Financing Collective Actions in the Netherlands

Towards a Litigation Fund?

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Collective actions and the financing of complex mass damage cases have been among the most debated and controversial topics in civil justice in Europe over the past decade.
With the entry into force of the Dutch collective damages procedure (WAMCA) in 2020, the Netherlands has re- confirmed its reputation as one of the frontrunners in having a well-developed framework for collective actions and settlements. Third party litigation funding has become an important source of funding, and its increase has also fuelled discussion on alternative pathways for funding to secure access to justice.

This book discusses developments in Dutch collective actions and in particular the financing of collective actions from a regulatory, empirical and comparative perspective. It delves into different funding modes, including market developments in third party litigation funding, and extensively addresses the question of the necessity, feasibility and possible design of a (revolving) litigation fund for collective actions. It is of interest to academics, legal practitioners, national and European policy makers and legislators in the area of civil justice.

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Preface and Acknowledgements

Collective actions have been one of the most important and controversial topics in European civil justice over the past decade. The Netherlands is considered one of the front-runners in having a well-developed framework for collective actions and settlements. The legal framework for collective actions was expanded four years ago, when the Mass Damage Settlement in Collective Actions Act (*Wet Afwikkeling Massaschade in Collectieve Actie* or WAMCA), applicable since 1 January 2020, enabled collective claims for compensatory damages. In the same year, the EU Directive on representative actions for the protection of the collective interests of consumers (RAD) was adopted, which has been applicable since 25 June 2023.

Collective actions for compensation are very costly owing to their inherent complexity and often international nature. For this reason, obtaining appropriate funding to bring these claims is crucial. In the Netherlands and several other European countries, third-party litigation funding by commercial funders has become an important way to finance collective actions. This has prompted the European Parliament to adopt a resolution for the regulation of third-party funding in 2022, which has led the European Commission to commission a study on the mapping of third-party litigation funding in the member states.

Acknowledging the importance of funding to sustain a well-functioning collective action system and the increase in third-party litigation funding, the Dutch Ministry of Justice and Security and its Research and Documentation Centre (WODC) commissioned a report on the utility, necessity, design and costs of a (revolving) litigation fund for collective actions. For this report, published in September 2023, extensive research was conducted on the regulation and practice of collective actions and the different funding avenues as well as developments in third-party litigation funding and on (public) litigation funds in the Netherlands and several other countries. Considering the importance of collective actions, ongoing discussions on third-party litigation funding, and the prominent position of the Dutch collective action system in Europe, we thought it worthwhile to translate this report into English and make it available for a broader readership. For the purpose of this book several adjustments were made, and, wherever possible, data was updated to include recent developments in Dutch case law.

We are grateful to the supervisory committee that provided feedback on the WODC report that underlies this book; to the interviewees who have enriched our research by sharing their expertise, experience, and views; and to our student assistants. We would like to thank, in particular, Michael FitzGerald (formerly student assistant at Tilburg

University), who prepared the first draft for the comparative research that underlies Chapter 6 of this book. Edine Apeldoorn (formerly student assistant at Erasmus University Rotterdam) assisted in the research, among others, by collecting relevant materials and mapping Dutch collective actions based on the WAMCA register. She and Eva Jacobse (student assistant at Erasmus University Rotterdam) also assisted in preparing the present book. Thanks are also due to Clive Zietman for reviewing the English version.

Preparing this book was also made possible by the funding of the Dutch Research Council (NWO) for the Vici project 'Affordable Access to Justice: towards sustainable cost and funding mechanisms for civil litigation in Europe' (project no VI.C.191.082), see <www.euciviljustice.eu>.

Rotterdam/Tilburg, November 2023

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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 Onderzoek- en 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 purposes[7] 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: Eijsermans-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?

The first part of this sub-question is answered based on desk research. After a brief overview of the development of collective actions in the Netherlands, the existing options for financing legal proceedings, and collective actions in particular, are discussed.[24] The focus is on the Dutch context, but when relevant, reference is also made to other jurisdictions. In addition to traditional forms of financing, such as publicly funded legal aid and legal expenses insurance, more specific forms that may be relevant to collective actions, such as crowdfunding and the assignment model, are reviewed. In jurisdictions with more experience in handling mass torts, primarily within the common law legal tradition, such as the United States of America, Canada, Australia and Israel (the latter having a mixed civil and common law system), collective procedures are funded primarily through outcome-based fees, such as no-win-no-fee arrangements and third-party litigation funding. Additionally, Canada and Israel have special litigation funds that cover certain costs of collective actions. Among these financing options, TPLF is currently available in the Dutch context (see Research Question 2). No-win-no-fee agreements by lawyers are only allowed in the Netherlands in individual personal injury cases, subject to prior approval by the Dean of the Bar Association. Currently, there are no litigation funds in the Netherlands specifically focused on financing WAMCA collective actions.

To gain a better understanding of how WAMCA cases are financed in practice, an in-depth analysis based on the WAMCA register was conducted, gathering information about the financing methods.[25] Additionally, in the qualitative-empirical part of the research, primarily through interviews, information was obtained regarding the financing landscape.[26]

(2) How has the market for commercial third-party litigation funding, specifically third-party litigation funding, developed, especially in the context of collective actions?

To answer this sub-question, we have examined general developments in the practice of TPLF, both internationally and in the Netherlands. Case law and literature on collective actions was reviewed, particularly concerning the WAMCA. This part of the research is based on desk research,[27] complemented by an analysis of the WAMCA register[28] and qualitative-empirical research, primarily through interviews with key stakeholders, including lawyers, organisations acting as claimants and litigation funders.[29]

24 Refer to Chapter 2, Sections. 2.1 and 2.2.
25 Refer to Chapter 3, particularly Section 3.2.2.
26 Refer to Chapter 4, particularly Section 4.3.
27 Refer to Chapter 2, particularly Sections 2.3-2.5, and concerning Australia also Chapter 6, Section 6.4.
28 Refer to Chapter 3, particularly Section 3.2.2.
29 Refer to Chapter 4.

(3) What relevant regulations exist at the national, European and international levels?

Based on desk research, existing legislation, proposed regulations and soft law instruments have been examined. In the Netherlands, besides the admissibility requirements related to financing included in Article 305a of the Dutch Civil Code (DCC), the 2011 Claim Code as revised in 2019 is of significance.[30] At the European level, the RAD applies.[31] Special attention is directed to the requirements of the RAD and how the stipulated requirements and other rules align with Dutch law and developments in practice. In addition, the European Parliament's Resolution with Recommendations[32] and the response from the European Commission to commission a study to map third-party litigation is discussed.[33] Brief reference is also made to the ELI-Unidroit Model European Rules of Civil Procedure[34] and the European Law Institute's initiative for model rules for TPLF.[35] To gather an international perspective, this part of the research also included legislation in several other countries, including relevant regulatory initiatives in Australia.[36]

(4) What type of cases are pursued under the WAMCA, and what are the costs associated with these collective actions?

Through desk research (literature and case law), an in-depth analysis of the WAMCA register and the interviews, the number of collective actions that have been brought, the characteristics of these cases and the associated costs have been analysed.[37] The case characteristics include the type of cases (including the distinction between those claiming damages and non-compensatory actions), the areas of law, the parties involved in the proceedings, the financing of these cases and cost aspects. Considering that the WAMCA was only introduced in 2020 and that only few cases have been concluded so far, it is not possible to give a complete assessment of the total costs in the different type of cases based only on the documentation available in the register. Therefore, through interviews, more insights into the cost considerations and cost components were obtained.

30 Commissie Claimcode 2019.
31 Refer to Section 1.1 above.
32 European Parliament 2022 (2020/2130(INL)).
33 European Commission, A 007282, 1 December 2022 (in possession of researchers).
34 ELI-Unidroit 2021.
35 ELI, Third Party Funding of Litigation, https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/third-party-funding-of-litigation/. This project started in 2022, and at this moment, there are no (draft) model rules available.
36 Cashman 2021, pp. 93-106. The Australian Law Reform Commission 2018.
37 Refer in particular to Chapter 3.

(5) Which issues arise in financing, and is there a need for alternative sources of funding?

Based on the financing options (Question 1), developments in the litigation funding market, legal framework in the Netherlands and Europe (Questions 2 and 3), and the costs associated with collective actions (Question 4), the problems related to financing are identified. It has been evident from the outset that the costs of collective claims are substantial and that traditional forms of legal aid are either unavailable or insufficient, while there are also limitations and uncertainties surrounding financing by commercial litigation funders. This question is answered through qualitative research, particularly interviews with key players in collective actions and litigation funding in the Netherlands,[38] complemented by a focus group and an expert meeting.[39] In conjunction with the inquiry into the problems, the study also assessed the extent to which there is a need for alternative forms of financing beyond those currently available (see also Sub-Question 9).

(6) For what problems could a litigation fund be a solution, and could a litigation fund be revolving?

Following the findings from the aforementioned sub-questions, the type of cases for which a litigation fund could potentially provide a solution are identified. Whether such a fund could be revolving depends, on the one hand, on the size of the fund and the resources it can generate (including the number of cases and the amount of compensation that could be reinvested in other cases). On the other hand, such a revolving litigation fund could also be funded from unclaimed or leftover compensation in collective actions and settlements that were not financed by the fund.

The aforementioned 2019 research on Big Data, which mentioned the possibility of a litigation fund,[40] did not specifically address the question of whether and under what circumstances such a fund could be revolving. In a broader context, the question of a revolving litigation fund is also relevant in terms of its potential contribution to legal development, especially because some of the cases involve public interests (such as consumer rights, privacy and environmental protection) that might not otherwise be brought before the courts. This sub-question is answered primarily through qualitative research, including interviews, focus groups and expert meetings.[41]

38 Refer to Chapter 4, particularly Section 4.4.
39 Refer to Chapter 5.
40 Van der Sloot & Van Schendel 2019, pp. 151-152.
41 Refer to Chapters 4 and 5.

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

The second part of the research builds on the findings of the first part, particularly Question 6, and focuses on investigating and analysing a potential structure for a (revolving) litigation fund.

The questions regarding the structure and funding of a (revolving) litigation fund in the Netherlands are answered through the following sub-questions:

(7) How are existing litigation funds in other countries organised, and what elements could be suitable for application in the Dutch context?

In this part of the research the most relevant systems abroad were further examined.[42] Litigation funds for collective actions that are of interest to the Netherlands exist in Canada, specifically in Ontario[43] and Quebec,[44] and – to a lesser extent – in Israel.[45] Additionally, specific financing models in Australia are relevant. The study delves into the financing of collective actions, with a particular focus on the structure and management of litigation funds and the extent to which the court takes into account the costs of financing the case when determining the amount of compensation. It also considers the experiences gained with these funds in practice. These experiences are largely drawn from existing literature but have been supplemented through interviews with experts from Canada and Israel. A revolving litigation fund in Chile is only mentioned and not further discussed because it was introduced recently and there is insufficient information available on its functioning.[46] Taking into account the different contexts in which these litigation funds operate, it is examined how far these litigation funds are useful examples for the Netherlands.[47]

(8) What are the advantages and disadvantages of a Dutch litigation fund, how could such a fund be structured and how would this relate to other financing methods?

In this part of the research, the findings from the comparative legal analysis and those from the first part regarding existing financing methods and associated problems are synthesised. The study explores how such a fund could potentially be structured in the

42 Refer to Chapter 6.
43 For an overview see: https://lawfoundation.on.ca/for-lawyers-and-paralegals/class-proceedings-fund/.
44 See, for example, Piché 2022.
45 See, for example, Bukspan 2021.
46 Refer to Chapter 6, Section 6.2, which also mentions similar (research) initiatives elsewhere that ultimately did not lead to the introduction of a litigation fund.
47 Refer to Chapter 7.

Netherlands. It addresses the (financial) powers and safeguards that should apply, the legal conditions and the appropriate forms of funding for a (revolving) litigation fund. Scenarios for a fund both with and without returns will be considered. The report of the General Court of Audit on revolving funds will also be taken into account, considering aspects necessary for the fund's operations, accountability and achievement of its objectives.[48]

(9) Is, all things considered, the introduction of a litigation fund in the Netherlands, also in light of the Representative Actions Directive, useful and desirable?

The final part of this research answers the overarching question of whether the introduction of a (revolving) litigation fund in the Netherlands at this moment is both useful and desirable, taking into account the existing methods of financing collective damage claims, the issues surrounding financing and experiences in other countries.[49]

1.2.3 Definitions and Scope

(a) Collective Actions

In general, a collective action involves a group of claimants who share certain common characteristics bringing a claim against one or more defendants. Although the terms 'group action', 'collective action' and 'class action' are often used interchangeably, there are generally several different mechanisms for collective redress:

- *Representative Actions* – various parties with the same interest are 'represented' by one or more parties instead of requiring each individual to join the action. Each judicial decision is binding on all represented individuals but can only be enforced by or against them if the court has approved the procedure as a representative one (different jurisdictions use terms like certification (US), authorisation (Canada) or admissibility (EU)). The Dutch WAMCA procedure is an example of such a representative action.
- *Class Actions* – these claims must raise common legal or factual issues and have representatives whose claims are typical of a group of claimants (the class) and who fairly and adequately protect the interests of the group. This assumes that the class representative must generally be a member of the represented group. Class actions are typically structured based on an 'opt-out' mechanism, meaning that all potential claimants are automatically part of the defined group when the claim is filed unless they choose to opt out. This significantly increases the size of the group compared

48 Algemene Rekenkamer 2019.
49 Refer to Chapter 7, Section 7.8.

with collective actions filed on an opt-in basis, where all claimants must actively join a claim.

- *Group Actions* – these are conducted on an opt-in basis, meaning that claimants must actively choose to participate if they want to receive a portion of the recovered damages. In the United Kingdom, the court issues a group litigation order (GLO) in such cases, which provides for the case management of claims giving rise to common or related factual or legal issues. A ruling on this binds all claims on this group register.

The term 'collective redress' is commonly used to capture all these different forms of collective proceedings. This term is also used in this book as an umbrella term to capture various types of collective proceedings in the Netherlands and other countries, including collective settlements. We use the term 'collective action' for the representative procedure under the WAMCA that is central to this research, unless otherwise indicated. Collective settlements, such as those under the WCAM, are only addressed to the extent that they are relevant to the question of the costs and financing of collective actions.

Other possible forms of bundled litigation involve disputes between multiple parties, including consolidated claims (where multiple joint claimants use a single claim and the case is managed through the court's case management powers), test cases (where an attempt is made in a case to establish legal and factual findings that may pave the way for a solution in other similar cases, although the ruling in the test case is not formally binding and/or does not have res judicata authority in individual cases), or the consolidation of existing actions, with or without joining of cases and/or roll consolidation.

(b) Opt-Out Versus Opt-In Procedures

Bundling interests in judicial proceedings can be categorised into two models: the 'opt-in' and 'opt-out' models. As mentioned previously, under the opt-in model, victims are bound to a collective action only if they have explicitly consented to it and/or actively registered as participants in the action. In contrast, the opt-out model includes all (potential) claimants within a narrowly defined group in the collective action unless they have explicitly indicated that they do not wish to be bound by it.

Traditionally, Dutch law is based on the principle of party autonomy and, by extension, individual access to justice, as enshrined in Article 6 of the European Convention on Human Rights (ECHR). The main advantage of the principle of party autonomy lies in the freedom of choice for individuals regarding both the chosen settlement strategy and the selection of a representative. Additionally, the right to be heard plays a significant role in this traditional view of access to justice. With regard to collective litigation, this

classical view may lead to a preference for an opt-in model, where an individual victim must actively consent to the bundling of interests in a collective claim. The WCAM and WAMCA procedures are exceptions to this and are designed according to the opt-out model.

A study conducted by the English Civil Justice Council in 2008 showed that opt-out regimes generally have a higher participation rate than opt-in regimes.[50] However, the percentages vary widely, with participation rates in the studied opt-in regimes ranging from 1% to 100% and in the opt-out regimes from 60% to 100%. The opt-out mechanism usually increases the potential compensation that may need to be paid. Although those who opt out of an opt-out procedure are free to file their claims individually, the typically larger size of the group of claimants remaining involved in an opt-out procedure enhances the chance of finality and limits ongoing uncertainty for the defendant.

The design of a collective action regime through opt-in or opt-out mechanisms can have an impact on the financing question and the success fee of the litigation funder. In general, the larger the group, the higher the collective damage claim, and the lower the success fee of the litigation funder.

(c) Revolving Litigation Fund

In a report by the Netherlands Court of Audit from 2019, a public revolving fund is described as a fund into which the government deposits public funds with the aim of financing projects with a social purpose.[51] However, there are various forms, including private revolving funds and public funds that are only partially funded by government contributions.[52] In this research, the emphasis is primarily on a private revolving litigation fund, which is not dependent, or at least not decisively, on government financing. It is a fund designed to finance collective actions, primarily or entirely funded by the proceeds from or what remains in collective actions.

1.3 Research Design and Methods

For the purpose of this study three research methods were employed: (1) desk research, (2) comparative law research and (3) empirical research. This approach aimed to ensure that the topic of research could be viewed from different angles and jurisdictions, and that both theory and practice were taken into account. This section provides a

50 Civil Justice Council of England & Wales 2008. See also van Dijck *et al.* 2010.
51 Algemene Rekenkamer 2019, p. 5.
52 Van Waarde 2020.

brief explanation of this threefold methodology. In the various chapters of this book, which is structured according to the different research sources and methods, a more detailed explanation is provided.[53] The research was concluded on 1 July 2023, but a few developments in case law after that date have been taken into account.

1.3.1 Desk Research

The desk research includes an examination of relevant legislation and further (soft law) regulation, literature study, case law research and an analysis of the WAMCA register. The research on legislation encompasses the relevant legal provisions in the Netherlands, especially the WAMCA (Articles 3:305 et seq. of the Dutch Civil Code and Articles 1018b et seq. of the Dutch Code of Civil Procedure), as well as soft law under the Claim Code 2011 as amended in 2019.[54] Additionally, European legislation and soft law and, where relevant, legislation in other countries has been examined. Particular attention is paid to the EU Representative Action Directive (RAD), the European Parliament Resolution with Recommendations for a directive on Responsible Private Litigation Funding, as well as the ELI-Unidroit European Model Rules of Civil Procedure.

The literature study is based on Dutch literature and reports, especially concerning the WAMCA, and further Dutch procedural regulations and Dutch market developments. A significant number of foreign sources, mainly in English, have been consulted for international and European regulations and developments regarding financing, particularly financing by commercial third parties (third-party litigation funding) in the context of collective actions.

The case law research via rechtspraak.nl focuses primarily on judgments rendered in WAMCA cases, which until now have been limited in number. This case law research is not intended as an exhaustive study of all cases under the WAMCA but serves primarily to identify specific issues that may also affect costs and financing.

In addition, an analysis based on the WAMCA register was conducted on the type of cases and funding aspects, taking into account claims filed between 1 January 2020 (the date on which the WAMCA became applicable) and 1 July 2023. This research is primarily quantitative in nature, and it also falls under the empirical research, discussed in Section 1.3.3.

53 Refer to Chapter 3, Section 3.1, Chapter 4, Section 4.1 and Chapter 5, Section 5.1.

54 This Claim Code (in Dutch: Claimcode) is a governance code drafted by the committee, the 'Commissie Claimcode', consisting of members with different (legal) professional backgrounds.

Desk research was carried out mainly to answer questions about the financing options and costs of collective actions, market developments for commercial third-party financing and the regulation of this in the Netherlands and in the European context (Sub-Questions 1–4). The reporting of this research is done mainly in Chapter 2 but is also taken into account in the other chapters.

1.3.2 Comparative Research

In addition to the desk research, which focused primarily on Dutch and relevant European regulations and developments, more extensive research on comparable litigation funding schemes in other countries was conducted. After a quick scan of existing forms of public and private financing of collective actions and existing or proposed forms of litigation funding, Canada (Ontario and Quebec) and Israel were selected as the most relevant jurisdictions. These are currently the only jurisdictions with such funds and where significant experience has been gained. Additionally, Quebec follows the civil law legal system, Ontario follows the common law legal system, while Israel has a mixed legal system. Moreover, these jurisdictions, like the Netherlands, have a loser-pays system for litigation costs. Specific financing arrangements in Australia were also considered because this legal system has the most experience with the use of third-party litigation funding for (opt-out) collective actions and the (im)possibilities of regulation. Just like in the Netherlands, no-win-no-fee arrangements for lawyers are generally not allowed in Australia, and the loser of a claim is responsible for paying the opposing party's costs.

The research is based on the study of relevant regulations, case law and literature in these countries. In addition, and for verification purposes, several interviews were conducted with experts in these countries. This includes a total of four interviews with two experts from Australia, Canada, the United States and Israel.

The research provides a description of the existing funds, practical experiences, relevant differences in design and the considerations that played a role in shaping these funds in these countries. The research answers the question of comparable litigation funding schemes abroad and the extent to which they are suitable for a similar implementation in the Netherlands (Sub-Question 7). It also provides insights into methods of financing (Sub-Question 1), the advantages and disadvantages and further structuring of a possible litigation funding scheme (Sub-Question 8). The results of the research are documented in Chapter 6 and are also referenced in several other chapters.

1.3.3 Empirical Research

An important component of the research consists of empirical research. As mentioned in the previous paragraph, in addition to the comparative legal research on financing and public funds in other countries, four interviews were conducted with two experts from Australia, Canada, the United States, and Israel, respectively.

In addition to desk research on collective actions and financing in the Netherlands, a quantitative analysis was conducted based on the WAMCA register. Another significant component of the research is qualitative research conducted through interviews with key stakeholders, along with a focus group and an expert meeting. A helpful orientation of ideas about financing collective actions in the Netherlands and the added value of a possible litigation funding scheme took place during a seminar organised by ClaimShare (a mediator between claimants/attorneys and funders) on 24 March 2022. Two of the researchers participated as speakers and organised a panel on the subject of this research. The seminar was also useful for establishing contacts with potential participants for the qualitative part of the research.

The empirical research is essential for gaining a better understanding of the financing landscape (Sub-Question 1), market developments in the field of commercial litigation funders (Sub-Question 2), the costs associated with conducting collective actions under the WAMCA (Sub-Question 4) and for identifying financing problems (Sub-Question 5). It has also provided insights into the problems a litigation funding scheme could address, how it could be structured, and the necessity and utility of such a fund (Sub-Questions 6, 8, and 9). This research is reflected in Chapters 3 (WAMCA register analysis), 4 (interviews), and 5 (focus group and expert meeting). The methods are elaborated on in the respective chapters and are only briefly explained here.

(a) Analysis of the WAMCA Register

To get an overview of the current Dutch market for litigation funding in mass tort cases, a systematic quantitative analysis was conducted based on the WAMCA register available on rechtspraak.nl.[55] All collective actions under the WAMCA must be registered in this database since 1 January 2020. The analysis was conducted for all cases that were registered up to 1 July 2023. For the analysis, documents from the WAMCA register were reviewed and filtered for several key data points relevant to this research. The documents available in the WAMCA register include filed (appellate) summonses, procedural decisions, interim judgments, supplementary judgments and final judgments. Case characteristics

55 Centraal register collectieve vorderingen: https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen.

that were recorded for this research include the involved interest organisations, the defendants involved, any involved funder, the type of collective action, the legal area to which the collective action pertains, the (inter)national context of the collective action, the amount of damages claimed and how the collective action is financed.[56]

(b) Interviews

Interviews were conducted to gain insight into how collective actions are developed and the cost structure and financing of such cases. They were also aimed at investigating challenges in the practice of the WAMCA and developments in the commercial financing market and gathering opinions on the utility and necessity of a litigation fund. In addition to the analysis based on the WAMCA register, the interviews provide a more detailed view of the costs of such procedures, the considerations made by interest organisations, and the financing issues that arise in this context.

Initial respondents were selected based on their involvement in WAMCA cases, and additional respondents were identified through snowball sampling. Three groups of respondents were approached: (1) lawyers, (2) interest organisations acting as claimants and (3) third-party funders. Originally, the research also considered involving judges. However, this was omitted because there is relatively little experience within the judiciary regarding the financing aspect of WAMCA cases, because the time required to obtain formal permission from judges to participate in the study would be beyond the research timeline and because we were able to gather indirect input from judges who participated in other meetings.[57] In total, 15 interviews were conducted with 19 respondents. The group of respondents consists of 14 lawyers (including 10 independent lawyers and 4 in-house lawyers from existing interest organisations), 3 litigation funders and 2 ad hoc interest organisations.

During the interviews, respondents were asked about their experiences with the WAMCA procedure (where applicable, in comparison with the old 3:305a regime or WCAM procedures), the costs (and cost structure) related to collective actions, financing strategies and related challenges. They were also asked about the potential contribution that a litigation fund for collective actions could make to the practice.[58] These insights were complemented by findings from the focus group and expert meeting.

56 Refer to Chapter 3, Section 3.1.
57 In particular, an evaluation meeting on the WAMCA organised by the Ministry of Justice and Security on 23 June 2022, in which one of the researchers also participated.
58 Refer to Chapter 4, Section 4.2 and Annex 2 (Topic List).

(c) Focus Groups

In addition to the interviews conducted primarily with claimants to address the question of the utility and necessity of a litigation fund, a focus group meeting was held with a group of five Dutch lawyers who have extensive experience representing defendants in collective actions. Prior to the meeting, a brief explanation of the research was provided in writing, and questions related to relevant developments and issues from the perspective of defendants were presented. The questions aimed to explore the potential contribution of a litigation fund, which cases should be funded, how the fund could be revolving and how it could be organised.[59] This meeting took place after the completion of interviews and an initial analysis, serving as a means of triangulation and validation.

(d) Expert Meeting

In addition to the interviews, an expert meeting was held for triangulation, validation and discussion of some preliminary findings. Experts in the field of collective actions and settlements from the Netherlands and a few from abroad were invited for this purpose. A total of nine experts participated in the expert meeting, including academics and representatives from a consumer organisation or a funder. Prior to the meeting, a brief explanation of the research and some findings was provided in writing, along with questions and discussion points. These pertained to the need for alternative funding methods, the potential contributions of a litigation fund, which cases should be financed, how the fund itself could be financed and how the fund could be organised.

1.4 Outline of this Book

This book is structured along the research methods and sources. Considering that the findings of the different research methods, including the desk research, empirical research and comparative research, each have their own intrinsic value, it proved more viable to include these in different chapters. Chapter 2 contains the extensive desk research on the development of collective actions in the Netherlands, in particular the WAMCA, financing and regulation. Chapter 3 includes an in-depth (quantitative) analysis of WAMCA cases filed since its entry into force on 1 January 2020 until 1 October 2022. Chapter 4 contains the (qualitative) analysis of the interviews conducted for this research, and Chapter 5 the reports resulting from the focus group and the expert meeting. The comparative study is presented in Chapter 6. Chapter 7 contains the analysis and conclusions based on the previous chapters and in light of the research questions.

59 Refer to Chapter 5, Sections 5.1 and 5.2.

2 The Dutch Collective Action Regime, Financing Options and Regulation of Third-Party Litigation Funding

This chapter first provides a brief overview of the development of collective actions in the Netherlands, particularly the new WAMCA regime (Section 2.1). This is not an exhaustive discussion of the WAMCA regime but serves to set the scene, in particular for the interviews reported in Chapter 4, where the heightened admissibility requirements frequently come to the fore. Thereafter, it discusses various methods of financing collective actions, excluding commercial financing, along with their limitations (Section 2.2). It then delves into private financing by commercial third parties (third-party litigation funding, TPLF) (Section 2.3), the development of the financing market in the Netherlands (Section 2.4), and relevant national and European regulations and initiatives (Section 2.5).

2.1 Development of Collective Actions in the Netherlands

The collective settlement of mass claims has become an important area of Dutch private law and civil procedure. The Netherlands has a relatively long history of collective redress. Two general civil law mechanisms have been specifically designed for collective settlement in court: the Collective Action Act (WCA, Article 3:305a of the Dutch Civil Code), which was introduced in 1994, and since 2005, the Act on Collective Settlement of Mass Damages (WCAM, Articles 7:907-910 of the Dutch Civil Code). Under the WCA, no collective actions to obtain compensation was possible, whereas under the WCAM, it is possible, but only on a voluntary basis as it is a settlement mechanism. Since 2020, with the amendment of the WCA, the WAMCA has come into effect, allowing claims for damages to be brought outside the context of a (voluntary) settlement. Therefore, since January 2020, damages can be claimed in a collective action.[1]

1 In addition, collective recovery also occurs in other procedural forms, for example as a result of joining comparable pending cases and/or assignment of claims to a claim entity. Well-known examples of this are cartel damage claims, such as Amsterdam District Court 12 May 2021, ECLI:NL:RBAMS:2021:2391, about the truck cartel; Rotterdam District Court 23 June 2021, ECLI:NL:RBROT:2021:6635, about the elevator cartel; Amsterdam Court of Appeal 6 July 2021, ECLI:NL:GHAMS:2021:1940, about the air freight cartel.

Collective action procedures are used regularly, particularly in the area of financial law, consumer law, cases involving infringements of personality rights (privacy) and intellectual property rights and, to a lesser extent, in personal injury cases. The collective interest organisations 'market' has grown and has become more professional over the past 10 years. This applies to both 'ad hoc' foundations, which are specially established for a specific claim, and traditional interest organisations such as labour unions and consumer organisations. A middle ground has also emerged: 'ad hoc multipurpose foundations' that are established in response to a specific case but that aim to address a certain category of cases, in particular, consumer cases. Due to the increasing (mass) communication possibilities, these organisations can reasonably expect to quickly, effectively and for a manageable cost, connect with very large numbers of potential claimants.

More recently, a strong market for third-party funding has developed. With the emergence of this market, concerns have been raised about the potential creation of an 'American-style' claims culture, where commercial parties primarily pursue their own interests, possibly at the expense of the aggrieved parties represented in the collective actions. At the same time, third-party funding can play a crucial role in collective actions, and commercial funders can contribute to improving access to justice by enabling costly legal proceedings that would otherwise not be feasible. As the data discussed in Chapter 3 shows, third-party funding is pivotal in collective actions for damages.[2]

2.1.1 WCA, WCAM and WAMCA

The development of collective actions through a representative foundation acting on behalf of victims in the Netherlands has evolved along the following lines.[3] In 1994, previous case law that allowed for collective redress was codified with the introduction of the Collective Action Act (Wet Collectieve Actie or WCA, Article 3:305a of the Dutch Civil Code) and existing fragmented legislation was revoked. The development of a collective action regime was spurred by the realisation that individual litigation in the context of mass damage claims, particularly in cases of general interest, was at best sporadic and that laws and regulations were not (sufficiently) enforced. Individuals were either unwilling or unable to seek redress because the interests were insufficient and/or the litigation costs were too high. The legislature assumed that such barriers to access

2 Refer to Chapter 3, Section. 3.3.

3 On these developments, among others, van Boom 2019; van der Krans 2019; Oving 2020; Tzankova & Kramer 2021. For an overview of case law, see de Monchy & Kluwen 2022.

to justice would not exist or would be less significant for representative organisations. Therefore, in 1994, representative organisations were granted the authority to initiate a collective action on behalf of a group of victims before the court. This collective action could result in injunctive or declaratory relief.

Until 2020, there was no possibility for claiming collective compensation. A collective action would require an individual assessment that was deemed unsuitable for such action, while compensation could also be achieved through a voluntary settlement or individual action following a declaration of law. In practice, however, there was a need for compensatory collective redress.

The first step towards this was the introduction of the Act on Collective Settlement of Mass Damages (WCAM) in 2005. The regulation is set out in Articles 7:907-910 of the Dutch Civil Code (DCC) dealing with the binding settlement coupled with the procedural rules in Articles 1013-1018a of the Dutch Code of Civil Procedure (DCCP). The immediate reason for introducing this new procedure was the DES case, which involved liability claims for pharmaceutical products.[4] After years of litigation in the DES case, a voluntary settlement was reached between the liable parties and the representative of victims. In order to secure compensation for the victims and provide finality for the liable parties, the parties sought to have the settlement declared binding, which the WCAM ultimately allowed. The WCAM procedure essentially involves one or more representative organisations, on the one hand, and the alleged liable party(ies), on the other hand, jointly submitting a petition to the Amsterdam Court of Appeal to have an agreement they have reached on compensation or damages declared binding on the entire group of victims. Nine settlements in eight cases have been reached under the WCAM so far.[5]

In the years following the introduction of the WCAM, the debate on collective redress continued. The main issue was bridging the gap between the collective action and WCAM for situations in which the (alleged) liable party is unwilling to negotiate. After years of debate and revisions of the (draft) bill, the WAMCA was introduced on 1 January 2020, complementing the regime of collective actions and settlements in the Netherlands. As mentioned, with the amendment of Article 3:305a et seq. of the DCC, the WAMCA expanded the collective action to include the possibility of claiming

4 Supreme Court 9 October 1992, ECLI:NL:HR:1992:ZC0706, NJ 1994/535 m.nt. C.J.H. Brunner (*DES daughters*).

5 Tillema 2018. The latest settlement, which is not included in Tillema's article, is Amsterdam Court of Appeal, 13 July 2018, ECLI:NL:GHAMS:2018:2422 (*Fortis/Ageas*).

damages.[6] Procedural rules are set out in Articles 1018b-m of the DCCP. While the new rules enable collective damage recovery through a court decision, reaching a settlement remains one of the focal points of the law.[7] This is encouraged by improving the quality of the representative parties (stricter rules for their governance, financing and representativeness), greater coordination of collective proceedings (joining claims and appointing an exclusive representative (ER) organisation), and the finality of a settlement agreement (the opt-out principle applied twice: after the designation of the ER and after reaching a potential collective settlement) or the court decision (the opt-out principle is applied only once after designating the ER).

Despite initial reluctance at the European level regarding opt-out procedures,[8] as the WCAM, the WAMCA is also primarily an opt-out procedure, with the exception of interested parties who do not have a domicile or residence in the Netherlands, although it may be requested to apply the opt-out regime.[9] The Oost-Brabant District Court rejected a request to apply an opt-out regime for foreign interested parties in accordance with Article 1018f(5) DCCP, as it was only an exception motivated by the interests of a party.[10] In this case, it concerned a group of unknown size, and the court considered an opt-out for foreign interested parties undesirable due to the far-reaching issue at stake, namely the specific pension scheme to which the relevant employees belong and the indirect involvement of pension insurers. In an intellectual property case brought by the BREIN Foundation, the Hague District Court ruled that the opt-out regime could be applied.[11] In this case many interested parties were located abroad, and not all of them were prepared to send individual opt-in letters to the Dutch court. Since they had financially contributed and had never raised any objection against the litigation, it was considered important that their interests would be covered by the litigation as well.

Furthermore, since 25 June 2023, the Representative Action Directive (RAD) applies.[12] Its aim is to ensure that a mechanism for representative actions is available in all member states to protect the collective interests of consumers.[13] As the Netherlands

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6 Amsterdam Court of Appeal 1 June 2006, ECLI:NL:GHAMS:2006:AX6440, NJ 2006/461 (*Stichting DES Centrum*).

7 *Parliamentary Papers II* 2016/17, 34608, no. 3, point 4.

8 See, e.g., European Commission Recommendation 2013 (2013/396/EU), No. 21: "The claimant shall be constituted on the basis of the express consent of the natural or legal persons claiming to have been harmed ('opt-in'-principle). Any exception to this principle, whether by law or by judicial decision, must be duly justified by reasons relating to the sound administration of justice."

9 Art. 1018f, Para. 5 DCCP. On this basis, at the request of a party, the court can decide to also apply an opt-out with regard to foreign interested parties. This does not apply in RAD cases, Art. 1018f, Para 6 DCCP.

10 Oost-Brabant District Court, 14 September 2022, ECLI:NL:RBOBR:2022:3931 (*FNV and CNV/GXO Logistics*).

11 The Hague District Court, 3 May 2023, ECLI:NL:RBDHA:2023:6324 (*Stichting BREIN/gedaagde*).

12 Directive (EU) 2020/1828.

13 Art. 1 Directive (EU) 2020/1828.

already had these mechanisms in place, legislation needed only minor adjustments.[14] The RAD leaves the choice of an opt-in or opt-out system, or a combination thereof, to the member states.[15] The main amendment to the WAMCA concerns additional admissibility requirements, which will be addressed further on.[16] These additional requirements only apply insofar as the claim falls within the scope of the RAD. These are the representative actions referred to in Article 2 that are brought for infringements caused by acts concerning the provisions of EU law, as listed in Annex I of this Directive, including their transposition into national law.[17]

2.1.2 Some Key Points of the WAMCA Procedure

(a) Preliminary Issues: Transitional Law and International Jurisdiction

The WAMCA entered into force on 1 January 2020 and is applicable to collective actions filed on or after this date. However, as transitional law, it also applies to events that occurred on or after 15 November 2016.[18] This is the date when the bill was sent to Parliament. For events before this date, the old conditions still apply, which also means claiming compensation is not possible. This can lead to complications, especially in mass damage cases that occurred wholly or partly before the cut-off date, such as in the diesel emission cases. In the parliamentary documents, it is explained that in cases where a series of damage-causing events occurred partly before and partly after this date, the law applicable is the one that was in force at the time of the last event to which the claim relates.[19] In the Volkswagen cases[20] against Stellantis[21] (Fiat-Chrysler group), the Amsterdam District Court determined that the decisive factor was the time when the cheat software was developed, and, therefore, the WAMCA regime, with the possibility of claiming compensation, did not apply. This ruling was repeated in later cases involving cheat software,[22] while the same court, in a different composition, surprisingly came to a different assessment and outcome in a case against Vattenfall concerning alleged overbilling, where there was also a claimed long-term deception of a contractual counterparty.[23]

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14 *Staatsblad* 2022, 459.
15 See considerations 34, 43, 44 and 46, as well as art. 9 Directive (EU) 2020/1828. See, however, Art. 1018f, Para 6 DCCP.
16 Refer to Section 2.1.3 sub (d).
17 This lists 66 guidelines.
18 Art. 119a Transitional Act new Civil Code.
19 *Parliamentary Papers II* 2019/19, 34608, no. 13 (amendment).
20 Amsterdam District Court, 30 March 2022, ECLI:NL:RBAMS:2022:1541 (*Volkswagen*).
21 Amsterdam District Court, 30 March 2022, ECLI:NL:RBAMS:2022:1542 (*Stellantis*).
22 Amsterdam District Court, 1 February 2023, ECLI:NL:RBAMS:2023:468 (*Renault*).
23 Amsterdam District Court, 1 February 2023, ECLI:NL:RBAMS:2023:403 (*Vattenfall I*). Another judgment in this case was rendered later in that year, dealing with the funding agreement: Amsterdam District Court, 25 October 2023, published in the WAMCA register (*Vattenfall II*), see further Section 2.1.3.

