimants are answered consistently and efficiently as much as possible.<sup>2</sup>

The second factor is the introduction in 1994 of a general rule on *representative group action* (art. 3:305a Dutch Civil Code) which authorises representative organisations to initiate a collective representative action in the civil courts in the interest of their constituency.<sup>3</sup> Such organisations need to be an association or foundation and their articles of association/foundation and byelaws need to state that their aim is to represent the interests of a specified group of persons or specific and commonly shared interests. In this representative action procedure, the self-proclaimed representative foundation/association (also referred to as 'vehicles') may (1) seek a declaratory judgment to the benefit of interested parties that are alleging the defendant has acted wrongfully against these parties, and is thus legally obliged to do something or to abstain from doing something towards them; (2) seek injunctive relief in the form of either a positive mandatory injunction or a prohibitory injunction; (3) seek performance of a contractual duty of the defendant owed to various interested parties; or (4) seek the termination or rescission of a contract between the defendant and various interested parties. From 1994 onwards, the crucial limitation to the representative action is that the claim cannot be for damages for the interested parties.<sup>4</sup>

Thirdly, in response to the aforementioned limitation to the representative action, the 2005 Collective Settlement of Mass Damage Act (*Wet Collectieve Afwikkeling Massaschade [WCAM]*) was introduced. Briefly explained, the WCAM operates as follows. First, an amicable settlement agreement concerning payment of compensation is concluded between the allegedly liable party or parties on the one hand, and a foundation or association acting in the aligned common interest of individuals involved (and injured) on the other. The parties

<sup>1</sup> Willem H. van Boom, *Beyond Tulips and Cheese: Exporting Mass Security Claim Settlements from the Netherlands*, *EBLR* 2010/6, p 857-883; Ianika Tzankova, *Everything You Wanted to Know About Dutch Foundations But Never Dared to Ask: a Check List for Investors* (pt. I) *VbR* 2015/106, p 149 ff (pt. I) and *VbR* 2015/122, p 178 ff (pt. II).

<sup>2</sup> See, e.g. HR 27 November 2009, ECLI:NL:HR:2009:BH2162 (*Vereniging van Effectenbezitters and Stichting VEB-Actie WOL vs World Online International NV, ABN Amro Bank NV and Goldman Sachs International*); HR 5 June 2009, ECLI:NL:HR:2009:BH2815 (*De Treek/Dexia*).

<sup>3</sup> Art. 3:305a-c Dutch Civil Code. See further Franziska Weber & Willem H. van Boom, *Dutch Treat: the Dutch Collective Settlement of Mass Damage Act (WCAM 2005)*, *Contratto e impresa / Europa* 2011/1, p 71 ff; Ianika Tzankova, *VbR* 2015/106, p 149 ff.

<sup>4</sup> Art. 3:305a (3) Dutch Civil Code.

to the agreement then jointly petition the Amsterdam Court of Appeals to declare the settlement binding on all persons to whom damage was caused. These interested persons are not summoned in this procedure but are notified by post or by newspaper announcement. The Amsterdam Court hears the arguments of all interested parties and considers several points concerning the substantive and procedural fairness and efficiency of the settlement (e.g. amount of compensation, adequate representation of interested parties). If the Court rules in favour of the settlement, it declares the settlement binding upon all persons to whom damage was caused and who are accommodated by the settlement, leaving the injured parties covered by the settlement with the opportunity to opt out from the settlement within a certain period. If they do, they may choose to pursue their claims themselves. If they do not opt-out, they are bound by the conditions of the settlement. Since its enactment, the WCAM 2005 has been used in a number of high-profile capital market cases, the most recent example being the Fortis-settlement of EUR 1.3 billion.<sup>5</sup> Thus, the WCAM can be called a successful tool to efficiently settle and put claims to rest. Since the basis of the WCAM is an agreement and the WCAM-proceedings are initiated by a petition rather than a writ of summons, the Amsterdam Court of Appeals has been able to assume international jurisdiction on the basis of domestic rules of international jurisdiction in petition cases to hear and approve settlements which not only involve injured parties domiciled in the Netherlands but also parties living elsewhere.<sup>6</sup> Whether courts outside the Netherlands would accept the preclusive effect of *res judicata* in case of WCAM-settlements, remains to be seen but that has not stopped petitioners from submitting settlements in which a 'mix' of both domestic and foreign injured parties were involved.

