

CLASS ACTIONS FOR DAMAGES: GOING DUTCH?

On 1 January 2020 the Act on redress of mass damages in a collective action (*Wet afwikkeling massaschade in collectieve actie*, "**WAMCA**") entered into force. This Act enables representative entities to bring damages claims on behalf of (international) parties in a class action before any district court in the Netherlands. The court can then award damages in its judgment, which was only possible under the prior regime (i) if parties had reached a collective settlement under the Act on the collective settlement of mass damages (*Wet Collectieve Afwikkeling Massaschade*, "**WCAM**"), (ii) by initiating individual damages claims after the representative entity had obtained a declaratory judgment or (iii) when the litigation was structured through an SPV.

The WAMCA therefore creates a potentially powerful tool for claimants to create leverage in settlement discussions. Although the legislator aimed to provide for a balanced and efficient system, whether the new Dutch class actions regime will also provide defendants with an effective way to deal with a mass claim setting, remains to be seen.

The new regime only applies to class actions initiated on or after 1 January 2020 and that relate to events that took place on or after 15 November 2016.

The Dutch mass class system – an overview

The WAMCA reshapes the Dutch class actions regime and has introduced the possibility for representative entities to claim damages in a class action. The other features of the Dutch mass class system shall remain in force. This means that parties can still try to reach a voluntary collective settlement agreement under the WCAM or use common procedural law with an SPV collecting individual claims by assignment or mandate.

Key takeaways

- Class actions for damages are here to stay
- The other features of the Dutch mass class system shall remain in force
- The Netherlands remains a very attractive jurisdiction in offering opportunities for mass litigation

The new Dutch class actions regime

Under the new class actions regime, a representative entity may bring a class action under Article 3:305a Dutch Civil Code ("DCC") in order to obtain, for example, damages, a declaratory judgment or injunctive relief. The class action needs to be more effective and efficient than individual court proceedings. The writ of summons needs to be published in a central register. Within three months, other representative entities can bring a class action for the same event with similar factual and legal issues. The different proceedings will then be consolidated.

The WAMCA introduces stricter standing requirements for representative entities to prevent misuse of the Dutch class action system. The court verifies whether the representative entity meets the standing requirements, including for example (i) certain governance and funding requirements (e.g. the directors of the representative entity, or the successors, are not allowed to make direct or indirect profit by bringing the class action), (ii) representativeness and (iii) the scope rule.

The WAMCA includes a scope rule to limit global class actions against defendant(s) domiciled in the Netherlands. The court will only allow class actions that have a sufficiently close connection to the Dutch jurisdiction. Such a connection generally exists if:

- a) the majority of the individuals, protected by the class action, are domiciled in the Netherlands; or
- b) the defendant is domiciled in the Netherlands and additional circumstances indicate a sufficient relationship with the Netherlands; or
- c) the events giving rise to the class action took place in the Netherlands.

The court will appoint an exclusive representative entity if multiple class actions for the same event or events have been filed in the central register and when the various representative entities have standing. This is a positive development for defendants as it will be more efficient to work with one single counterparty in a class action. From a claimants' perspective this may be a disadvantage as the other entities remain parties to the proceedings, but no longer act in the forefront. It is not possible to lodge an appeal against the court appointment of the exclusive representative entity.

The court also defines the precise scope of the action and the definition of the "class". The Dutch class members have the opportunity to opt-out and foreign class members can opt-in in principle within a term (of at least one month) set by the court. Any exception to this opt-in system could be made in case the foreign class members are relatively easily identifiable. If too many Dutch class members have used the opt-out possibility, the court may decide that the class action will not be continued, including for the foreign class members.

Subsequently, the court will order the exclusive representative entity to try to reach a collective settlement with the defendant(s) within a timeframe set by the court. If the parties reach a collective settlement, the Dutch class members have a second opt-out opportunity (of at least one month) after the court has approved the collective settlement agreement. The collective settlement agreement needs to meet the requirements of the already existing WCAM. Once the court has declared the settlement collectively binding on the class(es), the collective settlement agreement is binding on all class members who did not opt-out. If use is made of such opt-out option, the right to initiate

Key changes to the Dutch class actions regime

- Possibility to claim damages in a class action
- Introduction of a central register and consolidation of proceedings
- Stricter standing requirements for representative entities
- New scope rule
- Appointment of an exclusive representative entity
- Class action will be binding on all Dutch class members, unless they opt out (two opt-out possibilities)
- Foreign class members are only bound if they opt-in
- Parties will be ordered by the court to try to reach a settlement
- If the parties do not reach a settlement, the court can determine the damages awarded

individual proceedings against the defendant(s) is retained. These parties can bring their own, individual claims. If too many class members have used the opt-out possibility, the court may decide that the class action will not be continued. An appeal to the Dutch Supreme Court (*Hoge Raad*) is only possible if the court refuses the approval of the collective settlement.

If the parties do not reach a settlement, the proceedings continue and the court will render a judgment. In case of a class action for damages, the court can determine the damages awarded. Certain damages classes can be created and the court may order the exclusive representative entity and the defendant(s) to submit a proposal. The court will determine the amount of damages that is considered eligible for compensation. The final outcome is binding on all the parties, including the class members who did not opt-out earlier. Parties have a right to appeal against the courts' determination of the amount of compensation.

In case of a collective claim settlement ordered by the court, the court may order, if requested, the losing party (i.e. the defendant(s)) to pay the reasonable and proportionate court fees and other costs that the successful party (i.e. the claimants) has incurred, unless it would be contrary to standards of fairness.