In cross-border cases, the court will also have to establish international jurisdiction. The question of international jurisdiction arises as a preliminary question before assessing the conditions and specific admissibility requirements. In many cases, especially when the defendants have their domicile in an EU member state, the Brussels I-bis Regulation will apply.[24] In particular, Article 4 (defendant's domicile) and Article 7(2) (place where the damage occurred) and possibly Article 8 (multiple defendants) are relevant. In cases where the claim is (partly) based on a contract, Article 7(1) (place of performance of the contract) is important. Following the Schrems ruling by the European Court of Justice, it seems clear that the consumer protection provisions, allowing proceedings in the consumer's place of domicile,[25] do not apply in cases of representative actions where a claims foundation is acting or in cases of assignment of claims.[26] For cases where the Brussels I-bis Regulation does not apply, the rules of Articles 1-14 of the DCCP are determinative, with Articles 6 and 6a (Sub-Section a contract and Sub-Section d tort) and Article 7 (multiple defendants) being particularly relevant. In certain cases, special jurisdiction rules may also apply, such as those of the General Data Protection Regulation (GDPR) in the TikTok case.[27] In the latter case, Article 79 GDPR was used as a basis for jurisdiction alongside Brussels I-bis, as the court ruled that the GDPR was not exclusive.

(b) Key Phases in the WAMCA Procedure

Apart from potential complications related to transitional provisions and international jurisdiction, the key phases of the WAMCA procedure can be outlined as follows.[28] Once at least two weeks have passed after the request for consultation,[29] the claim organisation, as defined in Article 3:305a DCC, must prepare a process introduction. This introduction should include details such as the event(s) to which the claim pertains, the group of interested parties, how the admissibility requirements are met,[30] and information that enables the court to appoint an ER if necessary.[31] Subsequently, within two days of submitting the process introduction, the claimant must make an entry in the WAMCA register.[32] After a waiting period of 3 months, during which other organisations can also

24 Regulation (EU) No. 1215/2012. See Art. 4 jo.6 Brussels I-bis. This may be different if a forum choice has been made, but this will rarely be the case in mass damage cases under the WAMCA.
25 Art. 17-19 Brussels I-bis regulation.
26 CJEU, 25 January 2018, case C-498/16, ECLI:EU:C:2018:37 (*Schrems/Facebook*). This was, for instance, also concluded in the Hague District Court, 21 June 2023, ECLI:NL:RBDHA:2023:8562 (*Stichting Massaschade & Consument/Airbnb*).
27 Amsterdam District Court, 9 November 2022, ECLI:NL:RBAMS:2022:6488 (*TikTok I*).
28 See also van der Krans 2019, in particular pp. 64-66.
29 Art. 3:305a, Para. 3 sub c DCC.
30 See Art. 3:305a DCC.
31 Art. 1018c, Para. 1 DCCP.
32 Art. 1018c, Para. 2 DCCP and Art. 3:305a, Para. 7 DCC.

file a claim for the same event(s) with the same court,[33] the admissibility requirements set out in Article 3:305a DCC are assessed. Before proceeding with the substantive review, a decision is made (a) on whether these admissibility requirements have been met, (b) whether the claimant has sufficiently demonstrated that pursuing this collective claim is more efficient and effective than filing an individual claim,[34] and (c) that there is no prima facie deficiency in the collective claim.[35] Subsequently, the court appoints the ER, taking into consideration the size of the group represented by the claim organisation, their financial interest, other activities performed for this group, and previous activities or collective claims initiated.[36] The ER generally handles the procedural steps, while the other claimants remain parties. Following this decision, the opt-out period (and for foreign interested parties, the opt-in period, unless one of the parties requests to opt out and the court grants that request) typically lasts one month.[37]

If no settlement is reached after an attempt to do so,[38] the case is heard on its merits, and if successful, a collective compensation scheme is established where relevant.[39] Subsequently, notice is given to the known interested parties by letter, and an announcement is published on the internet page that should have been made available at the beginning of the case.[40] In the case of an agreed settlement, the settlement agreement is submitted to the court for approval in accordance with the WCAM procedure.[41]

2.1.3 Enhanced Admissibility Requirements WAMCA and Directive Supplement

(a) General Admissibility Requirements

One of the key points of the WAMCA is the admissibility requirements, which have been made stricter compared with the WCA and which also differ from the requirements

33 Art. 1018c, Para. 3. The judge can extend this period by another 3 months.
34 See Art. 1018c lid 5 sub b DCCP. This can be made plausible because "the factual and legal questions to be answered are sufficiently common, the number of persons whose interests the claim is intended to protect is sufficient and, if the claim is for damages, that they alone or jointly have a sufficiently large financial interest".
35 Art. 1018c, Para. 5 DCCP.
36 Art. 1018e, DCCP.
37 Art. 1018f, Para. 5 DCCP. In its ruling of 14 September 2022, the Court of Oost-Brabant ruled in a case filed by FNV/CNV that opt-out should be used sparingly and rejected the request: Court of Oost-Brabant, 14 September 2022, ECLI:NL:RBOBR:2022:3931 (*FNV and CNV/ GXO Logistics*).
38 Art. 1018g DCCP.
39 Art. 1018i DCCP.
40 Art. 1018j DCCP.
41 Art. 1018h DCCP.

for the WCAM. There has been criticism of these requirements in the literature.[42] The admissibility requirements are set out in Articles 3:305a, Paragraphs 1, 2, 3 and 5 of the DCC. In accordance with the implementation of the RAD, these requirements have been further supplemented since 25 June 2023 for claims falling within the scope of this Directive.[43] This addition will be discussed at the end of this section (under Sub-Section d).

First, the representative foundation must demonstrate that it represents the interests of other persons as stated in its articles of association and that these interests are sufficiently safeguarded.[44] The latter is detailed in strict representativeness requirements. The organisation must be sufficiently representative given the membership and the scale of the represented individual claims and must have the following:[45]

- A supervisory body.
- Appropriate and effective internal decision-making mechanisms that give the membership a voice.
- Sufficient resources to bear the costs of the proceedings.
- An easily accessible website with information about the articles of association, governance structure, governance and supervisory reports, remuneration of board members and supervisors, progress updates, insight into the calculation of contributions that may be requested from members, and information on how to join and leave the organisation.
- Sufficient experience and expertise in conducting collective claims.

In addition, the following requirements apply to establish admissibility:[46]

- The directors involved in the establishment of the legal entity and their successors do not have a direct or indirect profit motive realised through the legal entity.
- The claim has a sufficiently close connection to the Dutch jurisdiction.[47]
- Adequate efforts have been made to reach a settlement through dialogue.
- A management report and annual financial statements have been prepared and published on the website.

42 See, among others, Bauw & Voet 2017, p. 244; van Boom 2019, pp. 158-159; Tzankova & Kramer 2021, p. 126; van der Krans 2019, pp. 67-68, who does not call this unrealistic but does see problems in the higher costs in combination with limitations in financing.

43 *Staatsblad* 2022, 459. See further in this paragraph sub (d).

44 Art. 3:305, Para. 1 DCC.

45 Art. 3:305, Para. 2 DCC.

46 Art. 3:305a, Para. 3 DCC.

47 This 'scope rule' is further elaborated in art. 3:305a, Para. 3 sub, see this paragraph sub (b).

If the foundation or association does not meet these requirements, then it results in inadmissibility, unless the 'lighter' regime of Paragraph 6 applies.[48]

As is clear from case law, the admissibility requirements are thoroughly reviewed. An important judgment in this regard was given by the Hague District Court in the Airbus case.[49] The court declared the two claimant organisations inadmissible. The first organisation was not considered representative as the number of private investors (410) and institutional investors (less than 10) was considered too small in relation to the total number of (potential) victims. The other claimant organisation was declared inadmissible because it lacked sufficient experience and expertise and governance issues. What is important for the present research is that the governance concerned the TPLF, in particular. The claimant organisation was considered not to be sufficiently independent from the commercial funder as it largely seemed to depend on the expertise of the funder in managing the procedure and as there were close connections between the boards of the foundation and the funder.

In a second interim judgment in the TikTok case, the funding agreement was reviewed critically. The Amsterdam District Court required that the terms of the funding agreement be amended to avoid the claimant organisations being declared inadmissible due to a lack of independence.[50] The same happened in the Vattenfall case, wherein the Amsterdam District Court – with different judges than in the TikTok case – had requested more detailed information about the funding agreement and the maximum budget (not all of which had to be disclosed to the defendant).[51]

(b) Scope Rule: Close Connection to the Netherlands

The 'scope rule' in Article 305a(3)(b) of the DCC is a specific admissibility requirement. The requirement of a close connection to the Netherlands is considered met when: (1) the legal entity sufficiently demonstrates that the majority of the persons for whose protection the action is brought have their habitual residence in the Netherlands; or (2) the defendant in the action has his or her domicile in the Netherlands, and additional circumstances indicate a sufficient connection to the Dutch jurisdiction; or (3) the events on which the action is based occurred in the Netherlands.

48 See further in this paragraph, sub (c).

49 The Hague District Court, 20 September 2023, ECLI:NL:RBDHA:2023:14036 (*Stichting Investor Loss Compensation/Airbus SE*).

50 Amsterdam District Court, 25 October 2023, ECLI:NL:RBAMS:2023:6694 (*TikTok cs II*). See also Silva de Freitas *et al*. 2023.

51 Amsterdam District Court, 25 October 2023, included in the WAMCA register (*Vattenfall II*).

While this requirement is framed as an admissibility requirement, it appears to resemble the criteria of international jurisdictional requirements mentioned earlier.[52] The question of compatibility with the jurisdictional rules, especially those of the Brussels I-bis Regulation, was explicitly discussed during the legislative process. The State Commission for International Private Law and the Advisory Committee on Civil Law advised framing this rule as a specific national admissibility requirement.[53] However, scholars have argued that this requirement may be at odds with international jurisdictional law and the principle of non-discrimination under EU law.[54]

In practice, the scope rule has been considered in several cases, and it has been mentioned as an obstacle in interviews as well.[55] For instance, in the Boskalis case, the Rotterdam District Court declared a consumer organisation inadmissible in summary proceedings because, except for the defendant's place of establishment, there was no connection to the Netherlands.[56] Similarly, in the privacy case against Oracle and Salesforce, the Amsterdam District Court concluded that the admissibility requirement was not met because only part of the databases could be traced back to the Netherlands.[57] In a case brought by the BREIN Foundation, the Midden-Nederland District Court also expressed doubts about the compatibility of this requirement with EU law, but because the requirement was met in that case, there was no need to refer preliminary questions to the Court of Justice of the European Union.[58] It is expected that eventually, there will be preliminary questions submitted to the Court of Justice of the European Union regarding this requirement.[59]

(c) Lighter Regime under Article 305a(6): Non-profit Objectives and Limited Financial Interest

With the heightened admissibility requirements, the procedure has become, according to some authors, 'top-heavy'[60] and 'far too burdensome'[61] for injunction and declaration actions that could already be brought under the old regulations. Van Boom & Weber predicted that "non-institutional interest organisations and well-intentioned ad hoc organisations advocating consumer interests will also face challenges".[62]

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52 Refer to Section 2.1.2 sub (a).
53 State Commission for Private International Law and Advisory Commission on Civil Law 2016, point 4.
54 Van der Plas 2019; Tzankova & Kramer 2021, pp. 121-122.
55 Refer to Chapter 4, Section 4.10 and interview no. 11.
56 Rotterdam District Court (vzr.), 18 September 2020, ECLI:NL:RBROT:2020:8228 (*Boskalis*), r.o. 4.4-4.7.
57 Amsterdam District Court, 29 December 2021, ECLI:NL:RBAMS:2021:7647 (*TPC/Oracle en Salesforce*), r.o. 5.15.
58 Midden-Nederland District Court, 2 June 2021, ECLI:NL:RBMNE:2021:2142 (*Brein/YISP e.a.*), r.o.2.16.
59 De Monchy & Kluwen 2022, p. 87.
60 Bauw & Voet 2017, p. 244.
61 Van Boom & Weber 2017, p. 297.
62 *Ibid*.

The legislature did not overlook this concern and allowed for an exception to this 'heavy' admissibility regime in Article 305a(6). It is stipulated there that the court can still declare the claimant admissible if one or more of the criteria mentioned in Paragraph 2, as well as the additional admissibility criteria of Paragraphs 3 and 5, have not been met. The court can do this if the collective claim is filed with an idealistic purpose and involves a very limited financial interest or if the nature of the claim of the foundation or association, or of the individuals whose interests the claim seeks to protect, gives rise to such an exception. Ultimately, it is left to the judge to assess whether an organisation qualifies for the exception in Paragraph 6 in practice.[63] The first exception, for example, will apply to claims aimed at protecting the environment. The second exception is less clear in its interpretation. Van Boom and Weber even refer to the interpretation of this exception as 'completely obscure'. They write,

> In any case, the intention is not to allow claim cowboys to gain entry: the government states that there is no reason to make an exception to the strict admissibility requirements when a declaration of law is requested as a prelude to a collective compensation action. Whether it is possible (and desirable) to separate the sheep from the goats at this stage is, frankly, doubtful.[64]

Paragraph 6 also specifies that the exception cannot be applied in cases where the legal claim seeks monetary compensation.

In the meantime, Article 3:305a(6) DCC has been applied in several court cases. This occurred, among other cases, in a case brought by *Stichting BREIN*, in which the Midden-Nederland District Court considered that although *Stichting BREIN* also represents the commercial interests of copyright holders, these claims "in a broader sense serve the societal interest of preventing the Netherlands from becoming a haven for pirates offering illegal copies of films and TV series via Dutch servers".[65]

(d) Implementation of the Directive on Representative Actions

As mentioned, as of 25 June 2023, several changes have been made to Article 3:305a et seq. of the DCC in connection with the implementation of the RAD. These changes apply only to consumer cases falling within the scope of this Directive.[66]

A new Sub-Section (f) has been added to Article 3:305a(1) DCC, introducing an additional requirement regarding financing for the foundation or association seeking

63 *Parliamentary Papers II* 2016/17, 34 608, no. 3, p. 29.
64 Van Boom & Weber 2017, p. 296.
65 Midden-Nederland District Court, 2 June 2021, ECLI:NL:RBMNE:2021:2142 (Brein/YISP e.a.).
66 Refer also to Section 2.1.1.

to initiate legal proceedings. This requirement states that financing must not come from a funder who is a competitor of the party against whom the legal action is directed or a funder dependent on the party against whom the legal action is directed. This requirement applies only when it concerns a legal action aimed at protecting the collective interests of consumers harmed or potentially harmed by breaches of Union law provisions listed in Annex I of this Directive.[67]

After Article 305d DCC, a new Article 305e DCC is introduced, which specifies, among other things, that the Minister for Legal Protection may designate, on request from a foundation or association with full legal capacity and based in the Netherlands, that foundation or association as a qualified entity as referred to in Article 4(3) of the RAD. This designation expires automatically after 5 years. The foundation or association seeking this designation must meet various requirements set out in Article 3:305a et seq. DCC. Additionally, its website must demonstrate that it genuinely represents the relevant interests, disclose its sources of funding and confirm that it has not been declared bankrupt.[68]

2.2 Financing Options for Collective Actions

In this section, various options for financing collective actions are discussed, ranging from individual contributions and traditional legal aid to specific forms of financing for collective actions, including assignment and third-party funding. These financing possibilities are crucial in the context of access to justice, as enshrined in Article 6 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights. Particularly for cases falling under the RAD, Article 20 of the directive is relevant, as it obliges member states to provide public funding to competent entities for initiating representative actions, including structural support or access to legal aid.[69]

2.2.1 Traditional Individual Contribution from the Aggrieved Parties

The traditional form of litigation financing through contributions from the aggrieved parties involved in the claim seems feasible only in limited cases when it comes to collective actions. This financing method involves a distribution of the litigation costs

67 *Staatsblad* 2022, 459. This rule arises from Art. 10(2)(b) Directive (EU) 2020/1828.
68 *Staatsblad* 2022, 459.
69 For further information on the regulation under Directive (EU) 2020/1828, refer also to Section 2.5.2.

among the individuals who are actually affected and who are party to the claim. Sharing the costs in this way can potentially provide a better position for the aggrieved parties than if they were to initiate individual claims. However, in practice, this form of financing faces several barriers.

First, this financing method is susceptible to the 'free-rider problem'. The free-rider problem occurs when some of the aggrieved parties sit back and wait for someone else to take the initiative and make the investment, after which they can potentially benefit from the results without contributing. Over the long term, this problem typically leads to less favourable outcomes for the initiators and discourages the use of collective procedures.

Apart from the free-rider problem, several conditions must be met to make this financing method viable. The group of aggrieved parties must be large enough to cover the total costs of the proceedings. Additionally, the individual contributions must be low enough to be worthwhile in proportion to the eventual outcome. Furthermore, the aggrieved parties must have sufficient financial means to afford the contribution. This becomes particularly problematic when dealing with cases involving traditionally weaker parties such as consumers, tenants or other groups of aggrieved parties with limited financial means.

In practice, the individual contribution does play a significant role in collective actions, especially when it comes to existing foundations – such as *de Consumentenbond* or *Milieudefensie* – that primarily initiate collective actions in non-compensatory cases, as also highlighted in the interviews.[70] This funding typically comes from membership fees, which can have its own limitations.

2.2.2 Publicly Funded Legal Aid

Traditionally, there has been the option of publicly funded legal aid for people with limited means. However, in the context of collective actions, it is often not possible to make use of this. The system of subsidised legal aid is not designed (yet) to finance collective claims. The current application of public legal aid has certain aspects that hinder effective financing of collective actions. For instance, the Legal Aid Act generally assumes an individual handling of cases for which an application for legal aid is submitted. This means that legal aid is only accessible to natural persons or legal entities that are not representative organisations, as is the case with collective actions. Additionally, the

70 Refer also to Section 4.4.1.

legal aid system is based on the principle of party autonomy, where free choice of legal representation is one of the guarantees. In the case of collective claims, particularly in cases of mass harm, this principle of free choice of legal representation is not practically applicable.

Using the example of the Dexia case, Tzankova previously argued that mechanically applying the principle of party autonomy to the financing of mass disputes poses an obstacle to adequate financing through legal aid.[71] Due to the lack of an effective mechanism for joining similar claims and/or financing collective claims, the principle of free choice of attorney creates a barrier to using public legal aid in cases of collective harm. In practice, this can lead to a situation where a multitude of claims are individually funded from public funds, thereby not leveraging the efficiency and cost-reduction aspects of a collective action. It raises the question of whether providing legal aid to (representative) interest organisations could be part of the solution.[72]

2.2.3 Legal Expenses Insurance

One form of litigation funding that is relatively common in the Netherlands and that can contribute to the financing of collective actions is legal expenses insurance. Traditional legal expenses insurance is a policy that is taken out before the risk (such as an accident or damage) occurs. The basic idea of legal expenses insurance is to shift the litigation risk, similar to a contingency fee arrangement, to the insurer, thus relieving the victim of the burden.

Despite the potential benefits of legal expenses insurance for potential legal claimants, it is rarely taken out in many legal systems, even in countries where the conditions for such insurance are favourable, such as Germany, where lawyer fees are regulated.[73] An exception to this is Sweden, where legal expenses insurance is automatically (and mandatory) added to health insurance.[74]

Although the use of legal expenses insurance in the Netherlands has increased in recent years, both among businesses and individuals, the absolute numbers of potential legal

71 The Dexia case almost proved fatal for subsidised legal aid because it attracted many sole traders who had no specialist knowledge. At the same time, there was a lack of options to streamline the multitude of cases, due to the right to free choice of lawyer. See Tzankova 2017, p. 113.
72 Refer to Chapter 7, Section 7.7.
73 For an overview see Kilian 2003, p. 36; Regan 2001, pp. 293-297 and see also Kilian & Regan 2004, p. 238.
74 Regan 2003, pp. 49-65.

claimants who have such insurance remain limited.[75] Moreover, the distribution of these insurance policies is not evenly spread across different population groups, with those with limited means being less likely to be insured. Additionally, natural persons with limited financial resources may be eligible for publicly funded legal aid for certain types of disputes.

This type of insurance can also impose further limits depending on the terms and conditions agreed upon. These limits can pertain to the extent of coverage, the threshold for determining whether a claim is suitable for a court or arbitration proceeding, and the degree of freedom in choosing a legal representative.[76] The right to choose one's own attorney, which can hinder concentration in publicly funded legal aid, also plays a role here. Such insurance is generally only available when the events giving rise to the dispute have not yet occurred when purchasing the insurance.

Especially when some members of the group have legal expenses insurance and others do not, the question arises as to whether the insurance of those members can be used for the entire group. This could potentially lead to another free-rider problem. It is unlikely that, for example, a legal expenses insurer for some victims in a group would finance the entire cost of the collective action, even for members of the group who were not insured with them.[77] From an insurance perspective, this would mean that the expected costs of the proceeding would be too high compared to the premiums paid by individual members.

A variant of this scenario occurs when some policyholders have legal expenses insurance but with different providers. Some level of cooperation and coordination between the various providers in cases of mass harm could be helpful from a standpoint of efficiency and effectiveness, but this may raise antitrust issues. Thus, systematically involving traditional legal expenses insurance in a collective action is currently not straightforward. It could be explored whether legal expenses insurance could play a structural and more visible role in the early stages of mass harm resolution.[78] Given the foregoing discussion, it is not likely that the current system of legal expenses insurance, in its current form, can provide a solution for financing collective actions. Nevertheless, there are concrete cases of mass harm known to researchers where the legal expenses insurance industry has made specific ad hoc provisions, such as in the Bijlmer air disaster, the fireworks disaster in Enschede, the café fire in Volendam and

75 There are currently around 2.5 million insured people in the Netherlands. See van Velthoven & Haarhuis 2011.
76 See also Tzankova 2012.
77 *Ibid*.
78 Chapter 7, Section 7.8.

the Srebrenica issue. In the Enschede fireworks disaster, individual cases were funded without applying the relevant assessment criteria because the victims could not provide evidence. In the Srebrenica case, a number of test cases were pre-financed, and in the Volendam disaster, specialised personal injury lawyers were engaged to pursue a more collective approach. However, apart from these prominent examples, subsidised legal aid and the legal expenses insurance industry have played only a marginal role in financing collective actions to date.

Another form of legal expenses insurance, which is almost exclusively found in the United Kingdom, is insurance against a potential adverse costs order that is taken out after the relevant incident for the proceeding has already occurred. In this case, the insured party is not protected against a damage event but rather against the potential adverse costs order. This ex post insurance is called 'after the event insurance' (ATE). The insurer finances a potential adverse costs order, while the premium (received ex post) consists of a portion of the proceeds.[79] In this sense, insurance taken out after the event is similar to a contingency fee arrangement, as the premium is often only paid to the insurer if the victim is able to obtain compensation from the wrongdoer through litigation. ATE insurance is generally taken out by a lawyer on behalf of their client when they initiate a claim. The general concept of ATE insurance is that it protects the claimant from the risks of a costs order if the claim is unsuccessful, and the claimant is ordered to pay the opponent's costs. ATE insurance is usually combined with a contingency fee arrangement with lawyers and/or external funders and is rarely used independently.

This form of insurance is relatively popular in the UK, among both individual parties and litigation funders, because adverse cost orders can be substantial in the event of a loss in legal proceedings.[80] ATE insurance is generally allowed in the Netherlands but is not used because the potential costs associated with an adverse costs order in Dutch legal proceedings are limited in scope.[81]

79 In some cases, the costs incurred by the claiming party are also covered by the insurance. In these cases, ATE insurance is very similar to TPLF. Mulheron 2022.

80 Grave *et al.* 2018.

81 Although the so-called 'English' rule, or a system of ordering costs, is also used in the Netherlands, the fixed amounts in the Netherlands are many times lower than the costs orders in England (and other common law jurisdictions) where so-called 'adverse costs' are more prevalent and come closer to a realistic order for costs.

2.2.4 Institutional Financing for Test Cases

In the early days of collective procedures in the Netherlands, the government provided subsidies to certain representative organisations, particularly in the field of consumer rights, to initiate collective actions, among other purposes.[82] In a European context, the European Commission also subsidised collective actions by consumer associations in cases of (cross-border) proceedings to eliminate unfair provisions in various member states.[83]

However, the funding for representative organisations has gradually decreased over the years. As a result, the available budgets for potential intermediaries such as consumer organisations have declined, while the costs of litigation have increased. Article 20 of the RAD could be seen as an attempt to revive the practice of government subsidisation of collective actions. Given the current climate surrounding government funding for legal aid, this does not appear to be a realistic alternative.

2.2.5 Result-Based Remuneration for Lawyers

In other jurisdictions, lawyers often play a significant role in financing legal cases by covering the costs of the proceedings and working based on arrangements such as 'no cure no pay' or 'success fee' agreements. However, in the Netherlands, this practice has been restricted. Litigation lawyers can enter into fee agreements, albeit within certain limits. Conditional, contingency or other compensation arrangements can be made, such as starting with a lower hourly rate or fee that can be increased on achieving a specific outcome. While hourly rates are still commonly used, alternative fee arrangements, such as fixed and capped fees and success fees, are becoming more prevalent and widely applied in the Netherlands. However, 'no-cure-no-pay' arrangements or agreements where the lawyer's compensation is based on a portion of the value of a judgment or damages (quota pars litis) are generally prohibited based on the rules of conduct for lawyers. Additionally, lawyers must ensure that what they charge constitutes a reasonable fee for their services. No-win-no-fee agreements by lawyers are only permitted in individual personal injury cases in the Netherlands, subject to prior approval by the Dean.[84] Therefore, these structures are not applicable in regular or collective actions

82 Mölenberg 1995, pp. 125-126, 131, 337; Gousgounis 2009, p. 2.

83 COM (2000) 248 def., p. 9.

84 There is one exception to the ban on 'no cure no pay'. Since 1 January 2014, as an experiment of the Dutch Bar Association, lawyers have been allowed to make a result-dependent remuneration agreement with their clients in personal injury and death claims cases. This trial period initially ran until 1 January 2019 and has been extended on that date for another 5 years until 1 January 2024. In the Netherlands

in the Netherlands. A further examination of this issue (possibly followed by a limited reconsideration) of previously made policy choices may be warranted in light of the (mixed) positive experiences gained from the experiment in the field of personal injury.[85] The experiment has been extended for 5 years until 2024.[86]

Benefits of no-cure-no-pay agreements generally include shifting the litigation risk from the client to the lawyer, theoretically and according to the aforementioned evaluation, increasing access to justice.[87] However, a risk of the system is that claimants depend on cherry-picking of certain cases by the legal profession and the business model of law firms, as well as the availability of sufficient working capital to support lengthy and costly proceedings. It is not expected that many law firms will be able to do so. Whether result-based remuneration is allowed in a particular jurisdiction has a significant impact on how the rest of the financing landscape is structured. For example, the third-party financing market in the United States is still relatively limited because the vast majority of cases are (pre)financed by law firms based on a 'no-cure-no-pay' model. In countries like the Netherlands, where result-based remuneration is restricted, there is a greater need for other forms of financing, including third-party financing.

2.2.6 Crowdfunding

Unlike bundled contributions by victims, crowdfunding involves financing through relatively small contributions from a group of investors or sympathisers who are not directly involved in the case. This method of financing has become possible, especially with the use of the internet.

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it is possible to act as a lawyer pro bono, with the full costs being borne by the lawyer or his/her office. See Regulation on practice (part of Result-related Remuneration) of the Dutch Bar Association, advocatenorde.nl, n.d. This prohibition does not apply to legal service providers who are not lawyers. This does not seem to be without problems in the settlement of small individual claims: M. de Vries, Wildwest in letseschadepraktijk, Advocatenblad 19 June 2019, https://www.advocatenblad.nl/2019/06/19/wildwest-in-de-letselschadepraktijk/ and https://www.dutchnews.nl/news/2017/03/no-cure-no-pay-not-popular-with-personal-injury-lawyers/.

85 The costs that must be paid in the event of a positive result are calculated based on the lawyer's normal hourly rate. This hourly rate may be increased by a maximum of 100%. The total costs (including VAT and office costs) may not exceed 25% of the financial result that has actually been achieved. If the lawyer also finances external costs, this maximum is increased to 35%. Specific costs may be charged to the client, regardless of the result achieved. Refer also to Chapter 7, Section 7.7.2.

86 NOvA Evaluation Report 2018.

87 The evaluation shows that the scheme has been applied to a relatively limited extent over the past 5 years. However, the experiences of those involved are mainly positive. For the evaluation, discussions were held with deans, lawyers, specialist associations, science and client organisations. They indicate that the scheme certainly contributes to increasing access to justice and that this form of fee agreements is therefore desirable and should be retained. There have also been no complaints or disciplinary cases, and no undesirable side effects are known: NovA Evaluation Report 2018.

Crowdfunding is used to finance one-time projects by businesses, including new consumer products, art projects, humanitarian initiatives and films. In contrast to a traditional investor who expects returns and capital growth, donors typically receive a nominal reward in exchange for their money. Particularly in the cultural sector, crowdfunding has proven to be a popular and successful way for musicians to finance recording projects without the support of a record label.[88]

Crowdfunding websites leverage the internet to reach a wide audience. Once uploaded to a crowdfunding platform, anyone with a computer, phone or tablet can contribute to a project. No user needs to contribute more than a few dollars to help the project reach its goals. Using this method, crowdfunding projects can raise a significant amount of money in a short period. Crowdfunding has also made its way into the field of litigation financing.

Because crowdfunding relies on relatively small financial contributions from a large number of individuals, relatively expensive claims can be fully financed without any one person risking a substantial amount. From an investor's perspective, crowdfunding makes investing in individual claims similar to buying shares. Crowdfunding is seen as a possible solution for cases that cannot secure financing through traditional litigation funders because the case is deemed too risky or may not provide a sufficient return on investment (ROI). In the United States, there are crowdfunding platforms, such as LexShares and Funded Justice, that specifically focus on crowdfunding litigation. These platforms receive a commission for each project placed on their platform, regardless of the success of the case.

One of the key criticisms of this form of litigation financing is that these platforms do not perform any project selection, and they earn more as more projects are offered on their platform. Whereas traditional funders typically select legally strong cases, the significant reduction in risk in crowdfunding as a litigation financing method can lead to investments in a greater number of cases with a lower chance of success. Some authors argue that this increases the risk of an increase in legally weak cases.[89]

Moreover, due to a lack of regulation, there is a risk of abuse. There is often no effective system in place to protect the interests of donors. After contributions are made, it is often challenging to verify whether the funds are actually being used for the stated

88 ArtistShare, founded in 2003, was the first American platform, followed by Indiegogo and Kickstarter in 2008 and 2009, respectively. Voordekunst.nl is a well-known Dutch example.

89 Elliott 2018.

purposes. Another abuse risk mentioned is the use of a 'manufactured following' to conceal the identity of a real funder who prefers not to be identified.[90]

Interviews and case law review show that so far crowdfunding as a financing method has limited value in practice and generally does not yield significant results.[91] While it has been used in a number of collective action cases in the Netherlands, so far only in one case, an environmental claim, was a substantial amount raised that was sufficient to finance the case.[92]

2.2.7 Private Funds/Donations

Interest organisations can sometimes utilise structural and/or project-based funding from private funders, as indicated by the interviews.[93] Typically, these are funds with philanthropic objectives. Parties like the Open Society Foundation provide structural funding to civil society and NGOs engaged in strategic litigation and fundamental, digital and consumer rights. Other organisations are focused on specifically financing strategic legal cases, including collective actions. Parties such as the *Digital Freedom Foundation* (DFF) and *Luminate* offer financial support for strategic legal cases.[94] Financing can also be provided to an organisation initiating strategic proceedings without this funding being directly linked to a specific case.

Funding typically comes with specific conditions, both in the case of structural funding and for a specific claim, and the availability of private funding always depends on the strategy, objectives, budget and priorities of the private funder. Usually, this form of financing is available for a narrowly defined type of cases, and these funders focus exclusively on idealistic matters, forms of cause lawyering and fundamental rights. For example, both the DFF and Luminate currently primarily focus on breaches in the online data sphere.

90 Gomez 2015, p. 334.
91 Refer to Section 4.3.
92 The case of the foundation Milieudefensie against Shell, which was brought under the old collective action regime (before 1 January 2020) and not for damages. See the Hague District Court, 26 May 2021, ECLI:NL:RBDHA:2021:5337 (*Milieudefensie/Shell*). Shell appealed the case, and for this appeal case also the foundation has been collecting private funds.
93 Refer to Chapter 4, Section 4.4.1.
94 See, for example, the website of Luminate: https://luminategroup.com/funding and DFF: https://digitalfreedomfund.org.

In general, the resources available through this method of financing are limited, and competition is fierce. Moreover, reporting requirements imposed by certain funders can result in prohibitively high overhead costs for some organisations.

2.2.8 Assignment Model

Another possibility for handling mass damages alongside collective actions and the joinder of claims (as per Article 222 of the DCCP) is the so-called assignment model. This is not a form of financing as such, but it plays a role in the Dutch practice as a way to facilitate settlement and associated financing because it provides a means to protect the financial interests of the funder. Through the assignment of the claim, the funder gains maximum security for the investment. In the classic form of assignment, it involves transferring claims for collection. Through this mechanism, the claim is transferred for a lower amount than its value, and with it, the collection and associated risks are also transferred. From that moment onwards, the claim is exclusively owned by the funder, who makes all decisions regarding future legal actions or settlements. In addition to assignment for collection, there are also other forms, particularly power of attorney and agency, where the claim itself is not transferred in ownership.

In principle, such transfer of claims or similar forms can also be applied in the settlement of mass damages. When using this model, a group of claimants transfers their claims to a representative or third-party in exchange for (a portion of) the eventual compensation. In this case, claimants receive compensation in advance of the procedure, after which the representative or a third-party who engages their own representative takes over the claim. The claim is essentially bought in this manner. If the claim vehicle wins the case or manages to secure a settlement, the victim receives a percentage of the proceeds. The remaining amount serves as 'commission' for the claim vehicle, which finances the procedure and bears the litigation risk.[95]

Although this model seems attractive to address both the problem of rational apathy and the free-rider problem because only those who have transferred their claim and/or taken action benefit from it, it has been problematic in the international practice for a long time. One reason for this is that many legal systems do not allow such a transfer of a claim at all.[96] Another issue is that even when such a transfer of the claim is legally

95 Claim vehicles that litigate on the basis of claims for damages assigned to them do not have to meet the requirements of art. 3:305a DCC: Amsterdam District Court, 27 July 2022, ECLI:NL:RBAMS:2022:4466.

96 For example, assignment of a claim has long been problematic in England (Jennifer Simpson (as assignee of Alan Catchpole) v Norfolk & Norwich University Hospital NHS Trust [2011] EWCA Civ 1149) but now appears to be more nuanced (see Farrar v Candey Ltd [2022] EWCA Civ 295 and Casehub Ltd v Wolf Cola

possible, as it is in principle in the Netherlands,[97] the disadvantage is that the victim completely disappears from view during the procedure. This can lead to problems when the purchaser of the claim, who then wants to cash it in, also needs information during the procedure. The purchaser may still depend on the seller, for example, to provide further information relevant to the procedure. For the selling party, who has already received compensation, the motivation to cooperate in the procedure is likely to be limited.[98]

Specifically for the settlement of mass damages, buying and consolidating a larger group of claims brought together can be attractive. However, in practice, it turns out that collecting claims in this manner is a costly affair. The costs of tracing potential victims and the transaction costs of transferring many individual claims result in a situation where it is only interesting for funders if the claims are of some magnitude or if tracing a larger group of victims can be done relatively easily and thus at low cost.[99] Respondents in the context of this research mention the truck cartel and Dieselgate cases as examples where this is the case, and the potential damages to be obtained are also substantial (several thousand euros).[100] With an average premium of 25%, the returns outweigh the costs in these cases. In the case of more complex damage events, such as privacy breaches, where the group is harder to trace and the potential returns are more limited (a few hundred euros per victim), the costs generally do not outweigh the expected returns. This settlement model, too, is suitable primarily for substantial claims.

2.3 Third-Party Litigation Funding

Especially in the (international) practice of collective actions, TPLF has gained popularity, partly as a result of the limitations imposed by the financing methods discussed in Section 2.2. TPLF occurs when someone who is not otherwise involved in a specific legal case pays the costs of the litigation for one of the parties. TPLF is not simply an extension

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Ltd [2017] EWHC 1169). A reverse trend was observable in Germany (in more recent years, it had become more problematic following the diesel gate, but the highest court provided clarity on this in 2021 in favour of the model: Kruger 2021, 'Revival of the claims assignment class action in German private antitrust enforcement and beyond' https://carteldamageclaims.com/2021/08/05/revival-of-the-claims-assignment-class-action-in-german-private-antitrust-enforcement-and-beyond/.

97 See on this, among others, Tillema 2019a.

98 See on this, for example, Liesker about possibly taking over a claim during the procedure in the event of a difference of opinion about strategy: "It is very important for the course of the entire process that the customer remains on board, even if only to make his own case and for calling witnesses." https://www.advocatenblad.nl/2018/06/05/rechtszaak-als-verdienmodel/.

99 See on this also Tillema 2019a, p. 270 with extensive references to case law.

100 Refer to Chapter 4, Section 4.4.3, interview 11.

of (conditional) fee arrangements. The first difference is that under (conditional) fee agreements, the attorney provides services (i.e. invests their time and resources in a case) rather than merely providing the financial means needed to obtain such services. A second difference is that funders choose to fund disputes with the expectation of a positive ROI, weighed against alternative investments they could make in the financial market.

The financing can cover all costs related to the litigation. The funder may also take on the risk of paying the other party's costs if the case is lost. If the case is successful, the external litigation funder typically receives a success fee, often a portion of the proceeds and usually after reimbursement of the incurred costs. An alternative way to express the success fee is as a multiple of the investment. TPLF can thus be distinguished from legal expenses insurance, where an insurer receives a premium for covering legal expenses. It is also distinct from a loan agreement that typically needs to be repaid with interest. With TPLF, the payment obligation arises only in the event of success. This means that the funders lose their investment if the case fails. Successful cases must cover such potential losses. Portfolio financing is one way to manage this risk, which will be discussed in Section 2.3.4.

As is clear from the analyses of the WAMCA register, reported in Chapter 3, third-party litigation funding has so far been crucial in all collective actions for damages. As has been discussed previously, using commercial funders is not without risk. In a number of cases courts have assessed the merits of third-party funding agreements, which has also led to the inadmissibility of claimant organisations.[101]

2.3.1 Theory of TPLF

In the case of TPLF, the third-party bears the costs and risks of the litigants and their representative organisation. They no longer have to finance litigation costs and do not risk having to pay (part of) the costs if they lose. This improves access to justice by removing financial barriers.

Additionally, other benefits are attributed to third-party litigation funding. First, a decrease in what is referred to in legal economics literature as 'risk aversion' is expected.[102] Since litigation is inherently risky, less financially capable and risk-averse parties may refrain from filing a claim, even in cases where the claim has a good chance

101 Refer to Section 2.1.3.
102 Dammingh 2017.

of success. The transfer of a claim from a risk-averse party to a risk-neutral party, the funder, should lead to an increase in the total number of claims filed. In certain cases, potential claimants may not be aware that they have a strong legal claim, and third-party financing can provide incentives to locate and inform these claimants. This also addresses psychological barriers to filing claims since the presence of a funder can alleviate the rational apathy and risk aversion of victims (or their representatives).[103]

Funders can serve different types of parties: those who lack the financial means to litigate, those who are risk-averse and/or do not want to carry the litigation costs on their balance sheet, and/or those who fear reprisals or hope to do business with the alleged wrongdoer in the future. Moreover, depending on the arrangement, parties do not have to invest effort and time, and they can delegate much of the work.