## B. The Collective Redress of Mass Damages Act 2019

### 1. Reasons for introducing new legislation

In recent years, a number of issues arose with the existing legal framework. These issues prompted the legislature to consider a new framework for the compulsory compensation of mass damage in a collective procedure.

The first issue consisted of a rather self-evident limitation of the WCAM-framework: it can only work if the alleged wrongdoer is willing to settle. This willingness to settle is influenced by the shadow of the so-called 'BATNA', the *best alternative to a negotiated agreement*. This means that an alleged wrongdoer will ask himself what will probably happen if he does not agree to a settlement. This means that the WCAM will not offer a solution for small-scale damage suffered by many (trivial and scattered damage, *Streuschäden*): why would a wrongdoer enter into a mass settlement if individual claims would not be brought to court because they are too small to bother with at an individual level?

The second issue is the rise of entrepreneurial lawyering and commercially driven 'vehicles' in the recent past. Some entrepreneurs have found the use of [135] vehicles (mostly ad-hoc foundations) to stir up consumer sentiments against major compensation, to collect contributions from injured parties and then to try to play into media attention to create momentum and leverage for 'getting a chair at the negotiation table', has developed into an aggressive business model which is in fact unproductive for society as a whole. Here, it deserves mentioning that in the Netherlands, anyone can establish a vehicle and set up a contractual chain to syphon off any profits into an incorporated limited company. Although the number of cases in which such abuse was involved, seems limited, the public backlash has been substantial. Most of these vehicles have failed in their actions and a few 'bad apples' have in fact succeeded in creating so much negative emotions in court rooms and the corridors of parliamentary power that it has caused the legislature to reign in these practices. Furthermore, the low thresholds to starting up these vehicles sometimes caused a 'competition' between vehicles for a 'chair at the negotiation table' in certain WCAM-cases. For a wrongdoer it is difficult to assess which vehicle has the best reputation, the biggest constituency or membership and the best organisation to handle the case unless there is transparency and a willingness to disclose such information. However, between the vehicles this information is a 'trade secret' and disclosing it may harm their negotiation leverage. The result has been that in certain cases, there were so many vehicles presenting themselves as the 'true representative'

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<sup>5</sup> Hof Amsterdam 13 July 2018, ECLI:NL:GHAMS:2018:2422 (*Fortis/Ageas*).

<sup>6</sup> Hof Amsterdam 17 January 2012, ECLI:NL:GHAMS:2012:BV1026 (*Converium*).

of the constituency that it became nearly impossible for the wrongdoer to find the right vehicle to settle with (e.g. DSB-Bank insolvency).

The third issue for the legislature was the magnetising effect of the WCAM on foreign claims. In some of the WCAM settlements, there were investors involved who were domiciled in foreign countries. Somehow, policymakers at the Ministry of Justice & Safety considered this to be a bad development. The consequence is that the new 2019 Act introduces substantial hurdles and only allows redress for non-domiciled injured parties on an *opt-in* basis.

## 2. The new Act in a nutshell

The 2019 Collective Redress of Mass Damages Act (*Wet afwikkeling massaschade in collectieve actie* [WAMCA]) has been promulgated but it has not yet come into force.<sup>7</sup> We expect it to do so later this year. The Act will apply to collective actions initiated on or after the date of entry into force if the underlying event(s) date(s) from 15 November 2016 or later (that latter date being the date of introduction of the Bill to Parliament).<sup>8</sup> The WAMCA 2019 builds on the three pre-existing instruments of voluntary aggregation, representative group action (art. 3:305a Dutch Civil Code) and the WCAM. The rules on voluntary aggregation and the WCAM will not change after entry into force of the WAMCA. They remain as they are, which means for instance that a voluntary settlement under the WCAM regime will still be possible. What the WAMCA does do, is this:

Like its predecessor, the new general rule (art. 3:305a Dutch Civil Code) retains the possibility of representative group action proceedings initiated by a representative association or foundation (the vehicle) provided it represents these interests under the terms of its articles of association and these interests are sufficiently safeguarded by the governance structure of the association/foundation. However, further requirements for *locus standi* have been added, so the thresholds for entry into the court process have been heightened. Next to a declaratory judgment, an injunction to act or abstain from action, the collective action can now also be for collective compensation.

In either case, the group action needs to be published, registered and after a waiting period (deferral of proceedings) an *exclusive representative vehicle* (or 'lead claimant vehicle') is appointed and the court delineates the group of persons who are considered to be part of the 'precisely specified group' (in USA parlance: the 'certified class').

After step 3, the injured parties have the first option to opt-out from the collective proceedings and pursue their claims individually.

