ZZP*Int*

Zeitschrift für Zivilprozess International

Jahrbuch des Internationalen Zivilprozessrechts

25. Band 2020 *Sonderdruck*

Carl Heymanns Verlag

ZZP*Int*

Zeitschrift für Zivilprozess International
Jahrbuch des Internationalen Zivilprozessrechts

Zitiervorschlag:
Verfasser ZZPInt Band (Jahrgang), Seite(n)
Ferrand ZZPInt 25 (2020), 3 ff., 12

ISBN 978-3-452-29904-8
ISSN 1434-8888

Schriftleitung
Professor Dr. Alexander Bruns, LL.M. (Duke Univ.), Universität Freiburg, Institut für deutsches und ausländisches Zivilprozessrecht, Abt. 2, Werthmannstraße 4, 79098 Freiburg, e-mail: izpr2@jura.uni-freiburg.de. Zuschriften werden an die Schriftleitung oder an die zuständigen Mitarbeiter erbeten.

Manuskripte
Beiträge werden nur zur Alleinveröffentlichung angenommen. Die Annahme zur Veröffentlichung muss schriftlich erfolgen. Mit der Annahme erwirbt der Verlag vom Verfasser alle Rechte zur Veröffentlichung, insbesondere auch das Recht der weiteren Vervielfältigung zu gewerblichen Zwecken im Wege fotomechanischer oder anderer Verfahren.
Für Manuskripte, die unaufgefordert eingesandt werden, wird keine Haftung übernommen. Die Rücksendung ist nur möglich, wenn Rückporto beigefügt war.
Es wird davon ausgegangen, dass die zur Veröffentlichung eingesandten Entscheidungen von Instanzgerichten nicht auch anderen Zeitschriften angeboten werden.

Erscheinungsweise
Die ZZP International erscheint einmal jährlich als komplett gebundener Band.

Bezugsbedingungen
Nähere Informationen zu allen Bänden sowie die Bezugsbedingungen sind erhältlich unter Tel. 0 26 31/8 01-22 22 oder e-mail: info-wkd@wolterskluwer.com.

Adressenänderung
Es wird gebeten, bei der Mitteilung von Adressenänderungen außer dem Titel des Jahrbuchs die neue und die alte Adresse anzugeben.

Satz
Newgen Knowledge Works (P) Ltd., Chennai

Druckerei
WDS, Sandomierz, Polen.

Verlag
Wolters Kluwer Deutschland GmbH, Carl Heymanns Verlag, Wolters-Kluwer-Straße 1, 50354 Hürth, Telefon 0 22 33/37 60-60 00, e-mail: info-wkd@wolterskluwer.com, http://www.carl-heymanns.de

IV. Niederlande

Collective Actions in the Netherlands – A Step Forward?

*Prof. Dr. Ianika Tzankova, Tilburg University/Netherlands**

1. Introduction

The Act on the Resolution of Mass Claims in Collective Actions (Wet Afwikkeling Massaschade in Collectieve Actie: "WAMCA") came into force on 1 January 2020.[1] It applies to collective actions brought on or after the date of its inception and relates to events that (i) took place on or after 15 November 2016,[2] or (ii) started before 15 November 2016, but continued after that date.[3] As at 1st July 2021 at least thirty collective actions[4] have been initiated under WAMCA, seeking remedies ranging from various injunctions to damages. Currently, the Netherlands has three collective redress regimes in force: the old collective action regime that has been in place from 1994, the collective settlement regime on an opt out basis (WCAM) that has been in place since 2005[5] and the WAMCA. For the sake of completeness I also mention the assignment of claims, powers of attorney or mandates to a special pur-

* Ianika Tzankova holds a Chair on Global Dispute Resolution and Mass Claims at Tilburg University and is a visiting professor at Paris Dauphine University, she is also partner of a Dutch law firm.

1 Stb. 2019, 130.

2 The choice for this date is somewhat random. It refers to the date of submission of the legislative proposal before Parliament. Initially, the WAMCA was going to be applicable on all collective actions filed after the 1st of January 2020, but after critical comments in the literature that this would lead to chaos in relation to already pending collective actions the underlaying fact pattern of which would qualify for a WAMCA action, the legislature restricted the temporal scope of law.

3 34608, nr. 13 (Amendment Van Gent).

4 The actions are to be found on the website of the Council for the Judiciary: <https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen>.

