

## Class/collective actions in The Netherlands: overview

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A Q&A guide to class/collective actions in The Netherlands.

The Q&A gives a high level overview of class/collective actions, including current trends; the regulatory framework; limitation periods; standing and the procedural framework for bringing an action; funding and costs; disclosure; damages and relief; settlement; appeals; alternative dispute resolution and proposals for reform.

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This Q&A is part of the *Class Actions Global Guide*.

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### Overview of class/collective actions and current trends

1. What is the definition of class/collective actions in your jurisdiction? Are they popular and what are the current trends?

### Definition of class/collective actions

The Dutch legal system currently has two different collective redress mechanisms:

- Representative collective actions.
- A class/collective settlement mechanism based on an opt-out system that resembles US class action settlements.

These mechanisms for collective redress can be distinguished from other mass proceedings, such as proceedings in which claims are bundled. A claimant can bring a bundle of claims in the name of several individual claimants through a power of attorney obtained from them. A claimant can also bring a bundle of claims in their own name as the owner of claims obtained by assignment. These types of bundled claims are often used to circumvent the current restrictions that apply to representative collective actions.

Representative collective actions. The representative collective action is a mechanism allowing a representative entity, which is either a Dutch foundation (*stichting*) or an association (*vereniging*) with full legal capacity, to initiate proceedings to protect the similar interests of an unnamed group (class). These interests are only sufficiently similar if the claim can be decided without taking into account the specific individual circumstances of the members of the group (the commonality test).

A representative entity can submit a claim for a declaratory judgment, injunctive relief or specific performance or, in the case

of collective actions that relate to events that took place on or after 15 November 2016, also claim monetary damages. A declaratory judgment establishing, for example, the unlawfulness of the defendant's conduct, can be a stepping-stone to claim damages in separate proceedings, either on an individual basis or bundled, or to seek a class settlement agreement. When collective actions were first introduced in 1994, the legislature had the view that awarding damages would require the court to take into account the specific individual circumstances of each member of the group whose interests were represented in the collective action and that therefore a collective claim for damages could not pass the commonality test. However, on 19 March 2019, the Dutch Senate adopted a bill which makes claiming damages possible events that took place on or after 15 November 2016. This bill entered into force on 1 January 2020 (see below, *Current trends and Question 2*).

Class/collective settlement proceedings. Class settlement proceedings allow the parties to a collective settlement agreement to jointly ask the Amsterdam Court of Appeal to declare the settlement to be binding on all class members. In doing this, the court assesses, among other things, the reasonableness of the agreed compensation. Class members can opt out (see *Question 2*).

### Use of class/collective actions

Representative collective actions. Representative collective actions are frequently used for a variety of matters, including, for example:

- Common interest issues, such as general environmental concerns or the representation of women in a political party.
- The mis-selling of financial products by banks or insurance companies.
- Enforcing consumer rights.
- Prospectus liability claims on behalf of investors.
- Collective labour agreements.

Representative collective actions are until now used for injunctions against conduct that is perceived as harmful to the interests of a wide range of persons, or to obtain a declaratory judgment.

Class/collective settlements proceedings. So far, nine class settlement agreements have been successfully declared binding since the Act on the Collective Settlement of Mass Damage (*Wet Collectieve Afwikkeling Massaschade*) (WCAM) entered into force in July 2005. The most recent case, *Fortis/Ageas*, offered compensation to investors for a total amount of EUR1.3 billion. In 2016, entities representing the interests of investors reached a settlement with Ageas, the legal successor to Fortis, offering compensation for alleged losses due to alleged misrepresentations and mismanagement by Fortis in 2007 and 2008. The settlement was submitted to the Amsterdam Court of Appeal for approval. However, the court first denied approval, ruling that the settlement agreement could not be considered reasonable and did not sufficiently safeguard the interests of the shareholders. The court did not agree with the disparity in compensation offered to the "free riders" on the one hand and to investors whose representatives had been actively seeking compensation on the other. The court offered Ageas an opportunity to amend the settlement to address the court's objections. Ageas increased the settlement amount and the parties to the settlement made several other adjustments. The court also asked the representative entities to disclose their funding arrangements in more detail. Finally, on 13 July 2018, the Amsterdam Court of Appeal declared the settlement agreement binding, although it found that the shareholders represented by one of the entities were invalidly favoured over the others.

Class/collective settlement proceedings: international settlements. In two of the nine cases so far, *Shell* (2009) and *Converium* (2012), the WCAM has been applied to a class settlement in which the vast majority of the class members were foreign investors. *Converium* has proved to be particularly significant for international settlements. In *Vedior* (2009) and *Fortis/Ageas* (2018, see above), a substantial number of the class members were foreign investors.

*Shell* concerned a settlement with respect to certain misrepresentations made by Shell about its oil and gas reserves. The settlement was reached for the benefit of all investors (other than the US shareholders) with securities traded on any stock exchange (other than the New York Stock Exchange (NYSE)) between 8 April 1999 and 18 March 2004. The Amsterdam Court of Appeal assumed jurisdiction because one of the defending Shell entities was vested in the Netherlands.

