

NAVIGATING THE WAMCA

A Guide for Stakeholders

April 2026

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Introduction



Class actions enable claims that might never be pursued otherwise, regardless of their validity. Relying on courts to protect rights only makes sense when the benefits outweigh the costs. Small claims that don't even cover legal expenses are unlikely to be filed. No matter what rights laws protect, if they can't be enforced, they lose their meaning because they can be ignored without consequences.

Although individual claims may be small, their combined effect can generate significant illegal profits. As a result, even minor claims are important from a societal standpoint. The law serves as the backbone of an organized society and enforcing it in small claims cases helps sustain the predictability of social interactions.

Upholding the rule of law in minor matters prevents private powers, such as businesses, from becoming oppressive, for instance, by dictating prices. The public's perception of being heard and treated fairly—regardless of claim size—enhances confidence in the legal system.

Class actions provide a fairer chance for individuals with limited financial resources. Usually, a person faces tough challenges in court against well-funded companies with expensive legal teams. However, combining claims into a class action can generate sufficient funds to hire similarly skilled lawyers. The effectiveness of class actions in helping the economically powerless stand up to the economically powerful may explain why they have faced almost constant opposition from business interests.

A recent report by the Adam Smith Institute, a UK-based right-wing think tank, argues that the expansion of class-action lawsuits is eroding trust in the business environment. According to the report, the increase in class action cases has been driven by a growing industry of third-party litigation funding, the “primary goal of which is to profit from these lucrative lawsuits,” focusing on cases that “offer the most profit rather than the most merit.”

The Adam Smith Institute, which has previously called for the abolition of legal aid, overlooks the main reason for litigation funding: to provide claimants with access to justice when funding is their only way to get compensation. It also conveniently ignores that if businesses followed the law, there would be no cases to fund.

The accusation that the funding industry fosters frivolous claims is difficult to understand. Essentially, funders act as gatekeepers, safeguarding the judicial system from unfounded or questionable lawsuits. No prudent investor would allocate substantial non-recourse funds to a venture with a considerable risk of failure, regardless of the sector. Investors tend to avoid initiatives characterized by unfavorable success metrics.

The main drawback of consumer class-action lawsuits stems from the very reason for their existence. No class member possesses a sufficiently compelling interest to warrant the expenditure of time necessary to remain informed about the case, supervise the attorney's actions, or participate in key legal decisions, as would be expected of clients in regular litigation.

In the United States, it is usually the lawyer who represents the class by managing the lawsuit. While the law requires that the named plaintiffs be able to adequately represent the class, these plaintiffs often lack sufficient knowledge of the claims or of their responsibilities to represent other class members. Judges generally dismiss defendants' claims that the plaintiffs are unfit to represent the class due to limited understanding, as long as the lawyer is experienced and competent.

In UK Competition Appeal Tribunal (CAT) proceedings, the class representative is an authorized individual or entity designated to act on behalf of a group of claimants to initiate and manage collective actions. Such representatives must secure approval from the Tribunal, confirming their ability to represent the interests of the class, oversee funding, and direct legal teams to build the case. Class representatives are often individual consumer rights advocates or consumer organizations.

In the United States, the lawyers for the class cover all litigation expenses out of their own funds until the case is finally resolved, usually through settlement. In other jurisdictions, class actions are often funded by investors. Litigation funding, or third-party funding, is an arrangement where a specialized investor covers a plaintiff's legal fees and costs in exchange for a share of the final settlement or judgment. It operates on a "no win, no fee" basis, meaning if the case is lost, the funder is not reimbursed. Financial backing enables groups of plaintiffs with minor claims to file lawsuits against large corporations that would otherwise be unaffordable.

Clearly, the lawyers and funders involved have their own financial motives, which may not match those of the class. The class's goal is to maximize the total recovery. In contrast, class counsel's financial interest is in increasing their effective hourly fee, and the funder's interest is in boosting investment returns. In practice, these goals can conflict with each other.

For example, businesses often prefer to settle disputes amicably rather than engage in lengthy, expensive litigation, regardless of how strong their claims are. This strategic choice is influenced by high legal costs, operational disruptions, the need for confidentiality, and the importance of maintaining key business relationships. While early settlements can benefit lawyers and investors, they do not always serve the best interests of the class. Alternatively, legal counsel or investors may sometimes prevent claimants from settling fairly in pursuit of more profitable outcomes, thereby trapping plaintiffs in unfavourable legal battles.

The CMS European Class Action Report 2025 highlights the ongoing increase in claims across Europe, with 97 claims filed in 2024. Consumer and competition-related claims are the largest group litigation risks for businesses.

The total value of class actions in the UK reached €155 billion in 2024, followed by Portugal with €54.7 billion and the Netherlands with €36.3 billion. Claims against Big Tech amounted to €36.5 billion in the UK and €17.8 billion in the Netherlands.

The Netherlands has seen a sharp increase in collective action lawsuits, quickly becoming one of Europe's most active countries for mass claims. The data illustrate this trend: before the new WAMCA regime took effect (2008–2019), the average was only five cases per year. After 2020, the number rose to an average of 18 cases annually, matching larger markets like the UK.

This guide explains how class actions work in the Netherlands under the WAMCA regime. As we will see, lawmakers have adopted a model in which independent foundations and associations lead collective actions rather than lawyers, and they, along with courts, prefer a limited role for litigation funders in these cases.



CHAPTER 1

The Origins of the Dutch Collective Action

The Dutch collective action evolved through court rulings that permitted organizations with shared ethical aims to gain recognition and standing. In 1986, the Dutch Supreme Court, in the landmark De Nieuwe Meer case, ruled that three environmental groups had legal standing to pursue a collective action.

The Nieuwe Meer Case

Each year, the city of Amsterdam dredges 100,000 m³ of sludge from its canals, consisting of stones, waste, soft drink cans, glass, and bicycles. For many years, this material has been dumped into the Nieuwe Meer, a narrow lake located southwest of Amsterdam. However, three environmental organizations filed legal action against the municipality to end this disposal. The Supreme Court overturned the appellate court's decision that the environmental organizations lacked standing because they failed to show a concrete interest of their own that was affected. The interests involved in a claim like this are suitable for "bundling."

The mutual goal of seeking an injunction to prevent further environmental damage made combining the legal cases a practical choice. The Supreme Court noted that without consolidation, access to strong legal remedies against immediate harm would be significantly hindered. This is because these issues affect a large portion of the population, and the harmful effects on individuals are often hard to predict. The Supreme Court clarified that the interest groups need not have a direct interest; collective actions organized through representative organizations are generally acceptable.

The Collective Actions Act

Following *Nieuwe Meer*, it remained unclear whether collective actions were generally feasible or only relevant to public-interest cases. This question was settled in 1994 with the enactment of the Collective Actions Act (WCA), as specified in Articles 3:305a and 3:305b of the Dutch Civil Code (DCC). The Act permits foundations or associations with full legal capacity to initiate legal proceedings to protect similar interests of others, as long as those interests are also specified in their Articles of Association.

Article 3:305a of the DCC explicitly excludes monetary claims for damages. At that time, the legislature believed that awarding damages would require the court to consider each member's personal circumstances within the context of the collective action. Therefore, a collective claim for damages could not meet the commonality test.

The legislature emphasized that two fundamental principles regarding compensatory damages must remain unchanged: compensation should be paid directly to those who have experienced harm, not to their representative organization. Determining whether an unlawful act has occurred against someone and whether that person has been harmed can be assessed only on an individual basis.



The Collective Settlement of Mass Claims Act

In 2005, the Collective Settlement of Mass Claims Act (WCAM) was passed because it became evident that mass-damage cases were not being resolved efficiently. The DES case was the main reason for introducing WCAM.

The DES Case

Diethylstilbestrol (DES) is a synthetic estrogen. It was prescribed to pregnant women from 1940 to 1978 to prevent miscarriage, premature labour, and related pregnancy complications. The medication caused physical disorders in children—especially girls—born to those women.

Many of these "DES daughters" held the pharmaceutical companies that produced the drug, including Bayer and Merck, responsible for the harm. In 1986, they filed a lawsuit. However, the district court and the court of appeals dismissed the case because the women could not prove which manufacturer supplied the drug their mother had been prescribed.

In 1992, the Supreme Court ruled that this evidence was unnecessary. It was decided that each manufacturer could be held responsible, both jointly and individually, for the damages. Eventually, a settlement was reached between the DES daughters' representatives and the pharmaceutical companies. However, the settlement negotiations were complicated and lengthy because the responsible parties demanded final discharge.



The Declaration of Binding Effect

WCAM was introduced to solve this problem. It enables a representative organization and a responsible party to reach a settlement, which the Amsterdam Court of Appeal can declare binding on all injured parties.

Once declared binding, the settlement applies to all class members. However, individuals have an "opt-out" option that allows them to withdraw within a specified timeframe, usually three months, and pursue independent legal action if they are unhappy with the compensation.

Compared to the previous system, WCAM offered significant advantages to both injured and responsible parties. Injured individuals no longer need to undergo lengthy and expensive legal procedures to receive compensation. WCAM streamlined the resolution process, providing finality for the responsible party and enabling them to settle without admitting liability.

The Need for Further Change

While WCAM marked a notable progress in handling mass damages, the Dutch legislature acknowledged that further improvements were needed. Research showed a surge in claim organizations starting collective actions, but victims frequently struggled to identify the most suitable organization to represent their interests. Moreover, the responsible parties often faced several groups claiming to represent the same or similar constituencies.

For example, between 2002 and 2005, Dexia Bank became involved in class actions brought by several representative organizations and in approximately 3,020 individual lawsuits. Despite the bank's willingness to settle, a resolution proved elusive due to the difficulties in reaching a definitive agreement given the circumstances.



The Lottery Loss Foundation

An act of dishonesty by a representative organization damaged public trust in class actions. In 2008, the Lottery Loss Foundation was created to seek compensation from the State Lottery on behalf of players. The foundation argued that lottery participants had a valid claim because the State Lottery failed to disclose that unsold tickets also participated in the draw. In 2015, the Supreme Court ruled that the State Lottery engaged in deceptive practices from 2000 to 2008.

Lottery players who joined the foundation paid an initial fee of 25 euros to participate in the lawsuit. However, the founder kept this money for himself and later transferred a large sum to a personal account in Guernsey. The Dutch financial crime agency, the Fiscal Intelligence and Investigation Service (FIOD), arrested him in summer 2018 for embezzling 2.5 million euros. In December 2021, he was sentenced to two years in prison. New laws were considered necessary to stop such illegal conduct and to strike a balance between, on the one hand, victims' rights to seek justice and, on the other hand, protecting those responsible from baseless or trivial group lawsuits.

The Resolution of Mass Damage in Collective Action Act

The Resolution of Mass Damage in Collective Action Act (WAMCA) took effect on 1 January 2020. It applies to class actions filed after this date arising from events that occurred on or after 15 November 2016.

WAMCA's main innovations are that class actions for monetary damages are now allowed and that parallel or overlapping domestic class actions for the same event are no longer possible. In a WAMCA case, the claim organization represents the claimant as a party in the proceedings. It operates under its Articles of Association in its own name, but ultimately for the benefit of others' interests.

WAMCA involves two procedural stages: an admissibility phase followed by a substantive phase. The court reviews the claim's substantive aspects only after confirming the admissibility of the representative organization and its collective claim. In this respect, Dutch law aligns with customary practice in Anglo-American class action systems. During the "certification" stage, the court first evaluates whether the case is appropriate to proceed as a collective action.

The bifurcation of WAMCA proceedings thus gives the defendant a procedural advantage: the case's substantive issues are only addressed if the claim organization clears the initial admissibility stage. During this review, the court first evaluates whether the claim has any merit. These formal and substantive criteria protect the defendant from clearly frivolous claims, saving time and resources. If the court determines that a collective action is entirely baseless, it will dismiss the case and may increase the adverse cost order, the defendant's legal fees and disbursements, by a factor of five.

As of March 2026, a total of 113 proceedings have been initiated under the WAMCA. The proceedings' subject matter can be generally classified into the following categories: 22 actions concerning constitutional, environmental, animal, or human rights; 19 actions relating to privacy; 12 actions concerning intellectual property; 9 cases involving contract law; 7 cases related to employment law; 7 actions concerning Diesel emissions; 7 competition law cases; 5 COVID-19 claims; 4 tenancy law matters; 2 product liability cases; and 19 cases can be classified as "various" (including noise pollution, excessive tourism).

United Kingdom

The two-pronged approach is similar to the UK system, where Section 47B (4) of the Competition Act 1998 states that collective proceedings can only start if the Competition Appeal Tribunal (CAT) issues a Collective Proceedings Order (CPO). This process involves two steps: first, certification via a CPO, and then a trial on the merits.

Before a CPO can be granted, the CAT must approve the PCR as an appropriate representative for the class, ensuring they will act fairly and in the best interest of all members (Authorization Condition). Additionally, the claim must be deemed appropriate for collective proceedings, meaning it involves common issues of fact or law and is suitable for an aggregate damages award (Eligibility Condition).

United States: Rule 23

In the United States, Rule 23(c) of the Federal Rules of Civil Procedure mandates that the court must determine “as soon as practicable” whether a case qualifies to proceed as a class action after filing. If the judge approves “class certification,” the case can advance, enabling one plaintiff or a small group to represent others with similar claims.

If certification is denied because the case does not meet the legal requirements for a class action, it is typically dismissed, and the plaintiffs are required to pursue their claims separately. A defendant can file a motion to dismiss, asking the court to dismiss the case on the grounds that the plaintiff's claims lack sufficient legal foundation, evidence, or factual support to proceed.

The Representative Organization

WAMCA enforces strict standards for accepting claims from representative organizations. These criteria primarily aim to deter opportunistic claim vehicles that may not fully understand the issues and view mass claims as a way to profit. Lawmakers recognize that the interests of these groups' board members could outweigh those of the affected individuals. Since mass claims often involve large sums of money, there is a risk that board members might misuse funds.

A collective action under WAMCA can only be initiated by a foundation or association that has full legal capacity and represents victims. The organization must operate as a nonprofit and have both a governing board and a supervisory board. According to the Claim Code, “profit” does not include fees charged or agreed upon by representative organizations for expenses or services, including any reasonable additional fees for future collective actions.

The Midden-Nederland District Court ruled in *Essure v. Bayer* that the board members of the claim organization lacked a direct or indirect profit motive, as their compensation was reasonable.

Article 3:305a of the DCC permits claim organizations to initiate claims to protect the interests of others. A claim organization cannot defend its own interests. Two conditions must be satisfied: (i) the organization's articles of incorporation must specify that it is safeguarding the interests of others; and (ii) the organization must actively work to defend those interests.

The phrase “other persons” should be understood broadly—group actions can be brought on behalf of individuals or legal entities, whether in personal or professional roles. Claim organizations must not limit their focus to their members' interests; they should aim to protect the interests of all parties potentially affected.

The Admissibility Stage

During the admissibility stage, the court evaluates whether the claim organization meets the criteria set out in Article 3:305a DCC. Specifically, the organization must be sufficiently representative, considering its constituency and the claim amount. It must be able to cover the costs of the proceedings, and its board must operate independently.

The assessment also considers the relative practicality and effectiveness of pursuing collective action versus individual litigation, based on the similarity of legal and factual issues, the size of the affected group, and, in cases involving damages, the presence of a significant financial interest for group members, both individually and collectively. Additionally, the court reviews whether the collective claim is not clearly meritless at the outset.

A key factor for the court is whether the organization genuinely advocates for the group it claims to represent. The court considers its history, reputation, and backing from affected individuals and other groups. Effective management and supervisory boards are essential, which must maintain full control over litigation, independent of third-party investors. To move forward, the claimant must prove they can cover all legal expenses for the entire duration of the case.

The admissibility phase concludes when the court appoints an Exclusive Representative (ER). If multiple organizations make similar claims, the court will select the most suitable one to lead the collective action.

The Exclusive Representative

The WAMCA procedure requires mandatory consolidation when multiple class actions involve the same events and similar legal and factual issues. Usually, the court designates one claim organization as the Exclusive Representative, though multiple claim organizations may become co- or sub-ERs. To promote settlement, a primary goal of WAMCA, the legislature intended to simplify procedures and establish a single point of contact for the defendant by appointing an ER.

The ER serves as the representative for other claim organizations and advocates on behalf of all individuals in the narrowly defined group, as determined by the court. This group includes affected persons who have joined an organization's collective claim and those who have not but can still be regarded as victims. While the other claim organizations remain parties in the consolidated proceedings, the ER handles the litigation. Additionally, the court may authorize other claim organizations—those not designated as ER, co-ER, or sub-ER—to perform certain procedural actions on their own.



Opt-In

The WAMCA functions as an opt-in system for individuals who are not domiciled or residing in the Netherlands. Nevertheless, upon a party's request, the court retains discretion to implement opt-out regulations in favour of this group.