In general, third-party financing is considered a market for buying and selling claims.[104] More specifically, funders invest in legal cases with the aim of achieving a reasonable ROI from the ultimate outcome of a claim. The primary expectation is that individuals with limited means gain access to the courts through financial support from a third party, where it would otherwise not be possible. Third-party financing is also expected to contribute to rebalancing the existing power dynamics in favour of more financially capable defendant parties. When an individual claimant typically files a claim against a wealthier party, differences in financial capacity create a barrier for the claimant due to escalating costs during proceedings. Third-party litigation funding, in this way, contributes to a more stable financial foundation for the party seeking justice.

2.3.2 Advantages

As the main advantages of a third-party financing system, four aspects may be highlighted. First, it promotes access to justice by funding cases of less financially capable parties. An incidental benefit of this is that it subsequently contributes to legal development by making claims possible that would otherwise remain hidden. On this point, based on jurisprudence research in Australia, Abrams & Chen concluded that cases funded by third parties are cited more than twice as often in later judgments.[105] They suggest that, if such citations are seen as drivers of legal precedent, TPLF contributes positively to legal development. A second advantage is the increased bargaining power of parties who, without the support of a financier, would be in a weaker position. In practice, this

103 *Ibid.*
104 Abrahams & Chen 2013.
105 *Ibid.*, p. 1107.

can lead defendants to settle earlier. A third aspect is that third-party financing enhances the litigation capabilities of parties in court. Claimants are supported by a party with significant experience and expertise, often referred to as a 'repeat player', putting them in a more equal position compared to a powerful opponent. Fourth, TPLF may also have a preventive effect because the support of a financier sends a signal to defendants about the likelihood of success in a case.

2.3.3 Criticism

Third-party financing of legal cases has always been met with a certain degree of scepticism and criticism. The criticism of this form of financing can be divided into several arguments that are typically put forward.

First, there are concerns about the conflicting interests that arise when a third-party becomes involved in a legal proceeding.[106] The commercial interests of the funder can have a negative impact on the strategic choices of the client and their attorney during the process. The influence of the funder on the proceedings is generally seen as problematic. Additionally, the interests of an attorney may come into play when they are tempted, in order to maintain a lucrative partnership with a funder, to prioritise the wishes of the funder over those of the client. The attorney's duty of confidentiality may also be compromised in their communication with a funder.

Second, a more moral argument is made against the transformation of a public good, the legal system, into a tradable commodity, as its value is reduced to the amount of money for which it is sold.[107] This critique of what is called the 'commodification of justice' points to the (seemingly disproportionate) rewards that this 'commercialisation' yields, the influx of profit-driven entities and the potential encouragement of a culture of litigation.

Another objection relates to the opportunities for an amicable settlement. While TPLF is primarily focused on monetary solutions, in some cases, victims can be equally or even better assisted through non-monetary solutions. Agreements with TPLF could potentially hinder an amicable settlement.

106 See Van der Krans 2018.
107 See Cordina 2021.

Finally, there is a risk, in the absence of strict regulation, of a lack of liquidity among funders.[108] Without formal requirements and regulation, a claimant has no guarantee of the funder's liquidity. Due to the unpredictability of legal proceedings, if a litigation funder has insufficient capital buffer, a case may be jeopardised because there are insufficient resources to complete the process, while the claimant faces a process risk. In such a case, it would be in the financier's interest to settle the case quickly, possibly on unfavourable terms for the client.

Previously underexplored in the literature but also noteworthy is the possible objection that individuals using TPLF and bearing no financial risk themselves may have a tendency to continue litigation even when the chances of success are very low and/or the expected benefits do not outweigh the costs. In such a case, a rational party that bears all the costs themselves would terminate the proceedings, but an externally funded litigant has no economic incentive to do so. This aligns with the experiences gained in Dexia with financing through legal aid.[109] This could hinder the efficient conduct of legal proceedings if the financing agreement does not provide a solution for a potential difference of opinion.

Earlier empirical research does indeed show how an increase in TPLF affects the functioning of a legal system. Abrams and Chen found a correlation between an increase in TPLF and greater backlogs, fewer judgments and higher legal expenses.[110] However, the researchers add that if the ultimate value of the outcomes of these cases is greater than the costs of settling them, the overall welfare effects can still be positive.[111] Moreover, this study could not rule out that this was a temporary effect due to the rise of litigation funders rather than a lasting effect. Due to the aforementioned preventive effect, it is expected that once defendants recognise the increased likelihood of litigation and the greater resources available to claimants, they will be encouraged to reach an amicable solution (sooner).

Even in Australia, where third-party litigation funding first developed, there was initially concern about allowing this form of litigation financing. The main concern was that external financing of legal cases was in conflict with traditional ways of legal protection and litigation, that the changes would promote a culture of claims

108 *Ibid*.
109 Tzankova 2012.
110 Abrahams & Chen 2013.
111 *Ibid*.

in Australia, that it would change the nature of legal practice, and it was seen as an overreaction to concerns about rising litigation costs.[112]

Shephard concluded that TPLF, at least for the US context, does not fully deliver on its promise to improve access to justice for underfunded litigants. Instead, it appears that funders have little incentive to fund cases in which claimants face the greatest barriers to access to justice, and they achieve the highest potential return in cases where the underlying substantive law creates imbalances in risk and costs. As a result, Shephard argues that third-party financing, instead of improving access to the courts, actually exacerbates the inefficiency of the legal system and "threatens the compensatory and deterrent functions of the legal system".[113] Examples she provides include cases involving multiple parties seeking compensation, particularly patent infringements and price-fixing cases, which result in millions of dollars in attorney fees but only a small amount of compensation for those actually harmed.

In summary, involving (commercial) third-party funders in collective actions has two faces. There are four aspects that can have both positive and negative outcomes. First, it can stimulate access to justice by providing adequate funding, but it is also said – without further substantiation – that it can create or perpetuate a culture of litigation. Second, it can promote price and quality competition and benefit litigants, or it can create a race to the bottom. Third, it can improve the quality of claims by filtering out claims with a low chance of success, but it can also lead to an unfavourable (pre) selection for litigants. Finally, the involvement of third-party funders can align the interests of the parties involved, but, on the other hand, it can also lead to conflicts of interest. There is a fine line between these advantages and disadvantages, illustrating the balance that policymakers must find when allowing this form of financing.[114] As the European Parliamentary Research Service (EPRS) report on responsible third-party funding concludes, the outcome of regulation strongly depends on the standpoint taken: that of claimants, funders, companies, the market for legal services and/or the judicial system.[115]

112 Derrington 2018. In practice, these concerns turned out to be largely unfounded. The number of class actions grew steadily instead of exponentially, and the fear of a change in the status quo within the legal profession also did not materialise.
113 Shephard 2011, p. 611.
114 For more on this, see Tillema 2019b.
115 EPRS 2021, Para. 4.3.

2.3.4 Third-Party Litigation Funding in Practice

Over time, various types of financing and payment structures have emerged. One of the more popular financing structures is portfolio financing. This involves one funder funding multiple proceedings, either from a law firm handling several collective action cases in different legal areas based on alternative (no-cure-no-pay) fee arrangements or from a claimant (usually a large corporation) with multiple individual claims. This way, the funder spreads the risk across multiple proceedings. While the return per individual case may be lower, the funder has the opportunity to diversify the risks of financing across a variety of unrelated cases through what is known as cross-collateralisation. A consequence of this could be that the financier's success fee is lowered: lower risk corresponds to a lower success fee.

Portfolio financing does not seem to occur in Dutch collective action proceedings because lawyers are not allowed to act on a no-cure-no-pay basis, which is necessary to make portfolio arrangements economically feasible. In theory, portfolio financing of law firms in the Netherlands might be possible with respect to (individual) personal injury cases since no-cure-no-pay agreements are allowed there, but the question is whether it would be economically meaningful and profitable for the parties involved.[116]

The funder's return is paid from damages or out-of-court settlements. The structure of the success fee varies, as do the underlying commercial grounds. The precise terms differ significantly between individual funder and from case to case.

There are roughly three methods to determine the return on a TPLF investment: a multiple of the investment, a percentage of the award or settlement or a combination of both. Many funders seek an ROI of a multiple of the invested amount, which can range from 1.5 to 6 times the investment. This suggests a relatively high return, but it must also cover the losses from unsuccessful proceedings. It is more common for the return to be calculated as a percentage of the award or settlement in the financing arrangement with claimants. In the UK, this typically ranges from 20% to 40% of the award or settlement, but in some cases, it can be 50% or higher. In Austria, Germany, Ireland and the Netherlands, the experience is similar: a success fee of 20% to 40%.[117] These margins are lower than in Australia, where funder success fees range from 30% to 60%.[118] Further research is needed to explain these differences.

116 This is apart from any possible behavioural law complications that fall outside the scope of this investigation.
117 Hodges *et al.* 2009.
118 Abrahams & Chen 2013.

2.3.5 Development of TPLF in an International Perspective

Two closely related legal doctrines historically stood in the way of legalised third-party dispute financing on an international scale: maintenance and champerty. Simply put, maintenance is a prohibition on the financing of claims by individuals who are not parties to the dispute, and champerty is a form of maintenance for profit.[119] These doctrines arose in an attempt to prevent outside interference in judicial proceedings. The emergence of litigation financing markets is closely related to how different countries have adapted the effects of laws and regulations related to these doctrines.

Australia led the way in allowing third-party funding from the 1990s. After a substantial market developed here, many of the larger funders expanded their operations to other countries, particularly the UK, and later the US. In general, the emergence of these financing markets can be attributed to the following reasons: (1) significantly high litigation costs, (2) limited availability of arrangements for unforeseen expenses, (3) high cost awards in litigation and (4) a decline in available public legal aid.

Not all countries allow third-party funding, and where it is permitted, it is primarily (initially) used in specific legal areas (class actions, insolvency, competition, securities). Of all European jurisdictions, this type of dispute financing is most developed in the United Kingdom; Germany and the Netherlands are catching up.[120]

In what follows, we briefly discuss developments in Australia,[121] the United States, Canada, the United Kingdom and Germany. Canada is more extensively covered in Chapter 6, in particular in respect of (non-commercial) litigation funds.[122]

(a) Australia

Australia is considered a pioneer in TPLF and was the first jurisdiction to develop a substantial TPLF market. Since 1995, it has been possible in Australia to externally fund insolvency cases. Over time, third-party litigation financing has expanded further, including for collective actions involving stock market and competition disputes.[123]

Previously, two law firms were responsible for the majority of collective claims, but third-party financing is now a significant driving force behind Australian collective

119 International Arbitration Report 2016.
120 Cordina 2021, p. 271.
121 Refer also to Chapter 6, Section 6.4, especially with regard to litigation funds.
122 Refer to Chapter 6.
123 Barker 2012, p. 452.

actions.[124] Between June 1997 and May 2002, externally funded collective actions accounted for only 1.7% of all collective procedures. From March 2002 to 2013, this increased to 15%. Currently, the number of collective procedures externally funded has stabilised at around 75%.

The acceptance of third-party financing in Australia is said to result from cuts to publicly funded legal aid and financing problems specific to collective redress: a lack of necessary resources to pursue such claims and the cost risk arising from Australia's 'loser pays' regime.[125] Since the assignment of a claim to a third-party (cession) is generally not allowed in Australia, funders receive a percentage of the proceeds from the class action in the event of a win.

Organisations that were active in Australia at the beginning of this financing market then expanded their operations to other countries, including South Africa, New Zealand, the United States, the United Kingdom, Canada and now Europe. In Australia itself, third-party financing remains a growing market with a total revenue of approximately $105.4 million in 2018, with a profit of $44.8 million.[126]

(b) United States

The financing of civil proceedings in the United States differs significantly from European jurisdictions in many respects. In the United States, parties are generally responsible for their own incurred costs, and there is no cost shifting, even if a claim is unsuccessful. Attorney fees are typically governed by an agreement between the client and the attorney, with contingency fees being allowed and widely used.[127] This ability to enter into *no-cure-no-pay* agreements makes the financing landscape in the United States different from that of other jurisdictions. Especially in cases involving claims for damages, attorney (firm) financing has been the most common form of financing for decades.

In the case of class actions, there are more rules related to financing. Judges have broad discretion in evaluating class actions in the certification phase of the procedure. Claims are assessed against several criteria, including the 'adequacy of representation' of the represented group of claimants. Over the years, US judges have used this criterion to assess the competence and experience of the litigating attorney. As a result, the relationship between attorney and client, including financing agreements, has become part of the court's scrutiny in class action cases. Given the notion that it is virtually

124 Morabito & Waye 2011, p. 325; Kalajdzic *et al.* 2013, p. 96; Morabito 2017, p. 35.
125 Morabito & Waye 2011, p. 329; Kalajdzic *et al.* 2013, pp. 97-98.
126 Australian Law Reform Commission 2018, p. 50.
127 In the case of accident damage claims, 87% of claimants used a contingency fee agreement with a lawyer. See Hensler 2010, p. 152.

impossible for group members to collectively negotiate a financing arrangement with an attorney and that attorneys are not allowed to enter into financing arrangements with an organisation representing the group of claimants, it is the court that primarily controls and determines the fees.

Although class actions are traditionally considered a typically American phenomenon,[128] third-party financing in the United States is a relatively new development. The market for third-party litigation financing has grown rapidly in the United States,[129] with many organisations that originated in the United Kingdom and Australia now financing cases in the United States. Total investments in the American financing market amounted to US$12.4 billion in 2021, representing a 10% increase from 2020 and a 32% increase from US$9.4 billion in 2019.[130]

(c) Canada

Following the common law doctrine of champerty and maintenance, TPLF was initially prohibited in Canada. However, TPLF is now widely accepted and is also seen as a way to promote access to justice.[131] An important factor contributing to the acceptance of private financing is that the judiciary actively assesses the financing agreement and, in general, safeguards the rights of parties involved in class actions.[132]

In Ontario, rules have been laid down in the Ontario Class Proceedings Act (CPA). Approval of a TPLF agreement requires that the agreement be fair and reasonable; that the agreement does not restrict the rights of represented parties to instruct a lawyer and maintain control over the proceedings; that the funder can meet the financial obligations arising from a potential cost award.[133]

TPLF coexists with the possibility of contingency fees, which, given the high costs of litigation, can be risky for law firms.[134] Additionally, in Quebec and Ontario, public

128 The possibility of collective action in the United States dates back to the mid-19th century. The earliest precursor to the class action rule in the United States was in the Federal Equity Rules, promulgated in 1842.

129 In 2017, 36% of US law firms reported using external litigation funding, an increase of 414% from 2013, when only 7% of law firms reported using it. Buford Capital, Litigation Finance Survey 2017, p. 8, https://s201.q4cdn.com/169052615/files/doc_news/PressReleases/2017/09/2017-litigation-finance-survey-release-sept-6.pdf.

130 *Litigation Finance Market Report* 2021, p. 3.

131 Piché 2022, p. 282; Meighen 2021.

132 An important decision that formulated the criteria for funding agreements is Ontario Court of Appeal, 11 June 2014, *Bayerns v Kinross Gold Corp* [2014] ONCA 901.

133 Section 33.1(9) Ontario CPA. See Piché 2022, pp. 284-285.

134 Meighen 2021.

funds play a significant role in financing class actions. These aspects are extensively discussed in Chapter 6.[135]

(d) United Kingdom

The United Kingdom is a highly relevant jurisdiction for the Netherlands because a significant proportion of the parties in the Dutch litigation financing market originate from the UK. Additionally, the UK has a system of cost awards similar to the Netherlands. However, it is important to note that the costs of litigation and the magnitude of cost awards in the UK are much higher than in the Netherlands. The external funding of claims in the United Kingdom began in 2002.[136]

After a cautious start, more opportunities for TPLF were gradually allowed in the UK. Before TPLF was permitted in the UK, it was primarily prohibited based on old *champerty and maintenance* doctrines.[137] These rules were established to prevent abuse of the legal process. However, several judicial decisions led to the conclusion that external funding of disputes was 'accepted and seen as being in the public interest'.[138] Over time, there has been a shift in the UK's view of the desirability and utility of TPLF, and policies regarding it have been relaxed.[139]

Currently, most major group claims filed in England are supported by a litigation funder. In the European context, the British litigation financing market is the most developed. According to a study conducted by the law firm Reynolds Porter Chamberlain, the size of the UK dispute financing market has doubled in the past 3 years, with over 60 active funders and a total market size of more than £2 billion in 2021.[140]

In recent times, third-party litigation funding has been challenged, in particular resulting from the 2023 *PACCAR* judgment by the UK Supreme Court.[141] In short, the Court concluded that Litigation Funding Agreements are to be considered Damages-Based Agreements (DBAs) within the context of 'claims management services'. Consequently, such agreements will be unenforceable unless they fulfil the

135 Refer to Chapter 6, Section 6.3.
136 Perrin 2018.
137 *Maintenance* refers to the prohibition of a third party from interfering with and/or encouraging legal proceedings. Champerty is the superlative of this, with the third party involved also making a profit.
138 Among others, *R (on the application of Factortame and others) v. Secretary of State for Transport, Environment and the Regions* (No. 2) [2002] EWCA Civ 932 and Arkin v. Borchard Lines Ltd & Others [2005] EWCA Civ 655).
139 Neuberger, From Barretry, Maintenance and Champerty to Litigation Funding. (Harbour Litigation Funding First Annual Lecture) 2013, https://www.supremecourt.uk/docs/speech-130508.pdf.
140 Latham & Rees 2022.
141 R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) [2023] UKSC 28.

requirements of the Compensation Act 2006 (CA 2006). In practice, this ruling has been critically received.[142] It remains to be seen how this may affect the practice of the third-party litigation funding market or regulation.

(e) Germany

Similar to the Netherlands, the third-party financing market in Germany is largely unregulated. Financial institutions such as banks and insurers are regulated and supervised by the Federal Financial Supervisory Authority. Insurances play a significant role in funding cases.[143] However, funders of commercial disputes are not qualified as banks or insurers, and, thus, they are not subject to government oversight. There is no prohibition on third-party financing, and claimants can enter into agreements with commercial funders. Fees of 30%–35% are common and acceptable.[144] In a much-criticised 2018 ruling, the *Bundesgerichtshof* (Federal Court of Justice) ruled that consumer organisations are not allowed to use commercial financing to skim off profits resulting from unfair competition.[145]

A few court decisions have confirmed the legal structure of litigation financing as a partnership between the claimant and the funder. The attitudes of the courts vary from neutral to positive, and there are no known negative decisions against professional funders. However, it is different in cases where lawyers attempt to use their own funders to attract clients and thereby finance their own services. Such practices create conflicts of interest and violate the German Code of Conduct for Lawyers (Bundesrechtsanwaltordnung or BRAO).

The possibilities for collective actions were somewhat limited in Germany. However, with the introduction of a declaratory model for claims (*Musterfeststellungsklage*), in November 2018, there is potential for increased use of collective procedures, particularly in cases involving many consumers.[146] The recent implementation of the RAD expands the possibilities for collective actions. However, the German legislature has opted to substantially limit the TPLF in the context of the RAD. According to the implementation rules, the fee for the funder may not exceed 10% of the proceedings,

142 See, for instance, J. Diamond, Why PACCAR is a catastrophic decision, Law Gazette, 6 October 2023, https://www.lawgazette.co.uk/practice-points/why-paccar-is-a-catastrophic-decision/5117468.article.

143 Germany has the largest private legal expenses insurance market in Europe, with almost half of the population having a legal expenses policy. See https://wwwgdv.de/de/themen/news/versicherungsschutz-versicherungsdichte-ueberversicherung-49418. See also Gesamtverband der Deutschen Versicherungswirtschaft (German Insurance Association), Statistical Yearbook of German Insurance 2021 (2021) Table 82.

144 Stadler 2022a, p. 266.

145 BGH, 13 September 2018, I ZR 26/17.

146 This procedure was a response to the diesel gate-related claims from Volkswagen consumers.

which will not make it rewarding for funders.[147] So far, in consumer claims the German Federal Consumer Organisation has not used TPLF, and the effects of this price cap may therefore be limited.[148]

2.3.6 International Development of TPLF Summarised

Taking an international perspective, it becomes clear that there is no universal solution for financing collective actions, but some level of commercialisation in funding collective actions seems inevitable.[149] In Australia, the solution lies primarily in commercial litigation funding. In Canada, it combines a contingency fee arrangement, a public litigation funding fund (which will be discussed further in Section 6.3) and commercial litigation funding. In the United States, the financing landscape consists primarily of contingency fees.

Regarding TPLF in Europe, it is challenging to provide a comprehensive overview for various reasons.[150] The TPLF market is in its early stages and varies significantly from country to country and from one legal domain to another, due to historical and procedural factors. Furthermore, there is limited data available on the size and structure of the TPLF market since professional funders have only recently entered the market, often as part of hedge funds or financial institutions, and they tend to keep their activities confidential for legal and competitive reasons.[151] Therefore, describing the market has focused on the visible segment, which consists of specific litigation funders, and many hedge funds, financial institutions, family offices, and other organisations that can also finance claims are often not part of the analysis. In the European context, the market for litigation financing is most developed in the United Kingdom, where several dozen funders are active, explicitly focusing on litigation financing.

147 Art. 7, Section 2 Gesetz zur gebündelten Durchsetzung von Verbraucherrechten (Verbraucherrechtedurchsetzungsgesetz – VDuG).
148 Augenhofer & Dori 2023, p. 204.
149 Tzankova 2012.
150 A study commissioned by the European Commission to map the development of Third-Party Litigation funding in the EU will commence in 2024.
151 Veljanovski 2012.

2.4 Development of the Dutch Market for Third-Party Litigation Funders

2.4.1 TPLF in the Netherlands

TPLF is allowed in the Netherlands, both in judicial proceedings and arbitration. TPLF constitutes a growing market, particularly in arbitration, for settling cartel and investment damages, both individually and collectively, as well as mass claims, more generally. One of the key reasons for enabling collective actions and allowing third-party litigation funding in the Netherlands is to promote access to justice in cases of collectively suffered damages.

However, the effectiveness of a collective action mechanism depends on the initiative of representative organisations. Initiating a collective action can be a costly and risky endeavour due to its complexity, scale and duration. Organisations may not always have the capacity or willingness to take such action. Collective procedures involve significant costs due to their complexity and scale.

Securing funding for these activities can be a significant hurdle to initiating a claim. In recent years, following the example of other jurisdictions, commercial parties have partially stepped in to fill this gap.

The Netherlands has proved to be an attractive market for funders in several WCAM cases. The Fortis/Ageas settlement illustrates such an arrangement where litigation funders funded the procedure, demonstrating the potential returns on investment that litigation funders can achieve in the Netherlands. As part of the €1.3 billion settlement following the dismantling of Fortis in 2007/08, four representative organisations received €45 million from Ageas (successor to Fortis). Additionally, three of them received another €80 million based on the agreements they had made with individual claimants. With a settlement payout of €1.3 billion, such a total amounts to approximately 10 percent.[152]

152 Amsterdam Court of Appeal, 13 July 2018, ECLI:NL:GHAMS:2018:2422 (*Fortis/Ageas*). See also https://www.hln.be/de-krant/deminor-verdient-45-5-miljoen-euro-aan-fortis-schik~a6c5ab48/ and https://www.accountant.nl/nieuws/2022/6/gedupeerde-beleggers-fortis-krijgen-eindelijk-laatste-geld/.

2.4.2 Market Developments in the Netherlands

Consumers and small business owners who lack the means to litigate against larger opponents are increasingly finding their way to a growing number of third-party litigation funding providers in the Netherlands. Effects and complex financial products, such as investment insurance and interest rate swaps, were central in collective actions that were (partially) funded by third parties in the past.[153] Another type of collective action typically funded by third parties and for which the Netherlands has proved to be a popular jurisdiction are follow-on damages claims in antitrust cases.[154]

The Dutch market for third-party litigation funding is undergoing rapid development. Whereas this form of litigation financing was a relatively unknown phenomenon a few years ago, litigation funding has now become an accepted tool in the toolkit of lawyers and their clients who lack the means to file a claim.

The use of third-party financing in the context of collective actions has received a further impetus from the recent enactment of the WAMCA. Combined with the possibility to litigate in English before the Netherlands Commercial Court and subsequently enforce judgments in other EU member states pursuant to Regulation 1215/2012 (Brussels I-bis), it is expected that the Netherlands will become a more attractive forum for international mass claims.

However, even before the introduction of the WAMCA, the Netherlands was an attractive jurisdiction for various types of group claims. The presence of many international companies in the Netherlands, the recognition of judgments throughout the European Union under Brussels I-bis, and the WCAM as a relatively effective collective settlement mechanism are cited as key reasons for the attractiveness of the Netherlands as a jurisdiction for litigation and settlement, particularly in antitrust disputes and other collective claims.[155] The reliable legal system, relatively fast handling of cases, relatively low costs (both lawyers' fees and cost orders), and the recent introduction of the WAMCA also contribute to an attractive market for funders. An analysis of the

153 The best-known example is the €1.3 billion settlement between Ageas (formerly known as Fortis) and institutional and private investors regarding claims arising from the acquisition of ABN AMRO by Fortis in 2007.

154 Well-known examples of this are cartel damage claims, such as Amsterdam District Court, 15 May 2021, ECLI:NL:RBAMS:2021:3574 about the truck cartel; Rotterdam District Court, 23 June 2021, ECLI:NL:RBROT:2021:6635 about the elevator cartel; Amsterdam Court of Appeal, 6 July 2021, ECLI:NL:GHAMS:2021:1940 about the air freight cartel.

155 Philips 2021, p. 122.

WAMCA register reveals that there is always a third-party funder involved in cases where compensation is sought but not in cases where no compensation is sought.[156]

The WAMCA has particularly attracted market parties who see a potentially lucrative market in collective damage claims. It is difficult to determine the precise and potential market size for litigation financing in the Netherlands, in general (not just for collective actions), as there are no publicly available data sources that can serve as a reference. However, with regard to the field of collective actions, growth is clearly evident in the number of parties active in the financing market in the Netherlands.

2.4.3 Market Players[157]

The Dutch market for both collective proceedings and third-party funding is in full development. With the introduction of the WAMCA and the leading role that the Netherlands plays in collective proceedings compared to the rest of Europe, many changes are observable in this market. Not only does the Netherlands attract a group of foreign litigation funders and law firms entering this collective action market, but reactions are also visible among existing Dutch litigation funders and the legal profession to the new possibilities for collective damage recovery.[158]

Dutch company *Liesker Litigation Finance*, founded in 2011, has successfully introduced litigation funding to the general public, including individuals and SMEs. *Liesker* funds claims starting from €150,000 in the areas of contract disputes, bankruptcy law, patent disputes, inheritance law and cartel damages. Following this, we now see other Dutch funders with a similar focus. *Capaz Litigation Funding*, founded in 2016, targets claims starting from €200,000 and charges an average fee of 30% after deducting costs. *Redbreast*, active since 2015, initially focused on claims with a value of at least €5 million but has since abandoned this lower limit. This funder, operating based on the capital of a few private investors, funds complex claims and arbitrations.

Omni Bridgeway is a company that has built an international reputation for its ability to enforce judgments for litigants in less accessible parts of the world, long before the boom in litigation financing. More recently, it has also become active in financing anti-cartel claims and complex disputes, including arbitration and group claims. At the

156 Refer to Chapter 3, Sections 3.2.2 and 3.3.3.

157 The information in this paragraph is partly based on research into the cases in the WAMCA register, partly on research of the websites of the relevant funders, and partly on the interviews conducted and the practical experiences of one of the researchers.

158 For an overview see https://www.lexology.com/indepth/third-party-litigation-funding/Netherlands.

end of 2019, *Omni Bridgeway* merged with *IMF Bentham*, becoming one of the larger (listed) players in the world of litigation finance.

Other major foreign players currently active in the Dutch market include *BPGL Funding**, *Calunius Capital* (which no longer funds new cases), *Burford Capital* (also listed), *Harbour Litigation Funding*, *Therium**, *Fortress* (formerly *Vannin Capital PPC**), *Innsworth**, *Bench Walk**, *Deminor**, *Woodsford*, *Augusta* and *Orchard*.[159] Most professional litigation funders are members of the Association of Litigation Financiers. Additionally, there are also ad hoc funders established solely for the purpose of specific cases. Examples of these are *Consumer Justice Network B.V.*, *Right to Consumer Justice B.V.*, *Emission Claim Trust B.V.* and *Consumer Privacy Litigation Funding L.P.*

Most international funders operate based on capital provided by hedge funds, private equity or other substantial investment funds for institutional investors. These parties do not focus exclusively on collective proceedings. However, the fact that an increasing number of these parties are becoming active in the Dutch market is being driven by the pioneering role that the Netherlands plays in collective litigation. In particular, the introduction of the WAMCA has attracted parties entering the Dutch litigation funding market. This is also evident in the activities of funders that have been active in the Dutch market for a longer period. For instance, *Redbreast* established a fund exclusively for Dutch collective actions in 2021.

The aforementioned ad hoc funders such as Consumer Justice Network B.V.*, Right to Consumer Justice B.V.*, Emission Claim Trust B.V.* and Consumer Privacy Litigation Funding L.P.* are collaborations between lawyers and (usually American) investors focusing on financing a specific type of claim, such as the diesel emission cases. However, very little public information is available about these organisations since they are not traditional litigation funders. In some cases, American law firms act as funders of Dutch collective proceedings. American firms such as *Bernstein Litowitz Berger & Grossmann* (BLBG), *KesslerTopazMeltzer&Check (KesslerTopaz), Pomerantz, LieffCabraser, Grant&Eisenhofer* and *DRRT* have been active in the Netherlands for some time, while law firms like *Scott + Scott, Hausfeld, Milberg* and *PogustGoodhead* have recently established a presence in the Netherlands, apparently in an attempt to focus on the collective action market.

159 The funders with an * are known to be involved in WAMCA procedures that are included in the register so far.

2.4.4 The Types of Approach Taken by Funders[160]

The diverse backgrounds of funders also translate into different approaches. For example, American law firms tend to invest in cases they are familiar with from their own practice and have personally investigated and/or successfully litigated themselves. Professional litigation funders have a broader investment horizon, but there are also differences among them. While some, like American lawyer-investors, conduct a lot of scoping and/or due diligence research in-house, others rely entirely on market requests. This also reflects in the due diligence processes followed: some litigation funders prefer to do it mostly through experienced and/or specialised in-house legal teams, while others outsource it entirely to external law firms, depending on the jurisdiction and the field of law. In addition, some funders limit themselves to traditional litigation financing, while others offer more extensive litigation financing products, such as portfolio financing and/or purchasing claims, with or without assignment for collection. This can explain the size and personnel of a funder.

The way the due diligence process is structured and the variety of services that are offered influence the turnaround times for financing applications and the overhead costs of litigation funders. Therefore, they affect the pricing of financing facilities in WAMCA procedures. Another aspect that affects the pricing of financing facilities is whether the funder reserves the entire funding separately for the procedure or secures it per phase. The first approach can provide more certainty about the continuous availability of the financing facility but leads to higher costs of capital. In general, it can be stated that the larger and more professional the funder, the higher the costs of capital.

2.4.5 Other Market Reactions

The increased opportunities in the field of collective actions in the Netherlands have had several effects beyond attracting foreign litigation funders. In the Netherlands, a response to the new possibilities can be seen from not only traditional representatives and single-purpose ad hoc foundations established for a specific claim or type of claims (e.g., *Stichting NUON claim*, various diesel scandal-related claim foundations) but also new multipurpose ad hoc foundations that aim to represent specific interests through a governance structure focused primarily on bringing multiple mass damage claims,

160 This paragraph is largely based on the practical experiences of one of the researchers and was not contradicted in the interviews.

especially in the areas of online privacy violations and consumer issues.[161] Some of these claim foundations have already secured initial support from one or more professional funders,[162] while others are currently self-funded by their board members.[163]

Within the legal profession, there is also a visible response to the increasing normalisation of litigation funding. In recent years, more and more lawyers have gained experience working with litigation funding in one form or another. Some law firms invest a lot of time and effort in researching potential claims, especially collective actions, to present them to funders and the representative organisations of the aggrieved parties. This has led to an emerging market of entrepreneurial lawyers who investigate, substantiate and present potential claims brought to them, particularly collective actions, to funders or assist in investigating alleged misconduct themselves. This will be discussed further in Chapter 4.

Funders also indicate a shift in the way funding applications are submitted to them. While applications used to primarily come directly from the claimants, this has shifted to applications from clients referred by their lawyers or applications submitted directly by lawyers.[164] In addition, there is a growing trend of closer collaboration between funders and lawyers, with lawyers referring clients to specific funders and these funders forming partnerships with specific lawyers or law firms.[165]

Moreover, there are facilitating organisations that take an intermediary role and focus on the administrative side of mass damage cases. *ClaimShare* is an example of this and aims to bring together claimants, lawyers and funders. In practice, it adopts a hybrid form and sometimes also develops and (pre)funds cases until they reach a form or stage that meets the criteria of a professional funder.

Compared to the United States, there are currently no known entities in the Netherlands that specifically offer services (in addition to the aforementioned process facilitation) related to the settlement following a collective procedure. Examples include *JUST Legal*

161 The Right to Consumer Justice Foundation, the Mass Damage & Consumer Foundation, The Privacy Collective Foundation, the Take Back Your Privacy Foundation and the Netherlands Data Protection Foundation are some examples of these.

162 An example of this is the Mass Damage & Consumer Foundation, which is supported by litigation funder Omni Bridgeway.

163 According to its own website, the Market Information Research Foundation is currently provided with financing by the board members themselves. However, in the long term a registration fee of EUR 17.50 will be charged. See https://somi.nl/.

164 See, for example, Philips (Omni Bridgeway) in interview: www.advocatenblad.nl/2018/06/05/rechtszaak-als-verdienmodel.

165 See for instance van den Hurk, Gommer & Partners Pensioen Advocaten in interview: www.advocatenblad.nl/2018/06/05/rechtszaak-als-verdienmodel.

Finance and *Rightshare*, which provide end-to-end support for managing collective files, including organisation, governance, book-building and the administrative handling of potential compensation payments. In the focus group conducted with lawyers representing defendants for this study, a shortage was identified in this regard. Due to the lack of parties with experience and an infrastructure for handling claims and settlement agreements, an ad hoc institution is constantly being set up. The complexity and costs associated with this process hinder the efficient resolution of a settlement reached between claimants and defendants. Furthermore, it requires the reinvention of the wheel by the settlement parties each time.[166]

The current Dutch market for external financing, therefore, has various forms and types of market participants. In some cases, there is a financing facility and/or the (pre)funding of the costs associated with a procedure by small or large (inter)national funders. Additionally, an external party may not only finance the costs but also provide advice and/or perform certain services on behalf of the representative organisation, such as taking over specific administrative tasks. Lawyers play a significant role in this regard, both in terms of liaising between representative organisations and funders and in investigating, initiating and presenting cases to funders themselves.[167]

2.5 National and European Regulation

The regulation of third-party financing of collective claims by commercial entities is currently limited both in the Netherlands and at the European level. In what follows, we will first discuss the (soft law) regulation in the Netherlands and then delve into the regulation and further developments at the European level, especially the RAD, the initiative of the European Parliament and soft law. It goes without saying that these European regulations, to the extent that they are binding or become binding – especially the RAD – also apply to the Netherlands.

2.5.1 Regulation in the Netherlands

In Section 2.2, where various financing options were discussed, it became apparent that many forms of financing are not suitable or only partially suitable for financing collective actions. Some forms of financing that play a significant role in collective actions in other countries, particularly contingency fees charged by lawyers, are not allowed in the

166 Refer to Chapter 5, Section 5.2.2 (focus group report).
167 Refer to Chapter 4.

Netherlands. This section focuses on the regulation of financing by commercial third parties.

TPLF is not specifically regulated by law in the Netherlands. Since Dutch law upholds the principle of freedom of contract, parties are generally free to make agreements as they see fit, as long as these agreements do not violate public policy, good morals or principles of reasonableness and fairness. The relationship between the third-party funder and the party seeking financing is governed primarily by the financing agreement, which is a sui generis agreement.[168] Disputes between litigants and their funders regarding the validity of agreements made between them have been rare so far, or at least have not been publicly resolved, and there is generally little information available on this issue in both domestic and foreign contexts. An unusual exception in the Netherlands is a decision by the Amsterdam Court of Appeal in December 2011.[169] In this case, the litigant challenged the validity of the funding agreement due to the high fee demanded by the funder (40% excluding VAT, after deducting costs). The court rejected the claim, stating that the mere fact that a third-party funder charges a higher fee and interest than other external providers of litigation financing does not constitute a violation of public policy or good morals.

The role of the funder and their involvement in the proceedings are usually documented in the financing agreement as well. Some financing agreements require the funder to actively manage the proceedings, while others do not.[170] Over the past decade, funders have enjoyed considerable freedom in structuring financing arrangements, as there was no regulation in place. However, this has changed. First, in response to criticism of the functioning of certain (members of) ad hoc consumer organisations, the Claim Code was developed. This is a self-regulatory initiative in the field of good governance that was introduced in 2011 and revised in 2019. The most recent version of the Claim Code contains provisions that are relevant to TPLF. Additionally, the WAMCA includes several statutory provisions that involve a certain degree of (judicial) regulation of TPLF. As was discussed previously, these are also scrutinised by the courts and have led to declaring claim organisations inadmissible where the court has considered that the requirements have not been fulfilled.[171] Some of these provisions in the WAMCA are a codification of the Claim Code, which requires an independent decision-making

168 Van Boom & Luiten 2015.

169 Amsterdam Court of Appeal, 13 December 2011, ECLI:NL:GHAMS:2011:BU8763 (*Nederlandse Letselstichting/Geïntimeerden*).

170 In the same case, it was determined that if the client did not want to agree to a settlement offer that was considered acceptable by the funder, she had to repurchase her assigned claim from the funder, along with payment of the costs incurred to date. In fact, this means that the consumer in question had completely lost the power to settle her case. See Van der Krans 2018, p. 35.

171 Refer to Chapter 2, Section 2.1.3.

authority for the organisation, while others impose additional rules. Since the relevant WAMCA provisions were discussed in Chapter 2, this section will provide a brief discussion of the relevant provisions of the Claim Code.

The Claim Code establishes general rules aimed at providing represented parties with more clarity and guarantees regarding the organisations acting on their behalf. It follows a system of 'comply or explain': the Claim Code specifies the frameworks and norms, which can be temporarily deviated from with proper justification. The Claim Code consists of seven principles and explanations, including principles related to the composition, role and remuneration of the Supervisory Board of representative organisations, as well as principles regarding third-party financing of proceedings since 2019. Neither the representative organisation nor its (in)direct stakeholders may pursue profit, but the organisation may receive reimbursement for incurred costs or provided services. This may include reasonable compensation for future actions and/or incurred costs.

If the organisation is supported by an external funder, this must be disclosed publicly, along with the main terms of the financing agreement. Additionally, the funder must be financially sound, must not influence the proceedings, and must not cause conflicts of interest in any other way. The Claim Code also requires that the financing agreement be documented in writing and that, for dispute resolution, it must have a choice of Dutch law and a choice of forum for arbitration in the Netherlands in the event of disputes between the funder and the representative organisation. The agreement must also specify the funder's place of residence in the Netherlands. Although the Claim Code does not include sanctions for non-compliance, judges can take this into account. Since its establishment, the Code has been used as a guideline for judges to assess the admissibility of a representative organisation. In all cases of damages actions covered by the timeline of this report, a reference to (and claimed compliance with) the Claim Code is made.

