Trend report - Almost 5 years of class actions under the WAMCA: what is new?

Almost 5 years ago, the Act on Collective Damages in Class Actions (Dutch acronym *WAMCA*) entered into force in the Netherlands. With the introduction of the WAMCA interest organizations have the possibility to seek collective monetary damages. In exchange, the WAMCA introduced stricter and additional admissibility requirements for interest organizations to comply with. In addition, the WAMCA introduces a new procedural regime for handling mass claims.

In this trend report, we reflect on various relevant developments of the first 5 years of WAMCA case law and present some lessons learned for the class action practice in the Netherlands.

Extensive use of the WAMCA for variety of purposes

Various class actions have been initiated under the WAMCA over the past 5 years, by different interest organizations covering a wide range of subjects. For instance, the Dutch State has repeatedly been targeted by interest organizations, often on ESG- and public interest related matters (we discuss the rise of ESG litigation in more detail in our trend report here).

The expanded possibilities for class actions have also contributed to the rise of ESG litigation in general. These include the climate change litigation by Milieudefensie against Shell and the greenwashing case by Fossielvrij NL against Royal Dutch Airlines KLM (please also see our blogs about the Shell case and the KLM case). We expect public interest class actions, including ESG litigation, to remain a hot topic in the upcoming years. Milieudefensie for example already announced another climate change case against ING.

In addition, claim organizations have brought various mass damages cases against corporates, for example on matters related to consumer protection. The various class action cases against car manufacturers regarding alleged defeat devices in diesel cars are a striking illustration. Interest organizations also brought many GDPR/privacy-related class actions against big tech companies (please see our earlier blogs here and here).

A final category worthy of note are the securities class action cases against aircraft manufacturer Airbus et al. as well as a recently initiated action against Stellantis (the holding above car manufacturers such as Fiat and Chrysler). The top holdings of both these parties are domiciled in the Netherlands.

A quantitative analysis of WAMCA-cases published in the online registry reveals that a large majority of cases (nearly 3 out of every 4) does not concern mass damages. As such, the rise in class actions activity in the Netherlands cannot solely be attributed to the new possibility to claim monetary compensation. The introduction of the WAMCA does seem to have driven an increase in interest in class actions among legal practitioners, and increasing numbers of globally operating claimant firms and litigation funders opened offices or became more active in the Netherlands over the past five years.

Debates on procedural aspects of the WAMCA

Although it has clearly not stifled the growth of class actions in the Netherlands, the introduction of a new class actions regime has not been without obstacles. So far, we have seen extensive debates between claimant and defence counsel on various procedural aspects of the WAMCA. Most prominent are discussions on the temporal applicability of the WAMCA, the new admissibility requirements and some discovery issues related thereto.

Since before the WAMCA, most class action cases in the Netherlands are handled in multiple phases and take several years to conclude. As a result, many cases brought under the WAMCA have not (yet) reached the merits phase of the proceedings. This effect is amplified by the extensive appeal possibilities in the Netherlands. Many aspects of the WAMCA therefore remain up for debate.

Applicable class actions regime: WAMCA or pre-WAMCA?

Under the pre-WAMCA regime, it is not possible to claim monetary damages (although fewer admissibility requirements apply compared to the WAMCA). As a result, the applicability of the WAMCA is pivotal to any collective monetary damages claim.

The WAMCA entered into force on 1 January 2020. The new regime is applicable to class actions initiated on or after 1 January 2020 and with respect to events that occurred on or after 15 November 2016. For events that occurred before 15 November 2016, the pre-WAMCA regime stil applies.

In case of a ‘series of events’ occurring both before and after 15 November 2016, the applicable regime (according to the parliamentary history) is the one in force at the time of the last event in the series of events to which the claim relates.

In various class actions, discussions arose on the applicable regime. These discussions centred on two main topics: (i) which ‘event’ determines which regime is applicable and (ii) what constitutes a ‘series of events’ or even a ‘continuous event’ stretching beyond the cut-off date? So far, various interesting judgments have been rendered regarding these questions.

- The joined cases against Airbus et al. have been initiated on behalf of Airbus investors. These investors allegedly suffered damages because they acquired or held publicly traded shares in Airbus on the basis of inaccurate, misleading or incomplete information between 2008 and 2020. In these cases, the The Hague District Court determined the applicable class action regime separately per defendant, depending on the events on which the claims against each separate defendant are based. The court then ruled that the relevant ‘event’ for determining the class actions regime was the failure to provide accurate information. The court found that this was a ‘continuous event’ (and not: a ‘series of events’) that (for certain defendants) took place both before and after 15 November 2016. The court determined that the WAMCA was applicable to this continuous event if the continuous event ended after 15 November 2016 for a particular defendant.