*Converium* concerned the Swiss reinsurer Converium, which had securities listed on the Swiss Stock Exchange and American depositary receipts traded on the NYSE. Converium's share price dropped after it announced substantial increases in its loss reserves, leading to a class action in the US. The class settlement reached in the US excluded non-US shareholders. The potential claims of non-US shareholders were settled in a parallel class settlement agreement with a Dutch foundation representing the interests of non-US investors.

*Converium* is significant for several reasons, as the Dutch court:

- Assumed jurisdiction even though:
  - the claims were not brought under Dutch law and the securities were not traded on a Dutch stock exchange;
  - the alleged wrongdoing took place outside the Netherlands; and
  - none of the potentially liable parties and only a limited number of the potential claimants were domiciled in the Netherlands.
- Accepted that the compensation offered to non-US investors under the settlement agreement was much lower than the settlement amount offered to US investors under the US class settlement, due to a lack of remedies available to non-US claimants outside the US.
- Considered that a 20% fee for the principal counsel was not unreasonable.

## Current trends

On 19 March 2019, the Dutch Senate approved a bill that will allow representative entities to seek damages in a collective action. This Act on redress of mass damages in a collective action (*Wet afwikkeling massaschade in collectieve actie*) (WAMCA) also introduces:

- Stricter requirements for the standing of a claim vehicle and the scope of collective actions.
- Procedural changes to enhance the efficiency and effectiveness of the proceedings.

(See [Question 2](#).)

The WAMCA entered into force on 1 January 2020. It applies to collective actions that relate to events that took place on or after 15 November 2016. The former regime will apply to actions for events that took place before that date. The number of representative collective actions is expected to increase.

The EU has also expressed a growing interest in collective actions. The European Commission has issued a draft directive on representative actions for the protection of the collective interests of consumers (COM (2018) 184 final) and the European Parliament adopted an amended proposal on 26 March 2019 (first reading). The Council issued its general approach on 28 November 2019. Trilogues started in January 2020. On 22 June 2020, the European Parliament and Council reached an agreement. The adoption of the draft directive would, after implementation, create a national legal basis for collective redress within the EU. This could lead to an increase in collective actions.

Other trends include the increase in the number of civil damages actions following a decision by the European Commission establishing a competition law infringement. The national substantive and procedural rules in the Dutch Civil Code and the Dutch Code of Civil Procedure were amended on 10 February 2017 when the Act to implement Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Anti-trust Damages Directive) entered into force. This is expected to give private enforcement cases in Europe a boost. In addition, follow-on proceedings are usually based on the assignment model or conducted on behalf of the claimants with a power of attorney from them (*see above*). With the new possibility of claiming damages under the WAMCA, the representative

collective action might be an alternative model for follow-on proceedings.

There has also been an increase in the use of third-party funding in Dutch collective actions and the number of third-party funders active on the Dutch market is growing (*see Question 10*).

## Regulatory framework

2. What are the principal sources of law and regulations relating to class/collective actions?  
What are the different mechanisms for bringing a class/collective action?

### Principal sources of law

The principal sources of law for representative collective actions and class settlement proceedings are the Civil Code and Code of Civil Procedure. Representative collective actions are governed by Articles 3:305a to 3:305d of the Civil Code. The WAMCA modified Article 3:305a of the Civil Code and introduced additional rules specific to collective actions in Articles 1018b to 1018m of the Code of Civil Procedure (*see Question 1, Current Trends*).

On 11 April 2018, the European Commission proposed its “New Deal for Consumers”, a package of consumer protection measures. Part of this package is a draft directive on representative actions for the protection of the collective interests of consumers (COM (2018) 184 final). The draft directive repeals Directive 2009/22/EC on injunctions for the protection of consumers’ interests and introduces far-reaching possibilities for consumers to start redress actions against traders that have breached specified EU consumer protection legislation. The European Parliament adopted an amended proposal on 26 March 2019 (first reading). The Council issued its general approach on 28 November 2019. Trilogues started in January 2020. On 22 June 2020, the European Parliament and Council reached an agreement. The adoption of the draft directive would, after implementation, create a national legal basis for collective redress for consumers within the EU. It is expected that the proposed EU law on representative actions will not substantially change the Dutch legislation.

Court-approved class settlements are governed by the WCAM, which has been implemented in Articles 7:907 to 7:910 of the Civil Code and Articles 1013 to 1018a of the Code of Civil Procedure (*see Question 1, Use of class/collective actions*). Further guidance on the regulation of representative collective actions and class settlement proceedings has been developed in case law.

The Claim Code 2019, published in March 2019, is a code of conduct for foundations and associations that bring representative collective actions or negotiate collective settlement agreements. The first Claim Code was published in 2011 and has been recognised by the legislature as a body of soft law that provides guidelines for the courts on how to assess the standing of representative entities. In recent years, the courts have given increasing weight to the Claim Code 2011 when assessing whether a claim vehicle can be deemed to safeguard the interests it represents. Several of the Claim Code 2011’s guidelines are incorporated in the WAMCA. The Claim Code 2019 consists of seven “comply or explain” principles, each with a further explanation, that deal with the governance of claim vehicles and third-party funding. It is yet to be seen how the courts will deal with the principles of the Claim Code 2019.

### Principal institutions

Representative collective actions must be initiated at one of the 11 district courts in the Netherlands. This is usually the district court in the place of the defendant’s domicile. There is an exception for specific claims that protect the interests of consumers (*see below, Different mechanisms*). This specific course of action must be brought before the Court of Appeal of The Hague. Under the WAMCA, all collective actions for the same event involving similar factual and legal issues must be consolidated before the same district court. This is in principle the court first seised.