2.5.2 Regulation in Europe: Directive on Representative Actions

In the EU context, both contingency fees for lawyers and third-party financing have traditionally been approached with caution.[172] This is also evident in the first EU instrument on collective actions, the 2013 Recommendation on collective actions.[173] This recommendation allows contingency fees only 'exceptionally' and requires that the right

172 See also Kramer & Tillema 2020, pp. 172-174.
173 European Commission 2013, (2013/396/EU).

to full compensation be guaranteed.[174] The background to this is the apparent concern that the method of remuneration for lawyers may incentivise unnecessary litigation from a party's perspective.[175] Third-party financing is not prohibited, but it is not allowed to base the fees paid to the funder or the interest charged on the amount of the settlement reached or the damages awarded.[176]

The RAD, which has been applicable since 25 June 2023, also contains several important rules regarding costs and financing and is more nuanced regarding third-party commercial financing. Unlike the Recommendation, this Directive is binding legislation, but it only applies to consumer cases falling within the scope of this Directive.[177]

A general rule for the costs and financing of representative actions within the meaning of the RAD is included in Article 20, as briefly discussed previously.[178] According to Paragraph 1, member states must ensure that the costs of proceedings do not prevent competent consumer associations, within the meaning of the RAD,[179] from effectively exercising the right to bring representative actions. Paragraph 2 specifies that measures to achieve this may include public funding, structural support for competent consumer associations, limitations on applicable court costs or administrative costs, or access to legal aid. According to Article 20, Paragraph 3, consumers who have expressed their desire to be represented in the context of redress measures (in particular, compensation)[180] may only be charged a "modest registration fee or a similar fee for participating in that representative action".[181]

Of particular importance for third-party financing is Article 10 of the RAD. Third-party commercial financing is generally allowed as long as it is permitted under national law and conflicts of interest are avoided. Furthermore, Paragraph 1 requires that third-party financing by those with an economic interest in bringing or the outcome of the representative action for redress measures does not divert the representative action from protecting the collective interests of consumers. More specifically, this means that decisions in the procedure, such as settlement decisions, may not be influenced by a third-party to the detriment of the collective interests of the affected consumers (Sub-Section a). Also, the representative action cannot be brought against a defendant

174 Recommendation, No. 30.
175 Recommendation, No. 29.
176 Recommendation, No. 32.
177 Art. 2 Directive (EU) 2020/1828 and Ann. I. See also above, Section 2.1.1.
178 Refer to Section 2.2.
179 See Art. 4 for the admissibility requirements and Section 2.2.3(d).
180 See Art. 9 Directive (EU) 2020/1828.
181 See Art. 20 Directive (EU) 2020/1828.

who is a competitor of the funder or against a defendant on whom the funder depends (Sub-Section b). Member states must ensure, according to Articles 10, Paragraphs 3 and 4, that these requirements can be legally reviewed and that, if necessary, measures can be taken, such as refusing financing. In the Netherlands, this is ensured under the WAMCA in the context of the review of the admissibility requirements of Article 3:305a DCC. The specific requirement under Article 10, Paragraph 2, Sub-Section (b) was not included in the WAMCA, but it has been implemented in Article 3:305a, Paragraph 2, Sub-Section (f) for directive cases since 25 June 2023, as discussed previously.[182]

Article 12 of the RAD contains the so-called 'loser pays' rule, according to which the party that is unsuccessful in the proceedings must, in principle, bear the procedural costs. Paragraph 1 leaves a lot of room for the member states in this regard, and Dutch law complies with this principle under Article 237 of the Code of Civil Procedure. According to Paragraph 2, procedural costs should not be paid by individual consumers.[183] Small contributions, directly or indirectly in the form of membership contributions to claiming foundations, to participate in a claim do not fall under this category. A 'modest contribution' to participate in a claim is explicitly allowed under Article 20, Paragraph 3, as described previously.

It has been argued in the literature that the extent to which TPLF agreements are compatible with these provisions is unclear since the fee to be paid to the third-party funder often affects the amount that is paid out.[184] Indirectly, procedural costs are thus shifted onto the stakeholders – in the case of the RAD, the consumers. Nevertheless, it must be assumed that financing by a commercial third party is possible under Article 10, but it is a provision to take into account. In principle, it is possible to order the opposing party to pay the financing costs incurred by a third party in accordance with the rule that the losing party pays the procedural costs (Article 12 of the RAD) if these can be considered as genuine costs of the proceedings. The criteria used by the courts under the WAMCA are not yet entirely clear. This was also brought up during the interviews and is further discussed in Chapter 4, particularly in Section 4.8 and the conclusions in Section 4.10.

Finally, Article 9, Paragraph 7 of the RAD provides member states with the option to establish rules on the destination of outstanding redress funds that have not been

182 Refer to Section 2.1.3 under (d).
183 With the exception of cases where these costs have been caused by the individual consumer intentionally or through negligent behaviour, see Art. 20(3) Directive (EU) 2020/1828.
184 Gsell 2021, in particular pp. 1397-1399.

collected by injured parties within the specified period. This allows for the possibility of cy pres financing of a potential litigation fund, which is central to this research.[185]

2.5.3 *European Parliament Resolution: Responsible Private Litigation Funding*

As mentioned in the Introduction, in September 2022, the European Parliament adopted a resolution containing recommendations to the European Commission regarding Responsible Private Litigation Funding.[186] The draft report (the 'Voss report'[187]) addresses various issues, including the consequences of conflicting interests between litigation funders and claimants. It points out that the economic interest of litigation funders may lead to excessive portions of the proceeds being claimed and to the funder controlling the proceedings. It also addresses concerns that funders may seek a settlement as soon as sufficient proceeds are generated, withdraw their funding during proceedings, or become insolvent during the process. The proposed directive recommended by the Parliament includes several points aimed at increasing regulation, oversight and transparency.

First, it suggests a system for the approval of litigation funding activities,[188] similar to existing systems for financial services provided by banks and insurers.[189] Regulatory authorities would have the authority to grant licences and ensure that litigation funders are sufficiently transparent, adequately capitalised and fulfil their obligations towards claimants.[190]

Second, the proposal contains quite extensive requirements regarding the litigation funding agreement itself.[191] The terms of the funding agreement must be transparent, clear and written in plain language. There is also a cap on the distribution of proceeds from the litigation. At least 60% of the damages awarded must be paid to the claimants. Litigation funders are also prohibited from withdrawing their funding during the proceedings. Contractual provisions that involve conditional funding are considered void.

185 Refer also to Chapter 5, in particular, Sections 5.2.2, 5.3.2 and 5.4.
186 European Parliament resolution of 13 September 2022 with recommendations to the Commission on responsible private litigation financing (2020/2130(INL)).
187 After the rapporteur Alex Voss. Draft Report with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)), 17 June 2021. See also Stadler 2022b.
188 EP Resolution, Arts. 4-7 proposal Directive.
189 Stadler 2022b, p. 157.
190 EP Resolution, Arts. 8-11 proposal Directive.
191 EP Resolution, Arts. 12-15 proposal Directive.

Lastly, the court or a competent administrative authority must be informed of the existence of commercial funding and the identity of the funder. Parties are required to submit the funding agreements on request by the court or the defence, and the court reviews them based on a set of criteria.[192]

Some scholars have raised questions about the necessity of these provisions,[193] and the resolution and underlying report have also faced criticism from practitioners.[194] Stadler advises the European Commission to critically examine the Voss report and consider less far-reaching alternatives.[195] It appears that the European Commission intends to wait for the experiences with the implementation of the RAD before making extensive regulatory proposals. In 2024, a study commissioned by the European Commission will begin mapping the development of third-party litigation funding in the EU.

Some of the proposals, such as the requirement to submit the funding agreement and disclose the identity of the funder, are already common practice in the Dutch WAMCA practice due to the requirement in Article 3:305a that a claimant must indicate the financial means available. As demonstrated by the analysis of the WAMCA register, there are variations in the information provided about funding in the summons.[196] The transparency requirement is also included in the ELI-Unidroit Model European Rules of Civil Procedure (ERCP) to ensure the necessary financial support for expensive and complex collective actions and to prevent potential conflicts of interest.

2.5.4 Soft Law in Europe: ELI-Unidroit Model Rules and ELI Project

The ELI-Unidroit Model European Rules of Civil Procedure (ERCP) were adopted in 2020 by the European Law Institute and UNIDROIT.[197] These rules are intended as best practice model rules for civil procedures and can provide guidelines for both national and European legislatures.[198] They were developed over 6 years by a team of approximately 45 experts, in consultation with international organisations, European authorities and advisers. They currently represent the most comprehensive system of soft law rules in this field.

192 EP Resolution, Arts. 16-18 proposal Directive.
193 Stadler 2022b, pp. 158-159.
194 See, among others, the contributions to a seminar organised by Erasmus School of Law: Cordina & Storskrubb, 2022, in particular, pp. 40-43; Ishakawa 2022 https://www.lawgazette.co.uk/commentary-and-opinion/voss-report-is-unsatisfyingly-hollow-and-narrow/5113894.article.
195 Stadler 2022b, p. 158.
196 Refer to Chapter 3, Section 3.2.2.
197 ELI & UNIDROIT 2021.
198 See on this Sorabji 2019; Kramer 2019.

The ERCP includes rules for collective actions and some rules for the costs and financing of procedures.[199] Rule 245 provides a general rule for third-party litigation funding, and Rule 237 provides a special rule for collective actions. These rules are liberal and take as their starting point that third-party funding is a significant contribution to ensuring access to justice.[200] They contain only a few basic rules on this matter.

Rule 237(1) states that claimants may use third-party litigation funding. In 237(2), the general Rule 245 is made applicable, and it is determined that a court may require a claimant to provide details of the funding agreement. At the very least, both the use of third-party funding and the identity of the funder must be disclosed to the defendant.[201]

In Rule 245(2), it is stipulated that the funder's fee must not be 'inadequate' or enable the funder to exert 'undue influence' over the course of the proceedings. This rule is more specific on this point than the RAD but less restrictive than the proposals of the European Parliament discussed in the previous two paragraphs. Rule 245(3) states that parties may enter into success fee arrangements with a lawyer or third-party funder. Such agreements must comply with applicable law, provide access to and fair representation of parties, and maintain the integrity of the procedure. Through open standards that allow for judicial review, abuse is to be prevented.

Rule 238 provides several safeguards for cost orders concerning collective actions. Only a 'qualified claimant' (and not, for example, an individual consumer) can be ordered to bear the costs. If a case is successful, the entire amount of the award forms a general fund, from which the financing costs are paid first.

Partly as a follow-up to these concise rules of the ERCP and in light of European developments, a new project was launched in 2022, under the auspices of the European Law Institute, focusing on 'Third party Funding of Litigation'.[202] This project will build on the principles of the ERCP and, based on extensive comparative legal research and market research, develop model rules for the financing of commercial third parties.

199 Kramer 2023.
200 ERCP, Rule 245, Comment 4.
201 See also ERCP, Rule 245(1).
202 https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/third-party-funding-of-litigation/.

2.6 Conclusion

With the introduction of the WAMCA on 1 January 2020, the Dutch system of collective actions and settlements was completed. Practice under the WAMCA, the commercial litigation funding market, and the regulation of third-party litigation funding are still at a relatively early stage of development and are evolving.

The heightened admissibility requirements set out in Article 3:305a of the DCC aim to ensure that claim organisations meet a series of conditions, including possessing the necessary professionalism, transparency and financial resources. With the application of the RAD on 25 June 2023, an additional requirement for consumer disputes falling under the Directive is that the financing must not come from a funder who is a competitor of the party against whom the action is brought or from a funder who is dependent on the party against whom the action is brought.[203]

In the literature, the heightened requirements of the WAMCA have been criticised on several points because they make it more difficult – and thus costly – for claim organisations to initiate a WAMCA procedure. Complications have also arisen in case law, particularly regarding the interpretation of transitional provisions and the requirement of a close connection to the Netherlands (the scope rule). The picture that case preparation is time-consuming, and that the admissibility phase involves more procedural steps, with some cases faltering at the admissibility stage, is confirmed based on the analysis of the WAMCA register and the interviews.[204]

Notably, in a number of recent WAMCA cases, the courts have engaged more extensively with third-party litigation agreements. As discussed, in the Airbus case this has led to declaring a claim organisation inadmissible as the court considered, among others, that due to dependence on the (expertise of the) litigation and the composition of the board the governance requirements were not fulfilled.[205] Interestingly, apparently in a trial-and-error fashion, in the TikTok privacy litigation, the claim organisation got an opportunity to amend the funding agreement with a view to meeting the admissibility requirements. It remains to be seen whether this will be successful and what further impact there will be on the case. It is noteworthy that in the Vattenfall litigation, the same court – though with different judges – and on the same day seemed more liberal as regards certain terms of the funding agreement pertaining to prior consultancy of the lawyers regarding the proceedings, though the phrasing was different.

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203 Art. 3:305a, Para. 2 sub (f) of the DCC, as this provision has applied since 25 June 2023.
204 Refer to Chapters 3 and 4.
205 Refer to Section 2.1.3.

In theory, there are various possibilities for financing claims, in addition to financing by commercial third parties, including self-contribution, publicly funded legal aid, legal expense insurance, performance-based fees for lawyers, crowdfunding and private funds and donations. However, these have significant limitations in the case of collective actions. Self-contributions from foundations, for example, which usually come from membership fees, are not uncommon for non-damage cases but are insufficient for more complex matters and damage claims. Publicly funded legal aid is not available to interest organisations. Legal expense insurance, where it is in place, focuses primarily on individual policyholders and is not for financing collective actions, although legal expense insurance has played a role in some cases of collective damage, especially in disasters such as the Bijlmer plane crash, the Enschede fireworks disaster, the truck cartel and breast implant cases. Performance-based fees for lawyers, where the lawyer receives a percentage of the outcome, which plays an important role in collective actions in the United States, are largely prohibited in the Netherlands. Crowdfunding and donations are also possible means of financing but have so far been limited in practice.

Financing involving professional litigation funders has become more important, especially for collective actions. This has various advantages, such as a professional party bearing the financial risks, thereby facilitating access to justice and the settlement of a case. However, there is also criticism, such as the risk of conflicts of interest that may influence a procedure or settlement, and the apparent power that litigation funders have over which cases can and cannot be pursued. Not all cases are attractive to commercial litigation funders, especially those cases in which no or low damages are sought and/or where the risk of losing a case is higher, as these may not be sufficiently profitable.

The number of litigation funders in the Netherlands and the number of foreign funders active in the Netherlands have increased, indicating a growing market. These funders all have their own approach, leading to differences in the types of cases they fund. In response to these developments, there are also increasingly more multipurpose ad hoc foundations, in addition to traditional ad hoc claim foundations established for a specific case. These operate primarily in the field of consumer law (such as the Foundation for Market Information Research and the Mass Damage and Consumer Foundation) or privacy (such as the Take Back Your Privacy Foundation). Some of these are self-sustaining, while others rely on professional funders. Intermediaries, which mediate between claimant foundations/their lawyers and litigation funders, such as *ClaimShare*, have also emerged as a result.

At present, the regulation of commercial third-party financing is limited, both in the Netherlands and in other countries. In the Netherlands, in addition to the requirements set out in Article 3:305a of the DCC, there are the soft law rules of the Claim Code. This

Code establishes general rules aimed at providing represented parties with more clarity and guarantees for the organisations acting on their behalf. Concerning commercial external litigation funding, among other things, the funding agreement must be in writing, and it must be disclosed publicly that external litigation funding is in place. The RAD brings several requirements regarding costs and financing for consumer cases falling under the Directive. Member states are required to take measures to ensure that collective actions can actually be brought. From consumers themselves, only a modest contribution may be requested. Third-party financing by professional parties is generally allowed, provided that conflicts of interest are avoided. This rule has also led to an amendment of the WAMCA. Importantly, litigation costs should not be borne by individual consumers. This may potentially conflict with the indirect passing of litigation costs in the case of commercial third-party financing where the fee to be paid has an impact on the amount to be distributed. It is conceivable that, as part of a full cost order, the losing defendant will also have to reimburse the funder's fee.

Apart from a brief soft law regulation of third-party funding in the ELI-Unidroit European Rules of Civil Procedure, there is an initiative from the European Parliament for much more extensive and significantly stricter regulation in the form of a recommended directive on 'Responsible Private Litigation Funding'. At present, it is by no means clear to what extent the European Commission will adopt this initiative and in what form. It is clear that stricter regulation can have implications for the Dutch litigation funding market.

3 Analysis of the WAMCA Register

This chapter contains an analysis of pending and completed Mass Damage Settlement in Collective Actions Act (WAMCA) cases as included in the WAMCA register.[1] The aim of this analysis was to gain insight into the number and type of claims, the parties involved, the areas of law, the costs related to these procedures and the ways these cases are financed. After an introduction and discussion of research methodology in Section 3.1, the data and analysis are presented in Section 3.2. This chapter concludes with a summary in Section 3.3.

3.1 Introduction and Methodology

With the entry into force of the WAMCA on 1 January 2020, a central register for collective claims, the WAMCA register, was established. An analysis of the documentation included in the register[2] provides insights into the number and status of WAMCA cases, the areas of law in which these cases arise, the parties involved in the proceedings, and some inferences regarding the financing of these cases.[3] This allows for an initial understanding of the financing of collective actions under the WAMCA.

The register was systematically examined for several key pieces of information relevant to this research. After reviewing and filtering the various available documents, a 'summary' of each case was made. The documents used in this analysis include the (appellate) summonses, court decisions, interlocutory judgments, supplementary judgments and final judgments. However, not all of these documents are available for every case, with many cases (as of yet) having only summons(es) as their primary source of information. Each case in the WAMCA register was assigned a unique identifier, and factual details of the respective cases were recorded. This included information about the type of collective action, the claiming organisation(s), the defendant(s), potential funder(s), the legal domain covered by the collective action, the (inter)national context

1 Available at: https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen.
2 Until 1 July 2023, this included the summons(es), court decisions, opt-out announcements and (interim) judgments. Since that date it only includes extracts of the summons.
3 For an initial analysis with regard to other subtopics, see De Monchy & Kluwen 2020. Cf. also the analysis of Deminor and Wijn & Staal, Three years of WAMCA, a second quantitative analysis, can be downloaded via www.deminor.com.

of the collective action, the potential amount in damages involved, the claims made by the claimant(s), the costs related to the proceedings and the method of financing.

The summaries of the cases from the WAMCA register were compiled into an Excel spreadsheet, the cases examined presented in rows and the categories of factual details presented in columns. This approach allowed for a comprehensive analysis of the WAMCA register, enabling the identification of overarching patterns and developments across different cases. The status of the register as of 1 July 2023 was considered as the baseline for analysis. This moment is referred to as 'the cut-off date' in the subsequent sections. In a few instances, developments occurring after this point were also incorporated into the analysis.

3.2 Data and Analysis

3.2.1 WAMCA in Numbers

On the cut-off date, 71 cases were included in the WAMCA register. These consist of 13 completed claims and 58 ongoing collective claims.[4] Of the 13 completed claims, 4 cases ended with an interim judgment,[5] with an average processing time of 53 days. Four cases concluded with a final judgment,[6] with an average processing time of 362 days. Four cases ended in other ways.[7] The first ongoing case was filed on 13 February 2020,[8] and the most recent case as of the cut-off date was filed on 4 April 2023.[9]

It is still too early to make a well-founded statement (based on the WAMCA register) about whether the introduction of the WAMCA is leading to an increase in the number of collective actions. In previous research, Tillema attempted to compile the number of judgments in collective actions in district courts (civil and cantonal).[10] The data she collected goes back to the year 2018. The graph representing her research[11] results shows that the trend in collective actions dealt with by district courts has been relatively stable

4 This is based on the cases as they are included in the WAMCA register and the distinction made there. An overview of the status at the time of measurement can be found in Annex 1.
5 Completed cases 4, 5, 8 and 9.
6 Completed cases 2, 6, 11 and 13.
7 Completed case 1 (letter from lawyer requesting cancellation of the case) and 10 (judgment of dismissal of the agency due to late payment of court fees by the claimant's lawyer). In cases 3 and 7 it cannot be directly deduced from the WAMCA register how the case came to an end; it is possible that the cases were settled.
8 Case 58.
9 Case 1.
10 Tillema 2019c.
11 *Ibid.*

for years, hovering around 25 cases per year. Because the WAMCA came into force on 1 January 2020, and registration in the WAMCA register applies to collective actions filed on or after that date, a complete picture of the number of judgments in collective actions cannot be drawn from the WAMCA register for the period 1 January 2020 to 1 July 2023 (the cut-off date). The picture is also clouded because there is an ongoing debate in some of the proceedings about whether they fall under the old or the new collective action regime.[12] The number completed claims for cases included in the WAMCA register does not immediately indicate a significant increase in the number of judgments in collective actions in district courts.

In the context of a collective action, a distinction can be made between a collective action that does not aim to obtain collective compensation (non-compensation cases) and a collective action for damages (compensation cases). Of the 71 cases in the WAMCA register, 17 registered cases involve claims for obtaining (among other things) monetary compensation (24%).[13] Because 1 case concerns an appeal from a previously brought case, this concerns 16 actual disputes regarding collective compensation.[14] The remaining 54 cases are all non-compensation actions (76%).[15] Here too, appeals cause additional cases; this concerns 50 actual non-compensation disputes. The 71 cases in the register therefore relate to 66 disputes in which collective actions are initiated. The 13 completed cases all concern non-compensation actions. It is not surprising that the 16 cases involving collective compensation actions are still ongoing since claiming collective compensation is a complex matter.

3.2.2 Collective Compensation Actions

As previously mentioned, there are 17 collective compensation actions included in the WAMCA register that correlate with 16 actual actions.[16] All 16 of these cases are related to substantive proceedings, and all revolve around (contractual) liability law. The following division can be made within this: 31% (5 of the 16 disputes) concern the diesel

12 In three Dieselgate cases the old collective action regime applied according to decisions in case 57, 52 and 54. (ECLI:NL:RBAMS:2022:1541 (case 57); ECLI:NL:RBAMS:2022:1542 (case 52) ECLI:NL:RBAMS:2022:3586 (case 54).

13 This concerns the cases with the following numbers: 1, 2, 10, 12, 13, 19, 20, 24, 32, 36, 37, 39, 40, 52, 53, 54 and 57.

14 Because case 53 concerns the appeal of case 20, it is counted as one collective action, and it is shown in the footnotes as 53.

15 This concerns the cases with the following numbers: 3, 4, 5, 6, 7, 8, 9, 11, 14, 15, 16, 17, 18, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 38, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 55, 56, 58 and the settled claims 1 to 13.

16 This concerns the cases with the following numbers: 1, 2, 10, 12, 13, 19, 24, 32, 36, 37, 39, 40, 52, 53, 54 and 57.

emissions issue,[17] 19% (3 of the 16 disputes) concern privacy violations,[18] 13% (2 of the 16 disputes) concern product liability due to defective medical devices,[19] another 13% (2 out of 16 disputes) concern violations of competition law,[20] and, finally, the remainder of the cases (4 in number, 25%) concern other issues.[21]

It is noteworthy that in 7 out of 16 collective compensation actions, multiple summonses have been issued against the defendant(s) by different interest organisations.[22] This phenomenon is particularly prevalent in cases related to the diesel emission scandal (Dieselgate), where 3 out of 5 ongoing cases involve multiple summonses,[23] which are issued by the same three interest organisations.[24] This trend is also observed in another instance where one interest organisation issued summonses in two different cases related to consumer law.[25] This indicates a high level of competition among interest organisations in this field, as well as the presence of certain organisations, with expertise and experience in specific areas, acting as 'repeat players'. In total, 28 summonses in the first instance and two appeal summonses were issued in the 16 collective compensation disputes.[26]

It is striking that the government (and affiliated public law bodies and foundations) has only been summoned once in a collective action for damages.[27] In the 15 other collective compensation actions, the business community is being taken to court. Because the majority are companies that operate on the international market, this immediately gives these cases an international character. This pattern can be explained: internationally operating companies usually have deep pockets, which makes it seem

17 Cases 36, 40, 52, 54 and 57.
18 Cases 2, 39 and 53.
19 Cases 1 and 10.
20 Cases 12 and 32.
21 Cases 13, 19, 24 and 37.
22 Cases 24, 32, 36, 37, 39, 40 and 54. In these cases, the various interest organisations and the summons issued by them will be referred to by the letters a, b and c. Refer to Annex 1.
23 Cases 66, 40 and 54.
24 Diesel Emissions Justice Foundation, Car Claim Foundation and Emission Claim Foundation. The Diesel Emissions Justice Foundation also issued the summons in cases 52 and 57.
25 Mass Damage and Consumer Foundation in cases 37 and 39.
26 An earlier analysis by Deminor and Wijn & Staal already established that there is a fairly high degree of competition with regard to externally funded procedures. The explanation given was that there will be a large supply of external funders for procedures that are expected to be successful and that the large number of victims means that interest organisations will emerge more quickly to represent the interests of these victims. Refer to Section 3.5 of the document (for the location of the document refer to Note 3 of his chapter).
27 Case 2. The case revolves around security deficiencies in the IT systems of the GGDs, in which personal data of many Dutch citizens was collected for the purpose of combating the Covid-19 virus.

worthwhile to initiate a collective compensation action in advance. Two collective actions for damages stand out, with only Dutch companies being summoned.[28]

Although the primary goal of collective compensation actions is to seek compensation for damages, the extent of the incurred damages is often not explicitly specified in these cases. In roughly a third of the cases, there is no indication of the magnitude of the damages, while in another third, figures in the billions or (hundreds of) millions of euros in damages are mentioned. In the last third of the cases we see that concrete numbers of injured parties and concrete amounts of damage suffered and damages requested per injured party are mentioned. Coincidentally or not, it concerns the 5 collective damages actions that were brought most recently, between August 2022 and April 2023.[29] The clearest and most concrete are two cases that concern product liability law: in those cases reference is made to 30,000 and 60,000 injured parties, respectively. In the other three cases, specific numbers of injured parties and/or specific damages per (group of) individual injured parties are also mentioned, although the substantiation of these numbers sometimes leaves much to be desired. In any case, the numbers provide more insight into the scale of the problem being addressed. The summonses outline the claims made by the interest organisations, typically starting with a declaration of rights, often tailored to the specific legal basis the organisation believes justifies compensation.[30] Occasionally, injunctions or orders are also sought.[31]

In 15 out of the 16 cases, the interest organisations issuing summonses are foundations, while in one case, three associations jointly summon the defendants.[32] These foundations often appear to be established specifically for the particular case or a few similar cases, as indicated by their names. All interest organisations collaborate with an external (commercial) funder to cover the costs of the collective compensation action.[33] The information provided by the interest organisations regarding the funding and the financing agreements in the summonses varies significantly. Usually, the funder is

28 Cases 13 and 19.

29 Cases 1, 2, 10, 12 and 13.

30 For example, a declaratory judgment that unlawful conduct has occurred, that the defendant's conduct constitutes an unfair commercial practice, that the consumers involved are entitled to annul the agreement, that certain amounts have been unduly paid, etc.

31 For example, banning Airbnb from charging service fees in the future (case 37b), an order that Allergan ensure that the injured parties are enabled to have breast implants explanted at Allergan's expense (case 10), and an order for TikTok to destroy the unlawfully obtained personal data (case 39b).

32 Case 13.

33 In one case (case 40c), the summons issued by the Diesel Emissions Justice Foundation does not mention anything about cooperation with a funder. However, since later summonses against other defendants issued by this Foundation mention external funding and mention a funder by name, it is assumed that this will be no different in this case.

mentioned by name;[34] in three instances this is not the case.[35] Some funders are involved in multiple matters. This is particularly relevant in cases related to Dieselgate,[36] but we also see this in product liability cases[37] and competition law cases.[38] The explanations provided by interest organisations regarding the funder and the agreements made with the funder vary greatly. In broad terms, the following picture emerges.

In most cases, something brief is mentioned about the funder and/or funding agreement, such as an explanation of the choice to use a funder because of their resources and expertise.[39] Concerning this expertise, it is often noted that the funder has experience in conducting class actions in the United States or England related to the issue in question. Occasionally, the summonses refer to annexed exhibits for more information about the funding (agreement). However, since the exhibits are not included in the public WAMCA register, it is not possible to ascertain the specific information provided there.[40] Sixteen interest organisations delve more extensively into the funder and funding agreements, especially in the more recent cases.[41] They mention that beneficiaries will be required to pay compensation to the funder when a collective compensation award is granted by the court. This compensation may also apply when reaching a collective settlement. It is explained why this compensation is required (compensation for services provided and risks and costs borne by the funder), and the applicable percentage rates are included. Often, these are success-dependent fees, with the lowest percentage encountered being 5%,[42] and the highest being 27.5%,[43] whereby it is also agreed that the percentage decreases as the awarded compensation increases. This results-related remuneration sometimes has an absolute lower limit but is also capped to prevent exorbitant financing fees. When interest organisations provide more detailed information on funders and funding agreements, they often align with the principle of external litigation funding outlined in the Claim Code.[44]

34 In case 13, the names have been anonymised, so they appear to be natural persons (or entities comparable to natural persons).
35 Cases 36c, 39a and 54c.
36 Cases 36a and 40a have the same funder (Emission Claim Trust BV), and the same applies to cases 36b and 40b (Fortress) and cases 52, 54a and 57 (Consumer Justice Network B.V.).
37 Cases 1 and 10 are funded by Redbreast Associates N.V.
38 Cases 12 and 32c are funded by Tipan Van LF Ltd, which is ultimately affiliated with Fortress.
39 Cases 32a, 36a, 36b, 39a, 39c, 40a, 40b, 54b, 54c and 57.
40 Cases 36c, 40c and 52.
41 Cases 1, 2, 10, 12a, 12b, 19, 24a, 24b, 37a, 37b, 39b, 53, 21b, 21c, 54a and 57.
42 Case 12b.
43 Cases 46a and 57.
44 Principle III External financing. The Claim Code can be downloaded via https://www.massaschadeconsument.nl/static/6de103939aa53649e09c2a53a2d5be32/claimcode-2019.pdf.

3.2.3 Non-Compensatory Actions: Infringement of Intellectual Property Rights

As mentioned earlier, there are 54 non-compensatory actions included in the WAMCA register.[45] These concern 50 actual collective actions that are not aimed at damages.[46] The largest cluster within these non-compensatory actions is formed by cases related to Intellectual Property (IP) Law. There are 9 ongoing and 2 completed non-compensatory action(s) related to IP Law in the WAMCA register, totalling 11 (26%).[47] One ongoing case concerns a summary proceeding.[48] Approximately half of the proceedings are aimed at anonymous defendants who have sold IPTV packages that provided access to illegal copies of protected films, TV series, etc.[49] Taking action against the illegal distribution of protected (physical or digital) works on platforms and in email groups was the focus of the other cases.[50] Two cases have been initiated by the anti-counterfeiting foundation *React*;[51] in the other 9 cases, *Stichting BREIN* acts as the interest organisation.[52] Within the field of IP Law, these interest organisations can be seen as 'repeat players'. The business sector is always the defendant. Once, foreign legal entities were defendants;[53] otherwise, the cases have a national character because the infringements occur in the Netherlands, thus harming the Dutch market for businesses. In these proceedings, the foundations often claim measures to enforce intellectual property rights, such as declarations that the defendants infringe on IP rights, orders to cease infringement under penalty of a payment, orders to provide identifying information so that infringers can be traced, or a prohibition on continuing infringing activities.

There are no external commercial litigation funders associated with these cases; at least, there is no mention of this in the summonses. Interest organisations *React* and *Stichting BREIN* have affiliates consisting of (inter)national holders of well-known consumer good brands as well as artists, producers, broadcasters, publishers and distributors. Based

45 This concerns the cases with the following numbers: 2, 3, 5, 6, 7, 8, 9, 11, 14, 15, 16, 17, 18, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 38, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 55, 56, 58 and the completed case 1 to 13.

46 Due to pending appeals there are some cases that are double-counted; refer to Section 4.1.

47 Cases 22, 26, 42, 44, 45, 47, 50, 51, 55 and completed cases 2, 7 and 10. Completed case 10 has been given the status of completed because the lawyer in this case failed to pay court fees on time. This case has been relisted and has been assigned number 51 among current cases. In fact, it is the same dispute. Therefore, this case is counted only once and is shown as case 51.

48 Case 44.

49 Cases 26, 42, 47, 50 and completed case 2.

50 Cases 22, 44, 45, 51 and 55.

51 Cases 22 and 44.

52 Case 26, 42, 45, 47, 50, 51, 55 and completed cases 2 and 7. On one occasion, Stichting Brein collaborated with two large legal entities in the world of (digital) TV: case 42.

53 Case 10.

on the findings from the interviews, it can be generally concluded that these affiliated parties provide financial contributions to these interest organisations, allowing these organisations to cover the costs associated with conducting legal proceedings from their own resources.

3.2.4 Non-Compensatory Actions: Infringement of Fundamental Rights and Human Rights

The second-largest cluster within the non-compensatory actions concerns violations of fundamental and human rights. Out of the 50 non-compensatory actions in the WAMCA register, 12 relate to cases involving fundamental and human rights (18%); 9 cases are still ongoing, and 3 cases have been completed.[54] In 4 cases, an appellate summons has been issued.[55] Two cases involve summary proceedings.[56] Various issues are being litigated, including the right to euthanasia, reimbursement of contraception for adult women, children's right to clean drinking water, ethnic profiling by the Royal Military Police, the right to a fair trial, the export of military goods to a country where human rights violations occur, and the recruitment of military personnel and others on the internet for the war in Ukraine. In each collective action, different interest organisations usually act, and there is little evidence of 'repeat players' in this field.[57] It is clear that these interest organisations are often established for the purpose they seek to achieve through the collective action: the naming of the interest organisations reflects this. It is also noticeable that in this field interest organisations often collaborate. Only in 4 cases does a single interest organisation initiate the collective action,[58] while in the other cases, we see two,[59] three,[60] four,[61] five[62] or even seven[63] interest organisations jointly initiating a collective action. In 8 out of 9 cases, the Dutch government is the defendant, although

54 This concerns the cases with the following numbers: 4, 9, 11, 16, 23, 25, 31, 41, 56 and completed cases 6, 12 and 13. Because case 4 concerns the appeal from completed case 6, case 25 concerns the appeal from completed case 13, and case 31 concerns the appeal from case 23, these are counted as one collective action, and they are shown in the footnotes as 4, 25 and 31.

55 Cases 4, 25, 31 and 56. It is not clear on the basis of the WAMCA register alone why one first instance case in which an appeal has been lodged is included under completed procedures and others are not.

56 Cases 14 and 31.

57 We only see the Dutch Committee of Lawyers for Human Rights acting as one of the interest organisations in cases 23, 31, 56 and completed case 12.

58 Cases 16, 4, 9 and 11.

59 Cases 41 and 56.

60 Cases 23 and 31.

61 Completed case 12.

62 Case 25.

63 Completed case 13.

this is not entirely surprising given the field of litigation.[64] In addition to the Dutch government, public entities are also summoned twice,[65] one case concerns a Dutch municipality, and private legal entities are defendants only once.[66] This last case is also the only case in this field with an international dimension. In these collective actions, the interest organisations claim declarations of law, sometimes combined with injunctions, orders and prohibitions.

There are no external commercial litigation funders involved in these cases; at least, there is no indication of that in the summonses. One interest organisation states that it receives a subsidy from the Dutch Ministry of Security and Justice,[67] and it is not inconceivable that this applies to several interest organisations. Twice, it is mentioned in the summons that the proceedings are funded by donations from supporters.[68] It is likely that several cases are funded through donations from affiliated supporters. The fact that interest organisations have to obtain financial resources in this way likely explains why they collaborate in this field and initiate collective actions together. It is quite conceivable that interest organisations are simply compelled to do so to make the financial aspect work.

3.2.5 Non-Compensatory Actions: Violation of Labour Law

Of the 50 non-compensatory actions in the WAMCA register, 7 relate to labour law (14%), with one case completed.[69] Interestingly, there are a relatively large number of summary proceedings: 4 out of the 7 cases involve summary proceedings.[70] The subjects of these proceedings are very diverse, including working hours, saved hours, pension rights, participation rights, severance pay, and the classification of agreements with labourers. The interest organisations that have initiated these actions are all worker unions. 5 cases have been filed by the union *FNV*,[71] of which 2 are jointly with the union *CNV*[72] and 1 jointly with a union for train conductors and machinists;[73] 1 case has been filed by

64 It is generally assumed that fundamental rights have direct effect in the citizen-government relationship (vertical effect); In the citizen-citizen relationship, there is talk of an indirect horizontal effect of fundamental rights.
65 Cases 41 (the King) and 56 (other legal entities under public law).
66 Case 16.
67 Pax Netherlands Peace Movement Foundation, cases 23 and 31.
68 Cases 25 and 41.
69 Cases 17, 27, 28, 30, 38, 48 and completed case 3.
70 Cases 28, 30, 38 and completed case 3.
71 Cases 517, 27, 38, 48 and completed case 3.
72 Cases 27 and 48.
73 Completed case 3.

CNV,[74] and 1 case by a union in the maritime sector.[75] Within this field, both *FNV* and *CNV* can be considered 'repeat players'. The defendant parties are all companies, Dutch companies acting as employers in the Dutch labour market. All cases have a national character because they revolve around the interpretation of Dutch labour law and concern employees in the Dutch labour market. In these collective actions the interest organisations seek declarations of law, orders, commands and prohibitions, sometimes with the imposition of a penalty. In one case, it concerns a declaration of law that the employer is liable for retroactive payment of overdue salary; in the same case, both *FNV* and *CNV* seek €100,000 in compensation from the employer based on the Collective Labour Agreement Act and the General Extension of Collective Agreements Act.[76]

Also in these cases, there are no external commercial litigation funders involved; at least, there is no mention of them in the summons. The acting interest organisations are always worker unions. These are organised as associations, and affiliated members pay membership fees. Based on the findings from the interviews, it can be generally concluded that these interest organisations fund the costs associated with conducting legal proceedings from their own resources, including contributions from their members.

