

DUTCH DRAFT BILL ON REDRESS OF MASS DAMAGES IN A COLLECTIVE ACTION

DUTCH DRAFT BILL ON REDRESS OF MASS DAMAGES IN A COLLECTIVE ACTION AS APPROVED BY THE HOUSE OF REPRESENTATIVES ON 29 JANUARY 2019

INFORMAL AND UNAUTHORISED ENGLISH TRANSLATION FROM DUTCH

LEGISLATIVE PROPOSAL

We Willem-Alexander, by the grace of God King of the Netherlands, Prince of Orange-Nassau etc.

Greetings to all who shall see or hear these presents! Be it known:

Whereas we have considered that it is desirable to facilitate the settlement of large-scale claims in a class action, and to this end amend the Dutch Civil Code and the Code of Civil Procedure;

We, therefore, having heard the Council of State, and in consultation with the States General, have approved and decreed as We hereby approve and decree:

ARTICLE I

Book 3 of the Civil Code will be changed as follows:

A

ARTICLE 305a

1. A foundation or association with full legal capacity may bring a legal action which aims to protect the similar interests of other persons, in so far as it represents these interests under the terms of its articles of association and these interests are sufficiently safeguarded.

2. The interests of the persons the legal action aims to protect are sufficiently safeguarded if the legal person as referred to in paragraph 1 is sufficiently representative, in view of the persons in whose interest the foundation or association acts and the extent of the claims represented and has:

- a. a supervisory body, unless Article 9a(1) of Book 2 of the Dutch Civil Code is implemented;
- b. appropriate and effective mechanisms for participation or representation in the decision-making processes of the persons, whose interests the legal action aims to protect;
- c. sufficient resources to bear the costs of commencing legal action and has sufficient control of the legal action;
- d. a generally accessible internet page, on which the following information is available:

- 1°. the articles of association of the legal person;
 - 2°. the management structure of the legal person;
 - 3°. a general outline of the most recent annual report by the supervisory body of the supervision it has performed;
 - 4°. the most recently adopted management report;
 - 5°. the remuneration of directors and members of the supervisory body;
 - 6°. the objectives and procedures of the legal person;
 - 7°. an overview of the status of current legal proceedings;
 - 8°. if a contribution is requested of the persons whose interests the legal action aims to protect: an insight into the calculation of this contribution;
 - 9°. an overview of the way in which persons whose interests the legal action aims to protect, may affiliate with the legal person and the way in which they can end this affiliation;
- e. sufficient experience and expertise to commence and conduct the legal action.

3. A legal person as referred to in paragraph 1 has standing only if:

- a. the directors involved in the incorporation of the legal person, and their successors, do not have the objective of directly or indirectly profiting through the legal person;
- b. the legal claim has a sufficiently close relationship with the Netherlands. A sufficiently close relationship with Dutch jurisdiction exists if:
 - 1°. the legal person can make a sufficiently plausible claim that the majority of persons whose interests the legal action aims to protect have their habitual residence in the Netherlands; or
 - 2°. the party against whom the legal action is directed is domiciled in the Netherlands and additional circumstances suggest a sufficient relationship with Dutch jurisdiction; or
 - 3°. the event or events to which the legal action relates took place in the Netherlands;
- c. the legal person has endeavoured sufficiently in the given circumstances to achieve that being claimed by conducting consultations with the defendant. A period of two weeks following receipt by the defendant of a request for consultation, stating the claim, is in any case sufficient.

4. A legal claim as referred to in paragraph 1 may result in an order that the defendant publicise or arrange for the publication of the judgment, in a manner to be decided by the court and at the expense of the party or parties decided by the court.

5. A legal person as referred to in paragraph 1 will draft a management report and annual accounts in accordance with the provisions for associations and foundations in Articles 49 and 300 respectively and in Title 9 of Book 2. Despite the provisions of Title 9, the management report must be published on the generally accessible internet page of the legal person within eight days of its adoption.

6. The court may declare that a legal person referred to in paragraph 1 has standing without the requirements of paragraph 2(a through e) and paragraph 5 having to be met, if the legal action is brought with a non-commercial aim and a very limited financial interest, or if the nature of the claim of the legal person as referred to in paragraph 1 or of the persons, whose interests the legal action aims to protect, gives reason to do so. If this paragraph is applied, the legal action cannot result in monetary damages.