5 Stb. 2005, 340.

pose vehicle that are used on a stand alone basis or in combination with collective actions under the old regime, but these fall outside the scope of this article. As will be discussed further below and despite the extensive legislative text and accompanying Parliamentary notes, there are still many unanswered questions and uncertainties with respect to the functioning of the WAMCA in practice. Having three collective redress regimes applicable at the same time has certainly not reduced the level of complexity and uncertainty.

In 2. a brief overview will be given of the collective redress regimes predecessing WAMCA and the shortcomings that led to the latest legislation. 3. provides a high level overview of the most noteworthy features of the WAMCA and of the most significant changes, while 4. focuses on the issues that remain unclear. 5. ends with concluding remarks.

2. Collective redress prior to WAMCA

When it comes to collective redress within the EU, the Netherlands is an interesting and relevant jurisdiction to watch for a number of reasons. First, it stems from the civil law family and its legal culture and tradition are very close to those of other EU jurisdictions. In addition, it has had a collective action mechanism since 1994 when the case law of the Dutch Supreme Court[6] permitted collective actions by non-profit organisations protecting certain public or collective interests was codified in Article 3:305a DCC. Furthermore, the collective action regime is applicable since 1994 in all areas of law, which makes it possible to follow and study trends over the years. Moreover, the Netherlands is one of the few EU jurisdictions that takes a more pragmatic approach to access to justice by allowing for ad hoc established non-profit organisations to file collective actions and by recognising the commercial reality of collective redress. That offers yet another useful comparative perspective. The sum of these characteristics offers lessons that facilitate discussion about collective redress and meaningful access to justice at EU level that are more evidence based and less lobby driven.

2.1 Old collective action regime

Under the old regime the standing threshold was fairly low. The claimant had to be a non-profit making entity. It had to have a specific legal structure in place were required and adequate articles of association to be able to run the collective action in question.[7] Twenty seven years of experience in collective redress suggests that granting standing to file collective actions to ad hoc established foundations has not led to more collective actions in comparison to the ones brought by other types of

6 Supreme Court of the Netherlands June 27, 1986, ECLI:NL:PHR:1986:AD3741.

7 See also: I.N.Tzankova 'Everything that you wanted to know about Dutch Foundatons but never dared to ask: a check list for investors' 5 Zeitschrift für Verbraucherrecht 2015, 149.

institutional representative claimants[8] and in any event do not support claims of increased meritless litigation, in fact they suggest the opposite.[9] Dutch scholars asked to provide examples of vexatious litigation will struggle to come up with concrete examples, whereas many collective actions have contributed to the development of the law by establishing novel concepts of liability and other relevant legal topics. As collective actions became more frequent as a result of globalization, industrialization, the wider spread of social media[10] (especially after the financial crisis), a number of shortcomings in the Netherlands collective redress regime became apparent. The most noteworthy one was the fact that under the old regime only declaratory and injunctive relief was allowed, parallel actions for the same or similar facts against the same defendants were possible and a judgment had a res judicata effect only between the respective non-profit organisation/claimant and the defendant. The implications of the latter were that other organisations and group members could initiate new actions. Finality was only possible via a settlement requiring all individual group members to sign up to the agreement. Needless to say, this was not practical and certainly impossible to achieve. Finally, under the old regime 'free riding' was part of the system of collective redress, because it required non-profit organisations to undertake action and sometimes for individual group members to contribute financially to the warchest of the organization, while outside of a settlement there were no means to (adequately) compensate the respective group members or the organisations for taking up on an active role and making the action possible for the benefit of non-contributing group members.

2.2 The WCAM

The Dutch legislature remedied the lack of finality for the defendant under the old regime with the introduction of the WCAM in 2005, inspired by the US settlement only classes. Part of the legal provisions are to be found in the Dutch Civil Code dealing with settlement agreements[11] and part of the legal provisions are to be found in the Dutch Code of Civil Procedure.[12] Although it was predicted by the legisla-

8 Tillema, I 'Entrepreneurial Mass Litigation: Balancing the building blocks.' Erasmus university Rotterdam (2019), 273: "The number of cases brought by entrepreneurial representative organizations starts to gradually climb from 2008 onwards, but remains (well) under the level of the number of cases brought by the other representative organisations."

9 Tillema, I 'Entrepreneurial Mass Litigation: Balancing the building blocks' Erasmus University Rotterdam (2019), 274: "The findings did support the claim that there is an increased detection of mass wrongdoings, although the number of collective actions appears to have remained modest."