The Amsterdam Court of Appeal has exclusive jurisdiction over petitions under the WCAM seeking the approval of an out of court class settlement.

## Different mechanisms

The law for representative collective actions for events prior to 15 November 2016 and/or initiated before 1 January 2020 (Old Law). Articles 3:305a to d of the Civil Code allow various types of claimants to initiate representative collective actions. However, only Article 3:305a (old) of the Civil Code is and was widely used:

- Provides standing requirements for all collective actions (*see Question 5 and Question 6*).
- States that monetary damages cannot be claimed.
- Allows a person whose interest has been represented in the collective action to opt out by declaring that they do not want to be bound by the effect of the judgment, unless it follows from the nature of the judgment that its effect cannot be excluded with regard to that particular person.

A specific procedure is available to protect consumer rights (*Article 3:305d, Civil Code*). Foundations or associations with full legal capacity can submit a petition seeking an injunction to:

- Protect against the infringement of specific consumers' rights.
- Modify a code of conduct where it enhances certain unfair commercial practices.
- Make the court's judgment public.

The law for representative collective actions for events on or after 15 November 2016 (WAMCA) initiated after 1 January 2020. Under the WAMCA, a representative entity must register the writ bringing the collective action with a central register. Subsequent collective actions started by other entities relating to the same event and involving similar factual and legal issues must be brought before the same court. The different proceedings are then consolidated.

A substantive hearing of the collective action will only take place after the court has decided that the following all apply:

- The representative entity meets the standing requirements of Article 3:305a, Civil Code (*see Question 5 and Question 6*).
- The collective action is more efficient and effective than bringing an individual claim, that is, that:
  - the questions of law and fact are sufficiently similar;
  - the class of claimants is sufficiently large; and
  - in a damages action, the class members individually and jointly have a sufficiently large financial interest.
- It is not summarily apparent that the collective action is defective when the writ is served.

If more than one representative entity has standing, the court appoints an exclusive representative for all parties. The court can decide to appoint various exclusive representatives if the nature of the collective action or the claimants, or the interests of the persons they are representing give reason to do so. All other entities remain parties to the proceedings.

After the exclusive representative has been appointed, the Dutch class members for whose benefit the action is brought can choose to opt out within a timeframe of at least one month. The court decides the timeframe. The judgment in the collective action binds all class members that did not opt out. If too many class members opt out, the court may decide that the claim

cannot be brought. A different system for foreign class members applies and they are not bound if they do not opt in, unless the court orders that an opt-out system applies.

Once an exclusive representative is appointed, the court sets a timeframe for the parties to negotiate a settlement agreement. If a settlement agreement is reached, a class member can choose to opt out after the court has approved the settlement agreement. The settlement agreement binds all class members that did not opt out.

Where legally possible, the court can determine that damages are awarded depending on whether a claimant qualifies to be part of a certain category of claimants (damages scheduling). The court can order the exclusive representative and the defendant to submit a proposal on this.

Class/collective settlement proceedings. Class settlement proceedings can be divided into four different phases:

- First phase. The first phase is the private, non-court supervised and undisclosed negotiation process between the parties aiming to reach a settlement. The settlement agreement is ultimately concluded between:
  - the parties that will pay the compensation for the event that has caused damage; and
  - one or more Dutch foundations or associations that, under their constituent documents, represent the interests of the class of persons intended to be covered by the settlement agreement. It is possible to create a legal entity solely to qualify for the procedure under the WCAM.
- Second phase. Once the settlement agreement is concluded, the parties can request the Amsterdam Court of Appeal to declare the settlement binding on all class members. They must notify the intended beneficiaries of this request. Depending on the number of interested parties, this can be a time-consuming and costly process. Generally, all known interested parties must be notified in writing and in accordance with the applicable bilateral or multilateral treaties, regulations, civil procedural rules and any specific instructions from the Amsterdam Court of Appeal. The parties must also summon the class members using advertisements in newspapers. The court then calls a hearing at which the intended class members and other interested parties can object to the settlement. If necessary, this can be preceded by written submissions. The court also assesses whether the interested parties were notified correctly and if the settlement agreement meets the required formalities.
- The Amsterdam Court of Appeal then declares the settlement agreement binding on the parties as well as the class members, except in certain circumstances. Compensation may be considered unreasonable in relation to the:
  - overall damage;
  - possible causes of the damage; and
  - method and timeframe for obtaining compensation.
- The court's decision cannot be appealed to the Dutch Supreme Court by the class members. It can only be appealed by the parties to the settlement agreement if the settlement agreement is not approved (and only on matters of law).
- Third phase. The third phase allows the class members to opt out. Once the court declares the settlement agreement binding, the settlement's final terms and conditions must be published as stipulated by the court. Following publication, a period (set by the court) of at least three months begins during which class members can opt out of the settlement. Opt-outs must be submitted on an individual basis. There is no procedure for opting out on behalf of a group of persons or entities. It is also possible to agree on a "bust up" provision in the class settlement agreement under which the settlement is terminated whenever more than an agreed number of class members opt out of the settlement.
- Fourth phase. The fourth phase relates to payments to beneficiaries. When the opt-out period expires, all class members are in principle bound by the settlement (that is, they become a party to the settlement agreement), unless they could not have been aware of their damage. They can submit a claim form to receive compensation under the settlement. The settlement agreement can stipulate that the claim must be submitted within a certain timeframe of at least one year following the day that the beneficiary was aware of their claim being due and payable (usually after publication of the

settlement agreement). The payment process can be straightforward, unless the exact amount is established using a complex formula set out in the settlement agreement.