If enough injured parties remain, the court will consider substantive legal questions such as wrongfulness, and – in case of a claim for compensation – fault, damage and causation in the abstract.

If the claim has merits, the court will say so and invite the vehicle and the wrongdoer parties to negotiate a settlement; if this is successful and the court approves the settlement, more or less the same rules as in the WCAM will then apply: the court will declare the settlement binding and a second opt-out opportunity is created.

If, however, there is no settlement or the court rejects the settlement, then the court will itself render judgment, without a second opt-out option. It may dismiss the claim but it may also award damages to the 'precisely specified group', if the case is for damages compensation. It has the freedom to make a general compensation scheme ('damage scheduling') with fixed amounts, barèmes or other units of calculation per relevant group of injured parties. Whatever the court decides, the decision has *res judicata* effect for all those who did not opt-out (subject to revision on appeal and cassation).

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<sup>7</sup> Act of 20 March 2019 amending the Dutch Civil Code and the Dutch Code of Civil Procedure in order to facilitate the compensation of mass damages in a representative group action, the Act on the Collective Redress of Mass Damages (*Wet afwikkeling massaschade in collectieve actie*), *Staatsblad* (Bulletin of Acts and Decrees) 2019 nr. 130.

<sup>8</sup> Art. III.

## C. Some relevant characteristics

### 1. Locus standi of the vehicle(s)

For a case to be heard on the substantive merits, the vehicle (i.e., a foundation or association with full legal capacity) needs to have standing in court. Under the new Act, any representative vehicle can only have *locus standi* if it meets certain requirements. These relate to the governance of the vehicle itself but also to the [136] efficiency of having a group action instead of individual actions.

As concerns the governance, the new art. 3:305a Dutch Civil Code states that the vehicle may institute a legal action for the protection of similar interests of other persons, provided that it represents these interests in accordance with its articles of association and these interests are adequately safeguarded.<sup>9</sup> The vehicle needs:

- to be sufficiently representative, both in view of its constituency and the value of the claims represented;
- to have sufficient experience and expertise to commence and conduct the action;
- to have at its disposal a supervisory body;
- to have appropriate and effective mechanisms for participation or representation in decision-making by persons whose interests are the subject of the legal action;
- sufficient resources to bear the costs of instituting a legal action, in which case the legal person has sufficient control over the legal action;
- a publicly accessible internet page, on which specified information is available, such as on the management structure of the legal person, annual reports, management reports, remuneration of directors and members of the supervisory body and an overview of the status of current proceedings in which the vehicle is involved, and if any fees are charged to constituents, insight in the calculation thereof;
- to bring evidence that past and present directors of the vehicle do not have a profit motive that is achieved directly or indirectly through the legal person; and
- to show it has made attempts to settle the case out of court with the wrongdoer.

If there are foreign elements involved, the vehicle also needs to show that the case has a sufficiently close connection to the jurisdiction of the Dutch courts. Such a connection is deemed present when:

- the vehicle can plausibly argue that the majority of the persons whose interests the legal action aims to protect have their habitual residence in the Netherlands; or
- the wrongdoer is domiciled in the Netherlands and additional circumstances suggest that there is a sufficiently close connection to the jurisdiction of the Dutch courts; or
- the event or events to which the legal action relates took place in the Netherlands.

By means of exception, the court may decide that the previous strict requirements do not apply to the vehicle if it is clear that it has a genuine charitable cause (such as anti-discrimination or environmental claims). If the legal action is instituted with a non-commercial objective and has a very limited financial interest, or where the nature of the claim of the legal person so demands, the court may suffice with ensuring that past and present directors of the vehicle do not have a profit motive and that the case has a sufficiently close connection to the jurisdiction of the Dutch courts. This exception seems extremely important for group actions for injunction, initiated by small and non-professional associations in the public interest.

As concerns the requirements on the group action itself, the vehicle shall sufficiently demonstrate that instituting the group action is more efficient and effective than instituting an individual claim because the questions of fact and of law to be answered are sufficiently similar, because there is a sufficient number of persons whose interests the claim aims to protect and, if the claim is to obtain compensation, because they both individually and jointly have a sufficiently large financial interest.

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<sup>9</sup> Art. 3:305a Dutch Civil Code (after entry into force of the WAMCA).