3.2.6 Non-Compensatory Actions Concerning Contract Law

Seven out of 50 non-compensatory actions concern general contract law (14%).[77] Six cases are still ongoing, and one case has been concluded. The subjects of the proceedings are diverse: noise pollution from Schiphol Airport, offering a polluting service without addressing the consequences for climate change, the qualification of dealer agreements and repair agreements, and the distribution of received energy tax refunds to tenants. The organisations bringing the cases are also diverse in nature: foundations with an ideological purpose, a foundation representing the interests of a group of tenants, and a dealer association affiliated with French car brands. The types of defendants vary from government and housing corporations to large commercial companies. All cases are within a Dutch context. The claims made in these cases are primarily declarations of rights: a declaration of unlawful conduct, a declaration that dealer and repair agreements can be classified as franchise agreements within the meaning of Article 7:911 of the DCC, and a declaration concerning the qualification of energy tax refunds. In two cases, the

74 Case 28.
75 Case 30.
76 Case 48.
77 Cases 3, 5, 14, 15, 34, 35 and completed case 1.

requested declarations of rights are supplemented with orders and prohibitions,[78] and in one case only an order/prohibition is requested.[79]

Once again, none of the issued summonses mention external commercial litigation funders. It is likely that the interest organisations finance the initiated proceedings from their own resources, supplemented by donations or membership fees. In one case, it is mentioned that 3,000 individuals have registered as supporters or donors.[80] In another case, funding by the Legal Aid Board is mentioned.[81]

3.2.7 Non-Compensatory Actions Concerning Privacy Breaches

In addition to the 3 previously discussed collective actions for damages related to privacy violations, there are also 6 non-compensatory actions concerning privacy violations (12%).[82] Thus, of the total of 66 cases included in the WAMCA register, 9 are privacy-related in nature (14%). Out of the 6 actions related to privacy law, 3 are ongoing, while the other 3 have been concluded. 4 out of the 6 cases have been initiated in summary proceedings.[83] Three cases are directed against the Dutch government and concern privacy-sensitive data in databases managed by the government.[84] In the other 3 cases, the defendants are natural persons operating websites.[85] Almost all cases have a purely national context, with only one case in which a legal entity under Cypriot law is being summoned.[86] We see that the same interest organisations are involved: the proceedings against the state are conducted by the foundation *Privacy First*, and the proceedings against administrators of privacy-violating websites are conducted by the foundation *Stop Online Shaming*.[87] However, these organisations are different from the ones that addressed privacy violations in the context of the previously discussed compensatory actions. These claims filed by the interest organisations primarily involve injunctions and prohibitions, sometimes with the imposition of a penalty. In one case, declarations of unlawful conduct and the obligation to pay damages are also sought.[88]

78 Cases 14 and 15.
79 Case 3.
80 Case 14.
81 Case 5.
82 Cases 6, 8, 46 and completed cases 4, 9 and 11.
83 Cases 6, 46 and completed cases 4 and 9.
84 Cases 8, 46 and completed case 4.
85 Case 6 and completed cases 9 and 11.
86 Case 6.
87 In completed case 7, the Stop Online Shaming Foundation acts together with the Online Child Abuse Expertise Agency Foundation.
88 Completed case 11.

None of the issued summonses mention external commercial litigation funders. It is likely that the interest organisations fund the initiated procedure from their own resources, possibly supplemented by donations.

3.2.8 Corona-Related Non-Compensatory Actions

Also in the WAMCA register, the Covid-19 pandemic has left its mark. Of the 50 non-compensatory actions, 5 relate to Covid-19-related issues (10%).[89] Of the 5 cases, 3 have been initiated in summary proceedings, and 2 of them have already been concluded.[90] All cases are directed against the government, with one case also individually summoning some members of the Health Council.[91] In 3 cases, the legal challenge is against government measures to combat the spread of the coronavirus: these cases focus primarily on the forced closure of the hospitality sector, fitness centres, and retail.[92] The other two cases are related to vaccination (damage) and the mandatory use of face masks.[93] In the 3 cases challenging the closure of certain industries due to Covid-19 policies, it is industry associations (with one interest organisation also acting as a representative for some hospitality operators)[94] that have initiated the collective action. In the other two cases, it is a foundation and an association that work together to achieve their intended goals through the collective action.[95] The naming of the interest organisations in these 2 cases is also focused on their intended purpose. Because all 5 cases revolve around the Dutch government's Covid-19 policies, the cases have a national character. In the 3 cases initiated by industry associations, there is at least a request for an injunction to suspend certain Covid-19 measures.[96] Declarations of wrongful conduct and compensation for damages are also demanded.[97]

None of the issued summonses mention external commercial litigation funders. It is likely that the interest organisations finance the initiated procedures from their own resources. For the two cases in which interest organisations act on behalf of a specific purpose, it is likely that their own resources are also supplemented by donations.[98]

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89 Cases 21, 33, 43 and completed cases 5 and 8.
90 Case 43 and completed cases 5 and 8.
91 Case 21.
92 Case 43 and completed cases 5 and 8.
93 Cases 21 and 33.
94 Case 43.
95 Case 21 (*Stichting Viruswaarheid.nl and the Dutch Association for Critical Pricking*) and 33 (*National Committee against Mandatory Face Masks and the General Dutch Citizens' Interests Association*).
96 Case 43 and completed cases 5 and 8.
97 Cases 21, 33 and 43.
98 Cases 21 and 33; these interest organisations have websites that explicitly ask for donations.

3.2.9 *Miscellaneous Category*

There are 5 cases remaining that cover various topics, making up a miscellaneous category within the non-compensatory actions, accounting for 10%.[99] All of these cases are still ongoing, with 2 of them being initiated in summary proceedings.[100] The cases involve food safety law, aviation law, competition law and bankruptcy law. Since this is a miscellaneous category, there are few general, meaningful findings to note in this category. In 3 cases, the involved interest organisations are foundations,[101] while in 2 other cases, they are associations.[102] The Dutch government or a government-affiliated entity is being sued in 3 cases.[103] In 1 case, a company under German law is the defendant, and thus has an international dimension,[104] just like the case concerning aviation law.[105] A declaration of unlawfulness is sought in 3 cases,[106] and injunctions are requested in 2 cases as well.[107] In 4 cases there is no mention of external commercial funding; in one case, the interest group states that it is a foundation that works on the basis of funds, (project) subsidies and donations.[108]

3.3 Conclusion

When we summarise all the findings, several observations can be made regarding the total number of cases, processing times and the impact on funding, specified for each category of cases and whether or not a compensation is claimed.

3.3.1 *Total Number of Cases, Processing Times and Impact on Funding*

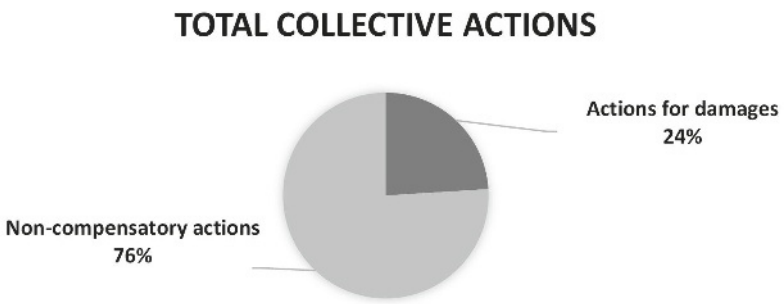
During the examined period, there were 71 cases registered in the WAMCA register, of which 54 were non-damage compensation actions and 17 were collective damage compensation actions. In total, 13 non-damage compensation actions have been concluded. Out of these 13 cases, 4 cases were concluded through a judgment in summary proceedings (average processing time 53 days), 4 cases were concluded with a

99 Cases 7, 18, 29, 49 and 58.
100 Cases 18 and 29.
101 Cases 7, 18 and 58.
102 Cases 29 and 49.
103 Cases 18, 29 and 49.
104 Cases 7 and 58.
105 Case 29.
106 Cases 7, 49 and 58.
107 Cases 18 and 29.
108 Case 7.

final judgment (average processing time 362 days), and 4 cases were concluded in other ways. In one of the compensatory cases, the formal admissibility phase was concluded with a final judgment at first instance.[109] This means that most of the proceedings are still ongoing. This is not surprising given the novelty of the WAMCA and the fact that many of these cases are inherently complex and time-consuming.

Longer processing times do not necessarily equate to higher costs, by definition. However, it is reasonable to assume that a longer duration increases the likelihood of higher costs. This is particularly true when the procedure is externally funded because the success fee of the litigation funder may be linked to the duration of the procedure: it can increase as the procedure takes longer.

Figure 3.1 Percentages of actions for damages versus non-compensatory claims



The numbers also show that a relatively small percentage of all WAMCA cases so far involve damage compensation actions (See Figure 3.1). Due to the lack of a baseline measurement at the introduction of the WAMCA and the absence of systematic empirical research on the use of collective actions under the old regime to obtain a declaration of liability from a defendant, it is difficult to draw any conclusions regarding whether the WAMCA has led to more or fewer damage compensation procedures. Under the old collective action regime, a claim for a declaration of liability was the prelude to a follow-up action in which damages were sought. Therefore, those procedures are the most relevant for comparison with the development of damage compensation procedures under the WAMCA. The previously mentioned figure of approximately 25 collective actions per year under the old law pertains to all collective actions and not only those for declarations of liability. Based on the registrations in the WAMCA register so far, it can be concluded that there is no empirical basis for the claim that

109 Amsterdam District Court, 29 December 2021, ECLI:NL:RBAMS:2021:7647 (*TPC/Oracle en Salesforce*).

there has been a (significant) increase in the number of claims since the introduction of the WAMCA. It should be noted that this research did not address any collective actions that were initiated under the old collective action law after 1 January 2020, because they relate to events that occurred before 15 November 2016. If such actions exist, the number of collective actions under the old law would need to be added to the WAMCA actions to obtain a more complete picture.

Another consequence of the increased requirements in the admissibility phase is that more costs must be incurred until an exclusive representative is designated. This applies to both procedures in which damage compensation is sought and those in which it is not, as more claims and arguments must be settled. Higher costs in a risky phase of the procedure affect the pricing of the investment from the perspective of a commercial litigation funder. Investments in that phase are seen as more risky and therefore more expensive.

3.3.2 Non-Compensatory Cases

Non-compensatory actions show a diverse range of topics (see Figure 3.2). The largest cluster of non-compensatory actions (22%) concerns violations of Intellectual Property Rights. In these cases, businesses, especially Dutch companies, are consistently summoned.

The second-largest cluster of non-compensation actions concerns violations of fundamental rights and human rights (18%). In these cases, the Dutch government is almost always the defendant. What stands out is that many different interest organisations, consisting of foundations and associations, are active in this field, often jointly bringing a collective action. It is possible that this collaboration is necessary to financially support a collective action. In any case, it is clear that no external commercial litigation funders are involved in these proceedings. The interest organisations must, therefore, fund the proceedings from their own resources, which may include subsidies, donations or membership fees.

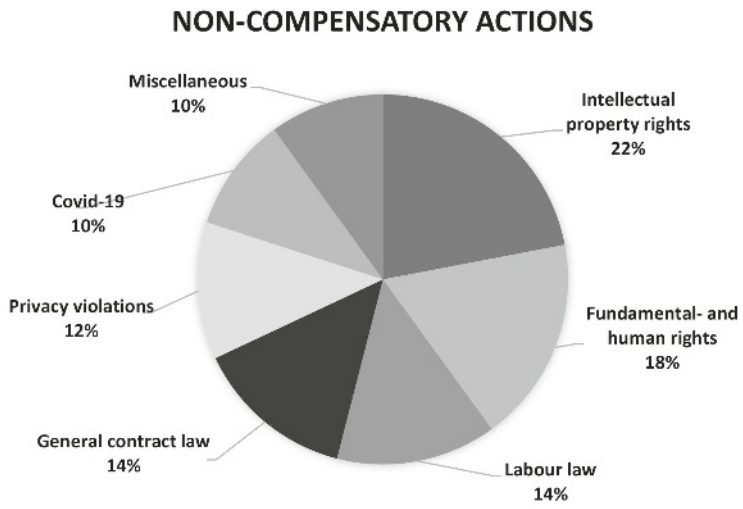
There are also multiple non-compensation actions related to labour law (14%), many of which involve summary proceedings. Within this cluster, the Dutch business community is also consistently summoned. The cluster that ranks third in terms of size, together with collective actions under labour law, concerns collective actions of a contract law nature (14%). This cluster provides a diverse picture in terms of litigated topics and types of defendants, although they generally occur in a national context. In both the field of IP rights and labour law, we see a number of established interest organisations operating as 'repeat players' in their respective fields. They do not involve

external commercial litigation funders in the proceedings but can fund the proceedings from their own resources. These resources are replenished through membership fees or contributions from affiliated parties, some of which may have significant financial means.

Within the remaining non-compensation actions, there are three smaller clusters to be distinguished. In the 6 privacy-related cases (12%), two of the same interest organisations are involved, and they act against the Dutch government or Dutch individuals operating a website. The 5 Covid-19-related cases (10%), often involving summary proceedings, were brought by (industry) associations or foundations against the Dutch government. In the remaining miscellaneous cases (5 cases, 10%), a diverse picture emerges: both the government and the business sector are summoned by various interest organisations. For these smaller clusters, the common finding is that there is no mention of external commercial litigation funders, and the initiated proceedings are likely funded from their own resources, supported by donations or contributions from members and affiliates.

Based on these findings, it can be concluded that the largest 'users' of collective action under the WAMCA are existing interest organisations that file claims other than those for compensation and finance these (national) actions entirely from their own resources, such as subsidies, membership fees, donations, etc. Prior to the entry into force of the WAMCA, concerns were raised in the literature that the new regulation and the stricter admissibility requirements could potentially have a dampening effect on this type of cases. Although it is also difficult, due to the lack of a baseline measurement, to make empirically supported statements about how the WAMCA has influenced this type of cases, the numbers suggest that the negative effect of an extensive admissibility phase has not necessarily manifested as an impediment to filing such actions. As shown in the previous section, the depressing effect is more pronounced in terms of processing times due to the need to make more extensive claims and arguments in order to be declared admissible.

Figure 3.2 Percentages of non-compensatory actions according to subject matter

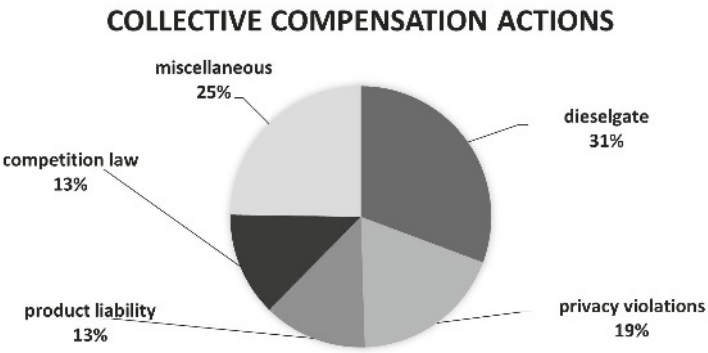


3.3.3 Compensatory Cases

The analysis makes it clear that collective compensation actions (17 cases) have their own dynamics (see Figure 3.3). These cases involve issues in the field of (contractual) liability law, where international and national businesses are consistently summoned. While the cases from the previous category were primarily of a national nature, these types of cases usually have an international component. They mostly aim to represent aggrieved consumers, with Dieselgate claims (31%) and privacy violations (19%) being prevalent. Interest organisations sometimes appear in multiple cases (relating to one issue), making them 'repeat players' to some extent. Additionally, in several cases, multiple interest organisations issue summonses against the same, or similar, defendant(s), indicating competition among interest organisations and a degree of 'market dynamics'. It is noteworthy that in all cases where compensation is sought, interest organisations collaborate with an external (commercial) funder to finance the collective action. This might justify the conclusion that without external funding, these cases may not have taken off. However, it is still too early to draw definitive conclusions. Furthermore, it is apparent that the information provided by interest organisations about the funder and the funding agreements varies significantly in the summonses. Where concerns were raised in the previously mentioned research on Big Data – that privacy cases might not gain traction – this appears to have been unfounded (at least for now).[110]

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

Figure 3.3 Percentages of actions for damages according to subject matter



3.3.4 Conclusion

While there is no systematic empirical research regarding the utilisation and use of the old collective action regime, the preliminary conclusion appears justified that the number of collective actions initiated under the WAMCA in the initial years following its introduction has more or less remained the same, or at least there do not seem to be any significant differences at first glance. However, there are longer processing times for all types of cases due to the extended admissibility phase under the WAMCA. While non-compensatory actions have a national character and are initiated primarily by existing and self-funded interest organisations, compensatory actions have an international character, are initiated by ad hoc interest organisations and are commercially funded. Furthermore, it is noteworthy that in compensatory actions the role of existing interest organisations is limited to providing support to some of these actions. In none of the pending compensatory actions has a claim been granted yet, making it difficult to make statements about the possible cy pres distribution of any remaining damage awards at this time. In general, it can be assumed that a more extensive and prolonged admissibility phase and/or longer processing times lead to higher financing costs and fewer remaining resources for a potential litigation fund.

Some of the findings raise the question of how to interpret them. Do these conclusions mean that there is no reason for compensatory actions in a purely national context, that they are resolved in a different (adequate) manner or that the WAMCA procedure is too costly to attract commercial financing for national cases? Or are there other explanations for this? The interviews, which will be discussed in the next chapter, are helpful in further interpreting and completing the insights gained.

4 Qualitative Analysis of Financing Collective Actions: Interviews

This chapter reports on the insights gained from interviews with professionals working in the Dutch collective actions field. The aim of the interviews was to find answers to the research questions that focus on the costs associated with collective proceedings, the challenges encountered in financing collective actions, and the potential positive contribution that a litigation fund can make. The interviews also provide insights that can be helpful in interpreting the results of the Mass Damage Settlement in Collective Actions Act (WAMCA) register research and/or confirming or complementing the insights presented in the previous chapter. After a brief introduction and discussion of the methodology employed (Section 4.1), the following sections describe how collective procedures are initiated (Section 4.2), the costs associated with these procedures (Section 4.3), the challenges that arise in financing these claims (Section 4.4), and several procedural challenges related to specificities of the WAMCA (Sections 4.5 to 4.8). Section 4.9 presents respondents' views on the potential contribution of a litigation fund. And, finally, Section 4.10 draws conclusions from these findings.

4.1 Introduction and Methodology

For the selection of potential respondents, an inventory was first made of the lawyers mentioned in the summonses included in the WAMCA register. From this list, the most frequently mentioned lawyers were selected and approached. After the initial interviews, additional lawyers were approached based on snowball sampling, or colleagues of respondents with relevant experience were invited to participate in planned interviews. The group of respondents was further supplemented with individuals known to the researchers and through targeted sampling based on a specific type of party or case that was not sufficiently represented in the initial selection. This was done in an attempt to obtain a broad range of respondent types.

Between May and July 2022, a total of 31 claim organisations and/or their lawyers were approached for an interview. Sixteen responded positively, while the remaining individuals were either unavailable during the research period or did not respond. Additionally, 10 litigation funders were approached, resulting in 3 positive responses. In total, 15 interviews were conducted with 19 respondents. The group of respondents

consisted of 14 lawyers (10 independent and 4 in-house lawyers), 3 litigation funders and 2 claim foundations.

The interviews were conducted online via a *Teams* meeting by a member of the research team with the relevant socio-legal background and extensive interviewing experience. Respondents were asked for permission to make an audio recording of the interview. Based on this recording, each interview was transcribed verbatim, after which respondents were given the opportunity to correct any inaccuracies and to redact or supplement information. Subsequently, the recordings were permanently deleted. This procedure was followed in all cases except for one interview, which was conducted in person and where the respondent did not consent to an audio recording. Researchers assured all participants of confidentiality to ensure that experiences and insights were shared freely. The transcribed interviews were then coded and analysed in *Atlas.ti*.

During the interviews, respondents were asked about their experiences with the WAMCA procedure (where applicable, in comparison to the old 3:305a regime or in comparison to WCAM procedures); the costs (structure) related to collective actions, financing strategies and related challenges; and the potential contribution that a litigation fund for collective procedures could make to practice. The interview topic list is included as Annex 2.

Where possible, insights are supplemented with input from the focus group of lawyers representing defendants and the expert meeting with foreign experts. Both the focus group of defence lawyers and the expert meeting with foreign experts (academics, some of whom also have or have had practical experience) took place on 23 November 2022. The focus group was primarily intended to corroborate the findings of the interviews, which involved mainly claimants and lawyers representing claimants, with this alternative perspective. The expert meeting aimed to obtain feedback on the findings of the overall research, including those from the interviews.[1]

4.2 Formation of WAMCA Cases

The interviews provide insights into the current practice of collective procedures and how financing plays a role in successfully bringing a claim. Different types of claims can be distinguished, based mainly on whether or not compensation is sought in the collective procedure. This distinction, as outlined in the analysis based on the WAMCA register in Chapter 3, is also maintained here.

1 Refer to Chapter 5, Sections 5.1 and 5.3 for a more detailed description.

4.2.1 Formation of Non-Compensatory Actions

As Chapter 3 revealed, based on the analysis of the WAMCA register, a significant proportion of collective procedures without a claim for compensation have been initiated by a few repeat players. Trade unions *FNV/CNV* and other established interest organisations, such as *Stichting BREIN* in the IP sector, frequently used the procedure under the old Article 3:305a to litigate on behalf of their members even before the introduction of the WAMCA. These interest organisations internally prepare cases based on complaints from their members, after preliminary work by in-house investigators and lawyers, and sometimes after externally sourced ideas and advice from experts. The financing of these procedures comes from their own resources, and litigation is generally carried out by in-house legal professionals or by a more or less fixed team of external lawyers. These organisations are often funded through contributions from their membership base, providing them with the advantage of a relatively stable source of income. Conducting legal actions can be the primary activity or one of many performed by these parties in the interest of their members. They typically have a specific and/or earmarked budget for this purpose. The overarching goal of these actions for these parties is limited to the enforcement of existing rules and the prevention of future harm.[2] Therefore, we primarily see claims for declarations of rights and injunctions or prohibitions, with or without associated penalties, and no claims for compensation. It is unclear whether the focus on or restriction to non-compensatory claims is driven by a strategic allocation of limited resources, a lack of experience and expertise in pursuing compensatory claims, and/or the assumption that the members of such organisations do not suffer material damages. A similar situation is observed in other non-compensatory cases initiated by associations or foundations that cannot be classified as repeat players.[3] However, these entities typically do not have access to a so-called 'war chest' and are thus compelled to seek financing for each case individually.

4.2.2 Formation of Collective Compensatory Claims

In contrast to these non-compensatory cases are the compensatory cases[4] financed with the support of commercial parties. Sometimes, these cases start with an initiator who approaches a lawyer with an alleged wrongdoing and asks them to develop the case and secure financing for it. These initiators can be the victims themselves, individuals with expertise in a specific sector (such as the stock- or financial markets), and/or (former)

2 Interview 6.
3 Given the short term of the WAMCA, some parties that were active as repeat players under the old 3:305a regime may not yet appear as such in the register.
4 For the specific numbers, refer to Chapter 3.

employees who come across a wrongdoing and provide the basis and/or evidence for a case to specialised law firms and/or litigation funders,[5] sometimes in exchange for a percentage of the potential proceeds in the event of success.

There are also professional 'claim originators' who essentially make a profession out of identifying wrongdoings, developing a case, gathering relevant experience and expertise and securing funding. These can be third parties or sometimes even consultancy firms or law firms themselves.[6] Instead of 'waiting for the gravel path to crunch', they actively identify and develop potential cases, even before a concrete 'client' is involved. In contrast to the classic scenario where a lawyer is approached by an individual client with a problem, in these cases, the lawyer (potentially in collaboration with experts and/or a litigation funder) is responsible for the initial investigation that forms the basis for a case. This is motivated by several factors, including establishing a presence in a new and rapidly evolving market; building knowledge and experience; investing in reputation; and establishing contacts with funders, relevant interest organisations, experts and claim originators.[7] In some cases, there is even talk of a potential bonus if the case is successfully referred to a funder.[8] Thus, we see that with the emergence of a litigation funding market in the Netherlands, where foreign funders are also entering, there is a growing group of specialised lawyers (and law firms) engaged in proactively investigating potential claims and securing funding for them.

Finally, there are cases brought to lawyers by litigation funders themselves, often based on developments in other jurisdictions. Diesel emission claims and truck cartel claims are well-known examples of this. Hence, lawyers bring cases to litigation funders,[9] but litigation funders sometimes also bring ideas or clients with problems to lawyers.[10] In practice, the relationships between lawyers and litigation funders are of great importance, and the market still largely operates based on trust, reputation and recommendations.[11] One of the interviewed litigation funders, who tracks the origin of cases, provided the following breakdown: 70% come from 'repeat users', parties they have collaborated with before, 20% come from referrals from individuals within their network, and only 10% of cases come from 'out of the blue'.[12] This respondent mentioned being relatively new to the Dutch market and conducting very little advertising. The

5 Interview 9.
6 Interviews 10 and 11.
7 Interview 10.
8 *Ibid*.
9 Interview 4.
10 Interview 11.
11 Interviews 4, 11 and 13.
12 For this last category, it was noted that people who are looking for financing and then 'google litigation funding' usually have 'poor quality' and are therefore less promising cases. Interview 13.

distribution may vary for other litigation funders who are more active in developing cases themselves and establishing themselves as partners among lawyers.

4.3 Cost Structure and Financing of WAMCA Cases

Based on the interviews, a picture emerges of the costs associated with the procedures. Here too, we see significant differences in the total costs and the major cost components when distinguishing between types of claims. The aforementioned distinction between collective compensatory actions and collective actions where no compensation is sought has an impact on the costs incurred for a procedure and, consequently, on the financing methods used. The choice of different financing methods is significantly influenced by the type of claim and the parties behind the claims.

The main forms of financing that emerge from the interviews are as follows: (1) established interest organisations, such as labour unions or organisations like *Stichting BREIN*, with a so-called 'war chest' from which multiple cases are financed; (2) private funds or pooling of budgets as a basis for financing a single case; (3) commercial third-party financing of complex compensatory procedures.

Crowdfunding is mentioned in three instances,[13] with only one case involving an environmental organisation receiving a sufficiently substantial amount (tens of thousands of euros) for the pursuit of an idealistic claim.[14] To the extent that this has been tried by other parties, the proceeds were found to be insufficient for financing a procedure. One instance was mentioned where the legal expenses insurer of one of the affected parties was willing to cover the costs of the entire procedure,[15] with the interviewee emphasising that this is very exceptional.

The total costs mentioned by the respondents vary widely, from approximately €20,000 for the least complex summary proceedings to over €5 million[16] for the most extensive WAMCA procedures. The total costs depend strongly on the nature of the claim, with the primary distinction being whether or not compensation is sought.

13 Interviews 2, 4 and 5.
14 Interview 5.
15 Interview 2.
16 This is a cost estimate made by funders and an amount that is reserved by one of the funders for a specific case. As no WAMCA case has yet reached a stage where total costs can be assessed, this is the best approximation of what the costs of the most extensive procedures might be. In practice, depending on the course of the case, this can, of course, be lower but also higher.

4.3.1 Cost Structure Non-Compensatory Procedures

Cases in which no compensation is sought appear to be the least costly cases. In these cases, the costs are almost entirely composed of attorney fees. The respondents mention amounts of around €25,000 for summary proceedings and, depending on the opposing party,[17] between €40,000 and €50,000 for substantive proceedings. Some respondents emphasise that in many idealistic cases, attorneys litigate at reduced rates, or (some of) the attorneys provide pro bono representation for parties with a limited budget.[18] These attorneys operate out of personal involvement with an issue and handle cases with a societal interest without a profit motive, which means that the actual costs are effectively higher. The mentioned attorney fees in these cases stand in stark contrast to estimates from attorneys involved in cases financed by third parties, where standard commercial rates apply, and many more hours are billed.[19]

Additional costs mentioned by respondents include the following:
- Bailiff costs for serving the summons. These costs vary depending on the number of defendants and any international components where summonses must be served abroad.
- Related to this are translation costs required in cases against non-Dutch defendants.
- Costs of experts and potentially outsourced (pre)investigations.
- Court costs.
- Potential cost orders in case of loss.

In the case of ad hoc foundations established for the purpose of bringing a claim, there are also the operational costs of these foundations.[20] Finally, there are the (hidden) operational costs incurred by existing interest organisations. These costs are not directly related to individual procedures but are nevertheless incurred in securing the continued existence of the organisations that bring the cases. Examples include the lawyers on the permanent staff of unions or an organisation like PILP-NJCM, an NGO with in-house attorneys who either bring cases themselves or advise other parties in proceedings that focus on human rights violations. Such 'institutional' or 'organisational' costs are inherent to a collective action model like the Dutch one,

17 The costs of cases against the government are estimated to be slightly higher.
18 Interviews 5 and 11.
19 The amounts mentioned for attorney's fees in these cases range from €150,000 to €500,000. These amounts also concern the process up to and including summons, where the amounts mentioned at a reduced rate in non-material cases concern the entire process up to judgment.
20 However, respondents indicate that these foundations are often populated by volunteers and that the costs therefore remain relatively low.

in which only interest organisations that meet certain criteria are allowed to initiate collective actions and individual victims do not have that authority.[21]

4.3.2 Cost Structure Compensatory Procedures

For compensatory actions, the costs are higher and cover multiple phases of the procedure. Therefore, they are less predictable and less broadly describable. The following is a list of common cost items, divided by the phase of the procedure.

Even before the start of a procedure and the filing of the summons, a significant proportion of the costs are incurred. Respondents mention the following cost items:

- Developing an identified misconduct into a plan for a procedure, also referred to as scoping.
- The factual and legal (pre)investigation necessary for drafting the summons.
- Securing funding.
- Costs for establishing and maintaining a (ad hoc) foundation in accordance with the Claim Code: 3 board members + 3 members for the Board of Supervisors (RvT), a possible expert/attorney for the RvT, directors' liability insurance, complying with the formal publication requirements of the Claim Code (website, governance, communication, financial reporting, secretariat).
- Optional: costs for establishing partnerships with relevant existing interest organisations.
- Optional: (economic) expert analysis. In cases involving financial products, this is often necessary to make detailed calculations of the damages suffered by affiliated parties and to present the 'business case' to potential funders.
- Activities related to identifying and activating the group of affected parties (book-building) and communicating with and on-boarding this group (via a website, campaign, etc.), along with related General Data Protection Regulation (GDPR) compliance. Building a demonstrable group of affected parties that supports the action is important in meeting the representativeness requirement and when competing for appointment as the exclusive representative.
- Costs related to mandatory negotiations with defendant parties.[22]
- Drafting the summons. This phase incurs the highest attorney fees. The attorney fees mentioned for this phase of a procedure range from €150,000 to €500,000, depending on the complexity of the case and the size of the summons.

21 See Tzankova 2020.
22 For example, the summons against the social media company TikTok has more than 150 pages.

Several respondents emphasise that the costs associated with establishing an ad hoc interest organisation in line with the Claim Code are perceived as a significant financial barrier. For instance, one respondent calculates that the six members of the board and the board of supervisors easily cost between €6,500 and €15,000 per person per year, and sometimes more, and that directors' liability insurance, which must be taken out, costs around €25,000 per year. As a result, the costs of maintaining a foundation can easily amount to around €100,000 per year, even before the procedure starts. Apart from the costs, problems are identified in recruiting board members who are unconflicted and/or independent, knowledgeable and willing to commit to such initiatives for an extended period. Problems are also encountered when taking out directors liability insurance and when opening a bank account on behalf of the ad hoc interest organisations. In practice, this can lead to significant delays of 6 months to over a year in launching initiatives, which is particularly problematic when limitation periods are a factor. Although the Claim Code allows for direct payments by funders, the timely absence of directors' liability insurance remains problematic.

Regarding costs during the procedure itself, respondents mention the following items:
- Ongoing foundation costs.
- Administration related to and communication with the affected parties, including opt-in/opt-out notifications.
- Standard attorney fees (but more procedural steps and hearings due to the complexity of procedures).
- Specialised legal assistance (for complex collective compensatory actions).
- Potential expert costs.

According to one of the litigation funders, more than half of the budget often goes towards costs related to the procedure itself.[23] Another respondent mentions minimum amounts between €500,000 and €1 million for the phase up to and including admissibility.[24]

After the procedure, costs related to the settlement of potential compensation or settlement agreements are mentioned, including the following:
- Ongoing attorney fees.
- Settlement or compensation: promotion/communication, further book-building and on-boarding if necessary.
- Ongoing foundation costs.
- Costs related to the actual distribution of compensation.

23 Interview 12.
24 Interview 11.

Because the WAMCA is still relatively new, and no collective compensatory actions are in this stage, there is still little information available about this phase of the WAMCA procedure. However, during the focus group with attorneys representing defendant parties, this phase was mentioned (including in the case of collective settlement agreements) as a very costly and complex part of procedures.

4.4 Financing Challenges

The challenges that arise are also strongly related to the type of claim, and here too, it is important to make a distinction between compensatory cases and cases in which no compensation is claimed, but only injunctions or declaratory judgments are sought.

4.4.1 Financing in Non-Compensatory Cases

A common approach among organisations with budgets is to establish an annual fund from which litigation costs are paid and into which any proceeds are reinvested.[25] However, respondents indicate that this is generally not a revolving financing method and that the budget needs to be replenished annually. This is mostly done from the general budget of the organisations, which is funded by member contributions, or from private, often philanthropic, funds[26] that support these organisations in their activities. For these parties, financing is an issue in a general sense and not just for potential (collective) claims. To the extent that litigation is a significant part of their activities (alongside other forms of action, such as direct communication with opposing parties, lobbying, campaigning, etc.), it is particularly important that the budget allocated to litigation is limited, and strategic choices always need to be made among various potential cases. The cost-increasing aspects of the WAMCA (compared to the old Article 3:305a regime) impose an extra burden on the budget, making fewer cases feasible.[27]

Similarly, with other parties that cannot be classified as repeat players, we see not only (costly) compensatory actions but insufficient resources as well. Consequently, these parties must be even more critical in determining the kinds of misconduct that should be addressed by a collective action and those that should not. In these cases, there is often a significant amount of pro bono work by law firms or lawyers who see the public

25 Interviews 1, 6 and 8.
26 A well-known example of this is the Digital Freedom Fund, a fund that supports NGOs and lawyers in strategic legal cases in the field of digital rights, https://digitalfreedomfund.org/.
27 Interviews 2, 5, 6 and 8.

interest in the case as a reason to contribute for free or at a greatly reduced rate,[28] provided they are not conflicted. Actions against companies tend to generate more conflicts than actions against the government or (semi-)government entities. Nevertheless, these parties are often dependent on pooling financial resources to finance the litigation, so multiple parties often act together.[29] In addition to pooling existing budgets, claiming parties collaborate to leverage other resources (such as in-house lawyers or experts). In some cases, two respondents mentioned that, in situations where the involved parties could not raise enough money, the case is initially handled pro bono in the hope that sufficient funding will be secured at a later stage.[30]

4.4.2 Financing in Compensatory Cases

Given the high costs associated with this type of claims, claimants are (almost) entirely reliant on the current private market of commercial litigation funders. In particular, the pre-litigation stage is an uncertain phase where costs are incurred but no certainty exists about the success of the procedure or the financing. Often, this phase (for cases initiated in this manner) depends on entrepreneurial lawyers who are willing to invest their own time in it. Funders prefer that this phase has already been (partially) completed before they provide financing and tend to ask lawyers to bear the costs of this phase. Some law firms are willing to make these investments to a certain extent, whereas others have indicated that they have done this in the past but have stopped due to the high costs, uncertainty and the amount of time it takes, given the uncertain outcome.[31] Depending on the level of detail of the pre-litigation research, respondents mention amounts ranging from €7,500 to €30,000, and occasionally even higher.[32]

Sometimes, the costs of the pre-litigation phase are covered by entrepreneurial lawyers or financed by a so-called 'angel investor'. The latter are affluent individuals or organisations that, based on trust and a prior working relationship with a lawyer, provide funding for this pre-litigation phase of a case. One respondent mentioned the speed with which this approach can be deployed as a significant advantage. A lawyer can have a budget to conduct the investigation within a few days, thereby improving the competitive position compared to other potential claimants. The investment of this type of funder is generally bought out if third-party funding can ultimately be secured.[33]

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28 Interviews 2 and 5.
29 Refer to Chapter 3, Section 3.2.4 and 3.2.6.
30 Interviews 2 and 5.
31 Interview 11.
32 This is the amount excluding any expert costs. Interview 11.
33 Interview 9.

Fund managers also indicate that they develop cases themselves. They have the expertise, budget and manpower for this. Moreover, funders point out the potential conflict of interest that arises when lawyers themselves have invested time and money in a case. They may no longer be entirely objective about the chances of success when presenting the case to a funder.[34] Funders always conduct their own research into the legal merits and chances of success of a case. They emphasise that the pre-litigation phase of such cases is important for filtering out cases with little chance of success.[35] One of the interviewed fund managers mentioned that in this sense, commercial funders contribute to a better market by investing in expert analysis in the early stages of a case, through which weak cases are rejected at an early stage.[36]

Respondents state that this is a challenging moment in the development of a case.[37] At this stage, there is the greatest risk because a case must be investigated and built up often before financing is in place. Funding by commercial funders generally depends on a well-argued 'business case'. In other words, funders only engage with claiming parties if they also see the potential of a claim, in terms of both the likelihood of success and possible return on investment (ROI).

4.4.3 Evaluation Criteria for Funders

To understand why cases are easier or more difficult to finance through third-party litigation funding, it is important to outline the evaluation criteria used by commercial funders in general terms. A combination of literature research and interviews with funders provides a list of common criteria used by funders when assessing cases brought to them. These criteria include the:

- legal merits of the claim.
- relationship between the investment and the expected financial outcome.
- estimated chance of success.
- solvency and ability of the defendant to pay costs and potential compensation.
- quality of the defence on the part of the defendant parties.
- motivation, professionalism and trust in the claimant, possibly based on previous cooperation.
- experience and reputation of the involved lawyers.
- intended jurisdiction and context of the procedure in relation to the chances of success and potential return.

34 Interview 3.
35 Interviews 3, 12 and 13.
36 Interview 13.
37 Interviews 9 and 10.

- required budget.
- ethical justification of the claim (potential impact on reputation).

An analysis of the interviews provides insight into which cases are currently able to secure third-party litigation funding successfully. The interviewed funders and lawyers mention the following requirements for a successful financing application:

- The presence of a damage claim is identified as a significant condition.[38]
- A sufficiently large group of claimants and associated financial interest (sometimes cases involve high claims per victim, but cases are more often based on a large group of claimants with smaller individual claims).
- A positive assessment of the merits of a case and an estimate of the chances of success.[39]
- A defendant party with sufficient means.
- Funders prefer cases that are well developed, in part to limit the costs of the preliminary phase.

In addition to the internal assessment of the foregoing criteria, funders, in most cases, have the case evaluated by external lawyers during a *due diligence* phase. The desired ratio between investment and return for funders is typically 10 to 1, meaning that the amount of funds they commit should not exceed 10% of the realistic claim value.

As previously mentioned, for cases that are expected to be successful and commercially attractive, there is a large supply of external funders. The large number of victims often leads to the emergence of interest organisations to represent their interests. We see in more promising collective compensatory actions that multiple parties often file claims and compete to be appointed as the exclusive representative.[40]

Other cases are difficult or nearly impossible to finance through this route. These are cases with limited potential for ROI for commercial funders. These cases have (among other things) the following characteristics:

- Cases with an unclear 'business case' for the funder.
- Cases aimed at a declaration of rights, prohibition or injunction.

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38 Although respondents indicate that there are other possible structures through which an ROI can be obtained, these are very rarely applied. One respondent gives an example of a case in which a medical patent was challenged, and a portion of the profits generated by the defendant's use of the patent was paid to the funder. Interview 13.

39 Cases with legal precedent or previously established wrongful conduct (by a regulatory authority) have a higher chance of success and are therefore more interesting to funders. Well-known examples include cases related to Diesel Emissions and Truck Cartels, as well as social media platforms that have faced regulatory scrutiny. As mentioned in Interview 11.