In a case concerning intellectual property rights initiated by the BREIN foundation involving numerous non-Dutch residents, BREIN pointed out to the court that a substantial number of rights holders affiliated with BREIN, who also provide financial support, are based abroad. These rights holders are reluctant to send an opt-in letter to the court for each WAMCA procedure aimed at collective enforcement, particularly when their individual interests are less significant.

The Motion Pictures Association (MPA)—through which many prominent American rights holders are affiliated with BREIN—had already informed BREIN of its decision not to send opt-in letters to Dutch courts. Consequently, an opt-in regime would mean that BREIN can no longer represent the interests of these foreign parties, despite their financial contributions and lack of objection to the procedures conducted by BREIN. Its request was granted.

The Assignment Model

In addition to collective actions, there is a well-established practice of claims aggregation through assigning claims to a specialized litigation entity. This approach has been frequently used in competition damage lawsuits. It is an effective way to consolidate similar claims when the number of injured parties and the claim amount per injured party are relatively high.

Bundling claims can generate significant procedural and practical efficiencies. Specifically, damage assessment benefits from a larger, more comprehensive database. Dutch courts have upheld the rights of litigation entities to pursue damages in their own name and have confirmed the validity of the underlying assignment agreements in cases like the Air Cargo, Sodium Chlorate, Trucks, and Paraffin Wax cartel litigations.

Ideological Collective Actions

The sixth paragraph of Article 3:305a of the Civil Code permits the court, in certain situations, to override stricter admissibility standards in favour of more lenient requirements. Essentially, the strict regime applies to damage claims to safeguard public interests against financial conflicts of interest, while the lenient regime applies to ideological actions.

Courts have, in various contexts, applied the lenient regime to claims driven by ideology where no damages are involved. This includes cases like ethnic profiling, access to free contraception, and online shaming.

Although WAMCA is not supposed to complicate legal proceedings for foundations with ideological goals, uncertainty about its interpretation and whether the “light regime” applies has led to delays and increased legal costs for small foundations and advocacy groups.

Some claims related to ideological actions that could have been brought before WAMCA took effect are now barred by the court's admissibility rules. These involve cases where the court is asked only to declare that a party is acting unlawfully, without seeking damages.

In a case involving the Sinti, Roma, and Travellers Foundation against the Municipality of The Hague, the court in The Hague categorized such claims under the WAMCA as preliminary steps toward damage claims and applied a strict admissibility test referred to legislative history, indicating that if a legal declaration is requested only as a lead-up to a damages suit, there is no reason to apply the more lenient rules. The foundation argued it was not seeking damages and explicitly stated that its claims did not concern damages.

Nature and Environment Federation v Dutch State

On 11 February 2026, the District Court of The Hague rejected claims filed by five environmental groups against the Dutch State over its handling of PFAS. The organizations claimed that the Dutch State was not doing enough to prevent the further spread of PFAS and to address the risks posed by existing contamination. However, the Court ruled that the State's approach to PFAS complies with the law, highlighting that it is the government's responsibility to decide how to implement policies and that the measures taken were appropriate and adequate.

The case serves as confirmation of the Bonaire class-action precedent, indicating that while the Court may scrutinize the Dutch state's efforts to comply with international standards, it is not empowered to prescribe the precise methods of compliance.

Greenpeace Foundation Netherlands v Dutch State

In January 2026, the District Court of The Hague ruled that the Dutch State's existing climate policy violates the human rights of Bonaire residents and treats them unfairly compared to those in the European Netherlands. The current climate targets and emission reduction measures are inconsistent with international commitments. As a result, the State is acting unlawfully towards Bonaire's inhabitants.

The Court ordered the Dutch government to establish and enforce economy-wide greenhouse gas emission reduction targets in national law, including interim targets and pathways aligned with the Paris Agreement, and to adopt a national climate adaptation plan. The Bonaire case demonstrates that courts are prepared to hold the Dutch government accountable when it fails to adequately protect citizens from climate change risks. Nonetheless, the Court highlights that its role is limited, placing the responsibility on the legislature to determine how to integrate climate targets into policy.

Offlimits v Grok and X

On 26 March 2026, the Amsterdam preliminary relief judge banned Grok and X from creating and sharing nude images and child pornography. The online abuse expertise center Offlimits sued Grok and X because AI chatbots can generate and distribute such illegal content without permission. This ruling marks the first decision by a European court to issue a binding injunction against an AI image generator for producing non-consensual sexualized content.

X.AI is the provider of the generative AI chatbot Grok. Grok is a large language model capable of answering a wide range of questions and performing tasks, including generating visual content. X.AI manages the development, training, security, and updates of the model. Grok is available as a standalone app on iOS and Android, via grok.com, and on X through the 'Grok-in-X' feature. This feature enables X users to interact with Grok on X using the @grok account, allowing them to ask questions and request images.

Grok and X claimed they had addressed this type of imagery by updating their terms of use and implementing measures to block content. However, Offlimits presented a stripping video with Grok dated three days before the March 12 hearing, the same day xAI's lawyers stated the company had put strict safeguards in place in January, making it impossible for Grok to still allow non-consensual intimate images or child sexual abuse material.

The court bans Grok and X from producing or sharing nude images or child pornography involving individuals in the Netherlands or images created and distributed within the country. Violating this order could lead to a daily fine of up to 100,000 euros, with a maximum total of 10 million euros. Additionally, X is forbidden from offering Grok on X until Grok complies with these restrictions.

On 26 January 2026, the European Commission announced it would launch a new investigation under the Digital Services Act against X. The probe will determine whether X has adequately assessed and mitigated the risks associated with Grok's functions on the platform within the EU. This includes concerns about the spread of illegal content, such as manipulated sexually explicit images and material that could be child sexual abuse.

CHAPTER 2

The Writ of Summons

After submitting a consultation request to the defendant detailing the claims, the representative organization—which must be a foundation or association with full legal capacity—can then file its writ of summons after 2 weeks. In addition to meeting the standard requirements, the summons must also comply with the additional legal criteria specified by WAMCA.

The Letter Before Action

Before a claim organization can initiate a collective action under the WAMCA, it must make a reasonable effort to settle the alleged claim with the potential defendant. Sending a letter proposing settlement talks and giving the potential defendant two weeks to respond is considered a reasonable attempt. However, mass claims are inherently complex, and such letters often arrive too early to enable meaningful negotiations. As a result, this letter is typically viewed as notice of the impending collective action rather than a genuine settlement attempt.

The potential defendant should assess, on a case-by-case basis, whether and how to respond, as there is no obligation to reply. Generally, failing to respond won't lead to adverse costs or penalties. However, the claim organization might face negative consequences if it fails to consult with the potential defendant.

The Basic Requirements

The claim organization is required to summon the defendant to appear before a district court, which generally hears cases with a panel of three judges. Local jurisdiction rules are fully enforced, so the defendant is usually summoned to the district court nearest their residence or registered address. The summons may request different types of relief, including injunctions, damages, or declaratory relief.

According to Article 1018c(1) DCCP, the summons must include: (a) a description of the event or events related to the mass claim; (b) details about the persons whose interests the mass claim aims to protect; (c) an explanation of the commonality of the factual and legal issues involved; (d) information on how the requirements of Article 3:305a(1-3) DCC are met or the reasons for a partial exemption under Article 3:305a(6) DCC; (e) data enabling the court to appoint an Exclusive Representative; and (f) the claim organization's duty to register the claim in the public register for collective actions and to inform about the implications of such registration.

If the writ of summons is missing any of these elements, the court can declare it null and void if the claim organization does not promptly correct the mistake by reissuing the writ or submitting a correction. Alternatively, the court may also declare the claim organization's collective claim inadmissible.

In its summary proceedings against several wind farms, the Platform Storm Foundation did not find it necessary to address these points in its summons. It simply stated that it was a foundation under Article 3:305a of the Dutch Civil Code, with its main goal and clear interest being to prevent the installation of wind turbines. On 22 October 2020, the Northern Netherlands District Court ruled that the requirements of Article 1018c DCCP, paragraph 1, must be complied with under penalty of nullity, declaring the foundation inadmissible.

48 Hours

The claim organization must file the summons with the court registry within 2 days of its issuance. At the same time, it must send a copy of the summons to the public Central Register of Collective Claims.

When the BREIN Foundation filed a case against a company that traded IPTV subscriptions and equipment, alleging infringement of its IP rights and those of its affiliates, a summons was served on 25 March 2021 and filed with the Rotterdam District Court registry on the same day. However, it was submitted to the Central Register of Collective Claims on 29 March 2021, two days late.

The Stop Online Shaming Foundation and the Online Child Abuse Expertise Bureau timely submitted the summons, dated 26 February 2020, to the Central Register of Collective Claims on 27 February 2020. However, the writ of summons was recorded only at the Amsterdam District Court registry on 10 March 2020, which was almost two weeks too late.

The National Committee against Mandatory Face Masks Foundation filed its summons with the Central Register and submitted it to the District Court of The Hague's registry more than two weeks after it was issued.

None of the courts found it necessary to declare the claim inadmissible. All three courts emphasized the rationale of the provision. The Rotterdam District Court stated that the aim is to promptly inform third parties, such as other foundations, of claims arising from the same event through an easily accessible online register. This allows them to decide whether to pursue their own claims. The courts found that other claim organizations' interests were not compromised, and declaring inadmissibility would be excessive.

The Request to Extend the Deadline

Under Article 1018d, paragraph 1, of the Code of Civil Procedure (CCP), a representative organization seeking to join an existing class action generally has three months from the date the initial class action is recorded in the central register to do so.

Paragraph 2 allows for an extension if this period proves insufficient. To request an extension, the organization must file a request with the court's registry within one month of the initial registration, indicating its intention to pursue a class action. Furthermore, the organization must clearly state and justify its interest in pursuing a class action for the same unlawful act, including an explanation of why the three-month window is inadequate.

In *Diesel Emissions Justice Foundation v Volkswagen*, an extension was granted to a competing claim organization due to the complexity of the matter. The organization anticipated relevant rulings from the ECJ and the German Federal Court of Justice within the extended period. The extension was limited to two months because the organization had known about the original summons for over a month when it was registered at the central register.

Fair Trade Practices Foundation v Vattenfall

In *Fair Trade Practices Foundation v. Vattenfall*, several foundations sought an extension, but the District Court of Amsterdam denied it on 20 August 2025. The foundations claimed they were in discussions with the Consumers' Association, the Owners' Association, and/or Claimer.nl to form a cooperation. However, the court said this does not align with the type of cooperation outlined in WAMCA's legislative history. The relevant paragraphs refer to mutual partnerships between claim organizations, not collaborations with civil society groups or bookbuilders. As a result, the foundations' request was denied.

A significant concern with this ruling is its potential to impede other parties' ability to secure an extension, should the initial claim organization declare its unwillingness to cooperate with them to the court.

Consumer Competition Claims Foundation v Apple

In a class action lawsuit against Apple, a second organization secured an extension of the three-month deadline. A third group, which had summoned Apple after this period, relied on the extension granted to the second organization to back its case. However, the Amsterdam District Court rejected the third group's request.

The Supreme Court upheld the decision, noting that the three-month extension falls within the court's discretion. That discretion will be exercised based on the specific circumstances and arguments of the organization requesting the extension. Consequently, the Court concluded that, consistent with legislative intent, any extension is exclusive to the requesting organization and has no wider impact.



CHAPTER 3

The Applicability of WAMCA

WAMCA applies to collective actions related to harmful events occurring on or after 15 November 2016, which is the date the bill was submitted to parliament, and filed after 1 January 2020. In the case of a series of events, the law in effect at the time of the last event applies. Courts vary in how they interpret this transitional rule.

NUON-Claim Foundation v Vattenfall

In a class action lawsuit filed by the NUON-Claim Foundation, the claim organization argued that energy provider NUON, now part of Vattenfall, wrongfully charged certain business clients capacity-based "kW" fees for electricity both before and after 15 November 2016, and that WAMCA should apply to the entire claim.

The foundation argued that NUON billed customers for electrical capacity without providing any actual service or product in return for the so-called kW charge and that many similar customers did not have to pay this fee. NUON-Claim contended that this unlawful charge made bills roughly 80% higher than those of competing energy providers.

The Amsterdam District Court issued an interim ruling on 1 February 2023, stating that the WAMCA applies only to claims where the alleged wrongful conduct—specifically, invoicing and payment of the "kW" capacity fee—occurred on or after 15 November 2016. Customers who paid these charges prior to that date are governed by the pre-WAMCA rules. The Court thus differentiated between these two groups, noting that both the previous and current collective action regimes are applicable.

In October 2024, the court dismissed the foundation's claims, ruling that the kW charges were legitimate. Vattenfall had been transparent about key information, especially the pricing structure, which was clearly communicated in the offers and bills provided to customers. In the liberalized Dutch energy market, consumers could switch providers or renegotiate terms if they found them unfavourable, indicating they were not forced to stay with their current agreements. Nuon-Claim filed an appeal on 7 January 2025.

Bureau Clara Wichmann Foundation v AbbVie

The Amsterdam District Court reached a similar conclusion regarding the applicability of WAMCA in the class action filed by the Bureau Clara Wichmann Foundation against AbbVie (formerly Allergan), a producer of breast implants.

The Dutch implants have been brought into circulation for more than 30 years, including after 15 November 2016. However, according to the Court, this does not constitute a continuous event or series of events. It is not an ongoing process, as its reintroduction into circulation constitutes a new occurrence each time.

In this case, it concerns the individual, repeated introduction into circulation of many variants of a certain type of product over more than 30 years. Such a broad range of actions cannot be regarded as a series of events in the narrow sense intended by the legislator. WCAM pertains to claims involving implants brought into the EEA before 15 November 2016, while WAMCA applies to claims connected to implants imported on or after that date.

On 17 December 2025, the Amsterdam Court ruled that Allergan breast implants are not defective. There is insufficient scientific evidence linking these implants to the autoimmune issues some women experience. After thorough research, it has been found that women with these implants have a slightly higher risk of developing a rare lymphoma (BIA-ALCL). However, this risk is minimal in absolute terms, and the likelihood of recovery remains very high.

The Court's ruling states that, although the increased risk might be linked to the implants, they cannot be deemed defective when all relevant factors are considered. Therefore, Allergan, the manufacturer, is not liable for the damages claimed. Bureau Clara Wichmann filed an appeal on 17 March 2026.

Dieselgate

In several Dieselgate lawsuits, various representative organizations argued that automakers and their dealerships sold vehicles equipped with emissions-manipulating devices both before and after 15 November 2016. They generally contended that only WAMCA should be allowed to apply to their cases.

In March 2022, the Amsterdam District Court ruled in cases against Volkswagen and Stellantis that the transitional arrangement was designed to prevent claims from being evaluated under both the WAMCA and pre-WAMCA regimes. Based on the timing of the “events” as defined by this arrangement, only one legal regime should govern the proceedings. The Court ultimately determined that the pre-WAMCA regime applied to all claims because the development of the manipulation software was the initial and crucial event that caused the damages.

Emission Claim Foundation v Mercedes

In a defeat-device case against Mercedes, the Amsterdam Court of Appeal disagreed with its district court on this point. The appellate court emphasized that the decisive event is not the development of the software itself, but putting vehicles equipped with that software on the road.

The Court of Appeal emphasizes the importance of differentiating between cars regulated by Euro 5 and Euro 6 emission standards. Euro 5 standards were in effect prior to 15 November 2016, and there is no evidence that such vehicles were sold thereafter. Therefore, the WCAM regime applies to claims involving Euro 5 vehicles, while those involving Euro 6 vehicles are governed by the WAMCA regime.

In his opinion for the Supreme Court on 6 March 2026, AG Snijders stated that the Court of Appeal's decision was incorrect. He argued that it should have simply distinguished between vehicles introduced into circulation before 15 November 2016 and those introduced after that date.

The Court of Appeal seemed to treat the introduction of Euro 6 vehicles as a series of separate events. Since claims involving those vehicles are not limited to events before 15 November 2016, the appellate court held that WAMCA covers the distribution of all Euro 6 vehicles. According to AG Snijders, this is a misinterpretation of the transitional law, and the previous regime applies to Euro 6 vehicles introduced into circulation before that date.

Essure Claims Foundation v Bayer

In *Essure Claims Foundation v. Bayer*, the Central Netherlands Court in Utrecht ruled that WAMCA covers the entire claim brought by the representative organization against the German manufacturer of Essure, a permanent female sterilization device, even though most devices were marketed and implanted before 15 November 2016.

The Court emphasized that the critical event is implantation, not market release. Evidence demonstrated that Essure was still being implanted after 15 November 2016. Bayer announced in September 2017 that it would withdraw Essure from the European market.

The Court finds that a sequence of related events in this case pertains to the same claim, necessitating the use of WAMCA for all claims. It clearly rejects splitting the claim (and the involved group) into pre-WAMCA and WAMCA claims, unlike the approach taken by the Amsterdam District Court in the similar AbbVie case, which did partition them.

