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The Netherlands CLASS ACTIONS

Contributor

DLA Piper



Marnix Holtzer

Partner | marnix.holtzer@dlapiper.com

Tom Hautvast

Associate | tom.hautvast@dlapiper.com

This country-specific Q&A provides an overview of class actions laws and regulations applicable in The Netherlands.

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THE NETHERLANDS

CLASS ACTIONS



1. Do you have a class action or collective redress mechanism? If so, please describe the mechanism.

Dutch law has permitted collective action proceedings for about 30 years. In 2020, the Dutch collective action regime was rigorously modernized with the introduction of the WAMCA (*Wet Afwikkeling Massaschade in Collectieve Actie*). The WAMCA only applies to collective actions initiated after 1 January 2020 and that relate to an event or a series of events that occurred on or after 15 November 2016. This cut has been applied strictly by courts in several cases. The below questionnaire is answered based on the WAMCA, unless it is specifically stated otherwise.

A claiming entity (see question 2 below) may initiate a collective action on behalf of the group that it purports to represent by serving a writ of summons on the defendant(s) and registering that writ in the public collective action register (see question 9 below). The collective action will first be stayed for three months to allow other claiming entities to file similar collective actions (see question 9 below).

Before ruling on the merits of the matter, the court will first decide on all preliminary procedural issues, including: (i) assessing its (international) jurisdiction (see question 14 below); (ii) determining which collective action regime applies to the action at hand; (iii) assessing whether the claiming entity meets the admissibility requirements (see question 14 below); (iv) determining whether the matter is suitable for collective action proceedings (see question 5 below); and (v) determining the law(s) applicable to the claims of the represented group. In complex, cross-border collective actions, courts tend to first deal with issues (i) and (ii), and subsequently with (iii) to (v).

If the matter can proceed, the court will appoint the claiming entity as the exclusive representative of the represented group. In the event that multiple collective actions on the same subject matter were initiated by different claiming entities, the court will determine which

claiming entity is best positioned to represent the represented group and appoint that claiming entity as the exclusive representative. In principle, only the exclusive representative is entitled to file submissions on behalf of the represented group. The court will further determine the content of the collective action (i.e., which factual and legal questions will be answered) and narrowly define the represented group (who, depending on whether they exercise their opt-out or opt-in rights, may be bound to the collective action (see question 8 below)).

After appointing the exclusive representative, the members of the represented group will be given a period to exercise their opt-out right (for Dutch domiciled parties) or opt-in right (for non-Dutch domiciled parties) (see question 8 below).

During the opt-out / opt-in period, the collective action may be stayed to allow for settlement negotiations between the exclusive representative and the defendant(s). If a settlement agreement is reached, the court can declare that settlement binding on all members of the represented group (see question 17 below).

If no settlement agreement is reached, the collective action will resume with the substantive phase. The exclusive representative will first be given the opportunity to amend and update its writ of summons after which the defendant will have the opportunity to respond. A second round of written submissions may also be allowed. After the exchange of all submissions, the court will schedule a hearing, after which a final judgment will generally be issued. If the court awards monetary damages, it will order a compensation scheme (see question 13 below).

- If the WAMCA is not applicable (see temporal scope above), the old regime applies. Notable differences are:
- under the old regime, no monetary damages can be awarded. A claiming entity could however obtain declaratory relief in a collective action which could be followed by

individual follow-up proceedings to claim monetary damages;

- the old regime is fully based on an opt-in mechanism rather than the opt-out mechanism that the WAMCA facilitates for Dutch-domiciled members of the represented group;
- the new regime sets stricter admissibility requirements in terms of governance, funding, and representativeness; and
- the old regime does not provide for the appointment of an exclusive representative.

2. Who may bring class action or collective redress proceeding? (e.g. qualified entities, consumers etc)

Any Dutch foundation (*stichting*) or association (*vereniging*) that meets certain conditions in terms of governance, funding and representativeness can bring a collective action. These entities are not prequalified; the courts will assess whether the entity bringing the claim meets the admissibility conditions.

Additionally, after the implementation of the EU Representative Actions Directive in the Netherlands on 25 June 2023, any entity that is designated in an EU Member State as a 'qualified entity' in accordance with the EU Representative Actions Directive is able to bring collective actions or collective redress proceedings in the Netherlands. Once an entity is listed as a 'qualified entity', the Dutch courts in principle can no longer assess whether it meets the relevant criteria for such listing.