40 Refer to Chapter 3, Section 3.2.2.

- Cases involving non-material damage, such as human rights cases, or similar non-monetary interests.[41]
- Cases with an unclear or unknown group of victims.
- Cases with a (too) small group of victims.
- Cases against a party without sufficient means.

From the foregoing summary of financing possibilities based on case types, it becomes clear that for cases that are focused on speedily stopping an infringement and that do not seek to recover damages for a group of victims, the commercial financing market does not offer a solution. These (ad hoc) organisations generally choose not to initiate a collective compensatory action but to seek a declaration of rights, prohibition and/or injunction. For this type of claim, it is sometimes difficult to meet the conditions for initiating a collective action.[42] Often, there is a difficult-to-define group of victims, and sometimes it is challenging to assign a monetary value to a claim.

Furthermore, the commercial context associated with a claim funded by third parties is often considered undesirable. However, the main reasons respondents cite for not opting for a collective compensatory action are the speed at which a decision can be obtained and the complexity and costs associated with a compensatory action. Compensatory actions require a great deal of preparatory work compared to simpler collective claims and make a procedure unnecessarily complex and lengthy. The objective of many of these actions is to quickly stop the infringement being addressed and, if necessary, to set a precedent to prevent future infringements. Complex collective compensatory actions are simply not seen as a suitable means to achieve these objectives. One respondent summarised it as follows: compensatory actions are about redress for past infringements, whereas these interest organisations are concerned primarily with preventing infringements in the future.

Several respondents in this segment indicate that they are currently exploring the possibilities and advantages of starting mass damage claims.[43] To what extent cost considerations will play a decisive role in this regard is not yet clear. However, based on the high costs associated with initiating these compensatory procedures, it is likely that they will be entirely dependent on the commercial financing market to secure funding for such procedures. The question remains whether the claim they have in mind is sufficiently attractive from a commercial perspective to secure funding through this route.

41 This also applies to environmental cases, as mentioned in Interview 7.
42 Refer to Chapter 2, Section 2.1.3 for the conditions and some constraints.
43 Interview 5.

For cases that require alternative forms of financing, the need primarily lies with certain types of parties and certain types of claims where there is insufficient ROI for commercial funders but where there is still a (collective and/or societal) interest in addressing unlawful actions resulting in collective harm. For this type of case, it is currently difficult to secure third-party funding because there is (as yet) no clear ROI possible.

4.5 Procedural Challenges in WAMCA Practice

When questioning respondents about the financial challenges associated with collective procedures, other aspects of these procedures were often discussed as well. In the discussion of the costs associated with a WAMCA procedure, procedural hurdles that increase costs were frequently mentioned. When identifying a potential market failure related to the financing of collective actions, it is difficult to separate financial challenges from other aspects that are a determining factor in the case of WAMCA procedures.

Respondents characterise the WAMCA procedure as a 'series of hoops' that must be navigated and a procedure that can come to a halt at each of these hoops.[44] Respondents with experience in idealistic claims particularly criticise the limited consideration given in the establishment of the WAMCA to procedures initiated by idealistic interest organisations.[45] The most frequently mentioned aspect of the new procedure that creates a new hurdle is the tightened admissibility requirements.[46] Navigating these requirements requires more preparatory work than before and increases costs. As a result, the outcome of a procedure at the admissibility stage becomes more uncertain. The law stipulates that, in the case of idealistic actions, Article 3:305a Paragraphs 2a to 2e of the Dutch Civil Code do not apply based on the exception in Paragraph 3:305a Paragraph 6. However, the wording of the exceptions, as well as other requirements that still apply, including when 'only' a declaration of law is sought, continue to pose significant challenges in practice. The following objections are regularly mentioned by respondents.

44 Interview 7.
45 Interviews 5, 6, 8 and 11. See also the warning of Bauw & Voet 2017 and after implementation: Peters & van Wees 2022.
46 Interviews 2, 5, 6, 7, 8, 9, 11 and 14.

4.5.1 Prolonged Preliminary Phase

An in-depth treatment of collective claims can only take place after the court has determined that the claiming party meets the admissibility requirements. It is not uncommon for this part of the procedure to take a year. In practice, this means that parties must first 'litigate to be able to litigate', so to speak.[47] This also affects the costs and poses a risk to potential funders. In other words, there is front loading of costs.

4.5.2 Representativeness Requirement

Ideological legal claims do not always aim to represent specific individuals (think of climate, animal rights, culture, future generations), so the required group description can be difficult to fulfil. The representativeness requirement can also be problematic because the size of the constituency is seen as a challenging standard. It is unclear how this requirement should be met. Advocating for the importance of the action and explaining why the representativeness requirement does not apply requires additional work and thus increases costs.[48]

4.5.3 Registration in the Register and the Three-Month Term

Article 1018c Paragraph 3 of the Dutch Code of Civil Procedure (Rv) stipulates that these claims must be registered in the designated public WAMCA register. The rationale behind this register is that in the case of competing summonses, the process must be organised, and an exclusive representative can be appointed by the judge. However, as noted by some respondents, such a requirement is unnecessary in the case of idealistic actions, as in practice, these organisations do not have competing interests and often collaborate, whether by jointly acting as claimants or otherwise. After registration in this register, a waiting period of 3 months commences so that cases for the 'same event or events' and 'concerning similar factual and legal issues' can be initiated (Article 1018d DCCP).

This waiting period can be problematic in certain cases because the wrongful conduct that the procedure is addressing continues during that period. Examples of such cases include those where action is taken against online forms of privacy violations.[49] Although

47 Interview 8.
48 Interviews 6, 7 and 8.
49 Interview 6. This delay can also be perceived as problematic in the case of IP infringements, as mentioned in Interview 2.

summary proceedings and interim relief can assist in these situations, the objective of a collective action can also be a means to address so-called repeat offenders through a declaration of law.[50] Therefore, respondents argue that in certain cases they are faced with the choice of opting for the more expensive and longer collective procedure or the more cost-effective quick procedure, which generally has less precedent value.

4.5.4 Obligation to Negotiate

The legally prescribed obligation to attempt to negotiate and settle that must be undertaken before and during the procedure prove to be particularly challenging in the context of online intellectual property (IP) infringements, mainly due to the issue of identifying the actual wrongdoer.[51] Settling is often not a realistic outcome in the case of ideological actions, especially when it comes to actions that require stopping unlawful conduct or, for example, in the case of a claim against the government/specific legislation. In the latter case, settling is not even a possible outcome. In practice, defendant parties often argue that the obligation to negotiate has not been fulfilled adequately.[52]

The aforementioned procedural challenges, seen from the perspective of organisations that generally focus on ideological matters and rarely seek collective damages, illustrate how the revamped procedure works in practice for cases that are not aimed at obtaining collective damages. Not all of the points mentioned in this list have direct relevance to the financing of collective actions; however, especially the points that contribute to the uncertainty and longer duration of the process or that provide the opposing party with more ammunition to defend on (partly unclear) procedural grounds have a cost-increasing and delaying effect due to the additional work required at various stages by lawyers and interest organisations.[53] The drafting of a summons is more labour-intensive because of the need to address the admissibility requirements and potential defences on these points in advance, and responses to these defences must be made during the procedure. Thus, it must be assessed whether these are teething problems of the WAMCA or structural objections.

50 Provided that the judge agrees to disregard the three-month deadline and other requirements. As mentioned in Interview 6.

51 Interview 6.

52 Interviews 6 and 8.

53 Peters & van Wees 2022 also mention the requirement of a 'narrowly defined group of harmed parties' as an additional bottleneck and argue that the requirement of a 'narrowly defined group of harmed parties' and the possibility of opting out (derived from the WCAM) are requirements that seem misplaced in ideological actions.

In addition to increased costs and pressure on the available budget, it is also a matter of available capacity for repeat players. The additional time spent on preparation and handling cases under the new regime cannot be allocated to other cases. In some cases, this means that cases are outsourced,[54] and the costs are generally higher than when a case is handled internally, putting more pressure on the available budget.

In some cases, issues related to transitional provisions and the scope rule have also been raised, as mentioned in a few interviews.[55] Uncertainties about these matters also put pressure on capacity and costs.[56]

4.6 Summary Proceedings Versus Substantive Proceedings

In addition to raising procedural barriers, WAMCA has made certain strategic choices, as they existed under the old 3:305a regime, more difficult. An example of this, which was briefly mentioned earlier, is that previously, a substantive proceeding (*bodemprocedure*) could be initiated with a request for injunctive relief (*voorlopige voorziening*), allowing for both the substantive benefits of a substantive proceeding and the urgency of injunctive relief to be utilised. Due to the three-month waiting period in WAMCA, this is no longer possible, and a choice must be made between summary proceedings *(kort geding*), without the substantive advantages and potential precedential value of a substantive proceeding, and the full WAMCA procedure, which involves specific procedural requirements and thus raises additional barriers for ideological cases.

In general, the delays attributable to the WAMCA in some cases render initiating a procedure pointless, as the addressed issue cannot be resolved within a meaningful time frame. Due to the duration and uncertainty of the new procedure, these parties consider alternative avenues more than before, rather than litigation to address the problem.[57] This could result in the judicial system becoming less burdened in the short term, although this can be questioned. However, the long-term consequences for the right to access the courts in such cases are unclear. Whether this is an (entirely) positive development therefore remains unclear and will depend on the effectiveness of alternative routes and the nature of the issues no longer brought before the courts.

54 Interviews 6 and 8.
55 Interview 10 (transitional provisions) and Interview 11 (scope rule).
56 Refer to Chapter 2 for the treatment of these rules, Section 2.1.2(a) (transitional provisions), and Section 2.2.3(b) (scope rule).
57 Interview 8.

Only when interest organisations opt for summary proceedings can they bypass certain provisions of the WAMCA. Summary proceedings are, of course, only possible when there is an urgent interest, and they nullify the benefits associated with substantive proceedings (such as precedential value).[58] Nevertheless, parties also indicate that they sometimes consider choosing summary proceedings in the hope of (partially) bypassing the high thresholds of the admissibility requirements, even if the urgent interest is debatable.[59]

An advantage for repeat players with a 'war chest' (compared to ad hoc organisations with commercial financing for a single case) is that they have more room to absorb cost-increasing aspects of a principled procedure. For example, in the field of IP infringements, there are significant cost differences between summary proceedings aimed at obtaining an order for a party to cease a certain infringement and substantive proceedings in principled cases. Substantive proceedings can lead to an appeal, which, in the case of principled cases, can result in preliminary questions being referred to the Court of Justice of the European Union. The more steps that are taken, the higher the cost that is incurred. And in cases with a principled character, these steps will be of greater importance to ultimately reach a decision and establish jurisprudence.[60]

4.7 'Chilling Effect' Uncertainties WAMCA for the Non-Commercial Market

The uncertainties surrounding the WAMCA sometimes lead interest organisations to make strategic choices. Even in the case of internally funded procedures, the current uncertainties have an impact on the choices that are made. One of these choices is to forego a collective action and instead opt for litigation in claimants' own name. Whereas in the past, a 3:305a procedure might have been chosen to serve the interests of a broad constituency through litigation, now a 'simpler' procedure with fewer uncertainties, involving several individual claimants, is chosen. In this context, the procedural uncertainties and financial aspects associated with a WAMCA procedure have a chilling effect on the accessibility of a procedure that is intended to make the administration of justice more efficient and facilitate the protection of collective interests.

58 Collective actions in summary proceedings fall outside Title 14A, except for what is stipulated in Art. 1018c, Para. 1 of the Dutch Code of Civil Procedure (DCCP), which defines the required content of the summons (see Art. 1018b, Para. 1, last sentence of the DCCP).

59 Interview 8.

60 Interview 6.

More specifically, for legal areas such as labour law, it is also the case that litigation in one's own name, rather than through a representative organisation, is not preferred and is generally difficult to initiate. This is because individual claimants would 'put their heads on the chopping block' and jeopardise their personal relationship with their employer, as one of the respondents pointed out.[61] While the old 3:305a procedure allowed both representation, where individual claimants did not have to litigate in their own name, and collectivity, where a large group of claimants was represented collectively, the uncertainties introduced by the new requirements under WAMCA sometimes lead to the abandonment of this option. Therefore, from the perspective of these claimants, questions can be raised about the advantages of WAMCA compared to the old regime.

4.8 Commercial Financing Market and WAMCA Uncertainties

The heightened admissibility requirements not only affect more idealistic cases but also bring uncertainties regarding compensatory actions and how they can be financed. Currently, some interviewed lawyers believe that the uncertainties surrounding the admissibility requirements are so significant that the involved funders do not look beyond this stage of the procedure when making cost estimates and allocating budgets.[62] The thought behind this is that once this hurdle is cleared, only the legal question remains to be answered, for which funders can generally make a better risk assessment. This perception is confirmed by an interviewed funder who considers admissibility requirements, alongside the amount and structure of the damages claim, as the most important 'make or break' aspect in funding specific cases.[63] The existing uncertainty about how this will be implemented in the Dutch context is causing some hesitation among funders in funding cases. This not only affects the current funding practice but is also expected to have a significant influence on the future market, according to the interviewed funders.[64] They outline the following future scenario: depending on how strictly the admissibility requirements are applied by judges and the (future) predictability of this phase of a procedure, funders will face a lower or higher degree of uncertainty. More uncertainty in the outcome of this phase of the procedure will lead to more caution among funders, thereby restricting financing opportunities for collective damage claims.[65]

61 Interview 8.
62 Interview 11.
63 Interviews 3, 12 and 13.
64 *Ibid*.
65 *Ibid*.

Regarding the Dutch collective claims market, both lawyers with experience in third-party funding and the interviewed funders themselves mention that the current uncertainty surrounding the practical implementation of the WAMCA is creating an uncertain market.[66] Funders prefer cases with a controlled group of claimants, clear boundaries for the investment and a clear view of the ultimate ROI.[67] In their view, the current uncertainty leads to riskier investments and makes funders adopt a more wait-and-see approach. They consider uncertainty about admissibility and the calculation of damages as the two most critical 'make or break' factors that make or break the Dutch market's attractiveness.[68] One significant reason for entering the Dutch market for collective action financing anyway, is the so-called FOMO effect: the 'fear of missing out'.[69] In case the Dutch market develops favourably, based on future case law, funders (just like the entrepreneurial lawyers mentioned earlier) want to have already built visibility, contacts and experience and not have to enter the market at that point with a less favourable competitive position.[70]

In addition, there are currently uncertainties about certain aspects of filling collective claims. One crucial uncertainty mentioned is the (for now, theoretical) possibility of recovering a funder's investment from the defendant in the event of a victory.[71] Under Dutch law, the losing party in the procedure pays the court fees and the costs of representation of the winning party (Article 237 DCCP). However, these costs are awarded based on fixed rates that do not cover the actual costs incurred but that are often substantially lower – usually no more than a few thousand euros. Only in very exceptional circumstances can the actual costs be fully reimbursed. This can happen in certain disputes related to IP rights[72] or in cases of wrongful litigation by one of the parties. In such rare cases, it is not impossible for the courts to order the losing party to pay the litigation funding costs of the winning party.

This theoretical possibility of recovering (a multiple of) the funder's investment from the defendant as part of the 'not unreasonable costs of the foundation' would also lead to a full reimbursement of the procedure's costs, including the funder's success fee, in cases other than those concerning IP rights. This could make these cases that currently do not qualify for TPF (due to the lack of an ROI based on a percentage of the damages

66 Interviews 3, 9, 10, 12 and 13.
67 Interview 9.
68 Interviews 3, 12 and 13.
69 Interviews 4 and 9.
70 Interviews 3, 9, 10, 12, 13.
71 Interview 10.
72 Art. 1019h DCCP.

compensation) more attractive to commercial investors.[73] In practice, however, it remains to be seen what criteria judges will apply in this regard.

Another related question is what Dutch judges will decide regarding the possibility of claiming abstractly calculated damages compensation and its potential amount in collective claims involving mass privacy violations, such as data breaches. The working hypothesis in some ongoing GDPR cases is that a collective can also claim an amount for suffered (immaterial) damages.[74] This is an assumption for which there are no precedents yet under the WAMCA and is, therefore, an uncertain starting point. From the funders' perspective, this is a form of 'testing the waters' to see to what extent these types of cases can be a worthwhile investment with an expected ROI. For example, in the case against Oracle & Salesforce, an amount of €500 per person is currently claimed in the hope that Dutch judges will follow this approach.[75] However, if it turns out that Dutch judges do not adopt this form of compensation or set lower compensation amounts, making the ROI unfeasible, funders will either not fund these cases at all or do so less quickly.[76] Meanwhile, the Court of Justice of the EU has opened the door for 'non-material' damages claims in case of online GDPR infringements, which is promising for these cases.[77]

As outlined earlier, the 'business case' of commercial funders depends heavily on the amount of the claim per affected party awarded by Dutch judges.[78] The outcome of this can have a determining influence on the future state of the financing field. This could also change if the judiciary decides that a multiple of the investment can be offset as a cost in the event of a victory and/or that compensation can also be given in the case of declarations of right.

4.9 Opinions on the Utility and Necessity of a Litigation Fund

Respondents were asked about their ideas regarding what a publicly funded litigation fund could potentially contribute to the current market and what important considerations should be involved. The following is a summary of what was discussed in the interviews

73 Interview 10. See also Art. 1018l, Para. 2 of the Dutch Code of Civil Procedure (Rv) and Parliamentary Documents II 2017/18, 34 608, No. 9, p. 5, from which this reasoning is derived.
74 Interviews 3, 10 and 11.
75 Interview 11.
76 Interview 12.
77 CJEU, 14 December 2023, Case C-340/21, ECLI:EU:C:2023:353 (*VB/Natsionalna agentsia za prihodite*).
78 Interviews 3, 10, 12 and 13.

regarding perceived market failures, a potential need for alternative forms of financing, and what is seen as the possible contribution of a litigation fund for collective actions. Several key themes emerge, which will be discussed in the following paragraphs.

4.9.1 Available Market for a Specific Type of Compensatory Cases

For legal areas and cases that are considered attractive from a financing perspective, there is essentially no issue with regard to current financing options.[79] For this category of claims (such as diesel emission cases, investment damages and cartel claims, although the latter group is currently under-represented under the WAMCA), there appears to be a sufficiently large private market for financing and specialised legal services in development.[80] The current Dutch market for collective actions is interesting for funders, and a relatively large number of them are now active in financing collective compensatory actions in the Netherlands. Claim originators also have an incentive to invest in the early stages of potential cases due to the possible return on investment, taking on the costs of scoping, case building and possibly preliminary investigations before approaching a funder. This creates a business case for lawyers (and law firms) and other professionals, such as experts, to help investigate and set up cases before they are presented in a more advanced form to funders. Conversely, funders know how to find this group of lawyers when they have a case 'on offer'.

4.9.2 Financing for the Preliminary Phase of Compensatory Actions

In this preparatory phase, there is often the greatest uncertainty and, therefore, the greatest risk that cases will not get off the ground because no party is willing to invest in the research and preparation of a case that may otherwise be promising. And if there are parties willing to provide this so-called seedfunding, the costs are substantial because funders charge a higher risk premium for it. Based on this, several respondents suggest that a fund for collective procedures could (also) focus on financing this uncertain preliminary phase of collective compensatory actions, in order to initiate more of these types of cases at lower costs.[81] The assumption is that with an increase in available

79 This conclusion was widely shared by the respondents in both interviews, the focus group and the expert meeting.

80 However, it is also worth noting that, even for this type of cases, there is a lot of uncertainty about the future of financing options. The current financing market depends on several crucial points on upcoming jurisprudence that will play a decisive role in how this financing market and the specialised legal profession related to it will evolve.

81 Interviews 10 and 11.

resources for this risky part of such cases, the total number of cases brought forward (first to commercial funders and then to the court) will increase. However, opinions among respondents on the necessity of this vary. In particular, the more entrepreneurial lawyers who are actively involved in researching and developing cases argue that this is a risk that can be adequately managed by lawyers, who can then approach a funder to secure funding. The main argument against financing this uncertain preliminary phase, as these lawyers point out, is that it would also subsidise larger law firms that have the financial capacity but are currently unwilling to invest in such cases. In other words, there are currently enough lawyers willing to take on this risk, provided that they are compensated later for this investment by the funder they find. Subsidising this preliminary phase would likely result in a situation where, due to the lack of risk, larger law firms would take over this part of the market.[82] Furthermore, as one respondent states, this would unjustly shift an important risk that currently lies with private funders to the fund.[83]

4.9.3 Financing Need in Commercially Unviable Claims

It is clear that the foregoing cases represent a specific category of cases. These are collective damages actions with a large group of victims, a clear possibility of ROI for funders, and good chances of success. Ultimately, this model, when viewed across all cases in the WAMCA register, has a relatively limited 'reach', and we also see many cases that do not meet the requirements for third-party funding and therefore cannot (be) financed in this way. There is, therefore, a need for alternative forms of financing in cases of alleged misconduct where public enforcement is absent or inadequate and where there is also no 'business case' for funders. Respondents (both in interviews and in the focus group and expert meeting) primarily identify the potential utility of a public litigation fund in cases with a societal interest, where (generally) no damages are claimed and where enforcement through other means is not (sufficiently) taking place. These cases typically have limited financing options.[84]

Respondents in the interviews identify the greatest need in cases where the claim serves a public interest that is not addressed in any other way (e.g. through public

82 Interview 10.
83 Interview 12.
84 Interviews 2 and 5. A well-known example of a successful case that almost ran aground due to lack of financing is the so-called SyRI case. This case, which fell under the old 3:305a regime, was initiated by dedicated lawyers but could not proceed at this stage because no financing could be secured. Later, the case was able to continue with the involvement of another attorney, thanks to funding from the German Digital Freedom Fund, which was willing to invest in the case.

enforcement).[85] In this sense, these collective actions are described as a form of civil law enforcement of societal wrongs. Moreover, collective actions are seen as a solution to problems related to individual claims, both in terms of the excessively high cost threshold for individual claimants (diffuse harm) and as a more efficient solution than multiple individual proceedings. However, these claims often focus on stopping a specific infringement and, for that reason, seek declaratory and/or injunctive relief rather than claiming damages.[86] The pursuit of damages is rarely applied in this context because it significantly extends the duration of proceedings (and thus fails to address the infringement promptly) and increases costs significantly. Several respondents indicate that achieving success in the form of a declaratory judgment, which puts an end to the wrongful conduct, is often preferable to the more complex and lengthy process of seeking damages. Nevertheless, significant costs are incurred in these cases for which sufficient financing is not always available. In response, organisations often collaborate to share costs, and lawyers may work at reduced rate or pro bono in cases with a public interest.

For these cases, a clear lack of financing options is identified, and a litigation fund could offer a solution for the dependence on the availability of lawyers who can act pro bono at a particular time. Similarly to repeat players, lawyers in this context are forced to select which cases to take on, with financial considerations playing the most significant role.[87] Respondents argue that the number of potential cases illustrates that there are societal issues that can be effectively and efficiently addressed through legal action of this kind. There is a relatively large group of organisations and lawyers capable of and willing to initiate such cases. At the same time, financing is a bottleneck. A litigation fund could provide a good solution for this situation.

4.9.4 Contribution to Legal Development

In a broader sense, the question of the usefulness of a litigation fund, according to some respondents, is also important in the context of a potential contribution to legal development because it involves cases with a public interest (e.g. consumer law, privacy, environmental protection) that would otherwise not be brought before the court.[88] We saw (in Section 4.4.3) that the criteria used by funders to invest in cases preferably align with established case law because it is considered to entail lower risk. This means that TPLF, by its nature, does not contribute to 'legal development'. However, this seems to be

85 This observation was shared by the participants in the focus group and expert meeting.
86 Interviews 2, 5, 6 and 8.
87 Interviews 2, 5 and 11.
88 Interviews 2, 5, 6, 7 and 11.

different at least in the field of some compensatory cases (e.g. privacy violations), but as outlined in Section 4.8, that has a specific time and place-related background.

The benefit of offering an alternative funding stream could, depending on its design, lie in the societal importance of these cases as de facto private law enforcement and in the effective and efficient bundling of claims that would never take off in individual form (e.g. scattered damages), or are currently putting significant pressure on the legal system in dispersed form. In the same context, respondents also point out the strategic choices that need to be made based on cost considerations, such as the considerations between summary proceedings and full-fledged court procedures. Since legal development generally does not occur in summary proceedings, and decisions in collective (court) proceedings have a broad impact, increasing access to collective proceedings is expected to have a positive contribution to legal development. The assumption here is that it is the financial, rather than substantive, barriers that deter parties from using 3:305a DCC and initiating court proceedings.

4.9.5 Wider Budgets for Repeat Players

Several legal domains, such as IP infringements and labour disputes, have interest organisations with a relatively effective track record in enforcement through representative actions. These repeat players account for a substantial portion of the collective proceedings brought under the WAMCA. They have ample experience in utilising collective procedures to safeguard the interests of their constituencies and can, in principle, manage individual legal cases within their available budget. However, they must carefully select which cases to investigate, prepare and pursue due to budget constraints. The available budget for conducting these procedures is limited even for these repeat players. Given the cost-increasing effects of certain aspects of the WAMCA procedure, these parties must now, more than before, decide which cases to bring and which not to. Moreover, the financing of these parties is always uncertain and subject to change. Hence, the prevailing sentiment is that an increased budget is always welcome.[89]

The need to make choices about which cases to take on based on budgetary possibilities, combined with the track record of these parties (who can also litigate without risking reputational damage), suggests that these procedures represent a relatively effective form of private enforcement that is not fully exploited at present. Respondents indicate that increasing the budget of these parties, whether through a litigation fund or otherwise, would invariably enhance enforcement.

89 Interview 6.

4.9.6 *Limitations in the Commercial Context of Third-Party Litigation Funding*

The interviews reveal that in cases of public interest, the commercial context associated with third-party financing can be a reason not to opt for this financing method. The context of third-party financing can introduce a commercial element into public interest cases that are fundamentally about addressing wrongful conduct. Even in such cases, it is theoretically possible to consider initiating a collective damages action and claiming compensation for incurred damages. A respondent working for one of the interest organisations considered repeat players mentioned being approached by litigation funders,[90] who likely want to leverage the reputation of certain organisations to increase their chances of being designated as exclusive representative. They emphasise that this can lead to conflicting interests between funders and the public interest that the case aims to serve.[91] While litigation funders have a profit model based on past damages, it is essential for interest organisations to stop the harmful activity and prevent future harm.

On the subject of privacy violations, there is the possibility of both litigating for a declaration of right to promptly end the violation and seeking compensation for incurred damages. In the latter case, it is logical, due to the complexity of such a procedure and the associated costs of a collective action (particularly book-building), to partner with third-party litigation funders. However, as respondents from this field point out, partnering with a funder can potentially sideline the option of litigating for a declaration of right (which is often preferable due to its shorter duration, definitive outcome and cessation of the violation, e.g., privacy violation) because there is no ROI for the funder in such cases. During the proceedings, a situation may also arise where a possible settlement, in which the violator acknowledges the wrongdoing and cooperates in finding a solution, is not seen as an acceptable outcome by a funder because it does not yield an ROI.[92] Other problematic aspects mentioned include the funder effectively becoming the client, strategic decisions being largely determined by the funder based on budgetary constraints, and the actual client losing factual decision-making power.[93]

In addition, respondents also mention the competition between different claiming parties as a problem that arises when cases are being developed. When parties are litigating for the same (public) interest, cooperation is possible and desirable, as evidenced by filed summonses.[94] However, when these parties partner with commercial

90 Interview 5.
91 Interviews 5 and 11.
92 Interview 5.
93 Interviews 5 and 11.
94 Refer to Chapter 3, Section 3.2.3.

funders, it complicates potential collaboration because these funders have their own financial interests. According to respondents, an independent fund could potentially address this issue by assessing who the most suitable advocate is when considering fund applications.[95] These aspects of financing by commercial funders are cited by respondents as a problem for which a public fund could potentially provide a solution.

4.10 Conclusions

First and foremost, it is noticeable that the results from the quantitative research of the WAMCA register are confirmed on several points by the interviews, including the longer duration of the new, more extensive admissibility phase. However, the interviews provide more depth and context to these findings, allowing for a better understanding of the implications for the financing question. Although only a limited number of funders participated in this research, the conducted interviews provide insights into the state of the financing market surrounding WAMCA cases and the possibilities and limitations concerning the financing of collective actions. In what follows, we discuss the findings for each research question.

4.10.1 Costs of Procedures under the WAMCA

Based on the interviews, insights have been gained into the various cost components that play a role in the decision to initiate a procedure, both in non-compensatory cases and in compensatory cases. In non-compensatory cases involving repeat players, the primary cost concern is the ongoing legal fees associated with providing additional support for the admissibility of interest organisations. In compensatory cases, several cost components come into play, including other aspects and challenges related to financing. These challenges include opening a bank account for ad hoc established interest organisations and obtaining directors' liability insurance. Both challenges can lead to significant delays and practical problems, and this issue appears to have been relatively underemphasised so far, even though it is not immediately clear what the solution might be.

Additionally, the interviews have provided an estimate of the order of magnitude of budgets considered necessary for different types of cases. The budgets mentioned for non-compensatory cases range from €25,000 to €50,000, depending on whether it involves a summary proceeding or a substantive procedure. In compensatory cases, budgets can reach over €5 million. In an unfavourable scenario, half of this amount can

95 Interview 5.

be consumed by the (uncertain and extensive) admissibility phase. Since none of the pending procedures have progressed beyond this phase, there is currently less visibility in the market regarding the costs in the follow-up phase of the WAMCA procedure. This includes costs related to publication and notification of the action for the exercise of the opt-out right, as well as the mandatory negotiation phase that may be facilitated by an external mediator. Experiences under the WCAM indicate that costs in this phase, especially in cases with an international component, can be significant. Unlike the WCAM, where an agreement is already in place, the notification costs in this phase of the WAMCA procedure carry more risk.

If it turns out that WAMCA procedures indeed require budgets in the range of €3–5 million, it will have implications for the types of cases eligible for financing to generate an ROI for funders. This could explain the current prevalence of substantial compensatory cases. Cases meeting this criterion often have an international component.

4.10.2 Challenges in Financing under WAMCA

The interviews reveal that WAMCA is used by various parties with diverse claims, ranging from summary proceedings with injunctive relief as the goal to full-fledged collective damages procedures. The choice of different approaches has an impact on the costs associated with conducting these procedures. This makes it challenging to draw uniform conclusions regarding identified problems and the need for a collective action fund in general. It is important, therefore, to distinguish between different types of cases.

For typical mass damage claims seeking compensation, there seems to be an emerging commercial private market for identifying, investigating and financing mass wrongdoings. Specialised law firms catering to this market are also developing. The presence of competitive initiatives in some cases indicates market dynamics. This suggests the development of a (healthy) market. However, there is still considerable uncertainty about the future of these financing options. Depending on crucial points in future jurisprudence affecting the costs of WAMCA procedures and the ability of litigation funders to ultimately recover these costs with a return on their investment, this financing market and specialised legal practice may either continue to grow or stagnate. Even in the most favourable scenario where this market continues to develop, questions remain about the extent to which the decision of which cases are 'fundable' should be left entirely to commercial funders. Additionally, as mentioned earlier, the fact that litigation funders could achieve an ROI does not automatically mean that all cases needing litigation funding will meet the criteria set by funders. A positive aspect of TPLF involvement in WAMCA cases could be that extensive preliminary research

and due diligence are conducted on various aspects of the case before filing a claim. It is reasonable to expect that the rise of specialised law firms will further contribute to the professionalisation of this market and raise its quality standards. Thus, it appears that the concern of lawmakers that WAMCA could lead to the filing of (seemingly) unfounded claims has been adequately addressed.

(Ad hoc) organisations that do not pursue complex collective damages actions typically opt for seeking a declaration of law and/or injunctions. Some respondents in this segment are currently exploring the possibilities and advantages of initiating collective damages actions. The extent to which cost considerations will play a decisive role in this exploration is not yet clear. It is likely that they will need to rely on the commercial financing market to secure funding for such procedures. However, it remains to be seen whether this type of claim is interesting enough for commercial funders. To the extent that there is a need for alternative forms of financing, it arises mainly from claims where there is no adequate ROI for commercial funders but where there is still a (collective and/or societal) interest in addressing wrongful conduct leading to collective damages. For this type of cases, third-party funding is currently difficult, if not impossible, to obtain, and according to respondents, a litigation fund could fill a gap in financing options.

This could potentially change if the jurisprudence evolves in a direction where the success fee for funders is calculated based on a multiple of the required funding (rather than a percentage of the damages) and if this fee, in case of success, becomes part of the cost order against the opposing party. Many funders already use a multiple of the investment as an alternative basis for calculating their success fee. This is easier to apply in cases where only a declaration of law or injunction is sought. This market development could potentially be encouraged by explicitly mentioning it as an option under WAMCA. This would significantly expand the financing options for non-compensatory cases. However, a drawback is that this form of financing is costly, especially when compared to a possible litigation fund. Healthy market dynamics could mitigate this drawback, but the fact remains that litigation funding, in itself, is an expensive financing method that ultimately has to be funded by someone. Depending on the development of jurisprudence, this could either be the collective or the defendant. Regulation or capping of success fees is theoretically an option. However, the danger is that if regulation does not take market dynamics into account, it could effectively lead to the demise of the market. This would leave the claimants under WAMCA even further from a viable solution.

Financing for interest organisations that operate as repeat players is less of a problem than for other cases, thanks to the relatively low costs of simpler proceedings for declarations of law or injunctions. Under the old 3:305a DCC regime, they could also

manage relatively well. For these parties, it is more the WAMCA-related (admissibility) requirements that make individual cases more expensive than under the old regime and limit certain strategic choices. Therefore, these aspects are frequently mentioned by respondents as (new) challenges. However, because individual cases ultimately become more expensive, this has a depressing effect on the budgets available to these parties. In practice, the choice between different possible procedures, as it has always existed, becomes more important. With the same budget, fewer procedures can simply be conducted. These parties would also benefit from an expansion of financing options, with or without the use of a litigation fund.

However, all of this could change based on developments in jurisprudence on aspects that are currently unclear. For example, reference is made to large-scale online privacy violations. Seeking compensation for damages suffered in the case of (online) privacy violations is a relatively new area in (Dutch) legal practice that is still in development.[96] Changes in the possibilities for compensation in these types of cases could make them attractive to funders, thereby overcoming the objections raised in the Big Data report. Additionally, the possibility of recovering a multiple of the funding made by funders in the event of a cost order could make more cases fundable, as it could break the link between financing and the (percentage of) collective damages. This facilitates an alternative calculation of the ROI for funders.

The insights from this research regarding the negative consequences of bringing together very different types of claims under a procedure designed with a specific type of claim in mind (the collective damages action) are not entirely new. The discussion about the (potentially unacceptable) barriers that WAMCA currently raises for NGOs litigating ideological cases is already in full swing. As described by Peters and Van Wees, the WAMCA contains several concepts that are inappropriate for ideational claims (representativeness, narrowly defined group, opt-out, collective binding) but must nonetheless be adapted to the procedure. This adds extra work and, more significantly, increases uncertainty:

> The costs arise from uncertainty about the interpretation and application of various WAMCA concepts to ideational cases, the much longer duration (both in the admissibility phase and in the subsequent phase with multiple settlement attempts), the many extra procedural steps and hearings added

96 The Court of Justice of the EU has recently dealt with the question of damages in the case of online GDPR infringements and has opened the door for 'non-material' damages claims. CJEU 14 December 2023, Case C-340/21, ECLI:EU:C:2023:353 (*VB/Natsionalna agentsia za prihodite*).

> to the process, and the need for additional legal assistance, as substantive expertise (climate law, fundamental rights) quickly becomes insufficient to address the procedural problems.[97]

It should be noted, however, that there is expected to be a relatively short-term crystallisation of how judges apply the admissibility requirements and a learning curve on the side of lawyers. Since the procedure was only recently introduced, and the admissibility requirements created a new legal context, there may be a start-up phase during which experienced lawyers' unfamiliarity with the new requirements is only temporary, and the extra time they spend on this in the future will, at least partially, be reduced.

The uncertainty surrounding the application of WAMCA-specific concepts, which can form significant barriers to the admissibility of certain parties, may be resolved in the (near) future through jurisprudence in pending cases. For some claims, for example, the revisions proposed by Peters and Van Wees[98] (e.g. no registration requirement in the register for ideational claims, an expansion of the exception of Article 3:305a Paragraph 6 DCC, and moving the admissibility question to the end of the procedure) could make a significant contribution to making the procedure more accessible, faster and less expensive, thereby significantly reducing the need for additional funding for some parties.

97 Peters & Van Wees 2022, p. 29.
98 *Ibid*.

5 Findings from the Focus Group and Expert Meeting

This chapter contains the reports of a meeting with a focus group and an expert meeting. Although these partly had different objectives and methods and involved a different target group, it was chosen to include the findings in the same chapter because both parts of the research shared a similar setup, with largely the same questions being presented. After a brief introduction and discussion of the methodology employed (Section 5.1), Sections 5.2 and 5.3 discuss the findings from the focus group and the expert meeting, respectively, before drawing conclusions in Section 5.4.

5.1 Introduction and Methodology

The focus group and expert meeting were set up to present a series of questions to professionals who, due to the nature of the research question, had not yet been interviewed, and to pose a series of questions to experts based on the preliminary findings of the research. The focus group aimed to obtain input from lawyers with extensive experience representing defendants, as the interviews – in light of the research question regarding the need for financing – were conducted with (among others) lawyers representing claimants. The expert meeting was intended to pose a series of questions primarily to academic experts. These questions, detailed further, focused on the need for financing, the potential positive contribution of a public fund to this need, the potential structure of such a fund and the types of cases that should qualify for financing. Both the focus group and expert meeting were held online on 23 November 2022.[1] The focus group involved five lawyers, and the expert meeting had nine participants. The focus group was conducted in Dutch, while the expert meeting was conducted in English because some participants were foreign experts. In preparation, participants received questions in advance, along with a brief introduction to the research and preliminary findings. The list of discussion points used by the researchers is provided as Annex 3.

1 Researchers Kramer, Tzankova, Hoevenaars and Van Doorn were present at the focus group; Kramer, Tzankova and Hoevenaars attended the expert meeting.

5.2 Focus Group

5.2.1 Presented Questions

The five participants were all attorneys with extensive experience in the practice of collective proceedings on the side of defendants. Respondents were asked to consider the following questions from the perspective of defendants in Mass Damage Settlement in Collective Actions Act (WAMCA) procedures:

1. *What relevant developments or problems, for the research, can be identified from the perspective of defendants in WAMCA procedures?*
2. *How could a fund contribute (positively or negatively) to the current practice?*
3. *If a fund were to be established, which cases should it fund?*
4. *How could the fund itself be financed?*
5. *What considerations are important for the organisation and institutional integration of a fund?*

5.2.2 Reporting of Findings

(1) Identified problems and the need for alternative forms of financing

When asked if there is a need in practice for an alternative form of financing for claimant parties, respondents emphasise the importance of first establishing this potential need. The question is raised as to whether there is indeed a deficiency in legal services. Respondents observe a lot of creativity on the part of claimant parties in making claims possible. There is a high degree of market competition among claimant parties to be designated as the exclusive representative in WAMCA procedures. In this sense, it is noted that the WAMCA functions as intended, and there is no additional need for financing for this specific type of case.