The Court determined that, despite the limited number of devices implanted after 15 November 2016, it was unnecessary to analyse events before and after that date in detail because the frequency of those events does not matter.

The Court clarified that its approach does not violate the principle of legal certainty because Bayer knew that devices continued to be implanted after the cutoff date and could therefore have anticipated WAMCA claims.

App Stores Claims Foundation v Google

In *App Stores Claims Foundation v Google*, the foundation alleges that Google has long abused its dominant market position, compelling developers to distribute their applications exclusively through Google Play and requiring them to use Google's payment system. As a result, users have faced steep commission fees of up to 30% on app purchases and in-app services. The organization seeks compensation for affected users and lasting changes to Google's practices to ensure compliance with competition law.

The Amsterdam District Court, noting that a key principle of the transitional arrangement is that WAMCA applies when an event began before 15 November 2016 but continued afterward, concluded that by continuing its practices after 15 November 2016, Google accepted the risk of liability under the new law.

It referred to the “single and continuous infringement” (SCI) concept. The European Court of Justice has clarified that an SCI exists when the various actions of cartel members or a dominant firm form a cohesive strategy to distort competition. The Court concludes that this is the case here. Google acknowledges that the policies related to the Play Store for Android, app distribution through the Play Store, payment processing, and the imposition of commissions are elements of an overall strategy that has been in effect since 2013 and has seen little change.



Comment

Courts differ in their interpretations of the transitional rule governing the applicability of the WAMCA regime. In my opinion, the crucial factor is whether the defendant continued with its practices after 15 November 2016. If so, WAMCA should apply to the entire claim, and there’s no need to split the claimants into groups. The main purpose of the transitional arrangement is to prevent companies from being caught unaware by sudden, strict legislation. If a company knowingly continues unlawful practices after being informed of the new laws and their consequences, those laws should apply.

For instance, in the case brought by the Bureau Clara Wichmann Foundation, AbbVie continued selling breast implants beyond the cutoff date, so WAMCA should have covered all claims. The type of implant should not be part of the equation. Similarly, in the NUON-Claim Foundation case, Vattenfall maintained its practices after that date, so WAMCA should have applied to the entire group. In the Mercedes case, claims related to both Euro 5 and Euro 6 vehicles should have been covered by WAMCA because Mercedes knew it could be sued under this new law. If Euro 5 cars were never sold after 15 November 2016, and Mercedes never introduced Euro 6, then the situation would be different; in that case, it would be fair for WCAM, not WAMCA, to apply to the claims.

That said, it obviously doesn't matter which emission standard the car has – Euro 5 or 6. What matters is whether a vehicle has a defeat device and when it was put into circulation.

WAMCA Claims Based on the GDPR

Currently, ten WAMCA cases are pending involving foundations seeking compensation for alleged GDPR violations. The ongoing debate about whether compensation claims can be pursued through WAMCA proceedings for GDPR violations has lasted for years.

Under WAMCA, a representative organization acts on behalf of individuals who may have suffered harm, but not specifically on their instruction or with a power of attorney. The key issue is how this aligns with the relevant GDPR provisions. Article 80(1) GDPR states that data subjects have the *right to authorize* a non-profit organization to file complaints on their behalf, exercise rights, and seek compensation under Article 82.

In its 2022 Meta ruling, the ECJ set a relatively low threshold for organizations to represent individuals' collective interests under Article 80(2) GDPR. The Court emphasizes that it is not necessary to identify in advance which individuals might have been affected. It is important to note that Article 80(2) of the GDPR does not relate to claims of compensation. It pertains to the right to complain to the appropriate supervisory authority, regardless of any instructions from the individual.

Some authors believe the Meta ruling clearly indicates that damages can be claimed under the WAMCA for alleged GDPR violations, even without specific instructions. Others contend that the ruling merely confirms that Article 80(2) of the GDPR does not require organizations to identify the individuals they represent in advance.

Currently, it is unclear whether mass claims for GDPR violations are permitted under WAMCA on an opt-out basis. The Meta ruling does not definitively determine that a claim organization can pursue damages for a GDPR breach without explicit authorization.

Estimating the losses users suffer from data misuse is challenging because privacy is intangible, and individuals value their data differently. The personal impact is a complex, evolving legal issue, with courts frequently divided over what counts as a compensable injury.

Data Protection Netherlands Foundation v Amazon

On 23 July 2025, the Rotterdam District Court issued an interim ruling in the case of the Data Protection Netherlands Foundation against Amazon. The court referred questions to the European Court of Justice.

Both the WAMCA and the GDPR establish eligibility criteria for advocacy groups seeking to initiate collective actions. While these requirements overlap to some extent, they are not entirely aligned. For instance, Dutch advocacy organizations must, according to Article 3:305a, paragraph 2, of the Civil Code, be sufficiently representative in terms of support and the scope of claims, whereas Article 80, paragraph 1, of the GDPR does not specify any representativeness criteria.

The GDPR does not specify that actions like these are only allowed if the representative organization serves a particular constituency. As a result, even actions by an organization with a single member or supporter appear to be permissible in principle. Therefore, when it comes to GDPR claims, Dutch advocacy groups face stricter requirements under the WAMCA.

The Court considers these additional rules as a possible restriction compared to Article 80, paragraph 1, of the GDPR. The main question is whether the WAMCA impedes the effective enforcement of the GDPR.

Article 82 of the GDPR addresses the right to compensation, but it may be inferred that member states may not allow interest groups to claim compensation for a GDPR violation without the mandate of the parties involved. The ECJ also needs to resolve this question.



CHAPTER 4

Jurisdiction

Jurisdiction of the courts is a key part of the judicial system, referring to a court's authority to hear and decide cases. When a procedure involves an international element, such as parties from different countries, foreign assets, or actions across borders, it is important to first identify which court has international jurisdiction.

The DCCP and Brussels I-bis Regulation

According to the main rule of Article 2 of the Dutch Code of Civil Procedure (DCCP), the Dutch court has jurisdiction if the defendant has their domicile or habitual residence in the Netherlands. This is the general rule for domestic matters. However, settling mass claims often involves cross-border elements. The party responsible for the damage need not be established in the Netherlands, and there may also be foreign victims.

Until 2002, the international jurisdiction of the Dutch courts was governed by the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. This treaty was replaced on 1 March 2002 by the EEX Regulation (Brussels I). In 2012, the EEX Regulation was revised, and is now known as Brussels I (recast) or Brussels I-bis.

Brussels I-bis and the DCCP do not set specific jurisdiction rules for collective actions, so the general jurisdiction rules apply. Courts do not treat jurisdictional assessments in collective actions any differently than they would if the individual claimants filed the case themselves.

If the defendant, whether or not a national of a Member State, resides within the territory of a Member State of the European Union, the jurisdictional regime of Brussels I-bis applies. The main rule of Brussels I-bis is Article 4(1), which states that the defendant's place of residence, regardless of nationality, determines the court with jurisdiction (*forum rei*).

If the defendant is domiciled outside the European Union, even if they are a national of a Member State, the case falls outside the formal scope of Brussels I-bis, and the Regulation therefore does not apply. In that situation, such as in a case against a US company, the international jurisdiction of the Dutch courts must be evaluated in accordance with the appropriate rules of the DCCP, which closely resemble those of Brussels I-bis.

The Domicile of Legal Entities

Article 63(1) of Brussels I-bis applies to the determination of the domicile of legal entities. For the purposes of the Regulation, they are domiciled at the place of (a) their registered office, (b) their central place of administration, or (c) their principal place of business (or headquarters).

If a legal entity meets one of these three criteria (with no hierarchy among them), it is considered to have its residence in that state and can be sued there, even if other connecting factors are located in another Member State or outside the EU.

The rationale is based on the need for a connecting factor that determines whether disputes related to the activities of a company established or operating in a Member State fall under that state's jurisdiction. This ensures claimants are not unfairly denied access to a court within the Member State. It also gives the claimant the option to summon at the location where the judgment is most likely to be enforced.

While the registered office provides some certainty because it is easy to identify, it is often not where the company's assets are located. Furthermore, this could allow a company to have its central administration or main place of business in one Member State while establishing its registered office elsewhere to avoid that Member State's jurisdiction.

Although a company's central administration might be located in a place suitable for enforcement, it is often an internal part of the business that is not immediately obvious, making it harder to determine which court has jurisdiction. If a company's central administration is located in a non-member state, the company cannot be sued in a member state, even if its registered office or main place of business is in that state.

The country where its main place of business (its headquarters) is located is usually easier to identify and trace. It is the primary location where the business is conducted, decisions are made, and the company's books and records are maintained. In cases of dual headquarters, often resulting from a merger, the company can be sued in both locations.

The Place of the Harmful Event

Section 2 of Chapter II of Brussels I-bis outlines specific rules of jurisdiction relating to contractual obligations (Article 7(1) - *forum contractus*), obligations based on tort (Article 7(2) - *forum delicti*), and also includes a special rule when there is more than one defendant (Article 8(1) - *forum connexitatis*).

The preamble to Brussels I-bis explains why these special jurisdiction rules were deemed necessary. It emphasizes a key goal that jurisdiction rules should be highly predictable, with the main principle being that jurisdiction generally depends on the defendant's domicile. The defendant can be summoned there if someone believes they have a claim against them.

However, in addition to the defendant's domicile, alternative grounds for jurisdiction may exist based on a strong connection between the court and the claim or the need to promote the proper administration of justice, so that claimants can avoid having to pursue defendants in other countries where conflicting decisions might arise.

Pursuant to Article 7(2) of the Brussels I-bis Regulation, a defendant may be summoned before the court where the harmful event occurred in tort, delict, or quasi-delict cases. This alternative jurisdiction relies on a strong connection between the case and the court where the harmful event took place, making it logical for that court to handle the case to ensure better justice and efficiency.

In *Mines de Potasse d'Alsace*, the European Court of Justice clarified that the place of the harmful event encompasses both the location of the unlawful act that caused the damage (the *Handlungsort*) and the place where the damage was felt (the *Erfolgsort*). When these two locations differ, a claimant may choose to file a lawsuit either in the courts of the Member State where the damaging act occurred or in the courts of the Member State where the damage was experienced.

Right to Consumer Foundation Justice v Apple

In 2021 and 2022, the Right to Consumer Justice Foundation and the App Stores Claims Foundation filed legal actions against Apple in the Amsterdam District Court, seeking compensation for Dutch consumers harmed by Apple's app purchase policies. Apple challenged the Court's jurisdiction, arguing that it cannot be established under Article 7(2) of Brussels I-bis because the harmful event did not occur in the Netherlands. Apple also argued that the harmful incident affecting consumers in other parts of the Netherlands cannot be connected to the Amsterdam district. It maintained that no single court should have jurisdiction over the entire case.

The District Court found that Dutch courts have international jurisdiction over the claim under Article 102 TFEU. App Store NL clearly targets the Dutch market. The Court noted that determining which specific Dutch court has territorial jurisdiction is more complicated. It therefore referred this question to the European Court of Justice.

The questions in the interim ruling dated 30 December 2023 can be summarized as follows: When determining the *Handlungsort* and *Erfolgsort*, does it matter if a representative organization advocates for the interests of multiple users across different districts? If several national courts within a Member State have jurisdiction, does Article 7(2) of the Regulation prevent the application of national laws that allow referral to a single court within that Member State?

Advocate General's Opinion

On 27 March 2025, Advocate General Campos Sánchez-Bordona issued his opinion, stating that while Dutch courts have jurisdiction, the Amsterdam District Court is not authorized to assume jurisdiction over the entire group. A damages claim remains tied to the location where the harmful event occurred, regardless of whether it is assigned to a special-purpose vehicle or transferred to a third party, such as a foundation. Therefore, an organization pursuing representative actions can only file its claim in one court if the harmful event: (i) occurred as a single incident within that court's jurisdiction; or (ii) if each incident affecting the final beneficiaries took place within that jurisdiction.



Comment

The Attorney General's approach is impractical and flawed. Essentially, this means that a foundation seeking to initiate legal action must file cases in every district in the Netherlands where claimants reside. Then, they need to request the consolidation of these cases into a single proceeding, with Amsterdam—having the largest district—being the most likely venue.

The AG states that “proceedings are aimed, ultimately, at obtaining individual compensation for each directly affected individual. Underlying the collective action are the individual claims: the right to receive compensation, and the amount of that compensation, must be established at the end, separately for each of the injured parties.” However, this assertion is incorrect, at least with respect to WAMCA cases.

The claim organization is the sole plaintiff. Compensation rights and amounts are not assigned to each injured individual separately. Instead, eligibility and payments are based on the defendant's collective liability for violating the group's rights. Furthermore, compensation is calculated collectively rather than on an individual basis.

European Court of Justice

Fortunately, the ECJ did not follow the Advocate General's reasoning. After reviewing established case law on Article 7(2) of the Regulation, the Court observed that the usual connecting factors are not readily applicable when claims involve digital products purchased through an online platform by an initially indefinite, unidentified group. The ECJ emphasized the need for adjustments, stating that “The difficulties in applying those connecting factors therefore require them to be adapted in order to preserve the effectiveness of Article 7(2) of Regulation No 1215/2012 and to contribute to the sound administration of justice.”

Based on this, the ECJ concluded that the NL App Store functions as a single virtual market across the Netherlands. Therefore, damages from app purchases through that store are considered to have occurred nationwide. Any Dutch court with proper jurisdiction can hear the entire claim on behalf of all users, not just those in its district.

The ECJ explains that this approach supports the Regulation's goals, including proximity, predictability, and effective administration of justice. It justifies this method by highlighting the efficiency gains and the complexity of competition law cases, noting that consolidating claims in a single court makes it easier to manage the detailed factual and economic analyses.

With its judgment of 2 December 2025, the ECJ has acknowledged the nature of online platforms and the significance of effective procedural management of representative actions. One Dutch court can handle the case for all affected parties within its jurisdiction, making the process more practical by avoiding the fragmentation of claims among different courts.



Mass Damage & Consumer Foundation v Airbnb

On 27 May 2025, the Court of Appeal in The Hague ruled that the Dutch court lacks jurisdiction over the class action brought by the Mass Damage & Consumer Foundation (SMC) against Airbnb. This affirms an earlier decision by the District Court of The Hague. Therefore, the Court does not consider whether Airbnb's longstanding business model—charging double service fees to both tenants and landlords—is justified. More than 50,000 consumers took part in the collective action.

Airbnb is established in the European Union. This means the question of whether the Dutch court has jurisdiction in this case is determined based on the Brussels I-bis Regulation. It is clear that the Dutch court cannot establish jurisdiction from the primary rule of Article 4 of the Brussels I-bis Regulation, which is the defendant's place of residence, because Airbnb is based in Ireland.

Article 7(1)(b) Brussels I-bis

Is the Dutch court competent to hear this matter pursuant to Article 7(1)(b) of the Brussels I-bis Regulation? This provision provides an alternative jurisdiction for contractual obligations to the court in the jurisdiction where the obligation related to the claim was or should be performed.

SMC argues that the place of performance is not Ireland, where only platform management occurs, but the Netherlands. This is because the digital services are tailored for Dutch users. The website is in Dutch, Dutch consumers can pay via the Dutch payment system iDEAL on the platform, Airbnb applies Dutch VAT to service fees, and several employees based in Amsterdam focus on the Dutch market.

In the Court of Appeal's view, Airbnb's main service is connecting tenants and hosts by listing accommodations on its online platform. The operation and management of Airbnb's platform are conducted in Ireland by its employees there, which supports Airbnb's claim that the primary service is performed in Ireland.

Choice of Forum Clause

SMC also invoked the forum-selection clause agreed to by consumers and Airbnb, as set out in Article 22 of the Terms of Use. According to this provision, the consumer contracting with Airbnb can file any claims against Airbnb in the court of their own residence.

According to SMC, it is not decisive whether SMC itself agreed to the forum selection or if it can be classified as a consumer. SMC is the formal party in the proceedings, but the affected consumers are the substantive parties and are also bound by any judgment. Therefore, SMC should be considered a “consumer” under Article 22 of the Terms of Use. The Dutch court has jurisdiction under the forum-selection clause in Article 25 of the Brussels I-Bis Regulation.

Airbnb contends that the Dutch court lacks jurisdiction over SMC's claims under the forum selection clause. This clause states that only consumers can bring claims against Airbnb in their local courts. SMC is not a consumer and not a party to these agreements. The Court of Appeal agrees with Airbnb on this point.

Article 7(2) Brussel I-bis

Finally, SMC asserts that the Dutch court has international jurisdiction under Article 7(2) of the Brussels I-bis Regulation. SMC contends that Airbnb unlawfully incorporated unreasonably burdensome and illegal clauses into its terms and conditions, allowing the company to be summoned to court where the harmful act occurred or could occur. SMC explains that this applies to an obligation arising from an unlawful act that involves breaching a legal duty.