3. Which courts deal with class actions or collective redress proceedings?

The Netherlands does not have specialised courts for collective actions or collective redress proceedings; these are brought before the regular civil courts considering ordinary rules of jurisdiction and competence.

4. What types of conduct and causes of action can be relied upon as the basis for a class action or collective redress mechanism?

Collective actions or collective redress proceedings are not limited to a particular type of conduct or cause of action. They can have both contractual and non-contractual bases.

5. Are there any limitations of types of claims that may be brought on a collective basis?

Contrary to the EU Representative Actions Directive, which only applies to infringements of EU consumer law, Dutch law does not pose any limitations on the types of claims that may be brought on a collective basis.

In practice, we see a wide variety of claims: ESG claims, shareholder claims, abuse of market power claims, privacy claims, personal injury claims, consumer claims, claims against the Dutch government, etc.

For a collective action to be admitted, the courts will however assess whether litigation through a collective action is more efficient and effective than individual proceedings, whether the factual and legal questions are sufficiently similar, and whether the represented group and their financial interests (if any) are sufficiently large. Hence, there should be a collective element in any claim brought in a collective action.

6. How frequently are class actions brought?

With the WAMCA, a public collective action register was introduced. This register lists:

- 15 collective actions brought in 2020;
- 33 collective actions brought in 2021;
- 18 collective actions brought in 2022; and
- 8 collective actions brought in 2023 up until May.

These figures exclude collective actions still being brought under the old regime due to the temporal limitations of the WAMCA regime (see question 1 above) or collective actions brought under the WAMCA regime via summary proceedings. No public figures are available for those categories of collective actions.

7. What are the top three emerging business risks that are the focus of class action or collective redress litigation?

ESG (including business human rights) is probably the most important emerging business risk. This area is rapidly developing and is suitable for collective action litigation as is illustrated by the below examples:

- In 2021, in *Shell v. Milieudefensie* (Friends of the Earth), the district court of The Hague ordered Shell to reduce its own carbon dioxide emissions and those of its supply chain with

45% by 2030. This matter was structured as a collective action. This success incentivised Milieudefensie to target 29 other large companies active in the Netherlands and demand that they also reduce their emissions. It is expected that more collective actions on this issue will follow.

- Additionally, in 2023 a collective action was initiated against pharmaceutical company AbbVie arguing that AbbVie acted unlawfully by maintaining a too-high price for its flagship drug, thereby inter alia infringing basic human rights such as the right to life and the right of access to healthcare.

The technology sector also proves to be susceptible to collective actions. Large tech companies are being (or threatened to be) sued for alleged abuse of market power (Google and Apple) and for alleged privacy infringements (Facebook, Oracle, Salesforce, TikTok and Google).

Further, we see an increase in personal injury claims against companies that produced and distributed alleged defective (medical) products. Collective actions have been initiated or are threatened against AbbVie, Bayer, Philips and producers of COVID-19 vaccines.

8. Is your jurisdiction an “opt in” or “opt out” jurisdiction?

Collective actions brought under the new WAMCA regime bind any Dutch-domiciled member of the represented group, unless they actively opt-out. Non-Dutch-domiciled members of the represented group are only bound by the action if they actively opt-in.

After dealing with the various preliminary issues but prior to the start of the phase on the actual merits of the matter, the court sets a period of at least one month (in practice around three months) for the members of the represented group to exercise their respective opt-out and opt-in rights.

The opt-out mechanism was introduced as part of the WAMCA regime in 2020 and is an important cause of the sharp increase in the number of collective actions we currently see. Under the old regime, members of the represented group are only bound by the collective action if they actively opt-in.

9. What is required (i.e. procedural formalities) in order to start a class action

or collective redress claim?

Prior to initiating a collective action, the claiming entity should first try to settle the matter amicably. Observing a two-week period to allow for settlement negotiations suffices in any case.

To initiate the collective action, the claiming entity should serve the writ of summons on the defendant(s) and register that writ in the public collective action register.