Participants generally agreed that a fund would only be relevant in practice for cases that cannot secure financing in any other way. It is suggested that a public fund (a fund funded with public resources) may not be the only solution for this. It is mentioned that commercial funders could potentially establish their own fund, similar to law firms that undertake some of their work pro bono, as part of their social responsibility. In the context of taking social responsibility, funders sometimes have 'pots' available for public interest actions.

(2) Possible positive or negative contributions of a litigation fund

Participants mention the tension between the interests of actual claimants and their service providers (agent-principal problem). Commercial interests among service providers and potential commercial funders often lead to tough negotiations over fees and unrealistic compensatory demands. This can also negatively affect the willingness to settle on the claimant side. Defendants seek a balanced approach where a neutral party could play a positive role. A public litigation fund could potentially eliminate the commercial interests associated with third-party financing and serve as a gatekeeper for unrealistic claims by imposing certain conditions for accessing the fund. Moreover, it could promote settlements.

An alternative interpretation of the idea of a litigation fund, as mentioned by several respondents, involves the need for an entity to manage settlements. This entity could be linked to a litigation fund, since the ad hoc creation of such an entity for settlements is currently complex and costly. The complexity and costs associated with this process hinder the efficient settlement of agreements between claimants and defendant parties. Currently, the wheel is reinvented each time by the parties involved. It would be beneficial if such a structural 'executive entity' could also be incorporated into the fund. While this is beyond the scope of this research, it is emphasised that if an alternative form of financing through a fund is chosen, supporting the settlement of compensation claims (whether or not in settlements) for defendant parties would be a plus.

In general, it is emphasised that the willingness to settle on the part of defendant parties is strongly dependent on clarity regarding total costs. For claims financed according to a commercial model, where the success fee of the funder depends on the amount of damages awarded, this is problematic. Several respondents confirm that there is a strong need on the defendant side to move away from a system where the amount of damages and the return on investment (ROI) of the commercial funder are linked. It is emphasised that it would be beneficial for both claimant and defendant parties if both parties knew what their costs would be (and if it were clear that a fund would cover certain costs on the claimant side), as this could promote settlements, de-escalate and shorten proceedings.

(3) Possible forms of financing for a fund

Fines based on public enforcement, with the possibility of leniency if the fined party agrees to make a 'donation' to a fund in exchange for a reduction in the total fine (similar to competition law, where the Authority for Consumers & Markets (ACM) also seems open to this). It is emphasised that, in this case, the fund must be a general fund, as

otherwise parties would effectively finance their own possible counterclaims, which would negatively affect the willingness to settle.

Cy pres financing, where unclaimed compensation flows back to a litigation fund, is seen as a problematic form of financing because collective claims sometimes involve an estimated group of victims. Defendant parties would have to compensate for a group of claimants of unclear size. Since cy pres financing ensures that the claim must be paid for the entire group of victims, regardless of the percentage of victims who actually realise their claim, this could limit the willingness of defendant parties to settle.

Similarly, when considering a fixed percentage that must be paid to the fund for each collective action (as a kind of 'tax', following the Canadian model), it is emphasised that the question is whether this percentage is calculated based on the entire claimed amount or on the amount of compensation ultimately paid to victims.

(4) Organisation of a litigation fund

According to the participants, a public fund should focus only on the mentioned cases for which the current legal services and financing options fall short. The commercial market currently serves a significant portion of the total claims, but cases that are not commercially interesting for funders have more difficulty securing funding. In that sense, the fund could play a complementary role alongside the commercial initiatives in the market.

The fund should rigorously select cases to prevent frivolous claims and experimental cases. In general, it is noted that defendants are bothered when they have subsidised litigants on the opposing side.

When considering where a fund could be institutionalised, the Legal Aid Board and the Public Prosecution Service were mentioned as ideas. It was considered that the Legal Aid Board is expected to lack the expertise for a proper rigorous selection of cases, while the Public Prosecution Service's close association with the government creates issues, particularly when cases are brought against the government.

The importance of preventing potential conflicts of interest of evaluators involved with the litigation fund is emphasised by respondents. Alongside this, the importance of a good governance structure with safeguards and independent oversight is stressed.

An evaluation committee should consist of a mixture of expertise, with the independence of its members being crucial. It was considered that the evaluation committee could

operate under the chairmanship of former judges and/or scholars, who can safeguard the independence of its members to prevent conflicts of interest.

5.3 Expert Meeting

5.3.1 Introduction

The participants in the expert meeting[2] included six academics (working at a Dutch or foreign university), two representatives of a consumer interest organisation and one representative of a commercial funder. All respondents possess relevant expertise and experience in collective actions, settlements and (commercial) financing of these cases.

The respondents were asked to reflect on the following five questions:
(1) Is there a need for alternative forms of financing?
(2) How could a fund contribute (positively or negatively) to the current practice?
(3) In case a fund were to be established, what cases should it fund?
(4) How could the fund itself be funded?
(5) What considerations are important for the organisation and institutional embedding of a fund?

5.3.2 Reporting of Findings

Here is a summarised translation of the discussion based on the aforementioned questions. We have tried to retain the wording and statements as used by the participants as much as possible.

(1) Need for alternative forms of financing and the contribution of a public fund

The participants (excluding the participating commercial funder) indicate a clear need for financing cases that are not funded by commercial funders. Not all cases are commercially attractive, but enforcing compliance through legal procedures also serves non-commercial interests (societal, moral and legal). Therefore, it is essential to have alternative sources of funding alongside those from the commercial market. The current commercial financing market is also unpredictable, with shifts in the commercial interests of funders, economic changes, competition with markets in other countries or

2 The expert meeting was conducted in English; the translation of the discussion into Dutch was carried out by the researchers.

political decisions that expand or restrict third-party funding all impacting the market and potentially bringing about drastic changes in financing opportunities.

It is noted that the establishment of a public fund is not the only option to address a potential financing gap. The commercial market in the Netherlands is still in an early stage of development, and changes in the market can influence financing opportunities both positively and negatively.

(2) Types of cases and kinds of costs

Participants broadly agree that financing should not be limited to specific types of cases. It is noted that there may be constitutional objections to allowing public funding for only a part of the cases or market. A fund should be able to finance a wide range of cases to avoid excluding a particular type of case beforehand. To qualify for funding from a public fund, criteria should be established to ensure that only cases genuinely in need of funding from the fund are selected.

Criteria for qualifying for funding from a public fund could include (1) cases with a public interest (even though defining this can be challenging); (2) claimants demonstrating that other options have been sought but are unavailable and (3) the merits of the case (not patently unmeritorious). It is suggested that a point-based system could be used to ensure flexibility when assessing the criteria.

Regarding the costs that could be eligible for reimbursement, it is mentioned that such a fund should reimburse a non-exhaustive list of costs, including notification and service costs, court costs and attorney fees. The costs of a communication campaign and those associated with the distribution of compensation among claimants/stakeholders are also specifically mentioned, as both categories of costs can be substantial. An application for reimbursement should include a budget with a cost breakdown and specify the amount requested from the fund.

A question raised is whether a fund should also cover the costs of the opposing party that must be paid if the claimant is unsuccessful. In this context, one participant points out the existence of 'one-way shifting of costs' in other countries, where public interest cases are exempt from cost orders.

A general conclusion is that a fund should examine cases individually, considering the different stages of the proceedings and the requested amount of financing. The judge may play an active role in this regard.

(3) Possible financing of a litigation fund

Various options for financing a public fund are discussed. It is concluded that an initial capital injection is needed, and it makes sense for this to come from the government. The possibility of philanthropic donations is mentioned, as well as the option to include in distribution agreements that a portion of the compensation goes to a litigation fund (other than in a cy pres model).

Some participants note that a structural contribution from the government, regardless of whether there is political willingness, could expose such a litigation fund to political influence, both in terms of funding and in setting selection criteria.

The 'Canadian' model, where a tax is levied on all collective actions,[3] can serve as a gatekeeper function for unfounded claims because the general ROI lower. However, a solidarity mindset is required for this. It is also mentioned that democratic control is necessary given the imposed solidarity.

The amount to be deposited into the fund depends on the type of case, and some cases will generate nothing, even if successful. Only if compensation is awarded can a certain amount be deposited into the fund.

Participants do not agree on whether contributions should be made from all successful collective compensatory actions (as in Quebec)[4] or only in cases financed by the fund. In the former case, this establishes a more structural source of income and promotes the sustainability of the fund. However, some participants were fundamentally against the idea that parties who did not use the fund should still contribute.[5]

A question that arises regarding a model where a percentage of compensation must be contributed, especially if there is co-financing from private and public sources, is how much is left for the claimants. In this context, reference is made to the European Parliament Resolution on Responsible Private Funding of Legal Costs, which guarantees a certain minimum for claimants.

The suggestion of an allocation from fines imposed by public enforcement is considered interesting, but participants point out that imposed fines are limited, and public enforcement authorities also face financing problems, which would only shift the problem.

3 Refer to Chapter 6, Section 6.3.
4 Refer to Chapter 6.
5 European Parliament 2022 (2020/2130(INL)). Also refer to Chapter 2, Section 2.5.3.

Finally, it is noted that questions about financing models are closely interconnected. The organisation of a public litigation fund is complex because one choice can also affect other aspects. For example, if a litigation fund is structured as revolving through a contribution from successful cases, the question remains how feasible or desirable this is. If a fund only funds cases that are ineligible for commercial funding, there is a risk that the fund can only be funded from cases that are weaker and/or less profitable. In other words, establishing a litigation fund for cases that do not qualify for commercial financing could create a funding problem for the fund itself.

(4) Organisation of a litigation fund

For the organisation of a litigation fund, the importance of a mix of expertise to assess funding applications is emphasised. Regarding the required expertise and due diligence for an assessment of the merits of the case, one participant points out the expertise that insurance companies have. The organisation and expertise of commercial funders, who use external parties, can also serve as an example for a public litigation fund.

Similar to the focus group, the importance of preventing conflicts of interest among experts on a committee who assess funding applications is emphasised. Finding individuals with the right expertise but no potential conflicts of interest could be a challenge. Retired judges could potentially serve as neutral chairpersons of a selection committee.

5.4 Conclusions

The focus group and expert meeting were intended to gather feedback on questions related to the need for financing alongside existing methods of funding, the potential contribution of a public litigation fund and how such a fund could be structured.

The participants in the focus group note that, in principle, there is no additional need for financing because of market competition and competition among claimants. A public fund would only be necessary in cases where no other form of financing is possible, such as those with a public interest character or where no or limited compensation is sought. However, it is pointed out that other forms of financing exist, such as funders willing to make funds available out of social responsibility, on non-commercial terms. This, to some extent, contradicts the identified need for alternative forms of financing as observed by the participants in the expert meeting and, to a lesser extent, the issues surrounding the application of the WAMCA and the implications for costs and funding, as described by the interviewees. This difference in perspective might be partly explained by the different viewpoints of the participants. From the

defendants' perspective, there may be a belief that the number of cases being brought and developments in the commercial market indicate sufficient opportunities. From the perspective of claimants and participating academics, there seems to be a desire to expand financing options, also considering the uncertainty surrounding developments in the financing market.

However, the focus group does mention two potential positive aspects or functions of a public litigation fund. It can help address the agent-principal problem by removing the commercial interests of third-party funders, and imposing certain conditions for accessing this fund could serve as a gatekeeper function. This could also promote the willingness to settle. Furthermore, an alternative role for such a fund could be to play a part in the settlement of cases, given their complexity and costs.

Regarding the types of cases that could be financed by a litigation fund, cases involving a public interest, such as climate cases are mentioned. However, participants in the expert meeting rightly point out that defining these cases can be challenging.

Various options exist for financing a litigation fund, such as contributions from successful collective actions—whether limited to cases where the fund is invoked, cy pres, private donations and fines imposed in the context of public enforcement. Contributions from the government, particularly as an initial capital injection, are also mentioned. However, each financing method also has certain potential drawbacks, and the method of financing directly affects the sustainability of a fund and, consequently, whether it can be revolving. The most structural financing, aside from government contributions and contributions from public enforcement, is a contribution (percentage) from the proceeds of all successful compensatory cases. However, this also has repercussions for the level of compensation for claimants, requiring solidarity, and is dependent upon a steady stream of successful claims.

Regarding the types of costs that could or should be reimbursed from the litigation fund, it also depends on the amount of funds available. Ideally, as highlighted in the expert meeting, various categories of costs should be eligible, including court costs, attorney fees, possibly the costs of the opposing party if a case is not successful, and costs related to communication and the distribution of compensation among claimants/stakeholders. In line with what was also mentioned in the interviews,[6] it is essential to have (prior) visibility of the cost amount. This is also crucial for the willingness of parties to settle.

6 Refer to Chapter 4, Section 4.10.1.

In the organisation of a fund, it is important that members of a selection committee have sufficient expertise while also preventing potential conflicts of interest, given that it involves a relatively limited pool of experts. A selection committee with mixed expertise could potentially be led by a retired judge, as noted in the expert meeting. The Legal Aid Board and the Public Prosecution Service are mentioned as possible organisational units, with the question raised in the focus group whether the former has sufficient expertise. External experts may also play a role in such a selection committee.

6 Financing and Litigation Funds for Collective Actions in Canada, Australia and Israel

This chapter contains the findings of the research in countries where a public fund for collective actions exists,[1] including Canada (Quebec and Ontario), Australia and Israel. This research is largely based on desk research and additional interviews with professionals from these jurisdictions who, in a professional capacity, either as a scientific researcher or in another (procedural) capacity, have experience with the operation of the respective litigation funds. Four interviews were conducted with two experts from Australia, Canada, the United States[2] and Israel, respectively. For completeness, the litigation fund in Chile should be mentioned, but because it was introduced relatively recently, it will not be further discussed.[3]

This chapter is structured as follows: Section 6.2 provides a brief overview of the policy considerations and initiatives in several countries regarding the establishment of class action litigation funds. It then delves deeper into the jurisdictions that have opted for such funds. Section 6.3 examines the litigation funds in the Canadian provinces of Quebec and Ontario. It first explores the discussion in the academic literature about the utility and necessity of these litigation funds in those countries. Then, it reviews the intentions of lawmakers in those countries, and finally, it goes into more detail about the structure of the respective litigation funds. Sections 6.4 and 6.5 discuss developments in Australia and Israel, respectively. Conclusions are presented in Section 6.6.

1 This comparative legal research was largely carried out by Michael FitzGerald, student assistant at Tilburg University at the time of conducting this research, who provided the first draft for this chapter. That draft is included as Ann. 5 of the report underlying this book: Kramer et al. 2023 (WODC report), available at https://repository.wodc.nl/handle/20.500.12832/3294.

2 The United States does not have a public fund for collective actions; these experts were interviewed for their experience with cy pres distribution of unclaimed funds in class actions and for their experience in the management of the settlement stages of class actions. Additionally, this chapter includes relevant comparisons between the Canadian and US context of class actions that help to clarify the origins of the Canadian funds.

3 An informal English translation is included as Ann. 4 in the report underlying this book. Refer to previous footnote.

6.1 Introduction

Access to litigation funding is also a central theme in discussions about access to justice in other countries.[4] This is even more pronounced in the context of collective redress. In jurisdictions that traditionally adhere to the 'loser-pays rule', where certain financing arrangements such as no cure no pay and/or contingency fee arrangements for lawyers are prohibited, the question has arisen as to whether the government should intervene to facilitate the financing of collective claims. This question is particularly relevant in those jurisdictions because support in the form of (private and/or public) financing is needed to achieve policy objectives, such as access to justice; otherwise, there is a risk that the class action[5] mechanism becomes a dead letter in legislation.[6] In this chapter, the legal systems of countries where the government has played the role of litigation funder in class actions are examined.[7] We will delve into the policy considerations that led lawmakers in these jurisdictions to establish litigation funds, the decisions they made when setting up these funds and their operation since their establishment.

Four questions serve as a common thread in the comparative law paragraphs. Firstly, the question of why only these geographically distant and culturally different jurisdictions have introduced a system in which collective actions are supported by 'public' financing and/or 'public litigation funds'.[8] What common denominator underlies this? Secondly, the question of whether such litigation funds, in which the government plays or has played a role in financing to some extent, compete with commercial financing, and if so, whether such competition benefits the litigants. Third, the question of the extent to which comparative law research can be relied upon when analysing the effect that a particular financing mechanism would have within a specific and/or other legal culture. Finally, the question of the parameters by which the success of a fund can be assessed and/or when a litigation fund has succeeded in its purpose.

6.2 The International Context

Globally, there are only three jurisdictions with notable experiences of public litigation funds for class actions: Quebec, Ontario and Israel. Such funds remain an anomaly on

4 Mulheron 2020, p. 129.
5 Throughout this book, we use the term 'collective action' to designate the Dutch procedure under WAMCA; however, the relevant procedures in the jurisdictions discussed here are more accurately designated as 'class actions'. Therefore that term is used in this chapter.
6 Voet 2016, Para. 3.
7 Mulheron 2020, p. 129.
8 The litigation funds are referred to in various ways. For the Netherlands, we use 'litigation fund' without the addition of public or open, because the manner of integration determines the type of fund it is.

the international stage, despite recommendations from various law reform initiatives that designate the option of a public litigation fund as "the most compelling method to support collective claims".[9] In late 2021, the New Zealand Law Commission published a report on collective claims, recommending, among other things, a public litigation fund for class actions.[10] Mulheron mentions other entities that have proposed the establishment of public litigation funds.[11] These include the Law Reform Commission of Australia,[12] the Victorian Law Reform Commission,[13] the South Australian Law Reform Commission[14] and the Hong Kong Law Reform Commission,[15] as well as the Victorian Attorney-General's Law Reform Advisory Council[16] and the Civil Justice Council of England and Wales.[17] None of these recommendations have been adopted by governments so far. It has not materialised in Germany either.[18]

A limited number of law reform organisations have even discouraged the establishment of a government fund. These include the Alberta Law Reform Institute,[19] the Manitoba Law Reform Commission[20] and the Scottish Law Commission,[21] each of which discouraged the option as politically unrealistic due to the scarcity of government resources. Remarkably, the Ontario Law Reform Commission (OLRC) in 1982, 10 years before the establishment of the Ontario litigation fund, strongly advised against the creation of such a fund.[22] The reason for this was that the commission considered a different measure appropriate. Instead of a litigation fund, it advocated for the establishment of a 'no-costs' regime for class actions in Ontario. This measure would render a litigation fund unnecessary. However, 10 years later, in 1990, the Attorney-General's Advisory Committee on Class Action Reform rejected the OLRC's recommendation for a 'no-costs' regime. Nevertheless, this policy did lead to the creation of the Class Proceedings Fund.[23] In 1995, the Canadian province of British Columbia fully adopted the OLRC's original recommendations, including a 'no-costs' regime for class actions, making class action claimants nearly immune to paying costs.[24]

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9 Canada Federal Court Rules Committee 2000, p. 102.
10 New Zealand Law Commission 2021, Paras. 18.9-18.17.
11 Mulheron 2020, p. 170.
12 Australian Law Reform Commission, Para. 308.
13 Victorian Law Reform Commission, Para. 10.
14 South Australian Law Reform Commission.
15 Hong Kong Law Reform Commission, Para. 8.69.
16 Victorian Attorney-General's Law Reform Advisory Council, Para. 7.34.
17 Civil Justice Council of England & Wales, Para. B.
18 Halfmeier 2015.
19 Alberta Law Reform Institute, Para. 391.
20 Manitoba Law Reform Commission, Para. 86.
21 Scottish Law Commission, Paras. 5.21-5.31, 5.48, 5.50.
22 Ontario Law Reform Commission, Para. 713.
23 Kalajdzic 2022.
24 Watson 2001, p. 275: "she is only liable if the action is 'frivolous or vexatious' (merely losing is not enough)."

From these developments, two conclusions can be drawn. Firstly, no policy initiative has discouraged the establishment of a government fund for reasons other than political infeasibility. Secondly, recommendations for government litigation funds are not automatic; for example, in the United States, there has been no serious recommendation for the establishment of a government litigation fund. The establishment of a government fund is only seen as a necessity when there is a gap in the financing landscape. Such a gap can arise for a variety of reasons, the most important of which are restrictions on contingency fees and the application of a loser-pays rule in the context of class actions. Mulheron notes that in the absence of such a gap, the utility of a litigation fund should be seriously questioned.[25]

6.3 Canada

6.3.1 Academic Discussions: Consensus and Divergence

Canadian provinces Quebec and Ontario represent two of the three major jurisdictions in the world that provide a government fund for the financing of collective redress.[26] As for the Quebec fund, scholars agree that it is a success; it has been widely used. Until 2020, it had provided financing for 45% of all collective actions in Quebec since its establishment.[27] It is integrated into the local legal culture and widely praised as the "most suitable and effective way to finance class actions".[28]

Scholars' responses to the performance of the Ontario government fund were more mixed; early critics included Watson, who in a frequently cited article from 2001 unequivocally called the fund a failure.[29] Mulheron notes that the prospects for the fund were bleak in 2012, and numerous commentators expressed their doubts, including the Hong Kong Law Commission, which referred to the underutilisation and questionable viability of the fund.[30] In Canada, legal professionals noted that the government fund was not frequently used and that the primary financing method is and will continue to be the contingency fee.[31] In Fehr v Sun Life Assurance (2012), Perell observed that the

25 Mulheron 2020, p. 170.
26 With Israel as the third jurisdiction – Bukspan 2021, p. 528.
27 Piché 2022, p. 70.
28 Piché 2016.
29 Watson 2001, p. 276. Watson explains: "the Fund has been a failure in that, due to inadequate financing, it has given funding to very few class actions (approximately six to date)."
30 Hong Kong Law Reform Commission, Para. 8.69; cited in; Mulheron 2020, p. 146.
31 Brown *et al*., p. 350, cited in: Mulheron 2020, p. 146.

fund was accessed only in a minority of cases, while contingency fees for class counsel were more common.[32]

From 2012 onwards, an improvement can be seen in the utilisation of the Ontario fund. In the words of the Chair of the Class Proceedings Fund in its 2017 annual report:

> [T]he fund has evolved from being relatively unknown and underutilized to being a significant part of the class action landscape…. We estimate that the fund provides financing for 10% of class actions filed in Ontario.[33]

However, it should be noted that this same figure is cited by Kalajdzic[34] and by Piché[35] to highlight serious shortcomings reflected in the underutilisation of the fund. Therefore, this figure is subject to different interpretations.

Mulheron appears to be more in agreement with the fund's chair, who believes that the fund, after overcoming some initial challenges, is now undeniably of great importance.[36] In 2022, Kalajdzic warns against using the percentage of funded cases as a measure of success and disagrees with Watson's earlier assessment from 2001 that the fund was a failure.[37] These differing evaluations of the same factual material demonstrate that success is not a straightforward concept. This topic will be revisited later in this chapter.

6.3.2 Objectives and Intent of the Legislator

The OLRC's 1982 Report on Class Actions is considered a defining document for Canada's collective action regime, despite the fact that Quebec's regime was established 3 years earlier. This report was produced following the recognition by the Supreme Court of Canada in Naken that the old class actions regime was inadequate and that a comprehensive statutory framework for initiating and conducting class actions was needed.[38] The report establishes three often-repeated policy objectives that, although unassuming, provide an authoritative and principled benchmark against which the rise

32 [2012] ONSC 2715 [64]. Cited in: Mulheron 2020, p. 146.
33 *Class Proceedings Fund Annual Report* 2017, p. 29, https://lawfoundation.on.ca/download/2017-annual-report/.
34 Kalajdzic 2022, Para. 3: "The structural deficiencies manifest in the underutilization of the Fund: at best, 10% of Ontario's class actions have been funded by the Class Proceedings Fund."
35 Piché 2016, p. 800.
36 Mulheron 2020, p. 149.
37 Interview 21 July 2022.
38 Piché 2016, p. 790.

of national class actions can be examined and evaluated.[39] These three objectives are access to justice, procedural efficiency and behavioural change. These three criteria are ingrained in Canadian class action culture through constant reference to them by the judiciary.

In 1978, Quebec pioneered the introduction of class action legislation. Quebec's legislation on collective actions led, among other things, to the establishment of a public fund for collective actions, the *Fonds d'aide aux actions collectives* (1982). This fund was introduced as a measure to promote the public interest with the explicit goal of enhancing access to justice and more efficiently enforcing social legislation.[40] Although such general statements of intent may appear commonplace and obligatory, it is important to note that the Quebec legislator explicitly intended the new law to be claimant-friendly. Five years after the law's draft, Lauzon concluded that the legislator intended to promote the use of the procedure.[41] Piché also emphasises that the legislator was concerned about the accessibility of the class action as a procedural tool for litigants, regardless of their means.[42] This strongly implies that the legislator was primarily, if not exclusively, focused on improving litigants' access to the procedure.

This was different in Ontario, where the legislator, in 1992, under significant pressure from an *Attorney-General's Advisory Committee on Class Action Reform* largely composed of business representatives,[43] adopted the *Class Proceedings Act* to balance the interests of claimants and defendants. Legislation was introduced to ensure that claimants and defendants were treated fairly.[44] While Quebec's fund was expressly established to address the issue of access to justice for claimants, Ontario's fund aimed to strike a balance between the interests of defendants and claimants. This disparity in the objectives of the two funds may partly explain why two seemingly similar entities have achieved such remarkably different results in recent years.

39 Marcus 2013, p. 45.
40 Piché 2009, p. 118.
41 Lauzon 1984.
42 Piché 2016, p. 799.
43 Kalajdzic 2022, p. 3: 'Not surprisingly, this Committee, populated by organisations representing corporate (and therefore defendant) interests, rejected the OLRC approach to costs'.
44 Ontario Hansards, 12 June 1990, (Ian Scott). http://hansardindex.ontla.on.ca/hansardespeaker/34-2/l045_90-22.html.

6.3.3 *Identification of a Deficiency in Legal Protection*[45]

After discussing policy objectives, it is important to address a more practical point. The underlying problem that legislators in Quebec, and later in Ontario, aimed to address with the introduction of public litigation funds is the incompatibility of the collective procedures mechanism with the loser-pays rule.

As explained by Lauzon (translated and paraphrased):

> To understand the importance of the role of the public class action fund, it is important to consider that in our legal system, the losing party bears the costs. This also applies to collective procedures. However, in collective procedures, the representative appears before the Court on behalf of the group members. Such responsibility is disproportionate to their personal interest in the case. On the other hand, it would be practically impossible to distribute these costs among the members. It was to solve this problem that the class action fund was established.[46]

Lauzon wrote about the Quebec fund in 1984, while Watson later, in 2001, understood that the primary motive of the Ontario fund was roughly similar: to provide assistance to the claiming organisation in avoiding liability for the defendant's costs if the action is unsuccessful.[47] Result-dependent rewards are allowed throughout Canada as an incentive for law firms to finance claims, and, therefore, it is primarily the loser-pays rule that has created the deficiency in legal protection that legislators sought to fill by establishing government funds.

6.3.4 *The Canadian Setting for Collective Actions*

As mentioned, the public litigation fund can be seen as a way to incorporate a legal transplant – collective proceedings – into another system that had independently developed. Due to the incompatibility of the 'loser-pays' cost-sharing rule with class actions, additional litigation funding (private or public) is required to achieve the legal goal of access to justice.

45 Mulheron 2020, p. 164.
46 Lauzon 1984.
47 Watson 2001, p. 275.

The Canadian legal framework for class actions is regulated at the provincial level. The Quebec regime, similar to the regimes in Ontario (1993), British Columbia (1995), Saskatchewan (2002), Newfoundland (2001), Manitoba (2002), the Federal Court (2002), Alberta (2004), New Brunswick (2006) and Nova Scotia (2008), is modelled after the US Federal Rule 23, which governs how class actions are handled in the US context, with some adjustments (including the establishment of a public litigation fund in Quebec and Ontario). This modified 'transplant' of a US-derived system has resulted in a somewhat liberalised version of the American 'Lawyer-Entrepreneur' model in Canada.[48] However, this model does not necessarily guarantee real access to justice, which also depends on access to litigation funding and the quality of the market for lawyers representing claimants. Class action regimes in the United States and Canada are incentivised and sustained by the possibility of attractive court-approved contingency fees.[49]

Despite these procedural-level similarities (except for different cost rules), there are numerous factual differences that prompted lawmakers in Quebec and Ontario to improve access to litigation through a public litigation fund. In the United States and Canada, as in most developed legal systems in the world, the main consideration for introducing class actions is based on two factors. The development of industrial society, where mass damages occur more frequently, combined with increasing litigation costs, leading to an increase in individually unenforceable claims[50] (scattered damages). In Canada, there are many more such individually unenforceable claims than in the United States, due to several factors, including low caps on damages in personal injury cases, the rarity of punitive damages, the absence of (relatively unpredictable) juries and, finally, the presence of the *loser-pays* rule.[51] The interplay of these factors results in lower expected proceeds from claims, while the cost risks can be significant. In contrast, the American funding system lacks all these factors, making it by far the most favourable with respect to access to class actions for claimants.[52] This is because substantial results can be achieved while cost risks are lower.

The *loser-pays* cost-sharing rule is the main factor explaining the divergent funding conditions between the American and Canadian approaches to class actions. It is this cost-sharing rule that made the adjustments necessary – such as the introduction of public funds in Ontario and Quebec – when 'converting' American Rule 23 to the Canadian class action system. The *loser-pays* rule creates a significant financial obstacle

48 As in more freely available.
49 Watson 2001, p. 273.
50 Watson 2001, p. 270.
51 *Ibid*.
52 Hensler 2017, p. 976.

to assuming the role of a class representative and also serves as a disincentive for law firms that would otherwise be more inclined to finance cases on a contingency fee basis.[53] Due to this procedural distinction, the American market for the status of lead counsel (similar to the determination of 'exclusive representative' in the Dutch context) is considered stronger, more competitive and healthier than the Canadian market.[54] This competition also leads to lower costs for claimants.

The assumption that the claiming organisation is exposed to an adverse costs award is the starting point throughout Canada, except, as mentioned earlier, in British Columbia, which has a special 'no-costs' rule that applies to class actions. This means that in British Columbia, if the action is unsuccessful, there is no adverse costs award. In Quebec, although there is a cost risk for claimants, it is manageable because there is a cap on costs in the certification phase in that province. This keeps the costs to be paid in Quebec limited – even nominal. However, it is different in Ontario. Exposure to adverse costs in class actions in Ontario remains a significant barrier for so-called class representatives (similar to representative organisations in the Netherlands). This even prompted the Ontario Superior Court to comment that access to justice becomes too expensive, even if it takes place through a scheme designed for that purpose (increasing access to justice).[55]

Theoretically, increased exposure to adverse cost orders in Ontario should lead to a higher number of applications to the litigation fund, which is specifically designed to shield the claiming organisation from liability for the defendant's costs if the action is unsuccessful.[56] However, data show that the Ontario fund has received only 130 applications in the past 10 years, while the Quebec fund received more than 100 applications in just one year (2012-2013).[57] To understand why the fund in a province where the risk of an adverse cost order is higher has only 15% of the number of funding applications compared to another fund located in a province where an adverse cost order is insignificant, the design of the funds must be examined.

53 Kalajdzic *et al*. 2013, p. 104.
54 *Ibid*., p. 139.
55 Piché 2016, p. 784.
56 Watson 2001, p. 275.
57 Piché 2016, p. 800.

6.3.5 The Structure of the Canadian Funds

6.3.5.1 The Structure of the Quebec Fund

The Quebec fund is a legal entity established for the public interest.[58] It is managed by the Ministry of Justice of Quebec operated through three government-appointed board members who meet two days a month to review funding requests. Day-to-day operations are managed by a secretary appointed by the directors. The fund's finances are audited annually by the Auditor General of Quebec. The principal mission of the fund is to finance class actions at both the trial and appellate levels and to disseminate information about the (im)possibilities of class actions in Quebec.[59] The fund may provide contributions in the form of legal costs and expenses and does not charge interest.

Piché explains that the fund was initially funded from four revenue streams, which included an annual grant from the provincial government. However, between 2005 and 2013, the amounts received by the government decreased significantly due to the increasing liquidity of the fund, as a result of larger amounts being retained in class actions. Since 2012, when the government discontinued its financial assistance, the fund has become almost entirely self-sufficient. Currently, there are three streams of self-financing: subrogation in the rights of the claimant who receives a cost award in the event of success, percentages on awarded damages (the class action tax) and interest on investments (of these funds).[60]

The first source of income for the fund comes from subrogation in the rights of the claimant or their lawyer. This is limited to the amount paid as a cost award and depends on the success of the action. In exchange, the fund assumes the costs' risk. The second and most important source of self-financing for the fund is the percentage withheld from awarded damages. This is codified in Section 42 of the *Act respecting the Fonds d'aide aux actions collectives* and the *Regulation respecting applications for assistance for a class action*. A third regulation, the *Regulation respecting the percentage withheld by the Fonds d'Aide aux recours collectifs*, provides the calculations and percentages by which the fund determines its allocated share of the unclaimed balance after the group members claim compensation. This regulation provides three categories of percentage recoveries that the fund can make, depending upon the type of conviction. Piché described the categories and percentages in 2016 as follows:

58 *Ibid*., p. 796.
59 *Ibid*.
60 *Ibid*., p. 797.

> 50-90% of the balance remaining from the total allocation after the group members' claims;
>
> 30-70% of the total allocation reduced by costs and lawyer's fees if the court decides not to allow individual claims;
>
> 2-10% of each individual award (if no joint award is made).[61]

An important feature of the Quebec fund is that it receives a contribution from every collective action brought in Quebec, regardless whether it has financed the respective action. Piché confirms that this feature is a strong incentive for claimants to use the government fund.[62] As mentioned, the third revenue stream is interest on investments.[63] Piché notes that due to a lack of transparency, it is difficult to determine which revenue source is the most important, but she estimates that the largest source of income for the fund is the *class action tax*.[64]

In summary, the fund is largely self-sustaining. In addition, it grows through percentage recovery of unclaimed proceeds from all successful class actions in the province of Quebec. Furthermore, the fund reserves the right to supplement itself through subrogation from settlements and proceeds in cases it has funded (either for legal costs or expenses). This is allowed up to the amount contributed by the fund. It is important to note that Piché indicates the portion of legal costs usually covered by the fund is too low, namely only $100 or $200 per hour. Piché believes that greater coverage of high attorney fees by the fund is preferable.

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61 *Ibid*., p. 799: Piché explains: "Article 1(1) of the Percentage Regulation provides the calculation of the percentage withheld by the Fonds from the balance or from a liquidated claim. For example, there will be 'collective' recovery when the judgment fixes a total amount payable to the class members as a whole. The members will each have to present a claim to be indemnified from this collective amount. After distribution to the members, some amounts will remain unclaimed. The Regulation indicates how and in what percentage the Fonds can claim a portion of the undistributed balance. Article 1(2) of the Percentage Regulation also applies to collective recoveries, but only when the court considers that the individual liquidation of the class members' claims or the distribution of an amount to each class member is impracticable, inappropriate or too costly, and seeks to determine the balance remaining after the collocation of the costs, fee and disbursements, thereby ordering that the amount be remitted to a third person it designates. Article 1(3) of the Regulation provides for a percentage to be withheld on each 'individual' recovery (i.e., the type of recovery that is ordered when it is not possible for the court to determine the total value of a valid claim), the whole pursuant to Article 599 C.p.c. Accordingly, the following percentages may be claimed, for each of the three categories…. These percentages demonstrate that the most advantageous form of recovery for the Fonds in terms of claiming higher percentages of final recovery is collective recovery pursuant to paragraph 1".

62 Piché explains that this unique feature served as inspiration for similar proposals in France and Belgium. However, these proposals have not led to concrete legislative actions.

63 Piché 2022, p. 70.

64 Interview 21 July 2022.

The fund decides on financing cases by examining whether the claim would be viable without its assistance. Additionally, the merits of the case, the likelihood that a claim will be filed and the presumed existence of the right to be asserted are considered.[65] Importantly, the fund does not take into account the contribution of the procedure to the public interest: one of the criteria that its equivalent in Ontario does consider, as will be explained later.

6.3.5.2 The Structure of the Ontario Fund

The Ontario fund was established with an initial government contribution of CAD 500,000. This contribution consisted of funds accumulated by the *Law Foundation of Ontario* (from which the Class Proceedings Fund was created as an extension).[66] This organisation was established in 1974 to collect interest on lawyers' mixed trust accounts for legal education and research expenses. Therefore, this initial capital was not public tax money per se but funds transferred from one purpose to another through statutory provisions.[67]

The fund's task is to finance actions that promote the objectives of the Class Proceedings Act (*Access, Efficiency, Deterrence*). It is run by a group of five volunteers[68] supported by a full-time staff lawyer.[69] Unlike the Quebec fund, the lawyer's costs of the claimant are not covered here; only the (pre-approved) expenses and any cost awards in favour of the opposing party are covered. The latter category of costs is covered by the fund upon request from the successful defendant. If the claimant prevails, they must repay the fund for the advanced amount. Additionally, if a class action is successful, the fund charges a fixed fee of 10% on any damages or settlements. The fund calculates this fee and expenses from the amount after the attorney deducts their success fee but before the group members make their claims.[70] This differs from the Quebec model, where a percentage is only withdrawn after the group members have filed their claims.

In case of failure, the fund bears the risk. Mulheron emphasises that this arrangement has favourable consequences for both the claimant and the defendant.[71] The benefit

65 Piché 2022, p. 62.
66 For that reason and unlike the Quebec fund, the Class Proceedings Fund is not an independent legal entity and is legally represented by the Law Foundation of Ontario.
67 Mulheron 2020, p. 134.
68 One is appointed by the Attorney-General of Ontario, one is appointed by the Law Foundation of Ontario and the other three members are jointly appointed by the Attorney-General and the Law Foundation. This usually concerns lawyers or lawyers who work in practice: either on the defendant side or in the non-profit sector. See also https://lawfoundation.on.ca/for-lawyers-and-paralegals/class-proceedings-fund/committee/.
69 Kalajdzic 2022, p. 11, and further.
70 Kalajdzic 2022.
71 Mulheron 2020, p. 138.

for the defendant is that the fund assures the defendant that they can recover the costs incurred if they prevail.[72] This unconditional legal financial obligation does not allow the fund from refusing payment. Once the class representative receives funding from the fund and loses the claim, there is no way for the fund to escape paying the defendant's costs. This element carries the risk of the fund being wiped out by significant cost awards, partly explaining why the fund has been slow to establish itself in the Ontario class action regime; the fund could only take risks in financing new cases or public interest cases when it had built up sufficient income to ensure its solvency.[73]

The criteria used by the Ontario fund to allocate funding to cases can be distinguished into primary and additional criteria. The primary criteria include the merits of the case, whether attempts have been made to raise funds elsewhere and the financial control of the claimant over the distribution of any proceeds. Supplementary factors that the fund may consider include whether the issues affect the public interest, the likelihood of formal certification (in the case of an early application) and the financial health or cash flow of the fund.