3. Are class/collective actions permitted/used in all areas of law, or only in specific areas?

Representative collective actions and class settlements (proceedings) are permitted in all areas of civil law.

## Limitation

4. What are the key limitation periods for class/collective actions?

The general limitation periods for an action for damages are laid down in Article 3:310 of the Civil Code. A short limitation period of five years starts the day following the one on which the claimant became aware of the damage and the identity of the person responsible for the damage. A long limitation period expires 20 years after the event that caused the damage. The limitation periods can be interrupted by initiating legal proceedings or by sending a letter to the other party stating in unequivocal wording that that party is considered liable and that the sender is reserving their right to claim compensation. In 2014, the Dutch Supreme Court held that a representative association or foundation can, for the benefit of the persons it represents, interrupt the statute of limitations by sending this pre-litigation letter to potential defendants.

The Anti-trust Damages Directive contains slightly different provisions, implemented in Article 6:193s of the Civil Code. The five-year limitation period starts to run on the day following the day on which the competition law infringement ceased and the claimant became aware, or could reasonably be expected to have become aware, of the:

- Infringement.
- Fact that the infringement caused them harm.
- Identity of the infringer.

The 20-year limitation period starts to run on the day following the day on which the competition law infringement ceased.

In addition, Article 6:193t of the Civil Code provides two grounds for extending the limitation period:

- A consensual dispute resolution process between the parties.
- An act of a competition authority within the context of an investigation or proceedings in relation to the infringement of competition law on which the claim is based.

## Standing and procedural framework for bringing an action

## Standing

5. What are the rules on standing for bringing a claim in a class/collective action?

### Definition of class

A class is a group of natural or legal persons that have similar interests, for instance people who have allegedly suffered the same harmful conduct.

### Potential claimant

A Dutch foundation or association with full legal capacity can represent the interests of the parties concerned in a representative collective action (*Article 3:305a, Civil Code*). Certain public legal bodies can also initiate collective proceedings, provided that they represent the similar interests of other persons (*Article 3:305b, Civil Code*).

In class settlement proceedings, the parties that request the Amsterdam Court of Appeal to declare the collective settlement binding on all class members are the parties to the collective settlement. These may be foundations or associations with full legal capacity that represent the interests of the class members and the party or parties that will pay the damages.

All types of claimants can bring a bundle of individual claims on the basis of a power of attorney given by the individual claimants, or on the basis of assignment of the claims to a claiming entity (*see Question 1*).

### Claimants outside the jurisdiction

Foreign claimants can be represented by a Dutch foundation or association with full legal capacity in a representative collective action. Under the WAMCA foreign class members are not bound if they do not opt in, unless the court orders that an opt-out system applies.

Certain organisations with their registered office abroad but that are placed on the list referred to in Article 4(3) of the Directive 98/27/EC on injunctions for the protection of consumers' interests also have standing to represent interested persons for that purpose in the Netherlands (*Article 3:305c, Civil Code*).

### Professional claimants

Professional claimants can also initiate representative collective actions or class settlement proceedings, provided that they fulfil the standing requirements. However, they must:

- Promote and protect the interests of the group represented, and demonstrate this in their articles of association.
- Be sufficiently representative to obtain standing.

The WAMCA stipulates that neither the directors of the representative entity nor their successors are allowed to make a profit by bringing a collective action.

### Qualification, joinder and test cases



6. What are the key procedural elements for maintaining a case as a class action?

### Certification/qualification

Dutch law does not have a mechanism to certify the persons represented by a claim vehicle as a class. However, an entity bringing a representative collective action must be sufficiently representative. When assessing representativeness, emphasis is given to several factors, including the articles of association. These must cover the interests of the group that the entity is promoting, otherwise the entity will not have standing. A court will also assess whether the entity is capable of properly safeguarding the interests it represents. A representative entity will also not have standing if it did not try to engage with the defendant before bringing its action.

In addition, the interests of the persons that are represented in the action must be sufficiently similar (the commonality requirement). According to the Supreme Court, interests are sufficiently similar if they can be bundled so that a collective action is an efficient and effective way of safeguarding them. The court added that the claims can then be dealt with in single proceedings without taking into account the specific circumstances of the individual class members. This approach to the rules on standing also means that if there are two or more competing entities representing the same interests, each can bring its own collective action.

The WAMCA introduces additional standing requirements. The representative entity must:

- Meet certain governance requirements.
- Have sufficient resources to conduct the proceedings.
- Have sufficient control of the legal action.
- Have a generally accessible internet page with information about its governance and the collective action including the financial contributions requested.