10 For a more extensive discussion of the drivers of collective litigation see: Hensler, D 'How Economic Globalisation is Helping to Construct A Private Transnational Legal Order' in *Muller S. et al (eds) The Law of the Future and the Future of Law* (Torkel Opsahl Academic EPublisher, Oslo 2011).

11 Articles 7:907–910 DCC.

12 Articles 1013–1018a DCCP.

ture as a dispute resolution method to facilitate 'extraordinary' domestic matters, the WCAM has enabled a number of global settlements to be declared binding on opt-out basis by the Amsterdam Court of Appeal,[13] and has gained international attention in both academia and practice.[14]

Under the WCAM, representative non-profit organisations and alleged defendants, as well as other parties who have reasons to want to contribute to a settlement fund, can negotiate a settlement out of court and submit it jointly to the Amsterdam Court of Appeal for approval and to declare it binding for everyone who falls within the group definition on an opt out basis. There are two notification rounds: the first one to announce the conclusion of the settlement and to invite interested parties to express views and file objections at the fairness hearing and a second one if the settlement agreement is declared binding so that class members who do not wish to be bound, can opt out. If they do not do so in a timely fashion or by following the prescribed procedure, they will be deemed to be bound by the agreement and it will not be possible for them to file new proceedings in relation to the same matter. Even if they failed to obtain compensation. The only exception is if the group member is able to demonstrate that despite the (extensive) notification process it is impossible to be aware of the settlement. To date, distribution issues were encountered only in relation to the Converium settlement. Early 2021 it was reported in the media that a notary who was supposed to oversee the distribution process had defrauded investors for EUR 9 million.[15] Despite of proposals made in the literature to that end, the WCAM does not contain any reporting obligations by the parties to the court or to the outside world of the settlement distribution process, which enhances the opportunities for abuse such as in Converium.[16] The fact that such processes typically involve large

13 Arons, T. and van Boom, W 'Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands.' 21(6) European Business Review (2010), 857.; Kramer, X.E 'Enforcing Mass Settlements in the European Judicial Area: EU Policy and the Strange Case of Dutch Collective Settlements (WCAM)' in *Hodges, C, Stadler, A (eds) Resolving Mass Disputes: ADR and Settlements of Mass Claims* (Edward Elgar Publishing, Cheltenham 2013); Tzankova, I and Hensler, D 'Collective settlements in the Netherlands: Some empirical observations' in *Hodges, C, Stadler, A (eds) Resolving mass disputes: ADR and Settlements of Mass Claims* (Edward Elgar Publishing, Cheltenham 2013).

14 Halfmeier, A. 'Recognition of a 'WCAM' Settlement in Germany' 2 Nederlands Internationaal Privaatrecht (2012),available at < https://ssrn.com/abstract=2026701>, or <http://dx.doi.org/10.2139/ssrn.2026701>; McNamara, S. 'Morrison v. National Australia Bank and the Growth of the Global Securities Class Action Under the Dutch WCAM,' 68 Buff. L. Rev. 479 (2020), available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol68/iss2/3>.

15 Jennifer Ruffalo, 'Robbed foundation: Pels Rijcken must bear all costs' (Netherlands News Live, 8 march 2021) <https://netherlandsnewslive.com/robbed-foundation-pels-rijcken-must-bear-all-costs/106739/>, accessed 30 June 2021.

16 Ozmis, D and Tzankova, I.N 'De evaluatie van de WCAM: de kernthema's uitgelicht' Tijdschrift voor de civiele rechtspleging 2012(2), 33.; Eijsermmans-van Abeelen, D 'De uitkering van massaschadeclaims: Professionalisering van het distributieproces bij collectieve schikkingen.', dissertation Tilburg University 2020.

sums of money, take a lot of time and are often accompanied with personal changes on the various teams over the years, has not proven to be helpful either.[17]

A noteworthy feature of the WCAM is that it follows the damage scheduling approach: a form of 'rough justice', where group members receive compensation on the basis of their belonging to a certain category of claimants, rather than on the basis of the individual circumstances of the case. Appeal is only possible by the petitioning parties jointly and only in the event the court refuses to declare the settlement agreement binding. To date, nine settlements have been declared binding. Whereas in the early days after the introduction of the WCAM the Amsterdam Court of Appeal applied a marginal 'light touch' -review approach when approving the settlements, gradually that attitude has changed. In the last two WCAM settlements,[18] the Amsterdam Court of Appeal required from the parties to amend the settlement terms before it was willing to approve the settlement. The court's view was that without the changes, the settlements were not fair and reasonable. Under Fortis, the Court went even further requiring the settling organisations to disclose information about the costs of the litigation and their success fees. That was the first time that this topic had been discussed openly and the general public had insight into the costs of ten years of litigation and the benefits of different business models and procedural approaches to securities litigation. The table below shows the costs and fees of the various organisations that participated in the Fortis settlement:

Organisation	**Costs**	**AGEAS cost reimbursement**	**Success fee (estimate)**
Deminor	EUR 12,9 million	EUR 10,5 million	EUR 35 million
FortisEffect	EUR 5,7 million	EUR 7 million	EUR 3,5 million
SICAF	EUR 4 million	EUR 2,5 million	EUR 40–45 million
VEB	EUR 7 million	EUR 25 million	X
ConsumentenClaim/ St Fortisclaim	No substantiation	EUR 3,6 million	X

Despite of the introduction of the WCAM in 2005, the unavailability of a collective action for damages remained a point of criticism and concern.[19] The purpose of the WAMCA is to address these concerns.

17 Disclosure: the author was acting for the settling company SCOR/Converium in the settlement approval process.

18 *SCOR Holding A.G,* ECLI:NL:GHAMS:2012:BV1026; *Fortis/Ageas,* ECLI:NL:GHAMS:2018:2422.

19 For an extensive overview of discussion of various legislative measures aiming to remedy the absence of a collective action for damages see: Tzankova, I and Kramer, X.E 'From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands' in *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer International Publishing, 2021).

2.3 Claimcodes 2012 and 2019

Finally, two non-legislative initiatives should be mentioned, ones that aim at improving the governance of ad hoc organisations and decrease the inconvenience of parallel actions. Especially in the aftermath of the financial crisis, it was difficult for the outside world, courts, group members and defendants, to compare and contrast various claim initiatives. A self-appointed commission of professionals, some of whom were active in different roles in collective actions and settlements drafted a set of guidelines that the governance of ad hoc organisations ideally need to meet. The first version of the Claim code (2012) contained detailed rules about the composition of the Board and Supervisory board in terms of their profiles and expertise (extensive criteria and responsibilities) and in terms of their remuneration (very limited). In addition, it contained rules about the financial operations of the vehicle and about communications with group members. The Claim code follows the 'comply or explain'- principle.

A 2016 study of the Claim code 2012[20] demonstrated, not surprisingly, that neither the courts, nor organisations were adhering to it. The evaluation did not study, nor provide an explanation as to why that was the case. An educated guess would suggest confusion about the status of the Code, an initial distrust of the motives behind the establishment of the Code and an imbalance between on the one hand the onerous requirements and responsibilities for Board and Supervisory Board members and on the other hand the lack of any acknowledgement of the financial reality of running collective actions. Subsequently, in 2019 an updated version of the Claim code appeared, the aim of which was to remedy the shortcomings of the original Claim code. The two most significant changes concern the remuneration of Board and Supervisory Board members, which is allowed to be more aligned to the responsibilities and the market so as to attract experts with the required profile and standing, and acknowledgement of the legitimate position and role of litigation funders, who appear more and more often in collective actions. The Claim code 2019 stipulates explicitly that the representative organisation is allowed to enter into a funding agreement with a commercial third party funder. The board shall ensure that individual board members and members of the supervisory board, as well as the lawyer or other service providers engaged by the claim organisation, are autonomous and operate independently from the funder and the natural persons or legal entities directly or indirectly associated with it, and that the funder and the natural persons or legal entities directly or indirectly associated with it in their turn are independent from the defendant in the collective action. When selecting the third party funder the claim organisation needs to perform an investigation into the capitalization, track record and reputation of the funder.

20 T.E. van der Linden, 'Onderzoek 'Naleving Claimcode', Utrecht University, 2nd June 2016.

Moreover, the agreement needs to be governed by Dutch law and a choice of forum for the Dutch court or an arbitration body domiciled in the Netherlands needs to be made in case of a dispute. The agreement should also contain an address for service of the funder in the Netherlands and should make clear that the organisation has the sole control over the litigation and any potential settlement. Consequently: the organisation needs to ensure that its lawyer and any other service providers engaged by it, will act exclusively on behalf of and for the benefit of the organisation and its members, and will not take instructions from the funder and the natural persons or legal entities directly or indirectly associated with it, which does not alter the fact that funding and the actual payment of the attorneys' fees and any fees charged by any other providers of services may either directly or indirectly be settled by the funder on behalf of the organisation.