7. There is a central register for collective actions as referred to in this article. This register is maintained by a body to be designated by an order in council.

B

In paragraph 2 of Article 305b, '2 - 5' will be replaced by '3, point (c) and 4' and the words 'of this Book' will be removed.

C

In paragraph 2 of Article 305c, '5' will be replaced by '7'.

D

In paragraph 2 of Article 305d, '2' will be replaced by '3, point (c).'

ARTICLE II

In the Third Book of the Code of Civil Procedure a new title will be inserted after Title 14, to read as follows:

TITLE 14A - ON LEGAL PROCEDURES IN CASES CONCERNING COLLECTIVE ACTIONS AND COLLECTIVE CLAIM SETTLEMENTS

ARTICLE 1018b

1. This title applies to proceedings concerning a claim as referred to in Articles 305a and 305c of Book 3 of the Dutch Civil Code. With the exception of Article 1018c(1), this title does not apply to cases as referred to in Article 254.
2. Title 2 of Book 1 applies, unless otherwise provided for in this title.
3. Article 93 does not apply.

ARTICLE 1018c

1. In spite of Article 30a(3) 111(2), the writ with which the collective action referred to in Article 305a of Book 3 of the Dutch Civil Code is brought will contain:
 - a. a description of the event or events to which the collective action relates;
 - b. a description of the persons, whose interests the collective action aims to protect;
 - c. a description of the extent to which questions of law and of fact to be addressed are shared;
 - d. a description of the way in which the standing requirements of Article 305a, (1) to (3) of Book 3 of the Dutch Civil Code are met or the grounds on which paragraph 6 of that article applies;
 - e. the information that enables the court to appoint an exclusive representative for this collective action, in the event that other collective actions for the same event are brought in accordance with Article 1018d.
2. If the claimant fails to enter the writ in the central register for collective actions as referred to in Article 305a(7) of Book 3 of the Dutch Civil Code within two days of submitting the writ, the claimant will have no standing. The entry will be accompanied by a copy of the writ.

3. Unless the court immediately declares that the claimant does not have standing in accordance with paragraph 2, it will stay the proceedings until a period of three months following entry in the register referred to in paragraph 2 has passed. Unless this period has been extended under Article 1018d(2) or another collective action has been brought for the same event or events, following the expiry of the period the hearing of the case will be continued in the situation it is then found.

4. Besides the information referred to in Article 111(2), the registrar of the court will state in the notice to appear the obligation of the claimant to enter the case in the register referred to in paragraph 2, and the consequences attached to this under this article. In derogation from Article 111(2)(c), the last day on which the defendant may submit its statement of defence is six weeks after the period referred to in paragraph 3 has passed.

5. A substantive hearing of the collective action will only take place if and after the court has decided:

- a. that the claimant meets the standing requirements of Article 305a (1) to (3) of Book 3 of the Dutch Civil Code, or that these requirements do not need to be met on the grounds of paragraph 6 of this article;
- b. that the claimant has made it sufficiently plausible that bringing this collective action is more efficient and effective than bringing an individual claim, because the questions of law and of fact to be addressed are sufficiently similar, the number of persons whose interests the legal action aims to protect is sufficient and, if the claim is to obtain compensation, they individually and jointly have a sufficiently large financial interest;
- c. that the defectiveness of the collective action is not summarily apparent at the moment of submitting the writ.

In derogation from Article 30i(4), the defendant may restrict itself to the defences relating to that stated under a to c., until a decision has been given on the matter.

6. If a collective action for the same event or events is brought after a collective action as referred to in paragraph 1 has been brought, but before the period referred to in Article 1018d has commenced, the case will be joined, if necessary after a referral, to the collective action already brought as referred to in paragraph 2(a).

ARTICLE 1018d

1. Within three months of entry in the register as referred to in Article 1018c(2), a legal person as referred to in Article 305a of Book 3 of the Dutch Civil Code may bring a collective action for the same event or events as those concerned in the collective action referred to in Article 1018c(1), involving similar factual and legal issues, stating the entry. The collective action is brought before the same court as where the collective action entered in the register was brought. Article 1018c(1) will apply.

2. The court may extend the period referred to in the preceding paragraph by a maximum of three months, if within a month of the entry in the register the legal person as referred to in Article 305a of Book 3 of the Dutch Civil Code has entered at the court registry that it wishes to bring a collective action for the same event or events as those concerned in the collective action referred to in Article 1018c(1), stating the entry in the register, but that the period of three months is insufficient.