In addition, an entity only has standing if the legal claim has a sufficiently close relationship with the Netherlands. That is the case if either the:

- Legal person can make a plausible claim that the majority of persons whose interests the legal action aims to protect have their habitual residence in the Netherlands.
- Party against whom the legal action is directed is domiciled in the Netherlands and additional circumstances suggest a sufficient relationship with the Netherlands.
- Event or events to which the legal action relates took place in the Netherlands.
- The WAMCA stipulates that a substantive hearing will only take place if, besides the standing requirements, the collective action is more efficient and effective than bringing an individual claim and it is not summarily apparent that the collective action is defective when the writ is served (*see Question 2, Different mechanisms*).

In class settlement proceedings, “representativeness” is a key procedural element. It is assessed based on various factors, including:

- The number of persons associated with the representative organisation.
- The extent to which the organisation has actually promoted the interests of the persons involved and has presented itself as such in the media.
- Whether the persons who the organisation represents have accepted the organisation.

### **Minimum/maximum number of claimants**

There are no explicit requirements concerning the number of claimants that must or can be involved. However, a representative collective action must be an efficient and effective way to safeguard the interests of the class. This might not be the case if too few people are represented. It is not necessary for a substantial part of the class to agree with the collective action.

### **Joining other claimants**

The claimant in a representative collective action is the representative entity. The persons whose interests are represented are not parties in the proceedings. Other representative entities can initiate representative collective actions against the same defendant(s). Under the Old Law, the various procedures can be consolidated if they are sufficiently connected.

Under the WAMCA, a representative entity must register the writ bringing the collective action with a central register. Subsequent collective actions started by other entities relating to the same event and involving similar factual and legal issues must be brought before the same court as the first collective action. The different proceedings are then consolidated.

In addition, a representative entity can in principle apply either to join the claimant or to intervene and issue an independent claim in the main representative collective action. This is not common practice. The motion to join or intervene must be made no later than the day that the last written statement is due to be submitted and the parties in the main action can contest this application. The third party must demonstrate that it has an interest that could be adversely affected by the decision in the main proceedings. The fact that the judgment in the main case would create a precedent that could affect other parties with similar claims was not considered by the Supreme Court to be a sufficient enough interest to allow those other parties to join the main case. In addition, the motion cannot not be contrary to due process. The final decision is made by the court in an interim judgment.

In class settlement proceedings, initially only the parties to the settlement agreement are parties to the proceedings. However, interested parties that object to the settlement during the proceedings become parties in the proceedings as well.

### **Test cases**

Lower courts can refer to the Supreme Court for a preliminary ruling on certain questions of law. The question must relate to an issue that is relevant to resolving a significant number of claims or cases based on the same factual background. This instrument can also be applied in representative collective actions.

### **Timetabling**

7. What is the usual procedural timetable for a case?

Depending on the complexity of the case, a representative collective action typically takes between one to two years until a final judgment is given in the first instance. An appeal takes about the same length of time. An appeal to the Supreme Court adds another year. Therefore, a full case can take three to five years.

The timetable to negotiate a class settlement primarily depends on the parties, the complexity of the matter and the pressure to aim for a settlement. Class settlement proceedings typically take approximately one year, although the length is determined by:

- The complexity of the settlement.
- The extent to which persons for whose benefit the settlement agreement is concluded must be notified outside of the Netherlands.
- Whether the court of appeal considers that the settlement is reasonable and sufficiently safeguards the interests of the represented entities.

In complex matters, the courts are generally willing to work out a feasible timetable with the parties to the proceedings during a case management meeting. There is a specific provision that allows parties to request a pre-trial hearing in class settlement proceedings (*Article 1018a, Code of Civil Procedure*).

## Effect of the area of law on the procedural system

8. Does the applicable procedural system vary depending on the relevant area of law in which the class/collective action is brought?

The procedural system laid down in the Civil Code and the Code of Civil Procedure applies to all representative collective actions and class settlement proceedings.

## Funding and costs

### Funding

9. What are the rules governing lawyers' fees in class/collective actions?

Lawyers' fees in representative collective actions and class settlement proceedings do not normally have to be approved by the court. The rules of the Dutch Bar Association do not allow Dutch lawyers to work on the basis of contingency fees that depend entirely or substantially on the outcome of the case.

However, there was a remarkable decision on this issue given by the Amsterdam Court of Appeal in *Converium*. In those collective settlement proceedings, it had been agreed that the US class counsel would receive fees from the settlement amount based on a contingency fee arrangement. The Amsterdam Court of Appeal dismissed the objection that the arrangement was incompatible with Dutch law. It pointed out that in the context of determining the fairness of a class settlement, the court can take into account customary US fee practices, when US law firms are involved and the legal services they provided took place predominantly in the US. Consequently, the Amsterdam Court of Appeal held that a fee amounting to 20% of the settlement amount was not unreasonable.

10. Is third party funding of class/collective actions permitted?

There is no rule preventing alternative funding of litigation other than the bar rules that forbid lawyers from making contingent fee arrangements. However, third party funding arrangements are likely be scrutinised by the court to assess whether the interests of the persons being represented are sufficiently safeguarded. In *Fortis/Ageas*, the Amsterdam Court of Appeal ordered parties in collective settlement proceedings to give information about their funding so that the court could assess whether the interests of the class members were sufficiently safeguarded.

Under the WAMCA, a representative entity must have sufficient control of the legal action. This is to prevent abuse by third-party funders.