The agreement should contain rules that safeguard the confidentiality of the information in possession by the organisation and define the limits of the information to which the funder may have confidential access. The agreement ensures that, except in special circumstances, the funder cannot terminate the agreement before a final judgment has been rendered at first instance and furthermore guarantees that the applicable notice period is such as to reasonably enable the organisation to organise alternative funding.

The organisation must disclose on the publicly accessible part of its website (i) that funding is provided by a third party funder, (ii) the identity and place of domicile of the funder and (iii) the main features of the system of remuneration(s) and the services that have been agreed with the funder. If the funder is entitled to remuneration based on a percentage of an amount in collective damages to be awarded out of court, the percentage in question should be disclosed by the organisation as well.

In principle, the organisation is not under an obligation to disclose, on its website or otherwise, the amount of the remunerations to be paid to the funder, the budget available for the case, the financing documentation or any other sensitive information. The organisation must stipulate to the funder that it is authorized to disclose this information to the court if so instructed by the latter, in which case the organisation may seek to prevent such information being disclosed to the counterparty as well.

With respect to remuneration of Board members, principle VI can be summarised as follows. For the performance of their management duties, board members are entitled to receive reasonable remuneration which is proportionate to the nature and the intensity of the work performed by them. In addition they may claim reasonable expenses. Board members must not perform paid duties for the benefit of the organisation, which do not arise from their work as board members. The remuneration and expense allowance of the organisation's board members are determined by the supervisory board. Board members must not accept payment for their activities from any party other than the organisation or party that has appointed or nominated them as board members (see discussion of principle VII further below). All remuneration agreed with board members must be stated in the annual financial

statements. The organisation must publish the main features of the remuneration policy in relation to its board members on its website.

With relation to the supervisory board members, principle VII stipulates that the organisation should have a supervisory board, consisting of at least three individuals no more than one of whom will be appointed on the recommendation of the funder, if any. It is the duty of the supervisory board to supervise the policies and the strategy of the board and the general affairs within the organisation. This is a tool for the funder to have an extra ear/eye/voice within the organisation. In the event of third party funding, a member of the supervisory board, not being the chairman, may be appointed on the recommendation of that party. An appointment of that nature need be published on the organisation's website.

The WAMCA has incorporated some of the features of Claim code 2012, but since the Claim code 2019 and WAMCA were drafted in parallel, the last version of the Claim code, including the funder's provisions, has played no role in the legislative history and its status is currently unclear. Time will tell whether Claim code 2019 will suffer the same initial fate as the Claim code 2012, but absent any other guidelines with respect to the role of third party funders in collective redress it is more likely that courts and parties will take notice of it. It is noteworthy that the Claim code 2019 was also drafted by a self-appointed committee, partly consisting of the professionals who were involved in the earlier drafting process.[21] However, various consultations were held to let interested parties submit their views and observations.

3. The WAMCA

3.1 Introduction

The WAMCA is to be found in the Dutch Civil Code, Article 3:305a (new) that governs the admissibility requirements for collective actions and in the Dutch Code of Civil Procedure (DCCP) that contains the procedural rules.[22] For non-Dutch readers this division may not be evident, but it follows from the Code structure of Dutch civil law legislation.[23] There are four main procedural stages under the

21 For a more fundamental critical discussion of this type of 'self-regulatory' instruments in the context of mass claim dispute resolution see: Willging, T 'Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation' 148(6) University of Pennsylvania Law Review 2000, 2225.
One could argue that the nature of the two instruments (the US Manual and the Dutch Claimcode) is similar and that the concerns expressed with respect to the Manual are relevant also for the Claimcode. These concerns relate to the lack of democratic basis and the tendency to be treated rigid and as 'law', while the reality is much more complex.

22 Articles 1018 (b)-(m) DCCP.

23 In many jurisdictions the class actions rules and the rules on group litigation are laid down in the codes of civil procedure.