10. What remedies are available to claimants in class action or collective redress proceedings?

In principle, any remedy is available to claimants in collective action or collective redress proceedings, including monetary damages, declaratory relief and cease-and-desist orders.

Unlike many other jurisdictions, the Dutch WAMCA regime provides for the possibility of claiming monetary damages in a collective action. Together with the opt-out mechanism (see question 8 above), this is one of the main drivers for the development of the Netherlands as one of the leading European collective action jurisdictions.

The possibility to claim monetary damages is limited to collective actions to which the WAMCA applies (see question 1 above).

11. Are punitive or exemplary damages available for class actions or collective redress proceedings?

No, Dutch law does not allow punitive or exemplary damages.

12. Are class actions or collective redress proceedings subject to juries? If so, what is the role of juries?

No, juries play no part in Dutch collective actions or collective redress proceedings (or in any other Dutch legal proceedings for that matter).

13. What is the measure of damages for class actions or collective redress proceedings?

Dutch law aims to compensate damage that has actually

been suffered. The party that has suffered damage should be reinstated to the same position it would have been in had its rights not been infringed. If the damage cannot be accurately quantified, it can be estimated.

If the court awards monetary damages, it will order a compensation scheme for the members of the represented group that are bound by the collective action. Before ordering the compensation scheme, the court may invite the parties to make proposals in that respect. The court is not bound by these proposals.

It would be impractical and inefficient in collective action proceedings to consider each individual's circumstances into account to determine the amount of damage suffered. The court therefore has the possibility to divide the represented group into several categories depending on various factors (e.g., nature of infringement, causality, time, etc.) and award different amounts to different categories of members of the represented group. Consequently, the award of damages can to a certain extent be standardised.

14. Are there any jurisdictional obstacles to class actions or collective redress proceedings?

No, the courts assess their jurisdiction in the same way as they would in regular proceedings based on the EU Brussels I Regulation (recast) and national procedural law. The EU Representative Actions Directive does not affect those rules on jurisdiction.

In addition to the existing rules on jurisdiction, the WAMCA introduced a "scope rule" stating that a claiming entity will only be admitted if the collective action has a sufficiently close connection with the Dutch jurisdiction, i.e., if:

- i. the majority of the represented group is domiciled in the Netherlands;
- ii. the defendant is domiciled in the Netherlands and additional circumstances indicate a sufficiently close connection with the Netherlands; or
- iii. the collective action is based on events that happened in the Netherlands.

During parliamentary debate and in legal literature it has been suggested that the scope rule violates mandatory EU law as it *de facto* provides for stricter jurisdictional rules, but courts have to date applied this rule in the limited case law available.

15. Are there any limits on the nationality or domicile of claimants in class actions or collective redress proceedings?

The claiming entity should be a Dutch foundation (*stichting*), a Dutch association (*vereniging*) or an entity designated as a 'qualified entity' in another EU Member State (see question 2 above).

The members of the represented group do not necessarily need to be Dutch or domiciled in the Netherlands to be represented in a Dutch collective action. However, the courts will assess their jurisdiction as if those members were the actual claimants of the proceedings and whether the collective action is sufficiently closely connected with the Dutch jurisdiction (i.e., the scope rule) (see question 14 above). Hence, rules of jurisdiction and the scope rule may *de facto* prove to limit the nationality or domicile of the represented group.

16. Do any international laws (e.g. EU Representative Actions Directive) impact the conduct of class actions or collective redress proceedings? If so, how?

The Dutch implementation of the EU Representative Actions Directive comes into force on 25 June 2023. As the Dutch collective action regime was already, to a large extent, compliant with the Directive, changes are minimal. The most notable change is that any claiming entity designated as a 'qualified entity' in any EU Member State will be entitled to initiate a collective action in the Netherlands, irrespective of where the members of the represented group are domiciled.

17. Is there any mechanism for the collective settlement of class actions or collective redress proceedings?

Court-approved collective settlements were introduced in Dutch law almost two decades ago. Since then, the parties to a collective settlement agreement can jointly request that the court (either the court that is handling the collective action, or the Amsterdam Court of Appeal if no collective action is pending) declares that settlement binding on the represented group, with the exemption of members of the represented group that actively opt-out.