The Claim Code 2019 (*see Question 2*) includes a principle on the relationship between a representative entity and a third-party funder. The entity can enter into an agreement with a solid third-party funder. However, the funding conditions cannot conflict with the collective interest of the persons the claim vehicle aims to protect. It is still unknown whether Dutch courts will apply this principle.

11. Is financial support available from any government or other public body for class/collective action litigation?

Legal aid is generally available for individuals in the Netherlands. The Legal Aid Board (*Raad voor Rechtsbijstand*) is an independent governing body that decides whether legal aid is granted on the basis of someone's income. In practice, it is unusual for legal aid to be granted to representative entities.

12. Are other funding options available to claimants in class/collective actions?

Other funding options, for example crowdfunding, are possible but are not currently common practice.

## Costs

13. What are the key rules for costs/fees in class/collective action litigation?

In general, the losing party is responsible for some of the litigation costs. The court decides what portion of the costs they should pay. These costs rarely cover the actual costs and lawyers' fees incurred by the other party. The costs granted by the court are based on standard amounts for standard activities and on the amount of the claim. There is no way to recover the actual costs of litigation from the losing party, except in certain special circumstances in cases about intellectual property rights or in exceptional cases where the procedural behaviour of the counterparty constitutes an abuse of rights.

However, the WAMCA allows the court to award a much higher amount of costs to the winning party in some circumstances. If the court finds that the defectiveness of the claim was summarily apparent, it can order the claimant to pay a higher amount to the defendant, up to five times the fixed amount, unless fairness dictates otherwise. If the court orders a collective claim settlement, it can also order, if so requested, that the defendant pay reasonable and proportionate court costs and other costs that the claimant has incurred, unless fairness dictates otherwise.

### **Key effects of the costs/funding regime**

14. What are the key effects of the current costs/funding regime?

The key effect of the current regime is that the Netherlands as a jurisdiction is favoured by claimants bringing collective actions, particularly in the field of private enforcement follow-on actions. This is usually because:

- Litigation is relatively less expensive in the Netherlands.
- Adverse cost risks are low.
- Third-party funding is allowed.

### **Disclosure and privilege**

15. What is the procedure for disclosure of documents in a class/collective action?

There is no US-type pre-trial discovery or UK-type disclosure process in the Netherlands. However, parties are under a general obligation to state their case truthfully. This can include disclosing certain documents in their custody that are

relevant to the case. The court can also order the disclosure of certain information. If parties fail to do this, the court can draw adverse inferences if it considers this appropriate. However, privileged data or documents are protected against disclosure, unless privilege has been waived.

The Code of Civil Procedure has a number of provisions allowing a party to apply to the court for an order to disclose certain data or documents that are in the custody of a party to the proceedings or a third party. The most important provisions are Articles 843a to 843b of the Code of Civil Procedure. Article 843a states that a party to a legal relationship can request that the other party provides copies of documents relating to that legal relationship. Article 843b can be used if a party had an item of evidence but has lost it. The request must relate to a defined category of documents as specified by the claimant. In addition, the claimant must demonstrate a legitimate interest in the production of the documents. Although obtaining disclosure on this basis is subject to certain requirements, the lower courts tend to take a more generous view on well-reasoned applications.

A request under Article 843a should be denied if the information is subject to legal privilege. It can also be denied for compelling reasons such as confidentiality or privacy, or if the fair and proper administration of justice can be sufficiently secured without disclosure (for example, if the information could reasonably be obtained through witness testimony). However, the implementation of the Anti-trust Damages Directive allows a deviation for competition law related claims. In those cases, a request under Article 843a can only be denied for compelling reasons. For example, if the fair and proper administration of justice can be sufficiently secured without disclosure, that fact cannot be a ground for denying a claim under Article 843a. This makes it more difficult for the court to reject a claim under Article 843a in competition law related cases. Exceptions are also made for information coming from the competition authority's files.

16. Are there special considerations for privilege in relation to class/collective actions?

There are no special considerations for privilege under the law in relation to representative collective actions or class settlement proceedings. According to the generally applicable doctrine, only certain professionals can invoke privilege (for example, lawyers, civil law notaries and medical practitioners), and privilege cannot be invoked by bankers, accountants or tax advisers. Information is privileged if it was entrusted to a lawyer with a view to obtaining legal advice.

A person called as a witness must appear and give evidence (*Article 165, Code of Civil Procedure*). However, if that person must observe confidentiality by virtue of their office or profession, they can refuse to testify about information received in that official or professional capacity (*Article 165(2)(b), Code of Civil Procedure*). Once privilege is invoked, the court assesses whether it is justified.

If requested to disclose certain documents or data (*Article 843a, Code of Civil Procedure*) (see [Question 15](#)), a lawyer can refuse disclosure if the document was given to them in their professional capacity. The court then determines if this is justified.

## Evidence

17. What is the procedure for filing factual and expert witness evidence in class/collective actions?

## Documents

In principle, all documents can be presented as evidence and the court decides the value of the evidence presented. One exception is for notarial deeds, which are considered conclusive evidence. However, parties are free to offer counter-evidence against conclusive evidence (unless this possibility is excluded by law).

The party relying on written evidence must submit a copy of it. The court can draw adverse inferences if the copy is not submitted.