- Another example is the case on product liability for breast implants produced by biopharmaceutical company AbbVie. The producer’s liability is based on introducing the product into the European Union. AbbVie introduced different allegedly harmful breast implants to the European market over a period of over thirty years, both before and after 15 November 2016.

The Amsterdam District Court ruled that this is neither a continuous because nor is it a series of events: according to the court, each introduction to the Dutch market of a new type of implant is a separate event. The court held that the Dutch legislator intended the 'series of events'-exception to be reserved for exceptional cases. The court ruled therefore that - depending on the date the implants were first imported into the European market - the claims are partially governed by the WAMCA and partially by the pre-WAMCA regime.

- The Amsterdam Court of Appeal also recently handed down three judgments (link, link and link) in separate diesel litigation cases against different car manufacturers. The Amsterdam District Court ruled in first instance that the development of an alleged illegal defeat device is the initial, common and all-encompassing event on which the claims of the claim organizations are based. According to the district court, the actual introduction of vehicles allegedly containing defeat devices into the Dutch market is merely a harmful effect of the development of the alleged defeat device. Because this relevant 'event' occurred prior to 15 November 2016, the district court found that the pre-WAMCA regime was applicable.

  The court of appeal ruled otherwise and identified the introduction into the Dutch market of the vehicles allegedly containing defeat devices as the relevant 'event(s)' for determining the applicable class actions regime. The court of appeal then determined that the claims against the car manufacturers were partially covered by the WAMCA and partially by the pre-WAMCA regime, depending on the European emission regime in force on the date the vehicles were first introduced into the Dutch market. It remains to be seen whether the Supreme Court will uphold the court of appeal judgments in case of a potential cassation appeal.

Sufficient standing requirement in group actions vs. public interest actions

In Dutch case law, a distinction is made between public interest actions and group actions. In public interest actions, interest organizations promote public interests - which cannot be individualised (for example, combatting climate change). Group actions, on the other hand, involve a group of similar individual interests that can be bundled (for example, the interests of social media users whose privacy rights have been infringed). Class actions (whether they are group actions or public interest actions) initiated with an idealistic purpose and having no or a very limited financial interest, may benefit from a lighter admissibility regime under the WAMCA. In that case, certain admissibility requirements with respect to governance and transparency do not need to be met.

Under the WAMCA interest organizations must have a sufficiently large constituency which supports the class action, considering the scope of the claims and the total amount of injured parties ('*representativiteit*'). The rationale behind this sufficient standing requirement is to ensure that the interests of the represented individuals are adequately safeguarded. Despite years of litigation, the sufficient standing requirement is still subject of much debate.

In group actions, the sufficient standing requirement tends to be assessed on the basis of a numerical approach, comparing the number of an interest organization's active constituents to the total pool of injured parties. This, while perhaps closer to the test the legislator envisaged than the test currently applied in public interest actions (see below), is not without problems of its own.

Interest organizations are not obliged to submit a list of names of individuals supporting the claim. However, an interest organization must describe in sufficient detail which group it purports to represent and factually substantiate that it has a constituency supporting the class action. The lower limit of demonstrating such support yet remains unclear.

- For example, in the class action against Oracle and Salesforce, the Amsterdam District Court ruled in first instance that clicking an online support button was not sufficient to be considered an expression of support, mainly because insufficient details were known about the individuals who clicked that button.

  In the same case, the Amsterdam Court of Appeal ruled otherwise. The court of appeal found the number of clicks the claim organization received, alongside the support expressed by other interest organizations, sufficient. According to the court of appeal, it is not necessary that the interest organization makes

it plausible that the entire group that may benefit from the class action supports the class action. It is necessary and also sufficient that a constituency exists: a non-negligible number of persons belonging to the group of injured parties supporting the class action. In this respect, the court of appeal considered it relevant that interest organizations such as the Dutch Consumers' Association have expressed support for the class action. The clicks on the claim organization's website additionally indicate that a considerable (if not very large) number of individuals support the class action. The court of appeal therefore declared the claim organization admissible.

Also notable are the differing views of courts as to what should be considered a sufficiently large constituency (if, indeed, the court determines a numerical test is relevant in the first place). The same percentages are in some cases considered sufficient while in others they are not.

- In the aforementioned securities litigation class actions against Airbus et al., the district court found that the threshold for sufficient support from the injured parties was not met because the number of investors supporting the claim was less than 0.1% of the total number of investors and therefore insignificant.