To declare the settlement binding, the court will *inter alia* assess whether the amount of compensation is reasonable, in light of the extent of the damage, the ease and speed with which the compensation can be

received, and possible causes of the damage suffered. If the Amsterdam Court of Appeal is petitioned because no collective action is pending, the court will further assess whether the claiming entity that purports to represent the represented group is sufficiently representative.

Courts in other EU Member States should, in principle, recognise and enforce Dutch court judgments, including judgments to declare a collective settlement agreement binding on the represented group. Whether courts in non-EU jurisdictions are also willing to recognise and enforce such judgments is a matter of local law, but in practice we have not seen any issues in this respect.

18. Is there any judicial oversight for settlements of class actions or collective redress mechanisms?

Yes, courts can declare collective settlements binding on the represented group (see question 17 above).

19. How do class actions or collective redress proceedings typically interact with regulatory enforcement findings? e.g. competition or financial regulators?

Regulatory enforcement findings can be used as a basis to start collective action proceedings. A finding by a regulatory body that a certain public law obligation (e.g., disclosure of insider information) has been violated will be accepted as a fact by the civil courts in subsequent collective actions. The civil courts will, however, still have to establish any other facts relevant to determining civil liability.

20. Are class actions or collective redress proceedings being brought for 'ESG' matters? If so, how are those claims being framed?

Yes, ESG matters are already being brought in the Netherlands through collective action proceedings and we expect to see many more of them (see question 7 above).

These matters are generally being brought as a tort based on the alleged infringement of basic human rights.

21. Is litigation funding for class actions or collective redress proceedings permitted?

Yes, litigation funding is generally allowed but there are

some restrictions.

To be admitted in the collective action, the claiming entity should retain sufficient control over the collective action. This serves to protect the interests of the represented group should a conflict arise with the interests of the litigation funder.

Additionally, after implementation of the EU Representative Actions Directive on 25 June 2023, litigation funding by a competitor of the defendant or by a party that is dependent on the defendant is prohibited where it relates to a collective action based on the infringement of EU consumer law, as referred to in the EU Representative Actions Directive.

22. Are contingency fee arrangements permissible for the funding of class actions or collective redress proceedings?

Contingency fee arrangements are not prohibited. Courts will however take that into consideration when determining the exclusive representative amongst the claiming entities (see question 1 above) and when assessing whether the compensation received by the represented group in a collective settlement (see question 17 above) is reasonable.

23. Can a court make an 'adverse costs' order against the unsuccessful party in class actions or collective redress proceedings?

In Dutch litigation, the unsuccessful party is ordered to bear costs of litigation, including legal fees of the successful party. The award for legal fees is, in principle, limited to predetermined standardised amounts (based on the number of procedural actions involved and the value of the claim) which in practice are only a fraction of the legal fees actually incurred. Recovery of actually incurred legal costs is only possible in case of evidently frivolous claims, or in intellectual property cases.

The above also applies in Dutch collective action with two exemptions:

- if in the preliminary phase the court finds the claims brought in the collective action to be manifestly unfounded, it can multiply the legal fees of the defendant (still based on the predetermined standardised amounts, see above) with a factor of five, unless that would be unfair;
- if the court (partially) awards the monetary

damages claimed by the claimant in the collective action and determines a compensation scheme, it can include a costs award deviating from the ordinary rules for the costs award, possibly resulting in an order against the defendant to pay more than the standardised costs. This is intended as an incentive for the defendant to settle amicably.

24. Are there any proposals for the reform of class actions or collective redress proceedings? If so, what are those proposals?

The act with which the Representative Actions Directive

will be implemented in the Netherlands comes into force on 25 June 2023. This Act only marginally changes the already existing Dutch collective action regime (see question 16 above).

Further, in an attempt to limit the amount of collective actions initiated against the Dutch State for ideological reasons, early 2023 Dutch Parliament voted in favour of a motion in which the Dutch Government was asked to assess whether stricter requirements for representativeness should be implemented for claiming entities that initiate a collective action for ideological purposes. The responsible Minister has taken the position that stricter requirements are not required and desirable (when also considering free access to justice) and that the collective action regime as a whole will, in any case, be evaluated in 2025.

Contributors

Marnix Holtzer
Partner

marnix.holtzer@dlapiper.com

Tom Hautvast
Associate

tom.hautvast@dlapiper.com