## Witness evidence

Witness evidence can be given orally. However, it is also possible to submit written witness statements, although such written statements are considered to be written evidence. Generally, witness testimonies do not have any special value as evidence, and, as with written evidence, the court decides the value of the statement. There is one exception regarding statements of the parties with a view to delivering evidence of their own statements and these can only be considered as corroborative evidence.

Parties can request a court to order the examination of witnesses before or at any stage during the proceedings. The court can also order the examination of witnesses on its own initiative. Any person can appear as a witness. However, certain persons are not obliged to testify. This includes the spouse or former spouse of one of the parties and certain other close relatives, as well as parties who have a professional privilege exemption.

If the court considers it necessary it can, at the request of one of the parties or on its own initiative, commission an expert opinion or hear an expert witness. The court is not bound by the expert opinion or testimony. Parties can also submit expert opinions or submit a request to hear an expert that has not been appointed by the court.

## Defence

18. Can one defendant apply to join other possible defendants in a class/collective action?

## Joining other defendants

A defendant in a collective action that is held jointly and severally liable can apply for an order to commence third-party proceedings (*vrijwaring*) against their joint and several liable co-debtors for recourse for an awarded claim. If the court allows third-party proceedings, the defendant in the main proceedings must commence the new proceedings against their joint debtors, which then become the defendants in the third-party proceedings. They do not become a party in the main action unless those defendants join the defendant in the main action.

In addition, any sufficiently interested party can apply to join the defendant or to intervene and issue an independent claim in the main action (*see Question 6, Joining other claimants*).

## Rights of multiple defendants

Multiple defendants can co-operate in their defence. Multiple defendants can enter into “joint defence agreements” (or other arrangements) to share confidential information (without waiving privilege, including other protections such as a process to be followed if conflicts arise). Multiple defendants can also instruct the same lawyers or experts.

## Damages and relief

19. What is the measure of damages under national law in the field of class/collective actions?

### Damages

For collective actions under the Old Law, damages cannot be awarded in representative collective actions and damages are therefore not assessed. Under the WAMCA it is possible to claim monetary compensation in collective actions. The court sets the compensation in categories where possible. It can base its decision on a proposal that the exclusive representative (*see Question 2*) and the defendant submit after being ordered to do so by the court. The court can also order an expert to testify on the points that are important for the contents of the collective claim settlement. In addition, the court will ensure that the compensation awarded is reasonable and that the interests of the persons for whom the collective claim settlement is decided are also otherwise sufficiently protected (*Article 1018i, Code of Civil Procedure*).

In class settlement proceedings, a “damage scheduling” approach is usually applied, under which compensation is awarded to claimants based on the characteristics of the group that the particular individual claimant is a member of rather than on the basis of their personal characteristics. The court scrutinises the reasonableness of the compensation offered and refuses to declare the settlement binding if it finds that it is not reasonable. The court will look at the following factors to assess reasonability:

- The extent of the damage.
- The possible cause of the damage
- The ease and speed of obtaining compensation.

It will also take into account where the settlement agreement has been negotiated and both sides have made concessions.

20. What rules apply to declaratory relief and interim awards in class/collective actions?

### Declaratory relief

Typically, collective actions under the Old Law seek declaratory relief. The representative entity normally seeks to have the defendant declared liable. If the declaratory judgment is granted, the parties whose interests are represented can commence follow-up proceedings to obtain damages.

### Interim awards

Parties can request an interim measure from the competent district court in all urgent cases in which an immediate measure is required to protect the interests of the parties (*Article 254, Code of Civil Procedure*). The main characteristic of these



proceedings is that any measure ordered by the court must be provisional. A court decision in these proceedings does not prejudice the rights of parties in regular proceedings that are pending at the time of the judgment or that are initiated after that. However, in practice, an injunction or provisional measure can have irreversible consequences. An appeal against an interim award must be lodged no later than four weeks from the date of judgment.

## Settlement

21. What rules apply to settlement of class/collective actions?

### Settlement rules

Under the WAMCA, the court must order the parties to try to negotiate a settlement agreement. If the parties reach an agreement, they must submit it to the court for approval. Some provisions from the WCAM apply by analogy. All class members are bound by the agreement unless they opt out. The court will only decide on compensation if the parties fail to reach an agreement during the representative collective action.

With the WCAM, the settlement agreement must be concluded between:

- The parties that will pay the compensation for the event that has caused damage.
- A Dutch foundation or association that, under its constituent documents, represents the interests of the class of persons intended to be covered by the settlement agreement.

The settlement does not have to be based on existing, contested or pending legal action. Parties can initiate a private, non-court supervised and undisclosed negotiation process among the representatives of the interested parties. In principle, the court's involvement begins when a settlement agreement has been concluded and the parties request that the court declares it binding on the class of persons it intends to cover.

The parties can choose whether the settlement agreement is governed by Dutch or foreign law. So far, parties have opted for Dutch law, but, especially if foreign parties are involved, any foreign law (including UK or US law) can in principle be chosen as the applicable law.

### Separate settlements

Class settlement proceedings allow flexibility to enter into various settlements between defendants and with regard to a variety of claimants. In practice, the defendants sometimes contribute in differing ways to the compensation that is provided to one or various groups of beneficiaries. For example, in *Converium*, the settlement that was declared binding by the Amsterdam Court of Appeal on non-US shareholders was less favourable than the settlement that was reached for US shareholders. Based on damage scheduling, one settlement agreement may consequently actually contain a variety of settlements, while parties can also choose to enter into separate agreements for the various elements.