Collective Settlement Agreement under the WCAM

The representative entity/entities and the defendant(s) can try to reach a settlement whether or not following a class action pursuant to Article 3:305a DCC (an individual or WCAM settlement). The negotiations are private and not supervised by the court. If a WCAM settlement is reached, upon joint request, the Amsterdam Court of Appeal can declare the WCAM settlement collectively binding on the class(es) of represented aggrieved parties. During a hearing, the court will test, among others (i) whether the compensation awarded in the WCAM settlement agreement is reasonable, taking into account, inter alia, the extent and possible causes of the damage and the ease and speed with which the compensation can be obtained and (ii) whether the relevant entity is sufficiently representative.

Once approved by the Amsterdam Court of Appeal, the WCAM settlement agreement is binding on the class(es) of aggrieved parties. Individual aggrieved parties can expressly elect to opt-out within a term set by the court. If use is made of such opt-out option, the right to initiate individual proceedings against the defendant is retained. Parties not making use of the opt-out option have a right to receive the relief as agreed in the WCAM settlement agreement. This opt-out system is unique in Europe and is similar to court approved class settlements in the United States.

SPV

As an alternative course of action, claimants could assign their claims to an SPV, which would then litigate these claims, or claimants could grant a mandate (*lastgeving*) entitling the SPV to litigate the claim in its own name or in the name of the injured parties. In order to have standing, the SPV needs to be able to prove the identity of the assignors/mandators and in case of assignment, the transfer of claims to it.

The main difference with the class actions route of Article 3:305a DCC is that the SPV could immediately choose to claim damages or, alternatively, bring

two-phase proceedings by first seeking a declaratory judgment to establish liability for the damages suffered by the parties, and only upon a favourable outcome on liability pursue the second phase follow-on proceedings to establish quantum.

It is expected that these types of group actions, that are spearheaded by a litigation vehicle, will remain an attractive alternative for certain types of claimants and their funders.

Observations on the new Dutch class actions regime

Insofar as class actions relate to events that took place before 15 November 2016, the old class actions regime will apply and damages cannot be claimed in a class action brought by a representative entity under Article 3:305a DCC. In some cases it is undisputed when the event took place, for example in case of a natural disaster. In other situations it may be less obvious when the event took place and which class actions regime should apply. For instance, in case of a string of events that took place partly before and after 15 November 2016. An example could be an ongoing competition law infringement. It is expected that the applicable class actions regime will then be contested, which will delay the process.

The new class actions regime with its opt-out system has the potential to create more finality as all the class members domiciled in the Netherlands, even the inactive ones, are initially involved unless they opt-out (in general claimants, and in particular consumers, will not undertake any action). From a claimants' perspective, this will be an advantage. In this way, the number of claimants involved will increase and therefore the total amount of damages as well. This is a difference with the old class actions regime in which inactive claimants are not automatically part of the class action that is initiated by some active claimants.

A downside of the opt-out system could be that it remains uncertain how many claimants will be involved in a final settlement. The Dutch class members have two opt-out possibilities, so they could remain passive and may still opt-out after the approval of the collective settlement by the court. This uncertainty may affect the willingness of the defendant(s) to pay a compensation.

Foreign claimants are allowed to join a class action and are bound only if they opt-in, unless the court decides otherwise. It is expected that pursuant to the new class actions regime the number of Dutch class actions with foreign claimants will decline. Moreover, as a consequence of the opt-in system for class members who are not domiciled in the Netherlands, finality may not be fully achieved globally and the defendant(s) may still be sued in other jurisdictions for the same type of events.

The new class actions regime is strongly focused on reaching a settlement at an early stage of the proceedings. Even if the parties are not able to resolve the matter out of court, the judges will be proactive in solving the dispute together with the parties, e.g. the parties will be involved in the determination of the compensation by the court. As the court has the power to determine the compensation if the parties fail to reach a collective settlement, we expect that parties' willingness to settle increases. Therefore, it is unclear how often the court will render a judgment and will determine the amount of compensation itself in case of a class action for damages. It could very well be a rare

Implications for businesses

- The new Dutch class actions regime only applies to class actions initiated on or after 1 January 2020 and that relate to events that took place on or after 15 November 2016
- The class action needs to have a sufficiently close connection to the Dutch jurisdiction
- The new regime stimulates finality; however the two opt-out possibilities for Dutch class members may undermine this
- Finality may not be fully achieved globally because of the opt-in system for foreign claimants
- Claimants have a potentially powerful tool to force a settlement

occurrence, as parties are expected to be inclined to create a higher degree of certainty in the outcome by settling the matter themselves.

Looking ahead to the new Dutch class actions regime

All types of actions may be brought under the new class actions regime, including securities claims, product liability claims, claims resulting out of data breaches and (follow-on) damages claims against infringers of (EU) competition law. This unlimited application of the class actions regime makes the Netherlands very attractive as a jurisdiction to start proceedings.

For defendants, however, it remains to be seen how effective the new addition to the Dutch class actions regime will be as a tool to deal with mass litigation. In our view, the second opt-out possibility is a potential bottleneck in the system that is created by the WAMCA. Defendants do want to know which buy-in there is under the claimants population before committing to a proposed compensation plan in a collective settlement. The second opt-out possibility might therefore undermine the effectiveness of the new regime as a tool for enhancing collective settlements. Nevertheless, the fact that the new Dutch class actions regime stimulates finality in non-consensual situations also provides opportunities to defendants, as a successful defence and a subsequent positive judgment can be binding on all the class members.

The new class actions regime under the WAMCA with its stricter standing requirements may make the alternative features of the Dutch mass class system more attractive for claimants. It is therefore expected that the new Act may boost the use of an SPV collecting individual claims. In that case, the claimant is not obliged to meet the stricter standing requirements (e.g. the scope rule) and to cooperate with any other representative entity, in particular with the exclusive representative entity.

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