According to the Court, SMC's claims involve contractual obligations, and interpreting the agreement is necessary to determine whether Airbnb's alleged conduct is lawful or unlawful. The claims do not concern an unlawful act. Therefore, the Dutch court lacks international jurisdiction to hear SMC's claims under Article 7(2) of the Brussels I-bis Regulation.

Comment

What is remarkable about this judgment is that individual consumers who wish to complain about Airbnb's practices can go to the Dutch court, but once consumers unite in a collective action, they are redirected to Ireland – a country where no effective system for collective actions exists. Of course, a claim organization is only formally the plaintiff. It defends the interests of individual consumers who cannot go to court due to the prohibitive costs of litigation.

If the country where the platform is managed is considered the location where the service is provided under contracts, multinationals can easily avoid collective actions by establishing themselves in a country like Ireland, where pursuing collective action is difficult. Since it is unrealistic to expect individual consumers to file relatively small claims in their own national courts, multinationals can continue their practices without repercussions.

With this ruling (following Airbus), the District Court and the Court of Appeal of The Hague have strengthened their reputation as the most WAMCA-unfriendly courts in the Netherlands.

Multiple Defendants

Under Article 8(1) of Brussels I-bis, if there are multiple defendants, a defendant can be sued in the courts where any one of them is domiciled, provided the claims are so closely linked that it is practical to hear and decide them together to prevent the risk of conflicting judgments from separate proceedings (*forum connexitatis*).

An important goal of Brussels I-bis is to promote the “free movement of judgments” within the EU, which means that a judgment issued in one Member State should be recognized and enforced in another. When courts from different Member States issue mutually incompatible decisions, it undermines the functioning of the Regulation.

The ECJ has ruled that decisions cannot be considered irreconcilable solely because there is a difference in the outcome of the dispute. For contradiction to exist, this divergence must occur within “the same situation of fact and law.”

Basically, one ruling can't be seen as incompatible with another just because the case outcomes differ. For decisions to be truly incompatible, the disagreement must also occur within the same context; only then can there be conflicting rulings, where courts arrive at different (and possibly completely opposite) results on the same legal questions and facts.

The Territorial Admissibility Requirement

The territorial admissibility requirement in WAMCA is specifically designed to limit the international scope of collective actions and ensure they have a sufficiently close connection to the Dutch legal sphere. The scope rule aims to prevent opt-out collective actions from causing a "suction effect." According to the legislature, such a suction effect could negatively impact the Dutch business climate, leading to fewer businesses willing to establish in the Netherlands.

Under the scope rule, there is a sufficiently close connection with the Dutch legal sphere in three specific cases, all related to Brussels I-bis: the claimant shows that it is highly likely that most of the persons whose interests the legal claim aims to protect have their habitual residence in the Netherlands; or the defendant is domiciled in the Netherlands and additional circumstances indicate a strong connection with the Dutch legal sphere; or the event related to the legal claim occurred in the Netherlands.



Most Victims Are Dutch Residents

A claim organization has standing if most of the individuals it aims to protect are habitual residents of the Netherlands. This was discussed in *The Privacy Collective Foundation (TPC) v. Salesforce and Oracle*, where damages of 11 billion euros were sought on behalf of 10 million Dutch residents. The Amsterdam District Court ruled that the data leak claim lacked sufficient links to Dutch jurisdiction and therefore dismissed it.

The Court observed that the incident occurred in the United States, where the involved Oracle database is located. TPC reports that the data breach was one of the largest of 2020 due to the database's size. The breach affected the data of many individuals. Oracle argued that no more than 18 cases involved personal data linked to the Netherlands, a point that TPC did not contest. The Court therefore accepted Oracle's figure as accurate. From this, it could not be concluded that most individuals protected by the legal action are based in the Netherlands.

Place of Residence and Additional Circumstances

The second part of the territorial admissibility requirement concerns the defendant's residence, where “additional circumstances” must show a sufficient link to the Dutch legal system.

The phrase “and additional circumstances indicate sufficient connection with the Dutch legal sphere” was added at the last minute, just before the bill's vote in the House of Representatives. It was only then that it was realized that, without this phrase, meeting the territorial admissibility requirement could simply depend on the defendant being domiciled in the Netherlands.

The amendment's authors argued that, without it, lawsuits might have little or no genuine connection to the Dutch legal system, given the company's limited presence there. Many companies only operate in the Netherlands for tax reasons and maintain a minimal presence. To address this, the admissibility of the claim organization was further restricted by adding the requirement of “additional circumstances” to the second part of the new Article 3:305a, paragraph 3, sub b DCC.

The requirement of “additional circumstances” is an unusual addition. Usually, the defendant’s domicile is considered the natural and primary forum, especially under Brussels I-bis, which designates it as the main competent court. Many commentators believe this part of WAMCA’s territorial admissibility criteria conflicts with EU law, and some courts share this view.

BREIN Foundation v Yisp

On 2 June 2021, in the BREIN Foundation v Yisp, Worldstream, and Serverius case, the Central Netherlands District Court questioned whether the required close connection to the Dutch legal system complies with EU law principles. These principles include the Union’s loyalty obligation, the effectiveness of EU law, and the prohibition of discrimination under Article 18 TFEU. To resolve these issues, preliminary questions should be referred to the Court of Justice. However, because the case satisfied the admissibility criteria, there was no reason to do so.

Both ENDS Foundation v Boskalis

In legal proceedings initiated by the Both ENDS Foundation against Royal Boskalis Westminster on behalf of local communities impacted by Boskalis Indonesia’s sand extraction in South Sulawesi, the only Dutch link was the parent company’s location. This should have been enough under the DCCP’s general rules, but on 18 September 2020, the Rotterdam District Court dismissed the foundation’s case based on the controversial scope rule. The Court determined that the necessary close connection to the Dutch legal sphere was absent. Boskalis’s willingness to engage in discussions and the Dutch embassy’s intervention were not regarded as “additional circumstances.”



The Event Took Place in The Netherlands

The requirement that the event occurred in the Netherlands refers only to the location where the event actually happened (*Handlungsort*). It does not also refer to the place where the damage was suffered (*Erfolgsort*).

This third and final stipulation means that a representative organization can act on behalf of a majority of harmed persons outside the Netherlands if the event or events occurred within the Netherlands. In such cases, there is also a sufficiently close connection to the Netherlands. It effectively amends the first requirement: the majority of the persons must have their usual residence in the Netherlands.

The legislative history offers a (quite realistic) example: a group of tourists from different countries is robbed in Amsterdam by a gang. The gang is caught, and the tourists want to seek damages from the gang members. Since the damaging event (the robbery) happened in the Netherlands, a representative organization that meets the requirements of Article 3:305a of the Dutch Civil Code can file a collective action in the Netherlands, even if it represents people whose usual residence is outside the country.



CHAPTER 5

Commonality

Commonality is a crucial element in class actions, requiring members to share key legal or factual questions. It ensures that the class experiences a common injury and that a central issue connects the claims, enabling an efficient resolution for the entire class. This depends on a shared contention that is vital to the case and can lead to a single, streamlined resolution.

Aggregated claims need not be identical or target every defendant, but they must all involve related issues of fact or law. WAMCA proceedings are intended to protect similar interests. This requirement is satisfied when the interests safeguarded by legal action can be grouped or "bundled" together. Although the need for commonality is often connected to other criteria, it remains a separate concept.

Commonality assesses whether class members share legal or factual issues. As mentioned, it does not require every class member to present identical claims and arguments. Even a single shared legal or factual issue among all class members can satisfy the requirement. For example, if resolving one legal or factual question could affect the outcome for all class members, commonality is likely satisfied.

Bureau Clara Wichmann Foundation v AbbVie

In *Bureau Clara Wichmann Foundation v. AbbVie*, the Amsterdam District Court determined that the claims for both material and non-material damages related to allegedly defective breast implants were generally similar. The Court clarified that if the breast implants are proven to be defective, the specific circumstances of each affected woman can be sufficiently standardized and abstracted to assess damages and determine compensation.

The Court also observed that Supreme Court case law generally indicates that non-material damages in such cases are usually not awarded as a lump sum. However, courts might find that the severity and nature of the incident establish liability, and that the negative impacts on a particular group are sufficiently clear to satisfy a minimum damages requirement. The Court indicated that this line of reasoning could be applicable here if it is demonstrated that the implants are defective.

TikTok

In the TikTok case, a collective action lawsuit about privacy violations, the Amsterdam District Court ruled that the claims for compensation for non-material damages filed by representative organizations were inadmissible because they lacked commonality.

Claims for non-material damages depend heavily on individual circumstances and cannot be grouped together due to a lack of sufficient similarity. The Court rejected the foundation's argument that an infringement of personal privacy can be presumed based on the nature and severity of the violations. It must be evident that all users face adverse consequences; in this case, that is not shown. Therefore, this case differs from previous legal rulings, such as those concerning non-material damages following an earthquake.

The Court of Appeal reversed the District Court's decision and found that claims for both non-material and material damages stem from the same violations of standards and share the same factual basis. This shows that each TikTok user's case involves similar legal issues and factual circumstances. Although some differences among users may exist, they do not alter this primary similarity and can be managed by grouping the claims accordingly.

The Privacy Collective v Oracle and Salesforce

In this case, TPC argued that every internet user whose personal data was processed by Oracle and Salesforce experienced non-material damage, which, in all instances, could be valued at €500. Oracle and Salesforce disputed the extent of damages, claiming that it is unlikely all individuals suffered the same non-material harm, as such harm tends to be very personal. The Court of Appeal recognized that there could be significant differences among members of the foundation's constituency that affect how their damages are calculated. However, determining the extent of damages at the admissibility stage is neither practical nor appropriate.

The Court also observed that some users might not have experienced any non-material harm. However, it ruled that claims for non-material damages could be combined because they stem from the same legal violation. Differences in damage severity can be managed through categorization, a method explicitly allowed under WAMCA.

Data Protection Netherlands Foundation v X

On 24 February 2026, the Amsterdam District Court issued its ruling in a class action lawsuit against X Corp (formerly Twitter), determining that the Data Protection Netherlands Foundation (SDBN) is not admissible.

The case involves MoPub, an advertising platform formerly owned by Twitter. SDBN claimed that user data from free mobile apps was unlawfully collected over a long period through the MoPub SDK and shared with multiple third parties for targeted ads.

The Court determined that the claims do not meet the WAMCA commonality requirement. Data was processed across more than 30,000 apps, with significant differences in data collection methods, software setups, and consent procedures. As a result, each app and user must be assessed individually to decide if personal data was processed lawfully.

United Kingdom

In the United Kingdom, a claim must identify “common issues” in proceedings before the Competition Appeal Tribunal. According to CAT Rule 73(2), common issues are defined as “the same, similar, or related issues of fact or law.” To be considered common, an issue need not affect all class members equally or require identical answers from each member.

At the admissibility (CPO) stage, a potential finding that some class members suffered no loss does not necessarily weaken the common issues test, as long as common issues exist among all class members. For example, a common issue could be whether cartel overcharges were ultimately borne by consumers. The query is pertinent to all class participants, even if their personal circumstances could lead to diverse outcomes.

Horeca Netherlands v. Dutch State

Horeca Netherlands is an association that represents the Dutch catering industry. Its claim was filed on behalf of its members, including restaurants, hotels, nightclubs, and related businesses, regarding the restrictive measures implemented by the Dutch government during the Covid-19 pandemic.

It was argued that the government acted unlawfully against hospitality businesses when implementing certain measures and should provide compensation for damages. According to Horeca Netherlands, the State's restrictive measures are the same for all (groups of) hospitality entrepreneurs. The legal question of whether these measures are unlawful applies collectively to all hospitality entrepreneurs. Similarly, the damage for each hospitality entrepreneur can be calculated in the same way.

However, the district court of The Hague found that the legal and factual issues raised by these claims were not sufficiently common. The Court concluded that, even if the government's restrictive measures were the same for all hospitality businesses involved in this case, the effects of these measures differed. Although the State's restrictions were likely identical for all entrepreneurs, they impacted each group differently. For example, a snack bar or ice cream parlor faces different operational challenges than a restaurant, hotel, or nightclub.

The hospitality industry is diverse, and the impact of COVID-19 measures varies significantly across business types. A downtown coffee shop primarily serving takeout orders is affected differently than a full-service café. Similarly, the restriction to takeout and delivery is less restrictive for a snack bar than for a fine-dining restaurant.

Clearly, the COVID-19 measures impacted various segments of the catering industry differently, and the Court's analysis would have been stronger if it had focused solely on this variation. Emphasizing the measures' impact on businesses weakened the decision's persuasive power, as this issue could have been addressed through proper categorization.

Flexible Approach

Case law demonstrates a flexible approach to the commonality requirement. The Evaluation Report on five years of WAMCA notes that the legal interpretation of the common interest has broadened, emphasizing that interests only need to be sufficiently similar. In collective actions, an abstract, case-by-case assessment is considered appropriate.

Case law also demonstrates that the positions, backgrounds, and interests of those on whose behalf a 305a action is initiated need not be identical or substantially the same. There is no requirement that the parties represented by organizations be the same, nor that the legal grounds be identical. Because categorization is possible in a WAMCA action, the commonality test can be satisfied if interests within a subgroup are sufficiently similar. This also applies to claims for compensation for non-material damages.

In her February 2026 opinion for the Supreme Court, in *TPC v. Oracle and Salesforce*, AG De Bock emphasizes that whether similar factual and legal questions exist should not be examined in isolation. Instead, it should be considered in the broader context in which promoting an efficient collective resolution of mass claims is essential. Therefore, determining whether a collective action provides effective legal protection is important in its own right.

CHAPTER 6

Governance

WAMCA sets standards for the management of a representative organization. The legislature believed it was necessary to prevent foundations from representing victims' interests solely for profit. According to WAMCA's legislative history, whether victims involved are sufficiently protected through a collective action can be evaluated only on a case-by-case basis.

The Decision-Making Process

To ensure affected parties are involved in or represented in decision-making, effective mechanisms are necessary. When an organization is an association, decisions can be made at its members' meetings. Because foundations lack this kind of assembly, they must devise alternative strategies to ensure affiliates have sufficient say, such as providing avenues for them to share their views on specific decisions.

TPC devised an innovative approach by hosting 'Ask-me-Anything' sessions on Reddit to address their legal dispute with Oracle and Salesforce. They also established a 10-person sounding board to assist supporters with their questions.

Non-Profit

The directors involved in establishing the legal entity, along with their successors, must not be motivated by profit generated through the claim organization. This requirement, a key part of the WAMCA governance rules, aims to prevent undue influence and conflicts of interest. Founders or board members should be prohibited from using or controlling the claim organization's funds as if they were their personal assets.

Expertise

Another important governance question is whether the claim organization has the necessary knowledge and skills to manage the proceedings. The requirement that the organization has sufficient expertise means that board members must demonstrate relevant knowledge of the collective claim or at least have access to such expertise.

The specific type of expertise varies depending on the situation. For example, a certain level of financial knowledge is important in cases involving collective actions seeking compensation for investment losses. This can be achieved if the organization has a qualified expert on its board or has access to one. In cases of personal injury, the required expertise is more focused on understanding different types of injuries and their potential consequences from the incident.

SILC v Airbus

On 20 September 2023, the District Court of The Hague delivered a landmark ruling in two WAMCA cases against Airbus. Both claim foundations, Airbus Investors Recovery Limited (AIRS) and the Investor Loss Compensation Foundation (SILC), were deemed inadmissible.

AIRS was considered not representative because of an insufficient number of participating shareholders. The Court found that SILC did not offer enough assurance about protecting the interests of the relevant shareholders. The Court also observed that the foundation lacked the necessary experience and expertise. Additionally, the founder and the litigation funders exerted undue influence and were relied upon too heavily.

Because AIRS was not sufficiently representative and was declared inadmissible on that basis, the test for further admissibility requirements under the WAMCA was applied only to SILC. The Court ruled as follows.

Dependence on Funders

SILC is an ad hoc claim organization that does not seek financial contributions from its registered investors. Instead, it relies entirely on its litigation funder(s). Initially, SILC was financed by its founder, the law firm DRRT, which continues to cooperate with it, and this founder is also part of the funding agreement with the globally active litigation funder Therium. Given these circumstances, the Court believes it is important to carefully examine whether SILC prioritizes the interests of the investors it represents.

The Court ruled that SILC must consult the founder and the litigation funder before signing a settlement agreement. This grants these parties direct influence over SILC's decision-making. Additionally, SILC depends heavily on its founder. Since the founder's compensation remains payable even if the cooperation ends, SILC generally cannot terminate its relationship with the founder if it wants to.

No Independent Activities

The Court observes that, aside from these proceedings, SILC does not appear to engage in any other activities that benefit harmed investors. It is not SILC itself, but rather its founder and the company Rightshare BV that handle tasks such as attracting participants and gathering evidence. In the view of the Court, these are activities SILC should perform. Since SILC lacks its own organization, employees, and advisors, it was concluded that it cannot carry out these activities independently due to a deficiency in the necessary knowledge, resources, or experience.