## Appeals

22. Do parties have a right to appeal decisions relating to class actions, such as a decision granting or denying certification of a class action?

Final judgments in collective actions by a district court can be appealed to the competent court of appeal, unless expressly stated otherwise in the law or if parties have agreed to avoid or skip an appeal. In general, an appeal must be lodged within three months of the date of the first instance judgment. The court of appeal fully reviews the merits of the case. A decision that the representative entity has no standing can be appealed. A decision that the representative entity has standing can only be appealed by the defendant if the court grants the right to do so. The Supreme Court has jurisdiction to hear appeals against judgments of the courts of appeal and in exceptional cases against judgments of the district courts. Supreme Court proceedings do not offer a full review. New facts or evidence cannot be submitted. The Supreme Court will only consider whether the court of appeal has made errors of law or procedural errors.

Class settlements can only be declared binding by the Amsterdam Court of Appeal in the first and final instance. An appeal to the Supreme Court is only possible if the Amsterdam Court of Appeal refuses to declare the settlement binding. In that case, petitioners can only appeal to the Supreme Court as a group.

### Alternative dispute resolution

23. Is alternative dispute resolution (ADR) available in class/collective actions?

ADR methods are available for representative collective actions, but are not commonly used. ADR can be a helpful mechanism during the negotiation of a private and non-court supervised class settlement. It is not yet clear whether representative collective actions can be brought in arbitration proceedings.

### Proposals for reform

24. Are there any proposals for reform concerning class/collective actions?

There are no current proposals for reform. The Directive on representative actions for the protection of the collective interests of consumers could lead to adjustments although the position of the government is that no adjustments will be necessary (*see Question 1, Current trends and Question 2*).

**Contributor profiles**

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Professional qualifications. The Netherlands, lawyer; admitted to the bar as a Supreme Court litigator

Areas of practice. Complex multi-party cross-border disputes, with considerable experience in advising financial institutions and companies in different sectors confronted with cross-border mass claims.

### Recent transactions

- Representing Petrobras in its defence in a securities mass claim submitted by a mass claim vehicle allegedly representing a worldwide class of holders of securities (US investors excluded) who claim to have suffered financial loss as a result of the alleged fraud with the Petrobras group during the period 2004-2014. The scope of jurisdictions from which the allegedly represented security holders would originate is unprecedented in Dutch collective actions.
- Advising and representing Trafigura in its defence strategy against pending and upcoming class action litigation by several Dutch and foreign mass claim vehicles concerning the Probo Koala in connection with the alleged exposure to the alleged disposal of chemical waste in Ivory Coast.
- Advising and representing Volvo/Renault in its defence strategy against pending and upcoming class action, following the 2016 European Commission decision imposing fines totalling EUR2.9 billion for colluding for 14 years on truck pricing and passing on the costs of compliance with stricter emission rules. These matters are particularly complex because this civil follow-on litigation is brought by claim vehicles on behalf of purchasers from multiple jurisdictions against a number of truck manufacturers, involving the application of multiple legal systems, which also requires a strong collaboration with foreign counsel in other jurisdictions.
- Defending a Luxemburg airline in several proceedings against an accumulated number of cartel damages claims submitted by several claim vehicles arising from the alleged air cargo cartel.
- Advising a Japanese bank on its defence against announced class actions for damages as a follow-on to several alleged cartels regarding InterBank Offering Rates.
- Representing a European oil company in its defence against third party cartel damages claims submitted by a bitumen purchaser claiming damages allegedly suffered as a result of the bitumen cartel.
- Representing LGE, a South Korean listed electronics manufacturer, in its defence against a EUR2 billion cartel damages claim submitted by Vestel, the leading Turkish manufacturer of televisions and computer monitors. Vestel claims damages allegedly caused by the CPT and CDT cartel. The European Commission imposed fines totalling EUR1.74 billion to seven CPT and CDT manufacturers. Also representing LGE against claims by the Brazilian manufacturers of televisions and computer monitors Cemaz, IGB Eletronica and Itaotec.
- Representing Kemira in private enforcement proceedings initiated by the mass claim vehicle Cartel Damages Claims (CDC) as a follow-on to the sodium chlorate cartel.
- Represented the trustees of a Dutch retail bank, DSB Bank, in a EUR5.7 billion bankruptcy and represented them in a class settlement concerning a class of 570,000 members offering compensation for the miss-selling of financial products.

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### Recent transactions

- Representing Petrobras in its defence in a securities mass claim submitted by a mass claim vehicle allegedly representing a worldwide class of holders of securities (US investors excluded) who claim to have suffered financial loss as a result of the alleged fraud with the Petrobras group during the period between 2004 and 2014. The scope of jurisdictions from which the allegedly represented security holders would originate is unprecedented in Dutch collective actions.
- Acting as defence counsel to Trafigura in its defence strategy against pending and upcoming class action litigation by several Dutch and foreign mass claim vehicles concerning the Probo Koala in connection with the alleged exposure to the alleged disposal of chemical waste in Ivory Coast.
- Representing large charitable organisations in a litigation concerning the allocation of an inheritance of approximately EUR26 million.
- Providing strategy advice to an international bank with regard to its possible exposure to mass claims.

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