WAMCA. In stage one the court rules on the admissibility of the action. Typically, at that stage the court will examine whether it has jurisdiction to hear the claim, whether the organization meets the standing criteria, whether the action is suitable to proceed in a collective fashion and if there are competing initiatives, who should be the exclusive representative ("ER"). If the court rules affirmatively on all these questions then stage two comes into play, where the scope of the class is further established via opt in and/or opt out.[24] After that, at stage three, a court ordered negotiation and mediation take place.[25] That marks the end of the procedural discussions. In the last, fourth, stage the substantive review of the matter takes place and there are two potential scenarios. If the negotiation or mediation ended with a settlement, the parties can jointly submit a settlement proposal for approval to the court. The relevant WCAM provisions on the settlement approval process, e.g. the content of the settlement agreement, the possibility to file objections, notification and publication requirements and opt out are equally applicable.[26] Note however, that the international scope of the WAMCA is more restricted than that of the WCAM, because of the stricter jurisdictional requirements under WAMCA (see also further below under 3.2). If the negotiations do not lead to a settlement, the court will continue with the substantive review of the matter. The ER will be allowed the opportunity to further substantiate its arguments and the defendant(s) will be able to further raise a defence and substantive discussion of the claim. The court can order at its discretion, that the parties submit a proposal for collective damages calculation and distribution or a proposal for a compensation distribution plan,[27] but the court is free as to whether to follow that. Since the result of this stage is a court ruling, there is no opportunity for opt out or opt out. The final decision will have res judicata effect between defendants and the members of the class and brings finality.

3.2 Most Significant Changes

This paragraph provides an overview of the eight most significant changes brought about by the WAMCA.

The most important change under the WAMCA is that its default position, namely that it allows for collective damages actions on an opt out basis for all claimants domiciled in the Netherlands. Claimants domiciled outside the Netherlands need to opt in, but it is possible for the court to rule, at the request of a party, that the non-Dutch claimants also opt out if the nature of the claim makes that a more sensible approach. One could imagine that such a request is more likely to be granted, if it

24 Articles 1018 f (1) and (5) DCCP.

25 Article 1018 g DCCP.

26 Article 1018h DCCP.

27 Article 1018h DCCP.

concerns jurisdictions that allow for opt out actions in their national legislation. In any event, in this type of cases notification needs to be given special attention.

There are stricter requirements that the ER needs to meet in terms of governance, conflict of interest and funding. Some of these are a codification of the requirements under the Claim code 2012,[28] but the legislator has not followed all recommendations laid down in it.[29]

There is a central registry for collective actions. It is the responsibility of the claimant to register an anonymised copy of the writ of summons within two days after it has been served to the defendant. The sanction of failing to do so is inadmissibility of the action.[30]

Other entities considering filing a collective action against the same parties for the same events have a time period of three months to serve their writ of summons. This brings parallel actions to an end: the court will need to appoint one of the entities as ER.[31] The court will take into account e.g. the number of group members represented by the organization, the size of the financial interest represented, other activities of the organization and the (collective) actions track record of the organisations and/or the individuals involved in it. The court may require the organisation to proof that it has sufficient financial means to run the action. The court will also examine whether the organization has enough control over the claim, e.g. litigation funders should not have an influence over whether a settlement should be accepted. The terms of the litigation funding agreements might become a relevant factor when selecting the ER. Appointment of various exclusive representatives can be justified by the nature of the collective action or the interests of the persons represented by the claimant representatives.[32] Also, organisations who are not appointed as ER stay party to the proceedings. The court can decide that they can also perform certain actions in court.[33]

---

28 Articles 3:305a (2) (3a) DCC.

29 Bauw, E., van Mourik, J. 'De Claimcode van 2011 tot 2019', in *Claimcode 2019* (Boom-Juridisch, The Hague 2019). For example the Claim code 2012 prescribes that the Board should consist of a lawyer and an expert with financial background, whereas the new legislation doesn't prescribe what the expertise of the Board member should be (as long as it is relevant for the action). The collective action organisations need to, amongst others and as prescribed by the Claim code 2012, appoint a qualified and independent three headed board, a supervisory board and an accountant. In addition, a collective action organisation needs to have a website and communicate with its stakeholders. The more significant deviations from Claim code 2011 concern the fact that under the new regime there should be appropriate mechanisms in place to secure for the participation and representation in the decision-making processes of the class members.

30 Article 1018c (2) DCC.

31 Article 1018 (c) (d) (e) DCCP.

32 Artcile 1018 e (4) DCCP.

33 Article 1018 e (3) DCCP.

In addition to the admissibility or standing requiremens for the ER, there are also criteria the collective action or the claim needs to meet in order to proceed as a collective action. These resemble the certification test as that is known in a few other jurisdictions. Article 1018c (5) requires the claimant to demonstrate that it is likely that bringing such a collective action is more efficient and effective than bringing an individual action.[34] There is sufficient commonality in the factual and legal questions at issue and there is a sufficient number of persons whose interests the action seeks to protect.[35] Finally, the financial interest at stake needs to be sufficiently large.