3. For the application of Book 1, the collective actions brought in accordance with this article will be treated jointly as a single case following the submission and service or delivery of the writ as referred to in Article 112. The latest day on which the defendant may appear as a defendant within the meaning of Article 30a(3)(c) will be four weeks following the expiry of the period on the grounds of paragraphs 1 and 2.

ARTICLE 1018e

1. The court will appoint the most suitable claimant from among the claimants who have brought a collective action in accordance with Article 1018c or 1018d and who meet the standing requirements under Article 305a, (1) to (3) of Book 3 of the Dutch Civil Code, as exclusive representative, considering the following circumstances:

- a. the size of the group of persons which the claimant will represent;
- b. the extent of the financial interest represented by this group;
- c. the other work that the claimant performs for the persons he is representing, both in or out of court;
- d. the work carried out or collective actions brought earlier by the claimant.

This decision cannot be appealed.

2. The court will also assess what the collective action precisely entails, for which precisely specified group of persons the exclusive representative will represent the interests in this collective action, and whether the nature of the collective action linked to a particular location gives cause to have the case heard by another court.

3. The claimant who is designated as the exclusive representative will represent the interests of all persons in the precisely specified group referred to in paragraph 2 in these proceedings and as representative of the claimants not appointed as exclusive representative. The claimants not appointed as exclusive representative remain party to the proceedings. The exclusive representative will perform the procedural acts. The court may decide that the non-designated claimants may also perform procedural acts.

4. The court may decide to appoint various exclusive representatives in a collective action if the nature of the collective action or the claimants or the interests of the persons they are representing give reason to do so.

5. The judgment under this article will be entered by the exclusive representative in the register referred to in Article 1018c(2).

ARTICLE 1018f

1. The procedure for a collective action has no consequence for and does not bind those persons belonging to the precisely specified group of persons whose interests are being represented in this collective action, if within a period of at least one month from the announcement of the judgment referred to in paragraph 3, referred to in Article 1018e(1 and 2), such period to be determined by the court, they have informed the court registry in writing that they wish to be released from having their interests represented in this collective action. An earlier collective interruption of the limitation period for the claim only interrupts the limitation period with respect to these persons if within six months from the time they have been released from having their interests represented in this collective action under this article, they perform an individual act of interruption for this claim. If the number of persons who have been released from having their interests represented in the collective action is too large to justify continuing the proceedings, the court may decide that the proceedings will not be continued.

2. The judgment appointing the exclusive representative and describing the collective action and the precisely specified group of persons whose interests are being represented in this collective action by the exclusive representative, will be placed with the court registry for inspection by these persons. An entry of this will also be made in the register referred to in Article 1018c(2). The court may order the judgment, and a translation of it, in one or more languages other than Dutch, to be uploaded to one or more internet

addresses to be indicated by it, including the internet page of the exclusive representative as referred to in Article 305a(2)(d) of the Dutch Civil Code, in such a way that these can be stored by the persons referred to for later perusal.

3. An announcement of the appointment of the exclusive representative and of the collective action and the precisely specified group of persons whose interests are being represented by the exclusive representative in this collective action will be made by ordinary letter as soon as possible to the known persons, whose interests are being represented in this collective action by the exclusive representative, unless the court decides otherwise. Moreover, an announcement of this will be made as soon as possible in one or more newspapers chosen by the court. In this announcement, notice will be given each time, in a manner to be chosen by the court, of the way in which these persons may be released from having their interests represented in this collective action in accordance with paragraph 1, or may agree to the representation of their interests in this collective action in accordance with paragraph 5. It will also state how to inspect the judgment or obtain a copy of it. The court may order that information other than that referred to in this paragraph also be reported. Unless the court determines otherwise, the exclusive representative will arrange for the report and announcement referred to in this paragraph. The court may order that the information referred to in this paragraph be publicised in another manner. If persons belonging to the precisely specified group whose interests are being represented by the exclusive representative in this collective action, are not domiciled or resident in the Netherlands and an international or Union regulation binding for the Netherlands does not prescribe a method of announcement, the court will order an announcement to be made in a manner to be decided by it, for the benefit of these persons, if necessary in one or more languages other than Dutch.