I beg to differ. Claim foundations are not companies; they are small organizations, and board members are paid very little. Clearly, a claim organization must be able to outsource much of its work to a third party. Why should every claim organization have a full team of employees in addition to the Board and the Supervisory Board, with skills in areas like digital marketing, website development for claims registration, and evidence collection? No claim organizations in the Netherlands handle these tasks internally; they outsource them.

Insufficient Control

Building on these conclusions, the Court examined SILC's governance in detail. It found that SILC's Supervisory Board wields significant control within the organization, and two of its three members have close ties to SILC's founder and litigation funders. The Court noted that it is not difficult to see a real risk that SILC's actions could be influenced by these individuals for their own benefit. This situation is troubling because the WAMCA proceedings should primarily be overseen by SILC.

Insufficient Experience

The Court determined that SILC's board lacked the necessary experience and expertise to initiate and oversee the WAMCA proceedings. There was no evidence that any of the three current board members possessed relevant collective action experience. The supervisory board included two members with sufficient expertise, but their close ties to the funders raised concerns about their independence.

The Court's Conclusion

SILC itself performs very few activities and has authorized its founder to handle the essential activities related to the proceedings. As a result, the founder and litigation funder(s) can jointly exert considerable influence over SILC's decisions.

The foundation appears to be "an empty shell" created by the founder and litigation funder to pursue these proceedings against Airbus solely for profit. This setup is neither acceptable nor allowed by law. As a result, SILC's claims are deemed inadmissible because the interests of the investors it claims to represent are not sufficiently protected.

Court of Appeal

On 23 December 2025, the Court of Appeal of The Hague concurred with the District Court, holding that the interests of the investors represented by SILC are not adequately protected. It focused on a few specific points.

SILC outsourced most of the tasks for this collective action, especially bookbuilding, to its founder, DRRT, and to Rightshare BV, whose payments depend on the collective action's success. Initially, all proceeds go to Therium, which then disburses the deferred fees to DRRT and Rightshare in accordance with the “waterfall” schedule.

According to Principle II of the Claim Code, SILC is required to act in the best interests of the investors it represents, without pursuing profit or being directly or indirectly associated with entities motivated by profit. The Court of Appeal determines that DRRT and Rightshare, both profit-focused entities, are “directly or indirectly” linked to SILC.

Since SILC has an agreement with DRRT and Rightshare that costs will be covered from the claim's proceeds if the outcome is successful, this effectively acts as a form of “pre-financing” or “external funding.” In essence, the Court sees all three parties as joint funders.

Based on this somewhat weak reasoning, the Court of Appeal concluded that DRRT and Rightshare are profit-making entities connected to SILC, highlighting a structure that contradicts Principle II of the Claim Code. SILC is mainly influenced by DRRT, Rightshare, and Therium, and they are not sufficiently independent, considering their roles as “third-party funders” and risk-takers.



Comment

The Court of Appeal's ruling is demonstrably erroneous, and its strategy of disincentivizing litigation funding appears counterproductive. Articles 8.2 to 8.5 of the funding agreement simply grant DRRT and Therium a basic right to information and consultation. These provisions require that they be kept informed and that SILC consult them on any strategic or legal decision related to the legal action. This information and consultation clause is now common in WAMCA cases; many courts have accepted it.

In its September 2023 ruling, the District Court heavily critiqued SILC, metaphorically stripping, tarring, and feathering it. Even though SILC introduced significant governance reforms, such as creating an independent board and a supervisory board of experts, the Court of Appeal no longer had confidence in the organization. Instead, it appeared to predetermine the case's outcome and selected arguments to justify that decision. This case exemplifies the concept of “reasoning towards a desirable result.”



United Kingdom

The Tribunal must evaluate whether it is “just and reasonable” for an individual to serve as the class representative in legal proceedings. This is known as the authorization condition. The primary purpose of this assessment is to ensure that the interests of the class members are properly and adequately represented. So far, few challenges have been raised concerning the personal qualities of PCRs.

However, in January 2025, the Competition Appeal Tribunal refused to certify a standalone opt-out class action against Apple and Amazon because the proposed class representative (PCR), Professor Christine Riefa, was deemed unsuitable to represent the approximately 36 million claimants.

During the certification hearing, Professor Riefa was cross-examined about her knowledge of the funding arrangements and possible conflicts of interest involving the funder, the claimant law firm, and the class members. The CAT's ruling strongly criticized the PCR and her grasp of the regime and litigation funding, highlighting that the PCR is “not, and cannot be, merely a figurehead for a set of proceedings being conducted by their legal representatives.”

United States

While Rule 23 requires that the named plaintiffs adequately represent the class, it is often found that they lack substantial knowledge of the claims in the complaint or of their responsibilities to other class members. Judges generally reject defendants' claims that such ignorance disqualifies the plaintiffs as representatives. Instead, they focus on the capacity of the class's lawyer, who is primarily responsible for managing the lawsuit and making legal decisions. If the lawyer is experienced, well-funded, competent, and the plaintiffs' claims are typical, most judges will approve certification. However, critics argue that uninformed class representatives cannot properly oversee the lawyers to ensure they genuinely serve the class's best interests.

Fiat Chrysler Investors Recovery Foundation v Stellantis

In Fiat Chrysler Investors Recovery Foundation v. Stellantis, the organization failed to meet several governance standards and provided false information in its summons.

FCIRS alleged that, between 2014 and 2017, Fiat installed illegal emissions software without informing investors, thereby inflating the share price. When the fraud was uncovered, Fiat's stock price dropped, reportedly causing losses of between €967 million and €1.37 billion. FCIRS sought compensation for all investors who bought or held Fiat shares on the Milan exchange from October 2014 to May 2017.

The District Court of North-Holland assessed FCIRS's admissibility based on the circumstances at the time of the judgment request (*ex nunc*). However, it concluded that this approach does not apply to the false statements made by FCIRS in the summons, which were false when they were issued.

For example, FCIRS claimed to be sending newsletters. Evidence showed this was not true when the summons was filed on 27 August 2024; they had only sent two newsletters afterward, in March 2025 and May 2025. This demonstrates they misled the Court with false information in the summons.

Article 3:305a (5) DCC requires claim organizations to prepare a management report and annual accounts following the rules for associations and foundations in Title 9 of Book 2 DCC and Articles 2:49 and 2:300 DCC. The organization should publish the management report on its publicly accessible website within eight days of approval. This ensures stakeholders and affiliates can stay updated on the claim organization's current status via its website.

FCIRS claimed in the summons that certain documents had been published on its website, including the most recent annual reports, but this was not true at the time the summons was issued. On 23 July 2025, the District Court of Noord-Holland ruled FCIRS inadmissible under WAMCA.

CHAPTER 7

Representativeness

Under WAMCA, an organization can pursue a collective action only if it adequately represents the individuals whose interests the action aims to protect, taking into account its following and the size of the claims involved. The representativeness requirement under WAMCA is intended to ensure that a representative organization does not undertake litigation without the support of its constituents.

The Basic Requirements

The legislative history of WAMCA highlights that, in addition to assessing the quality of the representative organization itself, it is crucial to evaluate how effectively this organization is perceived as representing injured parties. This includes looking at the organization's ability to serve as a voice for these victims.

Important indicators include the number of injured parties, their claim amounts relative to all victims of a mass event, and the damages they seek. For each collective claim, the organization must clearly identify the parties it represents. This does not require submitting a list of names or detailed supporter information; instead, the organization only needs to accurately describe the group it represents.

The representativeness requirement is separate from the court's later decision on which organization will serve as the Exclusive Representative. At that stage, the court evaluates competing claim organizations, each of which must demonstrate sufficient representativeness. It then chooses the organization best suited to act as the Exclusive Representative, considering factors such as constituency size and financial interests.

Although WAMCA does not specify a particular numerical threshold for the support volume required for collective action, a certain number of interested parties must support it, as a representative organization cannot initiate a WAMCA action without a constituency.

Insufficient Numbers

In a case involving a request for a preliminary witness hearing by the Music#MeToo Foundation (SMMT) regarding inappropriate behaviour in the music industry, the Court of Appeal Arnhem-Leeuwarden ruled that the foundation failed to demonstrate that it had any supporters with an interest in the legal questions it intended to raise before the court.

A small, unspecified group of followers is also insufficient. For example, in preliminary relief proceedings in the context of national coronavirus measures, the District Court of The Hague ruled that an unsubstantiated constituency of 50 to 100 “acquaintances” is such a small number of people that it is clear that the required representativeness threshold for admissibility is not met: “Until the hearing, it was even completely unclear who makes up the Foundation's constituency, what the shared interests are of the people the Foundation proposes to represent, and to what extent these interests are protected by the claim. Submitting (a day before the hearing) 23 signatures of persons who state that they support the Foundation's objective and endorse the progress in these proceedings cannot fix that deficiency.”



Quantitative Versus Qualitative

A key issue in practice is whether the representativeness criterion should be met through quantitative methods or qualitative assessment. The Evaluation Report shows that, in collective actions, the court often assesses the size of the organizations' supporter base relative to the total affected parties, sometimes considering whether other organizations support them.

The Evaluation Report also shows that, in general, there are no strict standards for the size of supporter bases. However, as mentioned earlier, some rulings have declared representative organizations inadmissible when it was not clearly proven that they had sufficient support.

The Evaluation Report highlights ambiguity about when a court applies a quantitative or qualitative test, how sufficient quantitative representativity is determined, and how the representativity test is interpreted. It also notes that in routine cases, even when the quantitative representativity requirement is met, it remains unclear at what point it is considered fulfilled. Consequently, this leads to risk-averse practices, with 305a organizations spending considerable time and resources on bookbuilding.

A quantitative approach to assessing representativeness requirements can become overly stringent, leading to excessive effort to meet them. The academic literature generally agrees that representativeness requires enough alleged victims to support collective action. However, pinpointing an exact percentage or number is difficult.

It has been observed that requiring broad support might conflict with WAMCA's opt-out system, which does not require interested parties to register. Other opt-out jurisdictions, such as the US, Australia, and the UK (for competition cases), do not require bookbuilding or any kind of support for the class action.

Furthermore, several authors argue that the definition of "sufficient support" varies by context. Some claim that support from other (social) organizations for collective action is usually not meaningful because these organizations do not represent the supposed victims. Conversely, others consider such support relevant, especially as an additional factor.

Double-Check

A second issue involves how to determine whether those supporting the collective action are genuinely part of the injured parties the organization claims to represent. Often, courts do not require an assessment during the admissibility phase to verify if the individuals registered for the collective action are truly victims of the alleged infringement.

Reviewing registration forms does not really help verify whether registrants are authentic victims. Sometimes, courts ask organizations to provide a statement from an external party, such as an accountant, to confirm their supporter base. The most a verification can likely achieve is removing duplicate names. At this stage, it is not appropriate to go further and request evidence such as invoices.

In her opinion in *TPC v Oracle and Salesforce*, AG De Bock emphasized the importance of restraint, noting that courts typically do not need to perform detailed checks to confirm if supporters are truly the victims represented by the representative organization. Adopting a different approach could weaken WAMCA's main goal of enabling efficient collective resolution of mass claims. Furthermore, conducting overly invasive investigations of supporters would not align with WAMCA's opt-out system.



The Privacy Collective v Oracle and Salesforce

In December 2021, the Amsterdam District Court ruled that the TPC Foundation was inadmissible due to inadequate representation. TPC failed to provide the actual number of internet users who supported its claim or the scope of the claim itself. Although it received 75,000 expressions of support (“likes”) through a support button on its website, the accompanying information was too vague to clarify the nature of the support.

The Court evaluated whether the “likes” demonstrated enough backing for TPC’s claims. Initially, it considered the text accompanying the like button: “support TPC taking two tech companies to court for collecting and selling the data of millions of Dutch citizens without their consent.” The Court noted that no details about the nature or purpose of the proceedings were provided, and Salesforce and Oracle were not mentioned at all.

It concluded that a “like” could not be considered support for the proceedings, despite TPC’s claims that it provided information elsewhere on its website, in newsletters, and at conferences. The Court also noted that no contact information was registered for those who clicked the like button. This meant TPC could not prove that the supporters were part of the group allegedly harmed.

Additionally, the absence of contact details prevented TPC from communicating with supporters, as required by law. Lastly, the Court stated that support from privacy-focused NGOs could not substitute for support from the injured parties themselves.

Court of Appeal

The Amsterdam Court of Appeal reached a different verdict, overturning the initial ruling and finding TPC admissible. It disagreed with Oracle and Salesforce, who claimed that the 75,000 likes were relatively small compared to the ten million Dutch users supporting the cause (0.75%). The Court clarified that Article 3:305a BW does not specify a numerical threshold for determining the representativeness of a claim organization based on the amount of support for a collective action. Support from a “non-negligible” number of interested parties is enough. Unlike the district court, the appellate court also considered support from other organizations to be relevant.

The Court of Appeal emphasizes that the endorsements on the TPC website show strong public backing for the initiative. It also states that the mostly anonymous nature of these support expressions is not an issue, as supporters are not legally required to register. The Court finds TPC's methods for supporting engagement adequate. TPC shares information through its website, newsletters, and Reddit Ask-me-Anything sessions, and interacts with supporters via a sounding board group of around 10 people, as well as with supporting organizations and their own supporters.

In her Supreme Court opinion on this case, AG De Bock contends that what constitutes an adequate representative group depends on the specific circumstances. Sometimes, qualitative factors can make up for a smaller group size. Generally, it is not necessary to require a large group, as this could conflict with the need to consider all relevant details of the case. Moreover, setting an overly high bar for representativeness could undermine the WAMCA's primary goal of facilitating quick and effective collective handling of mass claims. An excessively strict standard might also be incompatible with the WAMCA's opt-out approach.

AbbVie and TikTok

In the class action lawsuit against AbbVie, 10% of the affected women registered with Bureau Clara Wichmann, provided their personal information, submitted evidence, and signed a participation agreement. In *TikTok*, the percentage of users who joined the three foundations ranged from 1% to 8.7%. The Court considered this level of participation sufficient for representativeness.

Airbus Investors Recovery Foundation v Airbus

In the *Airbus*, over 420 private investors registered with the Airbus Investors Recovery Foundation (AIRS) and fewer than 10 institutional investors. The District Court of The Hague noted that investors affiliated with AIRS constituted less than 0.1% of the entire investor base, a figure seen as negligible. Furthermore, to the Court's surprise, AIRS did not reveal how many shares its associated investors held or the extent of their claims. Consequently, the Court determined that AIRS was not representative.

In contrast, the Investor Loss Compensation Foundation (SILC) represented 157 institutional investors along with approximately 500 private investors. SILC stated that the institutional investors bore roughly 5% of the total loss. The Court concluded that this percentage was sufficient for SILC to be considered representative.



Fiat Chrysler Investors Recovery Foundation v Stellantis

In *FCIRS Foundation v Stellantis*, the North Holland District Court ruled in July 2025 that FCIRS did not meet WAMCA's representativeness criteria.

Regarding the total number of victims, FCIRS did not provide specific figures in the summons. At the hearing, the foundation estimated the number of injured parties to be between 30,000 and 440,000 investors, but the wide range prevented the Court from drawing clear conclusions. Additionally, Stellantis correctly noted that this estimate was based on general data about typical household share ownership and how these shares are usually distributed among various companies. It did not specifically relate to Stellantis, its investors, or any particular timeframe.

Shortly before the hearing, FCIRS claimed to represent 3,400 investors. However, the Court was unable to determine whether this number was significant relative to the total group. At the hearing, FCIRS admitted that it had not verified the 3,400 registrations and acknowledged that some registrants, specifically those who sold their shares before 2017, did not incur any losses.

During the hearing, FCIRS stated that it had 60 registered institutional investors, claiming they accounted for between 4.4% and 6.1% of the total damages. However, FCIRS was unwilling to reveal the supporting calculations for these figures, even though it apparently had the data.

In other words, FCIRS requested the Court to determine its representativeness—a crucial criterion for admissibility—based solely on the mention of unverified percentages during the hearing, which were, according to Stellantis, completely fabricated.

Stellantis' own calculation, which includes both private and institutional investors, showed that the 3,400 investors supposedly registered with FCIRS collectively held an average of 0.22% of Fiat Chrysler's freely tradable shares. FCIRS did not offer any argument to challenge the accuracy of Stellantis' calculation.

During the hearing, FCIRS argued that, based on the Amsterdam Court of Appeal's ruling in *TPC v Oracle and Salesforce*, it is sufficient if a non-negligible number of people support the action. FCIRS believed this requirement was satisfied. However, the court disagreed with FCIRS on this point.

In the *TPC v Oracle and Salesforce* case, the Court of Appeal emphasized that the law does not specify a numerical criterion and based its decision that the claimant was sufficiently representative on the support shown by the Consumers' Association and at least six other established foundations, in addition to the finding that a considerable number of natural persons agreed with the collective action. Such circumstances are not present in this case.