There is also the so-called "scope" rule that needs to ensure that there is a sufficiently close link to the Netherlands. The matter has a sufficiently close connection to the Netherlands in any event, if (i) the majority of the individuals on behalf of whom the collective claim is brought (the class) are Dutch residents; or (ii) the defendant resides in the Netherlands and there are other circumstances that suggest a sufficient link to the Netherlands; or (iii) the events on which the collective action is based occurred in the Netherlands. These are alternative and not cumulative requirements. Only one of these needs to be met. In the last stage of the discussions of the proposal an amendment was filed by a few members of Parliament to prevent that this scope rule would lead to more collective actions against Dutch companies. It now includes that if the connection is based on the condition that the defendant resides in the Netherlands, other circumstances should point to a connection with the Dutch legal sphere too in order to fulfill the requirement of "a sufficiently close connection". The court should assess whether this is the case. This could be the case if the revenue of a large multinational runs to a great extent through its Dutch subsidiary.

During the legislative process doubts were raised as to whether this extra requirement is compatible with EU law. It resembles the doctrine on forum non-convenience. The response of the legislator was that although it is ultimately for the ECJ to rule on that point, the view of the Dutch legislator is that this is not a jurisdictional, but an admissibility requirement and therefore should not be problematic under EU law.[36] One may wonder how convincing this argument is. A jurisdictional link or requirement does not change its nature by simply putting a different label on it. In the meantime two District courts have ruled on this topic, with differing outcomes. In one case, involving a claim for production of documents under emergency proceedings, the Rotterdam District court dismissed the claim referring to the scope rule and the fact that there was not sufficient link with the Netherlands.[37] The claim was filed against the mother company, Boskalis, that is domiciled in the

34 This resembles somewhat what is known in other jurisdictions as a 'superiority' requirement, although the interpretations of how that needs to be applied may vary.

35 This resembles the commonality and numerosity requirements in some jurisdictions.

36 Kamerstuk 34 608 nr. 9, *MvT* pp. 22–26, and *NnavV* p. 13.

37 *Stichting Both Ends v. Koninklijke Boskalis Westminster N. V.*, ECLI:NL:RBROT:2020:8228.

Netherlands, but the documents related to the activities of its Indonesian subsidiary in relation to a domestic Indonesian project. In another matter the District Court Midden Netherlands ruled in a regular collective action that it can be questioned whether the scope rule is compatible with EU law,[38] but that at the matter at hand this is irrelevant because in the view of the court that requirement was met in that particular case. One can imagine that this issue will ultimately be presented to the ECJ in one of the pending consumer cases in relation to some of the (alleged) emission scandals. Until then, it is part of WAMCA.

The same collective action regime is also applicable for all substantive areas of law, that is not new, but also for all types of remedies. It does not matter in principle whether the action is for damages or for declaratory or injunctive relief. This provision met heavy criticism from a number of scholars who argued that this is a step backwards for collective redress and access to justice in the Netherlands, because it will prevent many legitimate collective actions for injunctive and/or declaratory relief.[39] Therefore Article 3:305a (6) DCC contains a special provision that certain organisations can be exempted from the requirements in 3:305a (2a-e) and (5), containing the stricter governance and financial accounting requirements. Indeed, the first WAMCA actions are the ones that apply for an exemption under 3:305a (6) and although the courts seem to take a favourable approach to such requests, they do add an extra layer of costs and complexity, so the criticism of the scholars referred to above seems justified.

Another exception to the new collective action rules is to be found in Article 1018b (1): in emergency proceedings (kort geding), the special rules for collective actions laid down in the Code of Civil Procedure are not applicable with the exception of Article 1018c DCCP: all admissibility requirements are without exception applicable in the context of emergency proceedings, including the registration in the register.

The admissibility requirement laid down in Article 1018l (1) DCCP, that the court needs to verify after summary inquiry, that the claim is not without merit at the time the proceedings are initiated, is meant to prevent frivolous and evidently ungrounded collective actions. One may wonder how well founded a fear for frivolous litigation is, in view of the fact that the Netherlands does not have experience of such litigation under the old regime. Nor is it very likely that a representative entity would go through the trouble of overcoming the stricter admissibility requirements, if the claim were manifestly without merit. This requirement, that has also financial consequences, has most of all a political background. If a court rules that a claim is manifestly baseless, it can award the defendant a maximum of five time the applicable adverse cost orders schedule.[40] This cost order is still far from

38 *Stichting Brein v. YISP B.V., Worldstream B.V., Serverius B.V.*, ECLI:NL:RBMNE:2021:2142.