- In a case against Google, the claim organization argued that Google illegally collects data about Google Play Store users. The Amsterdam District Court considered that the constituency compared to the total number of injured parties (around 6 million) is only an indication and not a necessary requirement of sufficient standing. The district court ruled that in this case the absolute number of 7,100 active supporters (again about 0.1%) was sufficient for the interest organization to be considered representative.

- In the GDPR/privacy case against TikTok (see below), the Amsterdam District Court found that - although the relative share of the constituency compared to the total number of injured parties was small (around 1% to 8.7%) – the absolute number of constituents between 16,033 and 87,557 was sufficient.

All things considered, the numerical assessment of an interest organization's constituency to determine sufficient standing remains highly case specific.

Public interest actions often pursue a social or idealistic purpose. In this type of idealistic cases, it might be challenging for interest organizations to delineate the group it represents or demonstrate it has a sufficiently sizeable constituency compared to all injured parties, because the interests it represents are of a general nature. In case law, the sufficient standing requirement is therefore interpreted differently in these types of cases. Some courts have ruled that instead of demonstrating that the constituency is sufficiently large and supports the action, the interest organization should demonstrate that it is an adequate voice ('*spreekbuis*') of the group it represents (for example, by showing that it has sufficient support of other interest organizations, and it engages in other activities related to the class action).

The sufficient standing requirement in public interest actions has also generated discussions in literature and politics. A motion was filed in parliament and parliamentary questions were asked about the need to set further requirements for sufficient standing for interest organizations pursuing public interest actions with an idealistic purpose. The Minister of Justice & Security provided a response and stated this issue will be considered as part of the 5-year evaluation of the WAMCA.

GDPR/privacy damages class actions

The possibility to claim monetary damages under the WAMCA has been used in various class actions concerning GDPR/privacy breaches. This has led to a great deal of case law and a new discussion on the relationship between the GDPR and the WAMCA.

- In the TikTok case, three claim organization sued TikTok for violating the fundamental (privacy) rights of its users. The Amsterdam District Court ruled that a class action for damages is possible under Article 82 GDPR. Article 82 GDPR stipulates that any person who has suffered material or non-material damage as a result of an infringement of the GDPR shall have the right to receive compensation from the controller or processor for the damage suffered. However, the court ruled that an interest organization must then also meet the admissibility requirements of Article 80(1) GDPR. Article 80(1) GDPR sets four requirements for the interest organization, one of which is that the organization must be active in the field of

the protection of data subjects' rights and freedoms with regard to the protection of their personal data. These requirements mostly have equivalents in the admissibility requirements under the WAMCA and concern only the interest organization itself (and not the claims brought by it).

- During the COVID pandemic, 6.5 million individuals were tested and/or vaccinated in the Netherlands by the Regional Public Health Services (in Dutch: GGD). Unauthorised GGD employees accessed the GGD IT systems and illegally shared the personal data of (some of) these 6.5 million individuals with third parties. An interest organization initiated a class action against, amongst others, the Dutch State and various Dutch regional GGD entities. The claim organization represents the interests of two distinct groups: (i) the individuals whose personal data were exposed to theft but were not actually stolen; and (ii) the individuals whose personal data were actually stolen.

  The District Court of Amsterdam ruled that it follows from case law of the CJEU that damages for a privacy breach cannot be awarded if there is only a fear that personal data were processed unlawfully; the claimant must show that the data were *actually* leaked. The claim organization failed to record whether its active constituents belonged to the group that was merely exposed to the data theft, or the group whose data was actually stolen. Given that the second group was only a fraction of the whole, the court found that the claim organization had failed to sufficiently substantiate that it had a constituency of individuals whose data were actually stolen. The district court therefore declared the interest organization inadmissible in its damages claims in relation to both the first group (because the claim was summarily unsound ('*summierlijk ondeugdelijk*') and the second group (because the claim organization lacked sufficient standing).

Many more class actions on alleged violations of GDPR/ privacy rights were initiated in previous years, amongst which a class action against X Corp and Twitter on the collection and sharing of personal data through free apps with third parties. Most recently, on 16 August 2024, a second class action was initiated against X Corp and Twitter.

In this second case, the claim organization represents the interests of all Dutch X users regarding - briefly put - several alleged GDPR breaches due to insufficient data security measures in place at X.

Third-party litigation funding

Interest organizations must have sufficient resources to bear the costs of bringing a class action. This requirement applies if the proceedings are financed by the interest organization itself, but also if there is external funding. Especially for cases with external funding, the WAMCA provides that the interest organization must retain sufficient control over the claims in the class action.