The Court declared FCIRS inadmissible and saw no reason to give it another opportunity to demonstrate its representativeness. FCIRS should have addressed this in the summons or, at the latest, in Stellantis' written defence, where Stellantis provided a detailed argument on representativeness and explicitly requested further information from FCIRS on this issue.

Data Protection Netherlands Foundation v X

On 24 February 2026, the Amsterdam District Court determined that the Data Protection Netherlands Foundation (SDBN) is inadmissible in its class-action lawsuit against X Corp (formerly Twitter).

The group that SDBN claims to represent comprises nearly all Dutch smartphone users, estimated at about 11 million. However, only around 11,000 registrations have been made through the foundation's website, so roughly 0.1% of that group. The Court finds this insufficient. The Court cites the Amsterdam Court of Appeal in *TPC v Oracle and Salesforce* with approval, stating that "support from a non-negligible number of people" is both necessary and sufficient.

However, it also references the WAMCA Explanatory Memorandum (MvT), which states: “It must be evident beforehand that the claim organization represents a sufficiently large number of affected victims in quantitative terms.” The Court then concludes that 0,1% is, of course, very small to claim that SDBN “represents a sufficiently large number of the affected victims.”

This does not sound convincing. “Non-negligible” is not the same as “sufficiently large”; it is significantly smaller. “Non-negligible” is an adjective that means not so small or insignificant as to be overlooked. As in: “a small but non-negligible possibility.” “Sufficiently large” means that a quantity, size, or number is big enough to meet a specific requirement, threshold, or purpose. “The room was sufficiently large to accommodate 30 people.”

The Court also criticized the registration process, noting that it does not automatically demonstrate that registrants genuinely support the specific claims. About 11,000 people reportedly expressed support by submitting minimal information through a website form. However, providing basic details does not reliably indicate real support for the claims.

Ex Tunc or Ex Nunc

Under WAMCA, courts usually apply an ex nunc (prospective) standard instead of an ex tunc (retrospective) one when deciding on admissibility. This allows courts to consider all amendments to an organization's governance or representativeness until the hearing begins.

In practical terms, this means the organization doesn't need a fully established structure before issuing a summons. The foundation can start with just one board member, who can then take the time to find suitable candidates for the board of directors and the supervisory board. However, it's advisable not to wait until the last minute and to have a fully compliant foundation in place before filing a case. The ex nunc rule is not yet set in stone.

Ex Tunc or Ex Nunc on Appeal

In *TPC v Oracle and Salesforce*, the Amsterdam Court of Appeal held that TPC's claims were admissible, overturning the Amsterdam District Court on this issue. The Court of Appeal determined that the claims' admissibility should be evaluated as of the date of the oral hearing on appeal (ex nunc), rather than at the original filing date (ex tunc).

When the appeal was filed, TPC lacked a complete board of directors or supervisory board. The director who filed the appeal was authorized to do so by the articles of association, although the appointment was based on the recommendation of the external funder, Innsworth Capital. By the time of the hearing, TPC had formed a new, fully staffed board actively pursuing the appeal, as well as a complete supervisory board. Therefore, the governance requirements were met as of that time.

In her opinion for the Supreme Court in this case, AG De Bock agrees that the admissibility requirements on appeal must be assessed ex nunc, meaning at the time of the appeal hearing. Dutch procedural law generally requires the appellate court to decide based on the situation as it exists at the time of the appeal. This principle is connected to the remedial and re-examination role of appeal: its purpose is not only to review the correctness of the first-instance decision but also, within the limits of the legal dispute, to hold another hearing and reach a new decision, with the appellate court evaluating the facts as they then are.

As a result, parties in appeal can expand and improve their statements and defences as long as they follow procedural rules. There is no evidence in law or legislative history that the legislature intended to restrict the remedial and re-examination role of appeal in collective actions.

CHAPTER 8

Litigation Funding

Most representative organizations lack the funds to pursue collective actions. Litigation funders are third-party investors who provide non-recourse capital to plaintiffs to cover legal costs, such as attorney fees and expert witness expenses, in exchange for a share of the potential recovery. Without them, most of these cases would never see the light of day.

Introduction

Under the WAMCA, many large damage claims are financed by commercial third-party litigation funders. These funders cover the legal expenses of claimants in exchange for a portion of any future damages awarded, thereby risking that the claimant may lose the case and receive no damages.

The popularity of third-party litigation funding in the Netherlands is partly due to restrictions on result-based agreements and the lack of suitable alternative funding options. Dutch law generally prohibits "no-cure-no-pay" contracts or arrangements where a lawyer's fee is tied to a percentage of the case outcome.

WAMCA's legislative history highlights the pros and cons of third-party funding in commercial litigation: "Third-party litigation funding can improve access to justice by helping parties finance their cases. However, having too many funding options might result in negative effects, such as excessive litigation and victims rarely gaining from collective damages lawsuits."

It also raises concerns about possible conflicts of interest between funders and organizations. To be eligible for a WAMCA claim, representative organizations must establish safeguards when working with third-party funders. These safeguards have been developed over the years and are now incorporated into both WAMCA and the Claim Code.

The first six years of the WAMCA were marked by slow progress, debates over minor procedural issues, and considerable uncertainty for both claimants and defendants, mainly due to different interpretations of the law across courts regarding admissibility criteria such as representativeness and governance. For litigation funders, these varying legal interpretations and the lengthy pre-trial process pose major challenges. The extended timeline increases costs and risks, reducing potential returns and making funding claims less appealing.

The Basic Requirements

The litigation funding agreement should clearly specify that the representative organization has exclusive authority over litigation and settlement strategies. The organization must also confirm, through a letter of engagement, that its legal counsel and other service providers act solely on its behalf and do not accept any assignments from the external funder, even if the litigation funder directly pays legal fees and costs for other service providers.

The funding agreement must include a clause stating that the funder is prohibited from terminating the contract before a final judgment at first instance, except in extraordinary circumstances (usually a breach of contract).

Additionally, the organization must publish on the publicly accessible section of its website (i) details about external funding, (ii) the identity of the external funder, and (iii) the main structure of the compensation(s) and services agreed upon with the funder.

The board must also ensure that all individual directors, supervisory board members, and legal or other service providers associated with the representative organization stay independent of the funder, who must also remain independent from the opposing party in the collective action. Furthermore, the board must ensure that the funding terms, including the amount and structure of compensation, align with the collective interests of those the organization represents.



Influence and Control

WAMCA's legislative history clearly shows that the legislature viewed it as undesirable for anyone other than the representative organization itself, such as an external funder, to decide how the claim is handled. However, at no point did the legislator intend to establish that an external funder has no influence whatsoever. The legislature stated only that the funder should not have the final authority over how the proceedings are conducted or over the decision to accept a settlement.

The Claim Code 2019 provides a more extensive account of the relationship between a representative organization and its external funder than legislative history or the Civil Code. Principle III of the Claim Code requires independence and autonomy. The representative organization, along with its associated bodies, such as management and supervisory boards, and the experts engaged by the organization, must operate independently of the funder and related legal entities.

It is further stated that a funding agreement concluded with an external funder must specify that control over the proceedings and settlement strategy solely resides with the claim organization. The Claim Code thus appears to go beyond the law.

The Claim Code 2019 is soft law; it has no legally binding effect and cannot be equated with legislation. Nevertheless, the Claim Code has become an important reference point for courts when ruling on the admissibility of representative organizations.

NUON-Claim Foundation v Vattenfall

The funding agreement stipulated that the foundation "will take and follow the legal advice of the Lawyer in respect of the Claim (except that the Class Representative may decline to follow the Lawyer's legal advice where the Class Representative has taken advice from another lawyer experienced in the relevant area of law and reasonably approved by the Funder for this purpose)." Vattenfall contended that this clause resulted in the foundation not having enough control.

The court disagreed and held that the fact that the foundation must follow its lawyers' advice and can only deviate from it if it has received advice from another lawyer approved by the litigation funder does not mean the foundation lacks sufficient control. According to the court, such a rule is a permitted practical arrangement.

App Stores Claims Foundation v Google

According to Google, ASC was permitted to enter into a settlement only if its lawyers considered it reasonable. To meet the requirement of sufficient control over the legal claim, the Amsterdam District Court ruled that ASC must be able to decide entirely independently and even against the advice of its lawyers on which steps to take in the procedure and on negotiating and entering into a settlement.

Google also correctly argued that ASC's control over the legal claim was at stake due to the possibility of interim termination by the funder if they “cease to be satisfied about the merits of the Action” and the collective action is “no longer commercially viable.” This means the funder can stop funding the case if they no longer believe it has a chance of success and/or will produce sufficient results. This consideration cannot serve as grounds for the interim termination of the funding agreement because it represents a normal commercial risk for the funder and therefore does not qualify as “special circumstances” as intended by the Claim Code.

In my opinion, this is an oversimplification. Article 6:258 of the Dutch Civil Code allows a court, upon request, to change or end an agreement if unforeseen circumstances arise. This applies if, on grounds of reasonableness and fairness, the other party cannot be expected to uphold the original terms. Alterations in the case's circumstances may justify the funder's withdrawal of support, for instance, if all claims for damages have been dismissed, leaving only procedural matters

Finally, Google argued that the “free choice of lawyer” principle is at risk if the funder controls who the successor lawyer is, in the event that the foundation's current lawyer, appointed in consultation with the funder and (probably) named in the funding agreement, is no longer considered suitable. ASC must have the freedom to select a different lawyer independently. As currently worded in the funding agreement, this conflicts with the requirement that control over the legal action remains sufficiently with ASC. The Court also agreed with Google's reasoning on this third matter. The foundation was given the opportunity to revise the funding agreement to better align with the court's perspective on the issues mentioned above.

SILC v Airbus

In the Airbus case, the District Court of The Hague found that there was such a close connection between the representative organization and the funder that it was presumed the organization lacked sufficient independence from the funder. Additionally, SILC was required to consult the funder before reaching a settlement, which led the court to conclude that the funder could influence SILC's decision-making. The court explained that the legislature, by introducing the control requirement, intended to ensure that the approval or rejection of a settlement proposal could not be significantly influenced by third parties, particularly third-party litigation funders.

The Amsterdam District Court reached a different conclusion regarding consultation rights in *App Stores Claims Foundation v Google*. In March 2025, the Court ruled that, following amendments to the funding agreement, the control over the claim sufficiently rests with ASC. Google, on the other hand, argued that the ability to settle remained at risk because of the funder's ongoing close involvement. Although it may be formally agreed that ASC can decide independently without influence from its lawyers or funder, concerns remain about the weight given to the funder's opinion, especially since the funding agreement still requires consultation and indicates a close connection between lawyers and the funder. The Court disagreed with Google. The agreement's key provisions have been revised to reduce or modify the obligation to follow the lawyer's advice, clearly confirming that ultimate control rests with ASC. This is what matters. While the agreement still requires information sharing and consultation with the lawyer or funder, this is reasonable given their different interests. Because ASC is no longer obligated to follow their advice, the revised provisions do not hinder its control over the legal claim



Supervisory Board Appointment

Principle VII specifies that the foundation's supervisory board must have at least three members, with no more than one appointed based on a funder's suggestion. When a third party provides funding, that entity can nominate one supervisory board member, excluding the chairman.

In *Emissions Claim Foundation v Renault*, the lawyers representing the car manufacturer argued that the Supervisory Board's composition included the founding and managing partner of a US law firm funding the case, thereby violating Principles III, IV, and VII of the Claim Code.

The court, however, held that his position is not incompatible with proper governance requirements. The managing partner is a member of the foundation's supervisory board and also holds a prominent role as a shareholder of the law firm that acts as its funder. He has a personal stake in the outcome of the proceedings, as he benefits from the law firm's profits if the proceedings result in a financially positive outcome for the foundation's constituency.

However, in the court's view, this does not indicate that the foundation's governance is insufficiently protected. The Claim Code states that, with regard to the supervisory board, one member—excluding the chairman—may be appointed based on the funder's recommendation. Principle VII, elaboration 3, permits limited influence by the funder over the supervisory board.

The funder has no significant or unacceptable influence through the managing partner's position on the supervisory board. The board also includes independent members, and the managing partner does not serve as chairman. Additionally, the foundation's management oversees its daily operations. The supervisory board's role is limited to monitoring its policies and strategic decisions.

The parties disagreed on whether the Claim Code allows for a funder representative to be appointed to the supervisory board, or only a third-party proposed by the funder. The court sees little difference, as the funder's level of control remains the same: a third-party proposed by the funder would also speak for the funder.

The Funder's Fee: How High?

The debate over litigation funding often focuses on whether third-party funders make excessive profits compared to what plaintiffs receive. This raises ethical concerns about who controls the case and the tendency to prioritize profit over justice. Critics argue that funders turn litigation into a profit-driven industry. Some also contend that certain funders invest in frivolous claims and hold significant influence over case strategy, settlement decisions, and legal representation, creating conflicts of interest.

Much of the criticism directed at litigation finance is based on misconceptions rather than an accurate portrayal of the industry. Litigation funding does not generate disputes out of nowhere. It does not invent legal rights or compel claimants to file lawsuits. Instead, it simply provides capital to support legitimate claims.

The idea that the funding industry encourages frivolous claims is particularly concerning. In reality, funders serve as gatekeepers, stopping weak or dubious claims from reaching court. No prudent financier would put large amounts of non-recourse capital into a venture with a high chance of failure. Financial supporters avoid backing projects with a low likelihood of success.

Under WAMCA, the funder's return is evaluated not only by the representative organization when deciding whether to engage a third-party funder and by the constituency when choosing to join that organization, but also by the court.

TikTok

In *TikTok*, the Amsterdam District Court noted that courts often allow representative organizations to keep up to 25% of the awarded compensation to cover funders' costs and fees. This is acceptable, but the total fee should still be limited to five times the deployed capital.

The Court of Appeal in *TikTok* approaches this matter with greater subtlety. Determining whether a litigation funder's compensation is reasonable usually requires knowing the case's outcome and the actual compensation amount. Experience with collective settlements under the WCAM indicates that what is considered reasonable for funder remuneration depends on the specific circumstances. Due to diverse types of claims, varying durations of WAMCA procedures, differences in investment amounts by funders, and established or agreed damages, it is not possible to set a universal standard for all collective settlements and damages in advance.

Essure Claims Foundation v Bayer

The Essure case describes a three-step process for determining whether the funding fee negotiated between the representative organization and the funder is appropriate.

First, a funding fee of up to 25% is considered inappropriate only if the defendant provides convincing reasons that the fee harms the interests of the represented group. Second, if the funding fee exceeds 25% of the claim, the claim organization must present additional arguments, even if the defendant does not contest the fee. Finally, after a decision on the merits, the court will assess whether the funding fee is reasonable, considering the level of damages, all relevant facts of the case, including the risks borne by the funder, and the duration of the proceedings.

In *Essure*, a 25% fee of the damages was agreed upon with the litigation funder. Additionally, the litigation funding agreement allowed the funder to deduct all related expenses, both in court and out of court, from the damages, with a maximum cap of 5% of the total amount.

The foundation clarified that its goal is to recover the litigation funder's expenses from Bayer through a cost order if there is a favourable judgment or settlement. If a cost order is not granted or does not cover the expenses, the funding agreement provides that any remaining costs incurred by the funder will be deducted from the compensation awarded to the foundation, up to a limit of 5%. If the remaining costs exceed 5% of the compensation, the funder will cover that excess and will not charge the victims.

Consequently, injured parties will receive at least 71.25% of the total compensation (i.e., 95% minus 25%). If Bayer fully reimburses the litigation funder's costs via a cost order or settlement, the 5% deduction is waived, allowing victims to receive 75% of their total award.

Although Bayer argued that the agreement with the litigation funder was invalid due to its excessive terms, the Central Netherlands District Court disagreed. It ruled that a fee of 25% plus an additional cost allowance of up to 5% is reasonable. Empirical data show that EU litigation funders typically seek returns ranging from 20% to 50% of damages. Therefore, a compensation rate of up to 28.75% (calculated as 100% minus 71.25%) does not seem excessive.

Recovering Costs: Extrajudicial Costs

Extrajudicial costs, as defined in Article 6:96 paragraph 2 of the Dutch Civil Code, include expenses that the plaintiff incurs to establish liability and damages, and to secure payment outside of court. These encompass legal advice fees, negotiation costs, administrative charges, and expenses for sending notices of default. Such extrajudicial costs are considered a form of (pecuniary) damage, with compensation intended to restore the plaintiff's financial position to what it would have been absent the infringement. Generally, extrajudicial costs are fully reimbursable.

A claim organization conducting a collective action can be reimbursed for extrajudicial costs it incurs, even if the organization—and not the injured party—bears those costs. The organization does not seek reimbursement from the victims but recovers the costs from the liable party.

The double reasonableness test restricts the reimbursement of extrajudicial costs. Both the decision to incur costs and the amount must be reasonable. The principles of reasonableness and fairness are crucial in determining whether the costs meet the double reasonableness criteria.

