

A Collective Action for Damages in the Netherlands is a fact!

21 March 2019

On 19 March 2019, the Dutch Senate finally approved the legislation introducing collective damages actions in the Netherlands (the "Legislation"). The Legislation introduces an option to claim monetary damages in a "US style" class action.

Collective Action for Damages

The date on which the Legislation will enter into force has not been determined yet. The Legislation will apply to harmful events which took place on or after 15 November 2016.

The key features

The key features of the Legislation are:

- The Legislation introduces an **option to claim monetary damages** in a collective action on an opt-out basis. The Legislation consequently lifts the current prohibition on representative organisations claiming monetary damages in a collective action. The proposed action can either result in a judgment in which the court will award damages or in a collective settlement held to be binding by the court.
- The Dutch legislator chose for an **opt-out mechanism**, inter alia, because this will create closure for the defendant. It will prevent new collective actions being brought on the same facts and regarding the same legal issues once a collective action has finished. Initially, the Dutch legislator had international ambitions; the draft legislation did not limit the size of the (opt-out) class. Provided the scope rule (see hereinafter) was met, the class could consist of international class members. After some heavy criticism, the Dutch legislator decided on an amendment to limit the class to Dutch class members only, giving foreign class members the opportunity to opt-in. No rule without an exception: upon request by one of the parties, the court may also apply the opt-out regime to those foreign class members who are "easily identifiable".
- An **Exclusive Representative** can be appointed if there are more than one collective action organisations wishing to bring an action for the same circumstance(s) on similar points of law and of fact. This compares with a Lead Plaintiff in the USA. The Exclusive Representative will litigate on behalf of all collective action organisations. These organisations stay involved in the procedure. This means that it will be necessary to

co-ordinate with each other. After the appointment of the Exclusive Representative, it is possible for class members to opt-out.

After the Exclusive Representative is appointed, the court will set a period for the parties to try to negotiate a settlement agreement. If a settlement agreement is reached and declared binding, there is a second opt-out opportunity for the class members. If no settlement agreement is reached, the proceedings will continue.

However, if at a point in the proceedings the court deems this appropriate, it can order the parties to file a settlement proposal. On the basis of this proposal, the court can determine the amount of compensation to be paid. The possibility of reaching a settlement is laid down in the collective action for damages procedure.

- **Enhanced standing and admissibility** (e.g. in terms of governance, funding and representation) are introduced for collective action organisations, which will be assessed at an early stage of the proceedings (comparable to the US “motion to dismiss”). The collective action organisations need to, amongst others, appoint a three headed board, a supervisory board and an accountant. In addition, a collective action organisation needs to have a website and communicate with its stakeholders. The persons behind the organisation are not allowed to make a profit.
- One of the admissibility requirements is that the action must have a sufficiently close connection with the Dutch jurisdiction (the so called “**scope rule**”). This connection will exist if any of the following conditions are met:
 - if the majority of the individuals on behalf of whom the collective action is initiated reside in the Netherlands;
 - if the defendant resides in the Netherlands; or
 - if the circumstance(s) on which the collective action is based took place in the Netherlands.
- At the final moment an amendment was filed by a few members of Parliament to prevent that this scope rule would lead to more collective actions against Dutch companies. The Legislation now includes that if the connection is based on the condition that the defendant resides in the Netherlands, other circumstances should point to a connection with the Dutch legal sphere too in order to fulfill the requirement of “a sufficiently close connection”. The court should assess whether this is the case. This could be the case if the revenue of a large multinational runs to a great extent through its Dutch subsidiary.
- Next to the requirements to the collective action organisation, the Legislation also introduces requirements to **the collective action for damages** itself. Amongst others,

it must be made plausible that the collective action is more efficient and effective than initiating individual claims, because (i) the factual and legal questions to be answered are sufficiently common, (ii) the number of persons whose interests are protected by the claim is large enough and (iii) if the claim (also) relates to the award of damages these persons alone or together have to have a sufficiently large financial interest.

- The Dutch government anticipates an increase in **third party litigation funding**. The Legislation includes the possibility for the court to ask the claim vehicle to substantiate that it has sufficient means to finance the collective action. In addition, the court will assess whether the claim vehicle has sufficient control over the claim. The funder may, for example, not decide if the claim vehicle should enter into a settlement. Finally, the court will establish that the claim is not prima facie unfounded. In order to prevent nonsense claims, the Legislation – by way of a last moment amendment – provides that the court can order the plaintiff to pay five times the normal court approved scale of costs in the event that the claim does not pass the prima facie unfounded-test. This cost order is still far from the "loser pays all costs-principle", but more than can be awarded under normal circumstances.

The collective action for damages is a long awaited piece of Legislation. This Legislation together with the mechanisms already available put the Netherlands in the forefront of collective redress in Europe.

Do not hesitate to contact us should you wish to obtain further information on the introduction of the collective damages action in the Netherlands.

> [Read the full article online](#)