Class actions are increasingly being funded by professional, commercial litigation funders; also known as third-party litigation funding (**TPLF**). While TPLF may be a viable path to allow claimants access to justice, the rise of TPLF in class actions brings certain risks and issues - the most important of which is the emergence of 'entrepreneurial lawyering', claims which do not originate with injured parties but with profit-seeking litigation funders. As a result, in many of the cases litigated over the past 5 years, the parties debated the governance of the claim organization and the (in)dependence of the claim organization *vis-à-vis* its litigation funder.

It has become common practice for Dutch courts to request the interest organization to disclose its funding arrangements with its litigation funder. Although the Dutch system does not allow a U.S.-style discovery, the parliamentary history of the WAMCA provides an explicit basis for courts to request disclosure of the litigation funding agreement (and also, to a certain extent, for the defence counsel to review these funding arrangements). Based on a review of the funding arrangements, Dutch courts will then determine whether the interest organization is sufficiently independent from the funder and whether it has sufficient control over the claim.

For example, in the case against Airbus et al., the District Court of The Hague declared one of the interest organizations inadmissible because it was insufficiently independent of its funder. In the case against TikTok, the District Court of Amsterdam gave the interest organization the opportunity to amend its agreement

with its funder in order to meet the required level of independence. After the interest organization made the changes, the interest organization was declared admissible.

In addition, in a diesel litigation case against Renault, the court provided preliminary guidance on the success fee of the funders. The court was not convinced that a litigation funder demanding a cut of 27,5% of a potential damages award is justified, also because a funder receiving such a large share is not conducive to a potential settlement and thus not in the interest of the injured parties. The court considered a bandwidth of 10%-25% 'accepted in case law'.

It is not impossible that TPLF will soon be regulated by law as well as subjected to the scrutiny of the courts. The European Parliament urged the European Commission to adopt EU-wide legislation on the subject. If the Commission follows up on this request, that could contribute to making litigation funding in the Netherlands more transparent. Recent research by the WODC (a Dutch research institute in the field of law and justice) also points to the importance of new regulations regarding financing. Further regulation of TPLF is also in line with the Representative Actions Directive (**RAD**) for class actions on consumer protection, which was implemented in the Netherlands in June of 2023. When the RAD was adopted, it was recognized that further rules for, among other things, litigation funding should be developed to prevent abuse of representative actions by litigation funders.

Opt-in and opt-out and the exclusive representative

Under the pre-WAMCA regime, in principle, any number of interest organizations could bring a class action regarding the same event(s) and multiple actions on the same event(s) could exist alongside each other. The WAMCA introduces a system to effectively funnel multiple claims brought separately by separate interest organizations into one procedure. If multiple interest organizations wish to initiate a class action on the same event(s), they must do so at the same court and within a set period of time after the first writ is published in an online public registry.

After ruling on the admissibility of the different claim organizations, the court appoints one or more exclusive representative(s) (a position with similarities to a U.S. 'lead plaintiff') to represent the interests of the injured parties in the proceedings; the other interest organizations remain a party to the proceedings but take back seat. In the TikTok case, for example, the exclusive representative was appointed after a 'beauty contest' between the interest organizations.

Because the appointment of an exclusive representative may cause a delay in the proceedings, some claimants attempt to circumvent this stage by trying to intervene or submit a motion for joinder on the claimant side. In various cases, the courts decided that there is no place for joinder of an interest organization on the side of the claimant in WAMCA proceedings.

The WAMCA provides for an opt-out mechanism for injured parties represented in the class action residing in the Netherlands. This entails that a judgment is universally binding on those within the group of injured parties, unless they explicitly inform the court that they do not wish to be bound. For injured parties residing outside of the Netherlands, the WAMCA provides for a (voluntary) opt-in mechanism. The implementation of the RAD provides for a mandatory opt-in system for foreign injured parties (for actions consumer protection actions within the scope of the RAD).

In the case against Temper, claimants FNV and CNV (both Dutch trade unions) asked the Amsterdam District Court to determine that the professionals who performed work through Temper did so as (temporary) employees. The number of parties that opted out was so high that the court declared the unions (partially) inadmissible in their claims serving the particular interest of the professionals who use Temper, while the court allowed the unions to proceed with their claims serving the public interest.

In a few cases, such as the abovementioned AbbVie case, claimants have requested the courts to apply the opt-out regime to foreign injured parties as well (as opposed to the usually applicable opt-in regime). Until now, all such requests were denied by the respective courts.

What to expect next?

The first 5 years of litigation under the WAMCA shed light on various procedural requirements. Nevertheless, various key aspects of the WAMCA remain unclear, with different courts coming to different conclusions on similar issues. The WAMCA will soon be evaluated by the Dutch legislator which might result in some amendments to the current legislation. This will probably give some further guidance for the class action practice.

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