

1 INTRODUCTION: COLLECTIVE ACTIONS AND FUNDING NEEDS UNDER THE WAMCA

Collective actions play an increasingly important role in dealing with mass damage. In the Netherlands, the Mass Damage Settlement in Collective Actions Act (*Wet Afwikkeling Massaschade in Collectieve Actie* or WAMCA) became applicable on 1 January 2020.¹ In the same year the EU Directive on Representative Actions for Consumers (RAD) was adopted, requiring member states to implement legislation on representative actions in consumer cases before 25 June 2023.² With the expansion of the collective actions regime, the question of how to finance these inherently complex and costly cases has become key.

This book examines the development of collective actions under the WAMCA, the various financing possibilities of collective actions, and, in particular, the regulation and practice of third-party litigation funding. It assesses in greater detail the extent to which a litigation fund can provide solutions and how such a fund can be organised. It is based on the Dutch research report commissioned by the Dutch Ministry of Justice and Security and its Research and Documentation Centre (*Wetenschappelijk Onderzoeken Documentatiecentrum*, WODC) on the utility, necessity, design and costs of a (revolving) litigation fund for collective actions.³ That report relies on extensive desk research, empirical research and comparative research. For the purpose of the present book, apart from making the necessary textual adjustments, the data was updated, and new developments were taken into account as far as possible.

The present chapter discusses the background and rationale of the research (Section 1.1), elaborates on the research questions (Section 1.2) and the threefold research methodology (Section 1.3), and provides an outline of the chapters of this book.

1 *Staatsblad* 2019, 130.

2 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409/1.

3 Kramer et al. 2023.

1.1 RESEARCH BACKGROUND

Collective compensatory claims and their settlement have become increasingly important, with the Netherlands being one of the front-runners in Europe. With the introduction of the WAMCA, enabling collective compensatory claims, the Dutch framework for settling collective damage has been completed. The WAMCA expanded the regime for collective injunctive actions that was originally introduced in 1994 and complements the 2005 Collective Settlements Act (*Wet Collectieve Afwikkeling Massaschade* or WCAM)⁴ for collective settlements.⁵ Four years after the introduction of the WAMCA on 1 January 2020, 83 claims have been included in the central register for collective claims (WAMCA register).⁶ With the introduction of a registration requirement through a central register for collective action claims, along with other transparency requirements for claim organisations, the issue of financing has increasingly come to the fore. Various forms of litigation funding, particularly funding by commercial third parties (known as third-party litigation funding or TPLF), where an external entity with no ties to the parties or the dispute assumes the litigation risk in exchange for a percentage of the outcome in case of success, have become more common in Dutch legal practice as well as in several other countries. However, so far, they have been only partially documented and regulated.

Collective actions are often complex cases involving numerous (potential) parties and stakeholders for whom various forms of individual legal assistance (such as government-funded legal aid or legal insurance) may not be available or sufficient. In the context of the WCAM, where there has been experience for some time, financing options play a different role because they involve voluntary settlement, and all involved parties aim for the same ultimate outcome (the court's approval of the collective settlement) and are willing to invest in it. However, there are cases where funds remain in the settlement fund after the conclusion of the distribution process in the WCAM, and these funds have been used for various other purposes⁷ and have occasionally even been misused.⁸

4 *Staatsblad* 2005, 340.

5 See extensively on the WCAM, among others, Van Lith 2010; Kramer 2014.

6 Central register for collective claims (Centraal register voor collectieve vorderingen), <https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen>. The 83 cases included in the register to date (22 December 2023) include first instance claims as well as appeals. The extensive quantitative analysis conducted for this research was completed on 1 July 2023, based on the 66 individual claims that were filed at that time, as detailed in Chapter 3, Section 3.2.1 and Annex 1. Cases filed or judgments rendered after this date will only be referenced incidentally.

7 For a comprehensive analysis of the distribution process and the interests of the affected parties, see: Eijssermans-van Abeelen 2020.

8 Reference is made to the so-called 'Oranje affair', in which notary Frank van Oranje, who was appointed as a custodian of funds, including remaining WCAM settlement funds, on behalf of third parties, managed to embezzle these funds for personal use for many years; see, among others: <https://www.advocatie.nl/nieuws/pels-rijcken-totale-schade-door-fraude-frank-oranje-komt-uit-op-164-miljoen/>.

In a European context, there have also been significant developments, particularly the adoption of the Directive on Representative Actions for Consumers in December 2020.⁹ This Directive came into force on 25 June 2023, and member states were required to communicate the necessary legislation to the Commission by December 2022.¹⁰ The proposal for an Implementation Act was submitted on 8 February 2022,¹¹ following the publication of the draft and an online consultation,¹² and it was adopted on 2 November 2022.¹³ In the EU, growing attention has been given to the problems raised by third-party litigation financing, mainly owing to concerns about conflicts of interest and the fear of fostering a claims culture.¹⁴ Nevertheless, the RAD does not exclude the possibility of third-party financing. Additionally, in June 2021, the European Parliament published a draft report with recommendations to the European Commission regarding ‘responsible’ private litigation funding.¹⁵ This resolution was adopted by the European Parliament on 22 September 2022.¹⁶ The European Commission and the Council are now tasked with determining the extent to which they will follow up on this initiative from the European Parliament. If this initiative leads to EU regulation on private litigation funding, it is expected to have an impact on the further development of third-party financing in the Netherlands and may potentially limit its scope.¹⁷ In such a scenario, the importance of alternative sources of financing would likely increase.