39 Van Boom, W.H. and Pavillon, C.M.D.S 'Netherlands' in *Enforcing Consumer and Capital Markets Law: The Diesel Emissions Scandal* (Cambridge: Intersentia, 2020).

40 Article 1018l (1) DCCP.

the „loser pays all costs-principle", but more than can be awarded under normal circumstances.

More 'spectacular' is the provision in Article 1018l (2) DCCP that stipulates that in the event of success the claimant organisation is entitled to a full recovery of its costs and expenses, including the success fee of the litigation funder.[41] That needs to be paid by the defendant on top of the awarded damages, which is a unique feature of WAMCA. The logic behind this rule is to bring the WCAM and the WAMCA (settlement) practices as much as possible in line so there is no perverse incentive for defendants to not settle a matter only because under the WAMCA they would not need to cover full costs and expenses, including the success fees of the funders. The table under 2.2 of the fee awards in the Fortis settlement shows why a discrepancy between the two regimes could easily lead to perverse incentives.

3.3 The Major Challenges

Despite of the extensive legislative regime, the numerous amendments along the process and at times lengthy discussions in Parliament, there are still a number of challenges for the parties and the courts to tackle when working with the WAMCA. This paragraph discusses the major ones. For example, rights of appeal are unclear. The only certainty one has, is that no appeal is possible against the appointment of the ER and that if parties negotiate a settlement and the court refuses to approve it, the parties can jointly file an appeal with the Supreme court. Whether appeal is possible after certification of the action (prior the opt in and opt out) is unclear. The general rule in the Netherlands is that special leave of the court is needed to file an interim appeal. Who has rights to file an appeal if the claim is dismissed at first instance, the ER and/or the other claiming parties to the proceedings, is also unclear. The system of the WAMCA is to concentrate procedural rights with the ER. On the other hand: other organisations can remain party to the proceedings. There are arguments pro and con for both positions.

Because of the strict admissibility requirements, there is a huge frontloading of costs. The WAMCA actions for damages can hardly be run without the involvement of commercial litigation financiers. If there are multiple claiming initiatives involved with their funders at the back, all parties to the proceedings are entitled to a coverage of their success fees: how sustainable and affordable is such a system in the end? Time will tell. At the same time: what are the alternatives to commercial litigation funding?

In addition: WAMCA does not change the existing material law regarding liability and damages. How would these work in the context of collective actions for damages? The traditional models based on individual damages calculation are generally inadequate. Rough justice will be needed here as well, but how compatible is that with the existing material law on liability and damages? And again: what are

41 Kamerstuk 34 608, nr. 9, p. 5, 2018.

the alternatives to secure access to justice within a reasonable time if the individual approach will be applied also in collective actions.

Furthermore: how do WCAM and WAMCA relate to each other? Is a WCAM settlement still possible next to WAMCA? A WAMCA opt out settlement for Netherlands domiciled claimants and a WCAM for the rest of the world? How consistent is this system? Is this not simply "cherry picking" by defendants and if so, why is this legitimate and acceptable?

How will WAMCA influence pending individual actions and vice versa? There are some provisions about a stay of a year of pending individual actions after a certification under WAMCA, but until then individual actions can carry one and create case law. Alternatively, courts might be tempted to stay such proceedings prior to the appointment of the ER, although that will be contrary to the letter of the law.

Last but not least: although some scholars have defended the introduction of reporting obligations under WCAM of take up rates and costs and benefits of the settlements for the parties involved and despite of the scandal in relation to the Converium settlement, such reporting obligations are still missing in WAMCA.

3.4 Conclusion

The views as to whether or not WAMCA is a step forward towards effective collective redress in the Netherlands are divided. The appointment of an ER and the opt-out mechanism create closure for the defendant. They streamline potential parallel or competing actions and prevent new collective actions being brought on the same facts and regarding the same legal issues by other parties, once a collective action has ended with a judgment or a settlement. Because of its opt out model, that is potentially applicable also on non-Dutch claimants, it seems to offer better opportunities for international collective damages actions. At the same time it can be expected that 'certification battles' will be longer and more costly than under the old regime. Although the status of the Claim code 2019 is unclear, it is likely that it will gain importance both under the old and under the new statutory regimes. It is therefore adivisable to try to comply with it as much as possible. If there are competing organisations, full compliance with the Claim code(s) and voluntarily committing to reporting obligations after the conclusion of damages distribution processes by the candidate-ER might add value. The registration requirement of collective actions that have been initiated is a plus. Before WAMCA one could only follow the development of new collective actions prior to judgment, only via (social) media.