The specific circumstances of each case are decisive, which may include factors such as the nature and extent of the damage, the link between the damage and the claimed costs, the case's complexity, whether a defence has been filed or is expected, the parties' positions, the type and amount of legal assistance, and the expertise of the legal service provider.

In principle, extrajudicial costs can also cover the expenses related to settling claims, such as payouts to victims. In a recent case brought by the Data Protection Netherlands Foundation against Twitter, the foundation is seeking 2.5 million euros to cover distribution costs. In a case against TikTok, the Take Back Your Privacy Foundation is requesting 4.5 million euros.

Recovering Costs: Litigation Costs

If a dispute occurs, there will be both out-of-court and court-related costs. Court costs (also known as judicial or litigation costs) are the expenses involved in handling a lawsuit, including preparing legal documents and filing the case, such as drafting a writ of summons and various submissions.

In regular procedures, legal fees are generally not fully reimbursed. As outlined in Article 237 and following, compensation for these costs is determined based on the "liquidation" rate. This is calculated through a points system that considers the case's significance and the procedural steps involved. Typically, the victorious party recovers only a small part of its legal expenses.

However, Article 1018I sub 2 DCCP gives the court the authority in collective actions to order costs that differ from the standard liquidation rate. Although the wording suggests this is a discretionary power, in practice, reasonable actual legal costs imposed under this rule should usually be fully covered by the defendant in the collective action.

The legislature considers this fair because it reduces the financial burden on the claim organization. In collective settlements, it is also common for the claim organization's incurred costs to be included in the settlement. Article 1018I sub 2 should prevent a defendant from refusing to settle in order to avoid covering the legal fees incurred by the claim organization.



The Funder's Fee: Who Pays?

The claim organization is required to pay a success fee to the litigation funder as specified in the funding agreement, and this fee is ultimately passed on to the injured parties. Essentially, victims cover the funder's fee in return for funding, contingent on the case's success and damages recovered. If there is no settlement or damages award, the claim organization and victims usually do not owe any payment to the funder.

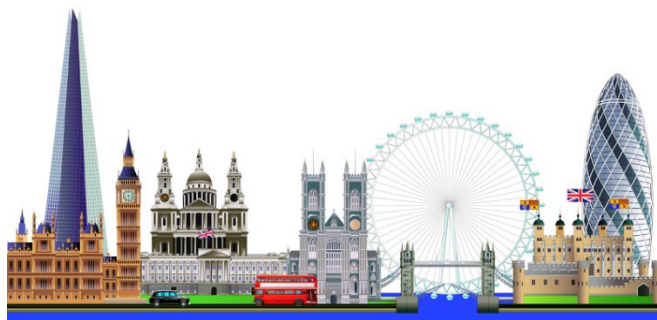
However, legislative history indicates that the funder's success fee—considered as “other costs” paid by the claim organization for funding—is eligible for reimbursement: “In the event of a collective award by the court, the costs incurred can be recovered outside the proceedings as damages (Article 6:96 DCC). The costs of the procedure itself and *other costs incurred* may also be reimbursed as legal costs (Article 1018I DCCP).”

Another example from legislative history that also demonstrates the legislature's intent to permit recovery of the success fee is the following: “In addition, the judge also has the possibility to take into account, for example, the reasonable costs incurred by the victims to determine the damage and liability (Article 6:96(2)(b) DCC), such as the costs of joining a claim organization.”

If the “costs of joining a claim organization” can be recovered under Article 6:96 DCC, then it is reasonable that the costs needed to finance the proceedings— including the compensation the funder ultimately receives - can also be recovered from the liable party under the same provision.

United Kingdom

In *Gutmann v Apple*, the CAT concluded that it has the authority to order that a funder's fee be deducted from the damages awarded to the class at the end of the proceedings. It is permissible for a PCR to enter into a litigation funding agreement that envisions this scenario. Neither the Competition Act nor the CAT Rules forbid this practice. If authorization to make such a payment to a funder is necessary, it is granted by section 47C(3)(b) CA. “Self-evidently, a funder must be paid for the risk it takes. If a reasonable return is dependent upon the happenstance of whether there are sufficient unclaimed damages that have the potential to increase the risk for funders and consequently the cost of litigation funding.”



United States

Rule 23(h) provides that “[i]n a certified class action, the court may award reasonable attorney’s fees and non-taxable costs that are authorized by law or by the parties’ agreement.” The common fund doctrine permits class counsel to seek an attorneys’ fee award from the recovered amount—the common fund.

The common fund doctrine holds that if the representative plaintiff recovers a benefit for many individuals through their efforts, it is only fair that all beneficiaries share the cost of obtaining that recovery. This is achieved by paying those costs from the common fund established by the litigation.

The lawyers representing the class cover all litigation expenses out of their own funds until the case is finally resolved, usually through settlement. If the plaintiffs lose the case, the lawyers do not receive any fees from their clients or the defendants, and naturally, there is no common fund.

If the case is resolved, whether by settlement or trial, with a monetary recovery for the plaintiff class, the class attorneys submit a request to the court for reasonable attorneys’ fees, which are paid from the class recovery. The fee award can be based on a percentage of the recovery or on reasonable hourly fees, adjusted by factors like the results achieved, case complexity, and the risk of receiving no fee if the case fails.

A court sets a hearing to discuss the fee award, but defendants rarely object to the fee application. This is because the fee is paid from the class recovery, so it does not create extra costs for them. Occasionally, class members attend the hearing to oppose the proposed fee, but this is uncommon, and judges seldom make significant changes to the requested fee. The court-awarded fees and expenses—typically between 25 and 35 percent of the total settlement—are paid to the lawyers from the settlement fund, with the remaining amount then distributed to the class.

CHAPTER 9

The Exclusive Representative

If multiple organizations meet the eligibility criteria and submit their claims on time for the same event, the court will select one as the Exclusive Representative. All organizations that file their claims by the deadline have an equal chance to be chosen. The appointed Exclusive Representative serves as the primary contact for the court and the defendant, representing the interests of the entire group, including those not officially affiliated with any specific foundation.

To qualify for the Exclusive Representative position, the court first determines whether a claim organization is sufficiently representative to be recognized as such. Only after this assessment does the question of whether it can serve as an ER, *primus inter pares*, arise.

When choosing the Exclusive Representative, the court will consider the following factors: (i) the number of individuals the organization represents; (ii) the financial interests of this group; (iii) additional services provided by the organization for those it represents; and (iv) previous work undertaken by the organization or collective claims filed.

If factors such as the nature of the collective action, the profile of the representative organizations, or the interests of those represented justify it, the court has the authority to appoint multiple exclusive representatives. Furthermore, representative organizations themselves can also request the appointment of more than one exclusive representative.

The trade unions FNV and CNV were appointed as joint exclusive representatives in a collective action against Temper. Additionally, FNV and CNV collaborated on a joint effort against transport company XPO Supply Chain Netherlands III B.V. regarding the company's ongoing participation in the pension fund following a transfer of undertaking.

In the TikTok case, Take Back Your Privacy represents children in the class action, and Mass Damage & Consumer represents adults. A third foundation, Somi, remains involved as a non-ER.

Group Size and Financial Interests Involved

An organization seeking to establish itself as an Exclusive Representative must attract the maximum number of participants possessing the greatest aggregate financial stake. To accomplish this, particularly in consumer class actions, representative organizations are likely to deploy advertising campaigns on Google and to prioritize social media platforms such as Facebook, Twitter, and Instagram.

The size of the constituency and the financial interest involved thus depend on how quickly and effectively a claim organization can sign up participants. This largely depends on the organization's financial resources and its familiarity with social media advertising. The likelihood that a claim organization will become an ER often hinges on a litigation funder's willingness to invest in book building.

As mentioned earlier, the size of the constituency and the financial interests it holds already play a crucial role early on, especially in determining whether the claim organization is considered representative. Therefore, investing in book building remains necessary regardless. After all, as the legislature has clarified, "Not every arbitrary organization can act as a defender of the interests of victims. It must be clear in advance that, quantitatively speaking, it represents a sufficiently large proportion of the group of affected victims."



All Other Activities Performed by the Claim Organization

A representative organization should not be seen merely as a typical claim vehicle but as an entity with a broader duty to serve its members (as an association) or supporters (as a foundation). This means board members need to commit to more than just overseeing collective actions. As the legislature has stated: “These other activities can, for example, relate to acting as a spokesperson for injured parties or other activities on the basis of which this representative comes into the picture in order to act for the entire group of persons.”

Previous Activities

Having experience in conducting a class action is also relevant in the fight for ER status. An organization that has been established for some time, has stood up for its members' interests, and has defended them in court before has an advantage. These past activities can demonstrate the expertise and experience needed to lead a collective action and qualify as an ER.

Within this context, the National Consumers' Association, founded in 1953 and currently boasting over 400,000 members, warrants consideration. It engages in numerous collective actions, and given its substantial membership and broad range of activities, it is clearly the alpha male among the various claim organizations seeking the ER designation. The key question is whether this constitutes unfair competition. The court's duty is to ensure organizations involved in collective actions are given equal opportunity to be designated as ER.

Co- and Sub-ERs

The court may appoint multiple representative organizations as ERs if the collective claim or the interests of organizations and their constituencies warrant such an appointment. Factors to consider include the absence of conflicting interests among constituencies and the comparable suitability of the organizations. Claim organizations can petition the court to designate multiple exclusive representatives.

Co-ERs can be useful when multiple claim organizations have the same specific interests, while sub-ERs are suitable when a claim organization serves a unique group whose interests don't fully align with those of other victims.

Contre Coeur ERs

The court might also appoint a claim organization that does not pursue ER status. Sometimes, it can be strategically advantageous to let another claim organization handle the work. An organization with limited resources may prefer to take a passive role: its constituency's interests are represented by the ER, and it simply supports the ER's views. In such cases, the claim organization might not face high additional costs but can still seek compensation, including through settlement negotiations.

Such a strategy involves some risk, given the legislature's viewpoint on this issue: “there can be no room in a collective action procedure for claim organizations that operate mainly for profit and then do nothing.” In principle, a court might still deem such a claim organization inadmissible for lack of sufficient interest.

Non-ERs

Once appointed, the ER will oversee its proceedings and act on behalf of non-appointed claim organizations that remain parties to the class action. The legislature explicitly assigns the ER the responsibility of coordinating the class action and designates it as the contact point for the defendant, including during settlement discussions.

However, non-appointed claim organizations play an important role. According to the legislature, they must keep a “sharp eye” on the ER, monitor it, make necessary adjustments, and provide input to ensure the interests of all victims are properly represented. The legislature states that a non-appointed claim organization can, if needed, “raise the alarm” to the court if it believes the ER pays insufficient attention to the interests it represents. This includes preventing the ER from choosing an unpromising litigation strategy or settling for an amount that is too low.

Courts may be inclined to generously permit non-ERs to file their own pleadings, in light of the fundamental rights of these co-claimants to a fair hearing and due process, and the lack of a remedy against the designation of the ER. However, unlimited acceptance of additional procedural documents could cause the court to effectively abandon the ER system. This compromises the intended efficiency benefits of the ER's coordinating role and underscores the need for cautious application of the system, especially when there is no clear disagreement between the ER and the non-designated claim organization.



Conflicts

There may be situations where the Exclusive Representative and the non-designated claim organization disagree on litigation strategies. The non-ER might argue that the ER, for example, pursues legal tactics with little or no chance of success or overlooks procedural opportunities. It is also possible that an ER opts for a settlement for a relatively low amount, while a non-appointed claim organization prefers to continue litigation in pursuit of a higher amount.

The key issue is how the court should address such conflicts. The legislature suggests two options: first, as mentioned earlier, permitting non-appointed representatives to submit additional procedural documents; second, a more drastic approach of replacing the Exclusive Representative.

However, replacement is usually a last option, mainly used when an ER no longer qualifies or is no longer sufficiently solvent. The ER typically collaborates with a litigation funder, and disagreements may occur for various reasons. This can significantly threaten the entire class action. If, for any reason, the litigation funder stops supporting the case, the Exclusive Representative may need to make decisions that could harm the interests of the entire group. In such situations, replacing the ER would be appropriate.

The Narrowly Defined Group

In addition to appointing the ER, the court assesses the exact nature of the class action and determines the so-called “narrowly defined group of persons” whose interests the ER will represent. The narrowly defined group under the WAMCA is the specific delineation of victims for whom a representative organization claims compensation in a collective action.

The law requires that the summons include a description of the events underlying the claim and identify the individuals whose interests the claim aims to protect. This helps the court understand the nature of the collective action and which “narrowly defined group of persons” the organization represents.

The Exclusive Representative acts on behalf of everyone within the narrowly defined group. All injured parties within the group may choose to opt out after the ruling appointing the ER. If they do not do so promptly, they will be represented by the Exclusive Representative, and the judgment will bind them. The final decision of the procedure will apply to all injured parties who do not opt out on time, regardless of whether it is favourable or not.

For victims living abroad who are part of this group, the collective action will be binding only if they confirm their agreement to be represented within a specified period. Consequently, an opt-in rule applies to victims residing abroad.

Opt-Out

Once an Exclusive Representative is appointed, the court will set a minimum one-month period for members of the group to opt out. The final sentence of Article 1018f, paragraph 1 of the Civil Procedure Code states: “If the number of persons who, pursuant to this article, have been released from managing their interests in the collective claim is too large to justify continuing the procedure, the court may decide not to continue it.”

The legislative history does not offer additional details on this provision or the concept of “too large” within it. In academic literature, it has been proposed to define this as 5% of the total settlement amount, similar to what was used in settlements under the predecessor of the WAMCA.

In the FNV and CNV versus Temper case—where labour unions filed a claim against an online platform, with nearly a quarter of its workers (about 15,000) opting out—the court declared the claim inadmissible to the extent it sought to protect the interests of the Temper workers.

United Kingdom

A carriage dispute arises when two or more applicants seek similar opt-out collective proceedings, requiring the CAT to decide which applicant is most suitable to serve as the proposed class representative. The CAT's review of a carriage dispute involves determining which case is best suited to advance first to a certification hearing and whether the unsuccessful application should be dismissed or stayed pending the certification decision.

For the successful applicant, this means their case may advance to a certification hearing, while the unsuccessful applicant's case will be stayed (or possibly dismissed) until the certification is resolved. If the certification application proceeds smoothly, it becomes the only case against the defendant.

Carriage disputes pose significant financial and operational risks for litigation funders. The main risk is that a funder might spend substantial time and money preparing a case, only to see their chosen candidate for class representative rejected, leading to the total loss of that investment. Courts have stressed that funders must accept the risk of losing these investments when their "beauty parade" candidate is not selected.

United States

The representative plaintiff needs to be a class member with claims typical of the class. Sometimes, multiple plaintiffs combine to initiate a class action, or courts may merge several class actions based on the same claim into a single case. This consolidation can expand the pool of available legal representation and help ensure at least one suitable representative plaintiff to assert each claim in the complaint.

The court typically permits all named plaintiffs involved in competing class actions to serve as class representatives, rather than selecting a single best candidate. In consolidated cases, the court generally designates lead counsel once the class is certified. This lead counsel is responsible for case strategy and staffing, though they can solicit assistance from other lawyers involved in the filings.

The Substantive Phase

After appointing the Exclusive Representative, the court will pause the proceedings to allow the Exclusive Representative and the defendant to attempt a settlement. If settlement talks fail, the case will be assessed on its merits.

During the admissibility phase, the court did not need to address issues like causation or relevance—for example, whether the injury is sufficiently linked to the alleged infringement or whether the laws violated are intended to protect the affected group. These issues must be considered during the next phase, the substantive review, after the admissibility stage. WAMCA provides no additional guidance for this substantive review and relies on established practices.

If no settlement is reached, the court allows the Exclusive Representative to expand their claim. This may involve incorporating arguments, grounds, or legal theories previously raised in writs of summons filed by other claim organizations. If other organizations have already raised relevant grounds in their own summons, the court allows the lead representative to incorporate these to streamline litigation.

If the defendant's earlier defence was confined to preliminary issues, the court will now permit them to present a full defence on the merits of the case. Following the defendant's statement of defence on the merits, the court might also allow both parties to submit a second written argument.

Typically, an oral hearing is scheduled three to six months after the last written submission. It gives both parties a chance to present their cases and respond to each other, while the court participates by asking questions. The procedural rules state that the court should issue its judgment within six weeks of the hearing, but in practice, this often takes much longer.

Disclosure

Article 22 of the Dutch Code of Civil Procedure grants courts the discretionary power to actively manage evidence and proceedings. With the new evidence rules that came into effect on 1 January 2025, courts are now better able to clearly and proactively request information, rather than waiting for parties to do so. The court may, at any stage of the proceedings and in any instance, order one or both parties to clarify specific allegations or to produce specific documents or information relevant to the case.