## 2. Foreign claimants

A vehicle will only have standing in court concerning foreign claims if there is a sufficiently close connection with the Dutch jurisdiction. If the underlying claims represented by the vehicle meet this requirement, the case can be heard. However, if the case is one for a collective compensation scheme, persons belonging to the precisely specified group who are not domiciled or resident in the Netherlands are only bound by the court-imposed scheme if they have opted into the proceedings. To do so, they must inform the court registry in writing that they agree to have their interests represented in this collective action within a time limit to be determined by the court (at least one month).

This means that if a Dutch foundation starts a representative group action for collective compensation in the interest of consumers affected by a Dutch company that has wrongfully caused damage to consumers in Germany and the Netherlands, the court will first test whether there is a sufficiently close connection with the Dutch jurisdiction (see paragraph C.1). If so, the proceedings will affect Dutch consumers who are part of the 'precisely specified group' *unless they opt out*. It will affect the German consumers only *if they opt in*. Note that this is only the case of a representative group action for collective compensation. It is not the case in a 'lone standing'<sup>10</sup> WCAM settlement procedure; there, German consumers can derive benefits from the settlement unless they opt-out.

## 3. Commercial motives

From the list of requirements, we can glean that the legislature is unhappy with the involvement of commercial motives in group actions. Noble as that cause may be, we think it is rather naïve. As we all know, money 'makes the world go round' and group actions are not any different in this respect. What is more, the new procedure is likely to be very expensive due to its length and complexity. The requirement that the vehicle has to show not only that it has sufficient resources to bear the costs of instituting a legal action but also that it has sufficient control of their handling of the case, means that courts may ask for any litigation funding contract to be disclosed. It may also mean that the court will test the contents of such contracts. If there is insufficient control, the case will not be heard. This in [137] turn means that funders will be deterred from financing these group actions: if they cannot control the vehicle strategic choices but may only pay for the consequences, their investment may be jeopardized. We think that this legislative choice will effectively kill any incentive to invest in group actions.

Also, if the remuneration of directors and members of the supervisory body is disclosed and scrutinized, and evidence will need to be brought on the financial motives of past and present directors, chances are that the most experienced persons in this business will not be willing to work anymore for vehicles. The only ones who will *not* be scrutinized, are the attorneys who take on business from the vehicle – provided there will be any vehicles left willing to initiate an action – to work on an hourly-fee basis and who do not run any of the business risks involved in the claim. So, the attorneys can continue to make a decent living out of any vehicle that has enough money to bring a claim.

## D. Conclusions

It remains to be seen whether the WAMCA will offer a solution for small-scale damage suffered by many (trivial and scattered damage, *Streuschäden*), the very issue it aims to solve. Indeed, the solutions such as the strict *locus standi* rules for the second issue addressed by the WAMCA – i.e., the allegedly growing problem of frivolous litigation by commercially motivated action groups, an issue which we feel has slightly been blown out of proportion – may discourage or even prevent its use. The Dutch legislature has tried to strike the balance between claimants' and traders' interests. It however proves difficult to reconcile such diverging interests. Preventing abusive litigation is crucial but we fear that the strict rules may deter the initiation of collective proceedings and funding of typical consumer (low-value!) damages actions. More generally, the new law is worrisome in terms of access to justice as it seems to increase the threshold for bringing other types of group

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<sup>10</sup> A settlement procedure, wherein the claimants do not fall back on art. 3:305a Dutch Civil Code for guidance.

actions, such as injunctions. Regarding the third issue – i.e., the (poorly substantiated) fear for class settlement tourism – the WAMCA only partially closes the Dutch borders. Foreign consumers may still *opt in* and the option of the ‘lone standing’ WCAM settlement remains open. It is clear, however, that from now on the Dutch judiciary will focus on collective actions which are closely connected with the Dutch jurisdiction, provided there are any actions left for the courts to deal with....

*In short*

This article offers a brief introduction to the Collective Redress of Mass Damages Act 2019 (the Netherlands), which will introduce a procedure for compulsory mass damages compensation.

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Recently published by the authors:

F. Weber, W. van Boom, [Neue Entwicklungen in puncto Sammelklagen – in Deutschland, in den Niederlanden und an der Grenze](#), *VuR* 2017, 290-297.

C. Pavillon, [Public interest litigation in the Netherlands – Recent developments in the collective enforcement of consumer rights](#), in: Martin Schmidt-Kessel/Malte Kramme/Christoph Strünck (Eds.) *Im Namen der Verbraucher?: Kollektive Rechtsdurchsetzung in Europa (Schriften zu Verbraucherrecht und Verbraucherwissenschaften)* (2015) 85-124.