The principal reason for this research is twofold. First, the subject of financing collective actions and settlements has been a topic of academic and societal interest for some time.¹⁸ The introduction of the WAMCA appears to have given an impetus to the use of commercial litigation funding.¹⁹ This has also raised questions about

9 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409/1.

10 Art. 24 Directive (EU) 2020/1828.

11 *Kamerstukken II* 2022/22, 36034, nr. 2.

12 Implementatiewet richtlijn representatieve vorderingen voor consumenten of 1 May 2021, https://www.internetconsultatie.nl/implementatie_rl_collectieve_actie.

13 *Staatsblad* 2022, 459.

14 It is worth noting that although the fear of a claims culture often dominates many discussions, a clear, let alone universally accepted, definition of this concept appears to be lacking.

15 European Parliament 2021 (2020/2130(INL)).

16 *Ibid.*

17 Criticism: Stadler 2022b. See also Cordina & Storskrubb 2022, in particular pp. 40–43.

18 A selection from publications of the past 5 years in the Netherlands: Kramer et al. 2022; Tzankova & Kramer 2021; Kramer & Tillema 2020; Biard & Kramer 2019; Tillema 2019a; Tillema 2019b; Visscher et al. 2018; Tzankova 2017. This subject is also frequently discussed in the media, for example, recently on NOS, *Nieuwsuur* 8 February 2022 (with Tzankova as one of the speakers).

19 Tzankova & Kramer 2021: on the one hand, this is due to the stricter admissibility requirements, which require greater financial resources from the interest organisations. On the other hand, it is because WAMCA allows for the actual legal costs to be reimbursed to the interest organisation, including the costs of financing and the success fee of the litigation funder.

whether alternatives to commercial litigation funding could be desirable and feasible. A revolving litigation fund is an important example of such an alternative. A revolving litigation fund means that the fund is not (entirely) subsidised by government but that it sustains itself through generating funding in ways other than government subsidies.²⁰ Such a fund was also proposed in a recent study on the modernisation of procedural law in the context of Big Data.²¹ Second, the aforementioned RAD offers member states the opportunity to determine that funds not claimed in a collective damages action within a certain period may be allocated to another purpose (cy pres distribution),²² as is already happening in the Netherlands under the WCAM practice. This could contribute to funding a revolving litigation fund and further promote the desired consistency between WCAM and WAMCA practices as envisioned by the legislature. It is important to note that the RAD obliges member states to provide support from the government. This support could include more structural assistance for competent authorities and/or interest organisations, as well as limits or waivers of court fees or other administrative costs, access to legal aid,²³ reimbursement of actual legal costs, and even the abolition of cost orders against representative interest organisations.

1.2 PROBLEM STATEMENT AND RESEARCH QUESTIONS

1.2.1 Problem Statement

The central problem statement of this study is twofold:

First, is there a need and/or a necessity for the establishment of a (revolving) litigation fund for collective actions? Second, how could such a fund be financed and structured in the Netherlands?

This twofold problem statement breaks down into two main questions, each subdivided into a number of sub-questions. To enhance readability, this book is structured along the lines of the different research methods and sources (see Sections 1.3 and 1.4), which only partially aligns with the sequence of the two main questions and sub-questions as presented further on. This is because various research methods were employed in answering some of the research questions, and following the structure of the questions in presenting the findings would lead to extensive cross-references and repetition.

²⁰ Refer also to Section 1.2.3 under (c).

²¹ Van der Sloot & van Schendel 2019, pp. 151-152.

²² Art. 9 lid 7 Directive (EU) 2020/1828.

²³ Art. 20(2) Directive (EU) 2020/1828.

Nevertheless, the two main questions and sub-questions serve as the guiding thread throughout the different chapters.

A. Usefulness and Necessity of a (Revolving) Litigation Fund

The first part of the research focuses on the rationale for a potential litigation fund and addresses the following question: is there a need and/or necessity to establish a (revolving) litigation fund for collective actions? This question can be approached from different perspectives. On the one hand, it can be examined from the perspective of the claiming parties, considering whether there is currently a shortage of adequate financing options for asserting legitimate legal claims. On the other hand, it can be viewed from the perspective of prospective defendants who may be unnecessarily dragged into legal proceedings. The public interest plays a role in both perspectives. The premise for this research assumes that the perspective of the claiming parties and/or the public interest associated with financing legitimate collective actions should be the starting point for the investigation, and this premise has been adopted by the researchers and occasionally supplemented in certain areas, as will be explained later in the discussion of the research methods employed.

B. Financial Structure and Costs of a (Revolving) Fund

The second part of the research focuses on investigating the potential structure for a (revolving) litigation fund that aligns with the identified needs and the intended purpose. It addresses the question, how could a (revolving) litigation fund be funded and structured in the Netherlands?

The sub-questions are outlined further on, and the research methods will also be briefly mentioned, with further details provided in Section 1.3.

1.2.2 Research Questions

Research question (A) regarding the need and/or necessity for the establishment of a (revolving) litigation fund for collective actions is answered on the basis of the following sub-questions:

- (1) What financing options currently exist, in general, to fund a collective action under the WAMCA, and what are the advantages and disadvantages of these options? What is the overall financing landscape in the Netherlands?