4. For persons who have released themselves from having their interests represented in the collective action, no claim as referred to in Article 305a of Book 3 of the Dutch Civil Code can be brought, based on similar factual and legal issues for the same event or events.

5. The collective action procedure has consequences for persons belonging to the precisely specified group of persons whose interests are being represented in this collective action and who are not domiciled or resident in the Netherlands, and binds those persons if within a period of at least one month from the announcement of the judgment referred to in paragraph 3, referred to in Article 1018e(1 and 2), such period to be determined by the court, they have informed the court registry in writing that they agree to having their interests represented in this collective action. At the request of a party, the court may decide that, in derogation from this paragraph, the first paragraph applies to persons belonging to the precisely specified group of persons whose interests are being represented in this collective action and who are not domiciled or resident in the Netherlands.

ARTICLE 1018g

Following the appointment of an exclusive representative as referred to in Article 1018e, the court will set a period for trying to negotiate an agreement which in any case will contain that stated in Article 907(2), (a) to (f) of Book 7 of the Dutch Civil Code and, if no agreement as referred to in this provision is reached, for adding to the grounds for the claim and the defence in so far as the defendant has made use of its authority referred to in Article 1018c(5), last sentence.

ARTICLE 1018h

1. If the parties conclude a settlement agreement as referred to in Article 907(2) of Book 7 of the Dutch Civil Code, this will be submitted to the court for approval.
2. Articles 1013, (1) and (2) and (4) to (8), 1014, 1016 and Article 907 of Book 7 of the Dutch Civil Code apply by analogy to the approval of the agreement.
3. Articles 1017, (2) to (4), and Articles 908, (1), (3) and (5), 909 and 910 of Book 7 of the Dutch Civil Code apply by analogy to an approved agreement. The court may give further instructions for notices and announcements referred to in Article 1017.
4. The exclusive representative will arrange for the announcement of the approved agreement on the internet page as referred to in Article 305a(2)(d) of Book 3 of the Dutch Civil Code and for entry in the register referred to in Article 1018c(2).
5. Article 1018f (1-4), applies by analogy to the approved agreement.
6. Only refusal of approval is open to appeal in cassation. This may only be lodged by the parties jointly. Article 1018(2) applies by analogy.

ARTICLE 1018i

If the collective action is a claim for compensation, before determining a collective claim settlement the court may order the exclusive representative and the defendant to submit a proposal for a collective claim settlement. This proposal includes at least the provisions of Article 907(2)(a-f) of Book 7 of the Dutch Civil Code, for:

- a. the persons belonging to the precisely specified group of persons whose interests are being represented in this collective action, who have not released themselves from having their interests represented in the collective action and the judgment, in accordance with Article 1018f, and
- b. the persons belonging to the precisely specified group of persons whose interests are being represented in this collective action and who are not domiciled or resident in the Netherlands and who in accordance with Article 1018f agreed to the representation of their interests in this collective action.

The court will decide the period within which the parties must submit a proposal. If this obligation is not met, the court may reach any conclusion it sees fit.

2. The court decides, based in part on the proposals referred to in the first paragraph, a collective claim settlement that is meant as compensation by the defendant of the damage sustained by the persons referred to in the first paragraph, under a and b. The court will ensure that for the application of the tenth section of Title 1 of Book 6 of the Dutch Civil Code it sets the compensation for these persons in categories where possible, that the collective claim settlement contains in any case the provisions of Article 907(2), (a) to (f) of Book 7 of the Dutch Civil Code, that the amount of 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 907(1) last sentence and (6) of Book 7 of the Dutch Civil Code apply by analogy.
3. Before determining the collective claim settlement as referred to in paragraph 2, the court may order one or more experts to state the points that are important for the contents of the collective claim settlement.

ARTICLE 1018j

1. In an ordinary letter to the known persons for whom the collective claim settlement has been decided, the judgment establishing the settlement will be notified as soon as possible, unless the court decides

otherwise. Moreover, an announcement of the judgment will be made as soon as possible in one or more newspapers to be designated by the court. This announcement will give a brief description of the collective claim settlement in a manner indicated by the court each time, in particular the way in which compensation can be obtained from the defendant or an appeal to the collective claim settlement can otherwise be made and, if the collective claim settlement so decides, the period of time within which a claim to such settlement may be made. It will also be stated in what manner the judgment establishing the collective claim settlement may be inspected and a copy thereof obtained. The court may order that information other than that referred to in this paragraph also be reported. Unless the court decides otherwise, the defendant will arrange for the report and announcement as referred to in this paragraph. The court may order that the information referred to in this paragraph be publicised in another manner. If there are persons, for the benefit of whom the collective claim settlement has been established, who are not domiciled or resident in the Netherlands and an international or Union regulation that is binding for the Netherlands does not prescribe a manner of announcement, the court will order an announcement to be made in a manner to be decided by it for the benefit of these persons, if necessary in one or more languages other than the Dutch language.