Emission Claim Foundation v Stellantis

In July 2025, the Amsterdam District Court allowed Stellantis to submit evidence to contest the assumption that all Euro 5 vehicles contain illegal manipulation devices. The Court noted that if Stellantis chooses to pursue this, it must provide full transparency about how the emission control system operates. Stellantis informed the Court that it plans to submit evidence through additional written submissions and by opening a database containing the original calibrations, software files, and/or software documentation for the Euro 5 vehicles.

On 21 January 2026, the Court ruled that Stellantis could submit this evidence in this manner. However, as Stellantis explained to the Court, the software and written documents are protected by a Blocking Statute under French law. This statute prevents Stellantis from sharing sensitive technical information located in France in legal proceedings abroad unless a request for direct evidence collection is approved under Article 19 of the EU Evidence Regulation. Such a request must be submitted to the Department of Mutual Assistance, Private International Law, and European Law (DEDIPE).

The Evidence Regulation route thus allows Stellantis to submit evidence while complying with the Blocking Statute. The Court found no reason to deny Stellantis this opportunity. A different chamber of the Court had previously approved Stellantis's requests for submitting evidence in this case, and those requests have been promptly fulfilled by DEDIPE. The Court noted that its decision is not affected by whether Stellantis faces criminal prosecution if it were to ignore the Blocking Statute.

According to the Court, requesting direct evidence collection does not cause an undue delay in the proceedings. The central authority of the requested state, in this case DEDIPE, must, according to Article 19(4) of the Evidence Regulation, notify the court within 30 days of receiving the request whether it has been accepted. It is reasonable to expect that DEDIPE will cooperate within this timeframe.

CHAPTER 10

Settlement

A class action settlement process involves negotiating a lump-sum payment from a defendant, which must be approved by the court to ensure fairness for all class members. WAMCA introduced the possibility of courts awarding damages in collective actions, but the legislature emphasizes that the primary goal remains to achieve an amicable, collective settlement between the parties. Therefore, the law allows for a collective settlement on an opt-out basis, subject to court approval.

Historically, court-approved collective settlements have been the preferred outcome in Dutch collective actions. Under WCAM, parties to a collective settlement agreement jointly apply to the Amsterdam Court of Appeal for enforcement on behalf of a specific group of affected individuals, who may opt out. The settlement process under WAMCA includes several elements from WCAM, resulting in court assessments and procedures that are similar to those under WCAM.

Suspension of Proceedings to Seek Settlement

After appointing the Exclusive Representative and during the opt-out period, the court pauses proceedings to allow negotiations between the ER and the defendant. Now that the defendant's direct counterparty is identified, the legislature considers it appropriate to pause the proceedings to see if the parties can reach a settlement. If they agree, the proposal must be submitted to the court for approval to ensure it binds all group members who have not opted out.

The (Obtrusive) Role of Non-ERs

A claim organization that is not designated as an ER might be unhappy with the ER's actions during settlement negotiations and the outcomes achieved. However, the legislature has decided that the ER can decide on behalf of the entire group whether to settle. Reaching a settlement does not need the approval of the non-designated claim organizations.

In practice, however, a settlement can become problematic if non-ERs disagree, as they might raise objections to the court that must approve the settlement, leading to uncertainty about how the court will rule. If the court approves the settlement, there's a risk that non-designated claim organizations will encourage their members to opt out, which could jeopardize the settlement's finality that the court aims to preserve. This situation might compel the ER to involve non-ERs in negotiations.

Procedure

The WAMCA settlement process starts when the Exclusive Representative and the defendant jointly file a petition with the court for settlement approval. This petition shifts their roles from claimant and defendant to co-petitioners. The affected individuals then become beneficiaries. After the submission, courts are likely to call the petitioners to a pre-trial hearing to review the settlement process and notification responsibilities.

Beneficiaries are bound by the settlement unless they choose to opt out, so they must receive information about the petition and the settlement terms. The petitioners are responsible for proactively informing the beneficiaries unless a court orders otherwise.

Notification requirements vary depending on whether the beneficiaries are known or unknown and may include newspaper ads, mail, and emails. It's a detailed process that could involve over 100,000 notices sent in multiple languages.

Beneficiaries must be notified twice during the process: first, to inform them about the petition filing and upcoming public hearing, giving them the chance to submit a statement of defence or take other actions; and second, when the court approves the agreement, providing an opportunity to opt out within the court's designated period.

Notifying the beneficiaries is essential because the settlement agreement's binding effect depends on their ability to object and opt out. The court will thoroughly review whether the notification requirements were met.

The Settlement Agreement

The court's initial review pertains to the mandatory components of the settlement agreement, including a description of the incident, details on beneficiary categories based on the severity of their losses, and the remuneration allocated to those beneficiaries. Subsequently, the court will review the agreement and may request modifications from the parties.

Under 7:907(3) DCC, the court may refuse to recognize the agreement as binding if the compensation awarded is unreasonable, there is doubt about the beneficiaries' ability to exercise their rights, or the group of beneficiaries is too small to justify making the agreement binding.

When determining reasonable compensation, courts consider the extent of the damages and the ease of recovery, often relying on expert reports to set fair amounts. Widespread agreement among beneficiaries and little opposition usually suggests that the settlement amount is fair.



Court Approval

Since the Exclusive Representative acts for the entire group involved in the proceedings, and their interests are impacted by the outcome, judicial review must apply to any settlement between the parties.

Once approved by the court, the settlement is binding on all beneficiaries, though they may opt out. This opt-out opportunity follows the same process as the initial one—done after the appointment of the Exclusive Representative, including publication and notification requirements. Clearly, permitting beneficiaries to opt out after court approval creates uncertainty in settlement negotiations because it remains unclear how many will ultimately be bound by the agreement.

A settlement agreement can be structured as a maximum payment amount, releasing the paying party from any further obligations to the beneficiaries. If, during payment distribution, it becomes clear that the total available funds are insufficient, the paying party may reduce the remaining payments proportionally.

The agreement might also specify a different process. If there is a surplus after fulfilling obligations, the paying party can ask the court to direct the administrator to pay the surplus to them or, if there are multiple paying parties, to divide it among them based on their contributions. Alternatively, the remaining funds can be given to claiming beneficiaries or donated to charitable causes, such as groups that represent consumer interests or support collective action.

Woekerpolis

In 2024, a collective settlement was reached under the pre-WAMCA regime in the so-called *Woekerpolis* (profiteering policy) case for tens of millions of euros with various claim organizations on one side and the involved financial institutions on the other. As a result, consumers who bought investment insurance policies years ago will receive compensation for the excessive costs they were charged.

The *Woekerpolis* scandal was exposed in 2006 by the TV program Radar, following an investigation by the Dutch financial regulator, the Financial Markets Authority (AFM). The AFM reported that hidden costs caused many customers to pay more for their investments than they earned from them.

Around half a million people bought these policies from various insurers between 1990 and 2008. Customers paid monthly premiums expecting a large payout after 20 or 30 years, only to discover that much of their money had been lost to costs, including commissions paid to sales agents.

Volkswagen

In September 2025, a final settlement was reached between Volkswagen and several foundations. The settlement relates to diesel cars sold from 2008 to 2015 that were fitted with software designed to cheat emissions tests. This includes vehicles from Volkswagen and its Audi, Seat, and Skoda brands. Owners of these vehicles may be eligible for compensation ranging from €300 to €2,500.

In 2015, Volkswagen admitted it had sold about 11 million cars worldwide equipped with illegal software, leading to billions of euros in fines, recalls, and settlements across various countries. Similar settlements have also been reached in the US, Germany, Italy, Spain, and other countries.

Settlement and Litigation Funding

Deciding whether to settle is a crucial decision for litigation funders because it affects their investment risk and potential returns. Since funders provide non-recourse capital—earning returns only if the case wins—they carefully evaluate settlement offers to ensure they are fair and accurately represent the claim's true value. Usually, funders target a multiple of their invested capital. Settlements can lead to a quicker resolution than a trial, boosting ROI by avoiding additional costs and delays. Litigation funding agreements often depend on the expected payout timeline. If a case exceeds that timeline, returns can drop significantly, making early or reasonable settlements more appealing. Even with a strong case, a funder may prefer settlement if they believe enforcing a final judgment against the defendant will be difficult or expensive.

In the Netherlands, WAMCA requires the foundation to have “sufficient control” over the collective action, including the decision to settle. Courts can review and modify funding agreements if they are concerned about the degree of control involved.

As previously discussed, in the *ASC v. Google* case, the Amsterdam District Court upheld Google's position that the original funding agreement was unacceptable because ASC could only enter into a settlement if its lawyers deemed it reasonable. The Court allowed ASC to amend the agreement, replacing the clause requiring adherence to the lawyer's advice with one granting ASC the final decision-making authority. The Court noted that it was acceptable for the revised agreement to include consultation with the funder, considering the different legitimate interests involved.

In *Vattenfall*, the funding agreement specified that the foundation must follow its lawyers' legal advice on settlement, except when it has received advice from "another lawyer approved by the Funder for this purpose," in which case it may choose not to follow the lawyers' recommendation. The court rejected Vattenfall's argument that this showed the foundation lacked sufficient control. The fact that the foundation must, in principle, follow its lawyer's advice on settlement and can deviate only if another lawyer has a different opinion does not mean the foundation lacks adequate control.

If the foundation's lead lawyer recommends settling, aligning with the funder's view, but a second lawyer opposes it, the foundation can still decline to settle, which could harm the funder's legitimate interests. I believe this does not align with the legislature's intent. The legislative history indicates that the funder should not have exclusive control over settlement decisions, but it does not mean that the foundation must have sole authority. It makes sense for the foundation and the funder to include a clause that assigns the final decision to independent arbitrators if they cannot agree on a settlement. Although not much different from what the Court in *Vattenfall* approved, this approach helps safeguard the funder's interests.

The litigation funding agreement between the Mass Damage & Consumer Foundation and its funder in a recent case against Google included a provision stating that the foundation "will actively consider and seek to initiate offers of Settlement where appropriate to do so. If the Foundation wishes to make a Settlement offer or proposal of any kind in respect to the Claim and/or the Proceedings in whole or in part or is required by the court to attempt to settle, before making such proposal, it shall notify the Funder in writing together with written reasons and shall consult the Funder."

The Court did not see this provision as problematic: "Contrary to Google's assertion, this cannot be reasonably understood to imply that SMC lacks control over its legal claims."

CHAPTER 11

Damages

A key aspect of WAMCA collective proceedings is that the remedy sought can include aggregate damages. This type of damages provides fair compensation for the loss suffered by the entire group of claimants, without requiring an individualized assessment of damages for each member. When aggregate damages are awarded, the law bypasses the usual requirement to separately determine each claimant's loss.

Four Instructions

The court must adhere to specific standards when designing a collective compensation scheme. WAMCA provides four clear instructions: (1) where possible, determine compensation for injured parties by category; (2) ensure that the collective scheme includes at least the provisions specified in Article 7:907 paragraph 2a of the Dutch Civil Code; (3) make sure the awarded compensation amount is reasonable; and (4) safeguard the interests of the injured parties.

When assessing damages, courts generally aim to restore the affected party to the position they would have been in if the event had not occurred. Article 6:97 DCC, the primary provision on damage assessment, allows damages to be determined by category. In a collective action, this enables damage assessment through damage categories, also known as damage scheduling. When defining these categories, courts may, to the extent possible, consider the different circumstances relevant to various groups of affected individuals.

Categories of Damages

Parties must provide the necessary information to determine damages when requested by the court, and expert assistance may be used to establish categories of damages. The court may ask for proposals or additional information from each party, though it is not required to do so. It is possible that the previously exchanged procedural documents contain enough information for the court, possibly with expert support, to determine a collective damages arrangement.

The categorization of damages must be sufficiently detailed or, at a minimum, allow for clear differentiation among “standard individuals,” ensuring that these standard individuals accurately reflect reality.

Mandatory Provisions

The court’s arrangement must, in any case, include sections a-f of Article 7:907, paragraph 2, DCC, which require the following information: (a) a description of the event or events to which the arrangement relates; (b) a description of the group or groups of persons for whose benefit the arrangement has been concluded, depending on the nature and severity of their loss; (c) an indication, as accurately as possible, of the number of persons belonging to this group or groups; (d) the compensation awarded to these persons; (e) the conditions that these persons must meet to qualify for this compensation; (f) how compensation is determined and can be obtained.

Aggregate Damages

The court must ensure that the awarded compensation is reasonable, but categorization naturally involves some level of abstraction. Once the defendant's liability to the class members is established, categorization helps quantify the total loss by assessing the overall damages of the class without examining each member's individual loss. This method differs from the traditional principle of compensation, which aims to restore the claimant (as an individual) to the financial position they would have been in if the wrongful act had not occurred.

In simple terms, an aggregate award determines the total amount the entire class is entitled to and serves as a practical, proportionate way to assess damages in collective proceedings. Aggregate damages provide a means of achieving approximate justice. After establishing the defendant's liability, class members are eligible for monetary compensation covering the entire class. The specific damages for each individual are not precisely calculated; instead, class members receive a fair share of the defendant's total liability to the class, paid as a lump sum.

Although this method might overcompensate some members and undercompensate others, it aligns with the purpose of the class action system, since examining each person's transactions to calculate exact damages would be impractical and inefficient.

Antitrust Damages

Antitrust damages calculation measures the economic harm caused by antitrust violations, such as cartels or abuse of dominance, by comparing the actual market outcome with a hypothetical "but-for" scenario. It mainly involves comparing prices or profits before and after the violation, using benchmarking or econometric models.

Put simply, if a violation of competition law led the claimant to pay higher prices, "but for" the defendant's unlawful conduct, the claimant would have paid less. Essentially, the claimant's loss is the difference between the amount paid and the amount that would have been paid in the absence of the unlawful act.

Damages usually include overcharges, lost profits, and interest, often adjusted for pass-on effects. "Overcharge" is an economic term that describes the difference between an actual market price and the price that would have existed without collusion or abuse of dominance. Passing on (or "pass-on") refers to the situation where the defendant claims that all or part of the damage caused by a violation of competition law (i.e., the overcharge) was passed on to a lower level in the relevant market.

Passing on is lawful, as the direct customer has a right to recover overcharges by increasing their product prices to their customers. Hence, the main issue is the extent of passing on, not the legality of the act. The defendant bears the burden of proving that the overcharge was passed on and can reasonably seek disclosure from the claimant or third parties.

Pass-on can therefore serve as a "shield," where an infringer uses it as a defence that the claimant's downstream pass-on has reduced the actual harm suffered. However, it can also act as a "sword," specifically when an indirect purchaser argues that an overcharge was passed on and caused harm to it.

The indirect purchaser is considered to have demonstrated passing-on if they can show that: (a) the defendant violated competition law; (b) this violation led to an overcharge paid by the defendant's direct buyer; and (c) the indirect purchaser bought the affected goods or services, or products derived from or containing them.



Non-Material Damages

Non-material damage refers to harm caused by grief or emotional suffering. This type of damage cannot be measured in monetary terms because it impacts mental well-being rather than physical assets. Unlike property damage, compensation for non-material harm is not intended to restore suffering but to help alleviate it. The Netherlands has historically been cautious in granting such compensation, setting a high eligibility threshold.

The 2019 Supreme Court *EBI* ruling has clarified that intangible damages require solid evidence unless the breach is severe and clearly shows harm to the injured party, such as when personal integrity is unmistakably violated. The Court highlights the *New Year's Riots* and *Baby Kelly* rulings as examples of such exceptional cases. In the *Riots* case, a couple faced serious threats for over three and a half hours and had their home vandalized. The *Baby Kelly* case involved a pregnant woman who, due to a medical blunder, could not prevent the birth of a severely disabled child. These serious examples demonstrate that the Supreme Court intends to apply the exception cautiously.

The subjective characteristics mentioned earlier make it difficult to prove immaterial damage, and this challenge is even greater in collective actions. In such cases, the discussion relies on general facts, and damages are assessed for the group as a whole, limiting the court's ability to consider individual victims' specific interests. Therefore, it remains unclear whether the broad, abstract approach typical of collective actions provides enough room to address the personal circumstances of those affected.

However, in principle, it is still possible to assess and estimate the scope of non-material damages in collective lawsuits. The Supreme Court noted in the Groningen earthquake case that although non-material damages are highly personal, an estimate can be made if the negative effects are clearly evident, considering the nature and severity of the norm breach (such as in exceptional cases described in the *EBI* ruling), and if the court can reasonably consider the damage incurred to be at least a specific amount. In such situations, damages can be estimated using a baseline lump sum.

In *TPC v Oracle and Salesforce*, the defendants contested the damages amount, arguing that not all individuals were likely to have experienced the same non-material harm, as such harm is often very personal. The Court of Appeal acknowledged that there could be substantial differences among members of the foundation's constituency affecting damage calculations. However, assessing damages at the admissibility stage is neither practical nor appropriate. It concluded that claims for non-material damages can be combined since they originate from the same legal violation. Variations in damage severity can be addressed through categorization, a method explicitly permitted under WAMCA. The Court of Appeal reached the same conclusion in the TikTok case.





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