2. The exclusive representative will ensure that the announcement of the judgment referred to in the preceding paragraph will be placed on the internet page as referred to in Article 305a(2)(d) of Book 3 of the Dutch Civil Code, and for entering it in the register referred to in Article 1018c(2).

ARTICLE 1018k

1. As soon as a judgment under this title becomes irrevocable, it will be binding to each of the parties and the persons referred to in Article 1018i(1)(a and b). Unless the judgment is declared provisionally enforceable, these persons may claim compensation in the manner and under the conditions stated in the judgment establishing a collective claim settlement, from the moment at which the judgment has become irrevocable.

2. For a person as referred to in Article 1018i(1)(a) who could not be aware of his loss when the announcement referred to in Article 1018f(3) was made, a judgment under this title has no effect if, after his loss becoming known, he has made it known through a written notice to the defendant or, if a collective claim settlement has been established, to the person referred to in Article 907(2)(g) of Book 7 of the Dutch Civil Code that he does not wish to be bound to it. The defendant may set a period of at least six months, within which the person as referred to in paragraph 1 may make known his wish not to be bound by the judgment. With a judgment under this title establishing a collective claim settlement in accordance with Article 1018i, the defendant must also state the person referred to in Article 907(2)(g).

ARTICLE 1018l

1. If the defectiveness of the claim is summarily apparent, the court may, in its judgment for the application of the second paragraph of the twelfth section of the second title of the first Book, increase the costs of the lawyer of the other party that will be payable by the party found against by fivefold at the most, unless fairness dictates otherwise.

2. A judgment pursuant to Article 1018i also entails an order to pay costs, where the court, in so far as necessary contrary to paragraph 2 of Article 12 of Title 2 of Book 1, may order, if so requested, the losing

party to pay reasonable and proportionate court costs and other costs that the successful party has incurred, unless fairness dictates otherwise.

ARTICLE 1018m

1. Proceedings between a party or parties against whom the collective action under this title is directed, and a person, whose interests the collective action aims to protect and who in accordance with Article 1018f has released himself from having his interests represented in the proceedings and the judgment, may at the request of any party be suspended if the proceedings concern similar factual and legal issues for the same event or events, also if the date has already been set for the pronouncement of the judgment, ruling or decision.

2. The suspended proceedings will be resumed in accordance with Article 227(1):

a. if the suspension has lasted for more than one year and any of the parties has requested the suspension to be lifted;

b. if a judgment has been given in the proceedings on the collective action and it has become irrevocable.

ARTICLE III

1. In the Transition Act new Dutch Civil Code, after Article 119, renumbering Article 119a and 119b in Article 119b and 119c, a new Article 119a is inserted, which reads:

ARTICLE 119a

1. In derogation from Article 68a and Article 74(2-4), the conditions that applied before [date of entry into force of Act] remain applicable to an action which aims to protect similar interests as referred to in the Articles 305a up to and including 305d of Book 3 and was brought before that date.

2. In derogation from Article 68a, the conditions that applied before [date of entry into force of Act] remain applicable to an action which aims to protect similar interests as referred to in the Articles 305a up to and including 305d of Book 3 and is brought on or after that date in so far as the action is related to an event or events that took place before 15 November 2016.

2. Article II of this Act applies to disputes where the writ has been submitted on or after the date of the entry into force of the Act and that are related to an event or events that took place on or after 15 November 2016.

ARTICLE IV

This Act will be evaluated five years after entering into force.

ARTICLE V

This Act may be cited as the Act on Redress of Mass Damages in a Collective Action.

ARTICLE VI

This Act will enter into force on a date to be decided by Royal Decree.

We order and command that this Act shall be published in the Bulletin of Acts and Decrees, and that all ministerial departments, authorities, bodies and officials whom it may concern shall diligently implement it.

Done

The Minister of Security and Justice,

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