Mulheron notes that the legal merits of a case are the most important and decisive factor to be considered.[74] Cases with less than a 50% chance of success are likely not to be eligible for funding, and that the claimant's lack of resources for the respective claim is not an explicit factor in granting funding.[75] This is a significant deviation from the Quebec model, which explicitly provides funding for otherwise unenforceable claims. Kalajdzic and Piché indicate that the Ontario fund is likely to support cases with higher expected returns and/or chances of success compared to the Quebec fund.[76] Nevertheless, during its existence, the Ontario fund has refused to finance complex competition and securities cases because of the potential exposure to substantial cost awards and associated enormous expenses that could ruin the fund in the future.[77] In one case, *Liebermann v. Bank of Canada* (2006), this refusal led to the discontinuation of the class action and its resubmission under the *no-costs regime* of British Columbia.

The Ontario legislature attempted to mitigate the prohibitive effects of the 'loser-pays' rule in the context of class actions by including *Section 31(1)* in the *1992 Class Proceedings Act*. Under this provision, adverse costs can be reduced or waived upon

72 *Ibid*., p. 136.
73 *Ibid*., p. 148.
74 *Ibid*., p. 140.
75 *Ibid*., p. 141.
76 Interview 21 July 2022.
77 Mulheron 2020, p. 138 – with reference to cases; *David v Loblaw* (2018); *Bayens v Kinross* (2013); *Lieberman and Morris v Business Devp Bank of Canada* (2006).

court request when the class action involves a fundamental issue, raises a new legal question or is a matter of public interest. When the judge determines that one of these three exceptions has been met, they may, at their discretion, reduce or waive the cost award. However, to date, the courts have been divided in their willingness to allow the application of this provision; in particular, one judge remarked that "nothing is certain except death, taxes, and the assertion that a *class action* is a matter of public interest".[78]

6.3.6 Comparative Analysis and Partial Conclusion

From the foregoing, several insights emerge. Firstly, the Quebec fund is by far the more widely used of the two funds. Over the past 40 years, this fund has financed nearly half of the class actions in that province, proving to be a significant and indispensable source of financing within this jurisdiction and largely fulfilling its purpose of improving access to justice for claimants. On the other hand, the majority of literature characterises the use of the Ontario fund as disappointing in terms of the amount utilised from it. However, over the past decade, significant improvements have been observed as the fund has generated enough revenue to take on more (responsible) risks in funding a wider range of cases. Nevertheless, the numbers speak for themselves, showing that the Ontario fund has received only 130 applications in 10 years, whereas the Quebec fund processed over 100 applications in just one year (2012-2013).[79]

The main reason cited in the literature for the difference in received applications is the divergent financing methods of the funds. The fixed 10% levy imposed by the Ontario fund on the outcome, in addition to the attorney's success fee in case of success, is considered substantial and inflexible compared to the amount of funding sought or the stage of the proceedings. This is seen as a significant factor discouraging applications to the fund (as confirmed by jurisprudence summarised by Mulheron).[80] In contrast, the Quebec model is more flexible in these regards. Additionally, the Quebec fund charges on all class actions, whether or not they have used the fund. This differs from the Ontario model, where only actions funded through the fund are subject to the (fixed) levy.

In fact, the 10% levy in Ontario has become a benchmark for third-party litigation funders and estimates from law firms for unforeseen expenses. In numerous cases, reference has been made to the 10% levy of the fund to support the question of whether

78 *Smith v Inco Ltd* (2013) ONCA 724 [64].
79 Piché 2016, p. 800.
80 Mulheron 2020, p. 137.

a litigation funding agreement with class counsel or commercial funders is fair and reasonable. In *Marriott v. General Motors* (2018), the court ruled that the litigation funding agreement was fair because the agreed-upon 7% was lower than the 10% premium applied by the *Class Proceedings Fund*, and, unlike with the fund, there was also a cap.[81] In other cases, judges have deemed funding agreements unfair when funders demanded higher fees than the government fund and often recommended reductions to align the agreement with the 10% benchmark set by the fund.[82]

Regarding the question of why the Ontario fund has approved fewer applications, the main reason cited is that the fund risked its viability by taking on risky and/or substantial cases in its early years. This caution was logical and stemmed from the low initial start-up financing combined with the absence of a legal obligation for the government to supplement the fund's resources.[83] Therefore, until 2012, the fund had to be extremely cautious in the cases it financed to avoid endangering its existence.

The question of whether more flexibility should be introduced and/or the levy should be lowered was raised by the OLRC in 2020. The OLRC argued that the fund could not compete with commercial financing because it was locked into a 10% levy, while commercial funders could adjust the terms of their agreements depending on the inherent risk in a case.[84] However, the *Class Proceedings Committee* was not positive about potential adjustments because the fund's management by 'unpaid volunteers' meant that any discretionary authority regarding the levy would require too much time and resources from a volunteer organisation. Furthermore, a reduction in the levy would have far-reaching negative consequences for the fund's viability.[85] Regarding one aspect, there was consensus: the fund's statutes should be changed to allow funding of attorney fees.[86] In one recommendation by Kalajdzic, the problem arising from the fixed 10% levy when applied to very large class actions is addressed.[87] In large cases, the fund's return appears disproportionate to the risk it faces in financing these cases. One possible solution is the introduction of a cap on the amounts the fund can charge.[88]

An important aspect of the operation of the litigation funds in Canada is that contingency billing (result-based fees and/or no-win-no-fee arrangements) is allowed. The problem of underutilisation that the Ontario fund has experienced or still

81 *Ibid*., p. 159.
82 *Ibid*.
83 *Ibid*., p. 149.
84 *Ibid*.
85 Kalajdzic 2022, p. 9.
86 *Ibid*.
87 Interview 21 July 2022.
88 Refer to Section 6.4, for further discussion of this topic.

experiences is primarily caused by claimants preferring to have their cases financed by law firms based on result-based fees. In a jurisdiction where contingency billing is not allowed, a government fund would likely attract many more applications.

In summary, the Ontario fund's biggest problem, as mentioned earlier, is the rigid levy, combined with the model where revenues are obtained only from cases financed by the fund. This levy is applied to the collective damages amount before the class members have filed their claims, and thus, it comes at the expense of the class members, whose representatives logically seek more profitable funding sources through result-based attorney fees and third-party funding,[89] with which more favourable arrangements for the class can be made. These factors explain in large part why the Quebec fund has consistently been described as a success on a larger scale, whereas the Ontario fund has received mixed reactions, both in academia and among users.

6.4 Australia

Australia has a long history of recommendations for legal reform regarding the establishment of public class action funds. In 1977, the *South Australian Law Reform Commission* recommended the creation of a public fund called *The Class Action Indemnity Fund*, which included detailed provisions regarding its formation and management.[90] In 1988, the *Australian Law Reform Commission* recommended the establishment of a government fund in broad terms, which led to the introduction of class actions in the Federal Court.[91] Subsequently, more detailed recommendations were included in the Civil Justice Review conducted by the Victorian Law Reform Commission in 2008.[92] However, none of these recommendations were implemented by the government.

The aforementioned Victorian *Civil Justice Review* of 2008 provides the most detailed framework for a government fund and is considered the most suitable recommendation to serve as guidance, according to Commissioner Peter Cashman. The proposed Justice Fund, the working title of the proposal, was designed as a self-sustaining entity not limited to class actions.[93] Its purpose was to provide financial assistance, compensation for adverse costs orders and security for court-ordered costs. The entity would operate on a self-sustaining basis through recoveries from successful cases (percentage unspecified), costs recovered from unsuccessful parties and court-ordered

89 Mulheron 2020, p. 145.
90 South Australian Law Reform Commission, pp. 16-17.
91 Cashman 2022; Australian Law Reform Commission, p. 308.
92 Victorian Law Reform Commission, Chapter 10.
93 *Ibid*., p. 614.

cy pres payments.[94] As advised by the Australian Law Reform Commission in an earlier recommendation, a significant source of income for the fund would consist of unclaimed monetary awards by eligible group members.[95]

The report enumerates a comprehensive list of issues that the Justice Fund aims to address. The most significant of these pertain to the exposure of claimants to adverse costs orders. Firstly, the class representative's interest in the claim often does not proportionately reflect the substantial risks they bear, discouraging claimants from acting as class representatives in class actions. Secondly, the losing claimant is often unable to cover the defendant's costs, resulting in difficulties for defendants in recovering their costs if they prevail. This has transformed what was intended as an opt-out system into a de facto opt-in system, negatively impacting the extent to which the scheme can achieve its goal of providing redress to all who have suffered harm from the behaviour giving rise to the dispute.[96]

The report recommends establishing the Justice Fund, as was done in Ontario, as an addition to an existing entity to limit administrative overhead costs and start-up expenses. Victoria Legal Aid is proposed in the report as a suitable existing entity for this purpose. The report emphasises that the fund needs a statutory basis (specifying objectives and criteria for assistance) and initial funding before it can become self-sustaining. Importantly, the report underscores that while the fund may enter into joint ventures with commercial funders, its overarching goal would differ from that of commercial funders, as the fund, being non-profit, would seek to reinvest its earnings into future public interest disputes and legal research.[97]

The report highlights the need for the fund to be set up with considerable flexibility regarding the terms of funding arrangements, both in terms of the portion of case costs funded and the percentage by which the fund recoups its investment in the event of success. The report estimates that the fund should support successful cases at a ratio of 2:1 to unsuccessful cases to be self-sustaining.[98] The report also suggests limiting the fund's exposure to adverse costs orders, at least initially, to the level of financial assistance provided by the fund.

The Justice Fund would be managed by a professional full-time staff and a board of directors. It would operate under the oversight of the Civil Justice Council, an

94 *Ibid*., p. 615.
95 *Ibid*.
96 *Ibid*., p. 616.
97 *Ibid*., p. 617.
98 *Ibid*.

independent government body. The fund is intended to foster both healthy competition and collaboration through joint ventures with commercial entities. Hence, the report repeatedly emphasises the need for the fund to operate flexibly. This emphasis on flexibility appears to stem from the challenges faced by the Ontario fund due to its inflexible 10% levy.

The report concludes with comments, support and criticism from various entities and scholars regarding the proposed fund.[99] The proposal received support from numerous sectoral regulators and NGOs because it could expand access to litigation in environmental, mental health, public interest and consumer matters.[100] *The Human Rights Law Centre* focused its contribution on the need to expand access to legal representation. Professor Peta Spender emphasised that the fund would encourage the growth of commercial financing by creating competition in the litigation funding market but noted that the fund should be more directly aimed at cases likely to go unfunded by commercial litigation funders.[101]

The primary Australian commercial funder, IMF (now Omni Bridgeway), did not object to the proposal but noted that the likely tax-free status of the fund would disrupt a level playing field for competition between public and private funding options.[102] In response, the committee noted that equal competition conditions should not be expected, given the different objectives of the government fund, and reiterated that the fund would benefit from joint ventures with private financing and access to expertise and resources that such arrangements would enable. The Law Institute of Victoria supported the fund but emphasised that its funding should not be limited to commercially viable, promising disputes and that the fund's profits should also be used to provide assistance to litigants in commercial cases with viable claims (or defences), regardless of whether the fund can collect a percentage of a monetary award.[103] *The Consumer Action Centre* supported the fund but noted that the proposed limitation of the fund's liability for adverse costs orders would undermine the fund's purpose, as potential litigants would be unwilling to pursue a claim if they risked having to pay the difference between the fund's liability and the total amount of costs to be paid.[104] This speculative concern is somewhat alleviated by the success of the Israeli fund discussed later in the report, despite offering only partial coverage to claimants.[105]

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99 *Ibid*., p. 618.
100 *Ibid*.
101 *Ibid*., p. 619.
102 *Ibid*., p. 620.
103 *Ibid*.
104 *Ibid*.
105 Refer to Section 6.5.

However, numerous responses from law firms, businesses and the Australian Corporate Lawyers Association opposed the Justice Fund proposal. These responses argued that the fund was unnecessary, given the availability of commercial financing in Australia and the availability of no-win-no-fee arrangements for lawyers in Victoria (these arrangements are not available in the rest of Australia).[106] Another criticism was that the fund would lead to endless bureaucracy and non-commercial decision-making.[107]

In a summary of the responses, the committee reiterated the urgent need for the establishment of such a fund but suggested that certain modifications would be appropriate.[108] Firstly, the cap on the fund's liability for adverse costs orders should only apply for a limited period, depending on the fund's financial performance. Secondly, fund administrators should have the flexibility to cover any shortfalls in the fund.

In conclusion, while Australia had a well-developed and detailed proposal for the introduction of a litigation funding scheme that enjoyed broad societal support in many aspects, it ultimately did not result in legislative action. Whether this is solely due to well-organised lobbying by businesses and litigation funders is, however, unclear.

6.5 Israel

The Israeli Public Fund was established in 2006 as part of the Israeli Class Action Law. This new regulation resulted in a continuous upward trend in class action litigation in Israel. In 2007, just one year after the law was enacted, 28 class actions were filed. By 2010, this number had risen to 335, further increasing to 820 in 2012, and reaching 1,250 in 2018.[109]

Unlike its Canadian counterparts, the Israeli fund is more explicitly focused on the public interest. Its explicit mandate is to assess the social and public significance of the claim and to provide financing or not based on that significance. Bukspan emphasises that the fund has more of a public and less of a legal value, as it solely concentrates on the social and public merits of the action rather than the likelihood of success.[110]

The fund is staffed by nine members from regulatory agencies appointed by the Minister of Justice. They act as impartial, de facto public jurors when screening cases

106 Victorian Law Reform Commission, p. 621.
107 *Ibid*., p. 622.
108 *Ibid*.
109 Bukspan 2021, p. 528.
110 *Ibid*., p. 532.

for their public interest. Therefore, in contrast to its Canadian counterparts, the fund clearly and unequivocally underscores the legislature's view that the class action is a 'private enforcement tool' that complements and reduces the need for public regulatory enforcement.[111]

The fund receives a limited annual budget from the government, amounting to less than half a million USD (which cannot be carried over to the next fiscal year). The fund primarily finances expert fees, reimburses adverse costs orders and recently started covering attorney fees.[112] In 2021, it had reviewed 700 applications and provided funding to over 45% of them, a remarkably high percentage.[113] It operates by partially financing as many claims as possible, meaning that successful applicants still have to fund the majority of their costs in most cases.

The fund meets quarterly, and the flow of applications is increasing, indicating that the fund is becoming more well-known and integrated into the funding landscape. While most funded cases are consumer-related, the fund also frequently supports antitrust cases, environmental cases, discrimination cases, insurance cases and cases related to the rights of disabled individuals.[114] Furthermore, it has a strong focus on promoting corporate social responsibility, as well as pursuing competition claims, upholding constitutional rights in the private sector, violations of privacy, and labour rights.[115]

In summary, the fund was established by the Ministry of Justice but is independently managed by representatives from various regulatory bodies. Its activities are explicitly considered quasi-regulatory, meaning that they serve in lieu of or in addition to public enforcement.

6.6 Conclusions

The comparative legal research yields several conclusions. Public litigation funds are suitable when there is a gap in the financing landscape, often caused by a loser-pays rule or a prohibition on contingency fees in the jurisdictions studied. In such cases, public litigation funds can help fill this gap. However, the establishment history of the Ontario fund shows that a no-cost rule for the class representative is also an option, as is waiving cost orders in cases of public interest or of a principled nature.

111 *Ibid.*
112 *Ibid.*, p. 533.
113 *Ibid.*
114 *Ibid.*
115 *Ibid.*, p. 535.

The comparative legal research demonstrates that where such a gap exists, the arguments in favour of a public litigation fund carry more weight than the arguments against (except in Australia).

Public litigation funds do not necessarily conflict with the presence of commercial litigation financing but can promote healthy competition, reducing costs while addressing public needs that profit-oriented commercial litigation funders may not fully meet.

In jurisdictions where cost orders are high, where funding is only charged on funded cases and where alternatives like contingency fees exist, other litigation funders (as in Ontario) may attempt to undercut the fund's rates, potentially resulting in underutilisation of the fund.

The Quebec approach, where all class actions are subject to a charge, serves as a strong incentive for litigants to utilise the public fund. However, this requires a significant degree of solidarity.

The Israeli approach underscores the benefits that can result from a principled acceptance of class actions as a private enforcement mechanism with a public regulatory effect.

The Australian designs for a public fund indicate a preference in the literature for a system where group members have priority over distributions, and any unclaimed proceeds go to the fund (after group members have claimed), in contrast to the Ontario approach, where the fund takes priority in distributions over group members.

The statutory inflexibility regarding the amount of the levy in Ontario is generally considered a limitation and a feature not to be repeated. Other drawbacks of the Ontario fund include low initial capital, limited reimbursement for expenses and potential adverse costs orders and the absence of a cap for potential adverse costs orders. Australian recommendations suggest establishing the fund as a not-for-profit enterprise with full flexibility to negotiate terms, albeit without a profit motive. However, this means the fund cannot be run by volunteers.

A model that allows financing of both court costs and attorney fees and expenses is considered the most optimal in the literature, although Cashman strongly recommends avoiding full coverage of attorney fees.[116]

116 Interview 19 July 2022.

In practice, it is economically and organisationally advantageous to establish a fund as an adjunct to an existing entity, such as a legal foundation, with existing infrastructure and personnel to avoid start-up costs.[117]

117 Interview from 19 July 2022.

7 Analysis, Conclusions and Recommendations

This chapter analyses and synthesises key issues regarding the financing of collective actions and answers the question whether a litigation fund is needed and desirable. After a recap of the background of the research and the research questions that guided it (Section 7.1), the chapter will reflect on the number and type of WAMCA cases and their financing (Section 7.2), developments in financing options and issues around financing (Sections 7.3 and 7.4) as well as the legal framework and regulatory dynamics of third-party commercial funding (Section 7.5). Next, it will elaborate on the usefulness and necessity of a litigation fund and possible alternatives (Section 7.6), and the requirements for and possible structure of a (revolving) litigation fund (Section 7.7). The chapter closes with a conclusion and recommendations for further research (Section 7.8).

7.1 Introduction

7.1.1 Introduction of WAMCA

At the heart of this research is the question of the utility and necessity for a litigation fund for collective actions under the Dutch Mass Damage Settlement in Collective Actions (WAMCA)[1] and, subsequently, how such a fund can be structured. With the implementation of the WAMCA on 1 January 2020, the possibility for filing collective damage claims on an opt-out basis was introduced under Articles 3:305a et seq. of the Dutch Civil Code. The WAMCA, along with the Dutch Act on Collective Settlement of Mass Damages (WCAM)[2] from 2005 for collective settlements,[3] has complemented the Dutch toolkit for the resolution of collective damage claims.[4] The introduction of a collective action for damages based on an opt-out system has further restricted the admissibility requirements for both compensatory and non-compensatory actions. The requirements for the representativeness of interest organisations on the claimant side (foundations, associations) have been enhanced, encompassing improved governance aspects such as supervision, appropriate decision-making mechanisms and the availability of relevant information on an easily accessible website. Additionally, the interested organisation must have sufficient financial resources and experience and

1 *Staatsblad* 2019, 130.
2 *Staatsblad* 2005, 340.
3 See Van Lith 2010.
4 Refer to Chapter 2, Section 2.1.

expertise to conduct collective actions. Furthermore, the claim must have a sufficiently close connection to the Dutch jurisdiction.[5]

Finally, a collective action must be the most effective and efficient way to settle the claim.[6] This is the case when the group of aggrieved parties is sufficiently large, and the financial interest in question is, either individually or collectively, substantial enough. If the court is convinced that the claimant organisation meets the legal requirements, it then appoints it as the exclusive representative. If there are multiple organisations that meet the criteria, they can be jointly appointed. Then, the opt-out period begins. Those aggrieved parties who do not opt out in a timely manner are bound by the outcome of the proceedings, regardless of what that outcome may be. In the absence of a collective settlement, a judicial judgment follows, without the possibility of opting out. The court's decision, whether positive or negative, is binding on everyone within the narrowly defined group who did not opt out in a timely fashion. Only if a collective settlement is reached is there still an opportunity for opting out.

7.1.2 Background of the Research

The introduction of the WAMCA on 1 January 2020 and developments in the financing of compensatory collective actions have prompted the present research. Collective actions for compensation are complex and very expensive and third-party litigation funding has been on the rise, seemingly because of very limited other possibilities to finance these cases. At the same time, it is acknowledged that not all cases may be eligible for funding by commercial parties, while regulatory and market developments may also influence the availability of third-party litigation funding.

Another important development is the establishment and the implementation of the Representative Action Directive (RAD). The RAD requires member states to take measures that facilitate the financing of collective (compensatory) actions and ensure that consumers are fully compensated for their legal costs. These measures can take various forms, from providing government subsidies and reducing court fees to introducing special cost-sharing rules for collective actions or contingency fees dependent on the outcome of the case. Additionally, the RAD mentions the option for member states to introduce cy pres distribution regarding any remaining funds. This means that if not all victims come forward to claim for compensation, which is more common in practice, the remainder of a compensation fund can be transferred to a

5 Refer to Chapter 2, Section 2.1.3. See also Art. 3:305, Paras. 1-3 DCC.
6 Refer to Chapter 2, Section 2.1.2. See also Art. 1018c, Para. 5 DCCP.

charitable cause or another destination related to the collective action. This could also include a potential litigation fund. As a result, the fund could become self-sustaining, and government subsidy would not be (permanently) necessary. Another positive side effect of this would be the monitoring of settlement funds and preventing potential abuse of these.

7.1.3 Research Design

Following the research questions,[7] the different financing options of collective actions and specifically how WAMCA actions have been financed were investigated, based on case characteristics and further information from the WAMCA register (Sub-question 1). An overview was provided as to how the market for commercial litigation funding has developed, especially for collective actions (Sub-question 2), and what rules are in place in other countries, in the Netherlands and at the European level (Sub-question 3). To set up and maintain a revolving litigation fund, a mature practice of collective actions is needed. If this is not the case, the fund will rapidly be 'exhausted'. Therefore, based on desk research and interviews, more insight was gained into the costs associated with conducting collective actions under the WAMCA (Sub-question 4). The study also examined what problems arise in financing, and which problems a (revolving) litigation fund could solve (Sub-questions 5 and 6).

To gain insight into the possible design of such a litigation fund, it was further considered which litigation funds exist in other countries and what the experiences are, with a particular focus on Canada (Quebec and Ontario) and Israel (Sub-question 7). Then, the advantages and disadvantages of a potential Dutch litigation fund were examined, how such a fund relates to other forms of financing and how this fund could be further structured (Sub-question 8).

In this chapter, conclusions are drawn as to the usefulness and desirability of a litigation fund, building on the conclusions in the previous chapters and taking into account the implementation of the RAD and further developments (Sub-question 9). These conclusions are based on desk research,[8] the analysis of the WAMCA register,[9] the qualitative analysis based on interviews,[10] the findings from the focus group and expert

7 Refer to Chapter 1, Section 1.2.
8 Refer to Chapter 2.
9 Refer to Chapter 3.
10 Refer to Chapter 4.

meeting[11] that were held to test some of the findings and ideas and research into the functioning of litigation funds elsewhere,[12] as reported in previous chapters.

For the sake of clarity, it is noted that due to the lack of a baseline measurement and given the limited data and experiences with the functioning of the WAMCA to date in practice, not all points can be conclusively addressed. These findings, however, can serve as a framework against which the effects of possible regulatory initiatives and legislative measures in the field of financing collective actions can be assessed to ensure access to justice.

7.2 Three Years of WAMCA Cases: What Do the Numbers Suggest?

7.2.1 No Increase in Collective Actions

An important finding from the study of the WAMCA register (Chapter 3) and earlier studies is that the absolute number of actions did not (significantly) increase after 1 January 2020, as some had feared when the WAMCA was introduced. The introduction of the WAMCA does not seem to have had a major impact on the total number of collective actions. If there has been any change, it appears to be more of a slight decrease, as the estimated 25 collective actions per year pre-WAMCA, which had been consistent since the introduction of Article 3:305a et seq. DCC in 1994, do not seem to have been achieved by the WAMCA[13] (with a total of 83 cases in 4 years' time despite the extension to cases for compensation).[14]

Nevertheless, there seems to be a persistent perception that the WAMCA has led to a (significant) increase in the total number of collective procedures.[15] For example, a

11 Refer to Chapter 5.
12 Refer to Chapter 6.
13 Refer to the preceding footnote and Chapter 3, Section 3.1 for a discussion of the methodological limitations of the analysis.
14 The research by Tillema, as well as this study, does not pertain to non-collective actions but rather to any other form of 'bundled' actions involving the settlement of mass damages. Think of cartel damages or the earthquakes in Groningen, and even the childcare benefits scandal. Such examples of mass damages also influence the perception of the claims culture. Furthermore, it is unclear to what extent the number mentioned by Tillema also includes collective actions in summary proceedings. Under the WAMCA, these must be registered. If summary proceedings are not included in Tillema's research, then the number of collective actions under the WAMCA is (still) lower compared to the pre-WAMCA period.
15 See, for example, Martijn Pols, 'Stroom aan nieuwe Nederlandse massaclaims om privacy op komst', *Financieel Dagblad*, 6 February 2022b; Roos Kraaier, 'Claimcultuur rukt op in Nederland', De Limburger, 19 February 2022.

headline in the Dutch quality newspaper NRC stated that the Netherlands has become 'a paradise for claims' and wrote that the number of mass claims filed with Dutch courts is rising 'rapidly' due to the legislative change (WAMCA).[16] Several explanations are conceivable to support this perception. There is now a registration requirement for every new action, making the general public aware of new claim initiatives more easily than in the past. New cases are immediately visible, allowing them to be followed by third parties and the media, even when there is no publicity sought. Furthermore, the WAMCA has also been used for the settlement of mass damage cases that have a societal interest and are newsworthy, such as those related to climate, the diesel affair, Facebook and TikTok, although the WAMCA was not always applicable to these cases.[17] However, this difference is often not discernible or relevant to the general public. In addition, the arrival of several American law firms in Amsterdam has not gone unnoticed in the media.[18] Furthermore, aspiring interest organisations actively seek media attention to activate their members to meet the representativeness requirement.[19] This increases the visibility of mass damage and/or collective actions without necessarily implying an increase in the number of collective actions. Moreover, the heavier new admissibility phase under the WAMCA[20] requires parties and the judge to perform many more procedural (management) actions. This can be perceived as a numerical increase in the number of collective actions without it being the case in reality. However, even if there were an increase in the number of collective actions at some point, this fact alone does not necessarily lead to the conclusion that there is an increased claim culture. There could be multiple reasons for this, including improved access to justice, allowing mass damage to be detected and addressed more effectively or the limited opportunities to settle mass damage claims extrajudicially, despite the existence of the WCAM. Further research and analysis are needed to verify and interpret signals that might indicate an increased claim culture before normative statements can be made and (significant) regulatory measures can be taken.

7.2.2 Financing of Compensatory and Non-compensatory Cases

Another important observation concerns the fact that approximately 75% of all actions filed so far are non-compensatory cases initiated by self-financed repeat players. These

16 Stefan Vermeulen, 'Nederland is een claimparadijs geworden voor buitenlandse investeerders', *NRC*, 16 February 2022.
17 Refer also to Chapter 2, Section 2.1.2(a).
18 See, for example, Maarten Albers, 'Viert straks in Nederland claimland het Amerikaans opportunisme hoogtij?', *de Volkskrant*, 6 June 2022; Martijn Pols, 'Toestroom Amerikaanse claimadvocaten leidt tot groeiend ongemak', *Financieel Dagblad*, 29 April 2022a.
19 Refer to Chapter 4, Sections 4.3.2 and 4.5.2 (concerning the activation and registration of the constituency).
20 Refer to Chapter 2, Sections 2.1.3.

are cases similar to those brought under the old Article 3:305a of the Civil Code. Therefore, this type of case may have even decreased slightly under the WAMCA.[21] One possible explanation for this may be the increased requirements for admissibility leading to lengthier preparation times and higher costs, although the research does not provide sufficient insight into this. Interview findings indicate that the budget previously available to existing interest organisations for non-damage actions is running out more quickly due to the longer admissibility phase. Article 3:305a(6) DCC, which imposes less stringent requirements on claims with an ideological purpose and a very limited financial interest, should theoretically offer a solution. However, in practice, more must be argued to support such claims, which can be challenged by the defence. This increases costs and means that the same budget must be allocated to a smaller number of actions.[22]

The damage actions represent a relatively small percentage of all collective claims initiated under the new regime. It is also important to note that these damages actions have been initiated exclusively by ad hoc interest organisations, whether or not with the support of existing interest organisations, and have been externally (commercially) funded. We have not found an explanation for this based on the interviews conducted, but we do not rule out the possibility that it is related to the required expertise, which can be recruited on a case-by-case basis, and the fact that pursuing WAMCA actions is time-consuming, risky and costly. Existing interest organisations generally do not have the deep pockets required for this and have no experience with commercial funders or (prolonged) litigation. This raises questions (and concerns) about the consequences for damage actions under the WAMCA if third-party funding is not available or is limited, and there are no alternatives available.

7.2.3 Progress of WAMCA Cases and Processing Times

Four years after the WAMCA came into effect, none of the compensatory procedures have moved beyond the completion of the admissibility phase and the subsequent appointment of an exclusive representative. Of course, not all of these cases were filed in the first year, and no hard conclusions can be drawn about the processing times as yet. However, it may be an indication of a potentially more challenging process for the compensatory cases that are new under the WAMCA, compared to the old regime, while some of the judgments (in particular the Airbus and TikTok cases) have made it clear that admissibility requirements and the judicial review of the funding agreement are rather

21 While it is possible that some cases that would have previously only sought a declaratory judgment may now also include a claim for damages, from the interviews there were no indications that this 'shift' has materialised. Refer to Chapter 4.

22 Refer to Chapter 4, Sections 4.5.4, 4.7, and 4.9.5.

stringent.[23] Processing times have an impact on the return on investment for funders. If long processing times are not just teething problems but a structural part of the WAMCA, it will also have consequences for the required and available funding. Either fewer funders will be willing to fund WAMCA procedures or the litigation funders who are willing to do so will charge higher success fees. Both outcomes are not optimal from the perspective of access to justice for victims, especially when there are no alternatives. The latter consequence (higher success fees) is also not optimal from the perspective of defendants if they were to be ordered to pay the actual costs of the procedure, including the funder's fees. Another consequence of a smaller number of (successful) WAMCA compensatory cases will be that there will be fewer remaining funds that could flow into a potential revolving litigation fund.

Although the total number of cases under the WAMCA has not increased and may even have slightly decreased, there does appear to be longer processing times and thus higher costs in the admissibility phase (front loading of costs).[24] As already mentioned, this phase is more intensive compared to the procedure under the old law.[25] This applies to both non-damages actions and damages actions, albeit to varying degrees and with different cost implications.

7.2.4 Privacy Cases

Finally, it is worth noting that the concerns raised in previous research on Big Data that privacy cases would not be brought or would be brought sparingly do not seem to have been substantiated thus far. Privacy cases are well represented in the new WAMCA procedure, although the absolute numbers are low. One possible explanation for this could be that the legal practice has found a way to initiate these cases as damages actions, enabling commercial funding. However, the financing of privacy cases currently relies on assumptions about anticipated developments in GDPR and WAMCA case law concerning how the court will assess damages in data breaches and calculate the success fee of the funder and/or have it reimbursed as the actual costs of the interest organisation. Whether these assumptions are correct remains to be seen. If they prove to be incorrect, the financing needs in this type of cases will need to be reconsidered, and the concerns from the aforementioned research on Big Data may become relevant again. The TikTok case is entering the next stage where, after judicial scrutiny of the funding agreement,

23 The Hague District Court, 20 September 2023, ECLI:NL:RBDHA:2023:14036 (*Stichting Investor Loss Compensation/Airbus SE*); Amsterdam District Court, 25 October 2023, ECLI:NL:RBAMS:2023:6694. See Chapter 2, Section 2.1.3.

24 Refer to Chapter 4, Section 4.5.1.

25 Refer to Chapter 7, Section 7.1 and Chapter 2, Section 2.1.3.

the claimant organisations will need to revise the agreements in order to be admissible.[26] In any case, access to justice in this type of cases would be ensured if there is access to financing, even if no damages are sought. A litigation fund is one option, another option is to award the funder a fee that is a multiple of the investment (the funder's success fee), which is separately reimbursed by the losing party as a lump sum.

7.3 Financing Options and Developments in the Market

As discussed in Chapter 2, there are theoretically many possibilities for financing claims, in addition to financing by commercial third parties.[27] In practice, however, these options face significant limitations in the case of collective actions, including those under the WAMCA. Furthermore, the funding provided by victims to the interest organisations, typically through membership contributions (associations), may not only be insufficient for more complex cases and claims for damages but may also be less compatible with the RAD's mandate to fully compensate consumers.

The limited availability of funding sources in the settlement of mass harm is a key reason why commercial TPLF has become more important internationally and in the Netherlands. The advantages of TPLF include the fact that a professional entity bears the financial risks. The expertise provided by some funders can also contribute to the resolution of complex, time-consuming and expensive mass harm claims, which are inherently costly. Disadvantages or concerns related to TPLF include the risk of conflicts of interest, which could potentially influence the possibility or terms of a settlement.[28] Furthermore, TPLF indirectly affects which cases can and cannot be brought because not all cases are commercially attractive to funders. TPLF plays a central role in the collective damages action practice in the Netherlands and is essential given the limited alternative sources of funding and the high costs and risks associated with the resolution of such cases. If regulatory measures were to have a suppressive effect on TPLF, ideally, this would be offset in some other way to ensure access to funding under the WAMCA.

Based on the analysis of the WAMCA register and the interviews conducted (Chapters 3 and 4), it can be concluded that the collective action market in the Netherlands is evolving and appears to be undergoing a professionalisation process.[29] However, without a baseline measurement, it is difficult to make definitive statements about comparisons

26 Refer to Chapter 2, Section 2.1.3.
27 Refer to Chapter 2, Sections 2.2 and 2.3.
28 Refer to Chapter 2, Section 2.3.3 and Chapter 5, Section 5.2.2.
29 Refer to Chapter 3, Sections 3.2.2 and 3.3.3, and Chapter 4, Sections 4.4.2 and 4.4.3. Refer also to Chapter 2, Section 2.4.

with the situation under the previous legal regime. There is an increasing number of litigation funders with diverse backgrounds active in the Dutch market, and some entities are pursuing a business model based on identifying (alleged) wrongdoings and developing funding propositions for third parties. It also appears that Dutch lawyers are open to facilitating research into (alleged) wrongdoings, even before funding is secured and/or to facilitate a funding application, although the nature and extent of such legal support are currently limited. The interviews revealed that there is sufficient interest from TPLF entities in the Dutch market to make the WAMCA work, but the financial stakes must be substantial, which is not the case for all claims.[30] Therefore, relatively smaller cases fall outside the proverbial funding boat. The prediction in the literature before the introduction of the WAMCA that the new legislation would lead to a smaller number of cases, but those that are brought (and funded) would be substantial, appears to be coming true in this regard.[31]

Furthermore, the differences in the funding of non-compensatory claims and compensatory claims are noticeable. The first category is financed from internal resources and – due to the lengthy admissibility phase under the WAMCA – more of the available budget of repeat players is spent on issues (organisation's admissibility) that did not need to be resolved or were resolved more quickly in the past. The budgets for this type of claim are substantially lower than the budgets available for claims for damages. The first category of cases also relies more on the work of pro bono lawyers. Limited funding options are problematic for cases with a general interest or social justice component. Additional funding through a litigation fund could make a difference in these cases, but so could shortening or simplifying the admissibility phase for such organisations, bringing it more in line with the situation under the previous legal regime. The exception in Article 3:305a(6) DCC for particularly idealistic claims does not seem to provide adequate relief at this time.

7.4 Issues Concerning Financing

More traditional forms of litigation funding are often not suitable or only limitedly so, and certainly not for more complex and expensive compensatory cases. TPLF is a solution for this type of cases, but not all cases are eligible for funding because commercial funders require a sufficient ROI, which is calculated as a percentage of the potential collective compensation. This may involve cases in which only a limited compensation is requested or cases that are riskier, possibly including cases with a general interest

30 Refer to Chapter 4, Section 4.9.6.
31 Tzankova 2017, p. 119.

aspect.[32] Additionally, the qualitative research revealed several specific issues concerning the financing of WAMCA cases.

Litigation funders are not interested in financing non-compensatory cases because they calculate the ROI as a percentage of the compensation that can be claimed from the collective. However, if the claiming organisation could claim a multiple of the investment as reasonable (financing) costs from the defendant, then even non-compensatory cases might be eligible for litigation funding. The letter of the law does not appear to preclude such an interpretation, but the legislator could consider clarifying Article 1018l(2) of the Dutch Code of Civil Procedure to expedite and/or facilitate such a solution. This provision allows for a departure from the ordinary cost order and states that a court may order the losing party to pay the 'reasonable and proportionate court costs and other costs' of the prevailing party. Nevertheless, litigation funding remains an expensive form of financing, not all cases are eligible for litigation funding and it is undesirable for litigation funding to hold a monopoly on financing collective actions, especially when the public interest is at stake. Therefore, a litigation fund could add value.

The interviews also revealed that obtaining litigation funding involves an extensive research and preparation phase, both regarding the legal merits of the case and the factual substantiation and the amount in damages. In this initial phase, where there is a (perceived) grievance but no financing is available yet, there appears to be a need for funding.[33] The heightened admissibility requirements of the WAMCA, as well as some procedural uncertainties surrounding it, such as the application of transitional provisions, the interpretation of representativeness and the scope rule, have an impact on the preparation phase and costs.[34] However, it is expected that the judiciary will provide clarity on these matters in due course and the Vattenfall and TikTok judgments seem useful in providing further judicial guidelines even if there may be a tension between these two. Furthermore, the focus group highlighted the costs associated with the actual settlement and distribution of the compensation.[35] Whether a litigation fund should be the solution for this remains questionable.

32 Refer to Chapter 4, Section 4.9.3, and Chapter 5, Section 5.2.2.
33 Refer especially to Chapter 4, Section 4.3.2 and 4.9.2.
34 Refer to Chapter 4, Sections 4.4, 4.7, and 4.8. Also, see Sections 2.1.2 and 2.1.3 for key points of the WAMCA procedure, transitional provisions and heightened admissibility requirements, including the scope rule, which requires a close connection to the Netherlands.
35 Refer to Chapter 5, Section 5.2.2.

7.5 Legal Framework and Regulatory Dynamics of Commercial Third-Party Funding

TPLF is a contract that is established between a collective organisation seeking collective damages and a litigation funder. The regulation of TPLF is limited in the Netherlands, in other countries and at the European level.[36] In the Netherlands, financial and other safeguards for claim organisations are included in Article 3:305a DCC, which was supplemented due to the implementation of the RAD.[37] For consumer cases falling under the Directive, the financing cannot come from a funder who is a competitor of the party against whom the legal action is directed or from a funder dependent on the party against whom the legal action is directed. This requirement is aimed at preventing potential conflicts of interest. In addition to this, the 2011 Claim Code, revised in 2019, plays a significant role in the Netherlands. The revised Claim Code contains additional rules that are complied with (or explained if not complied with) by the parties involved in the compensatory cases registered in the WAMCA register and has been successful in this regard. Several of the involved funders are also members of the Association of Litigation Funders. Therefore, self-regulation plays a significant role in the market of commercial third-party funding.

At the European level, there are currently developments that could impact the use of TPLF in the Netherlands. As mentioned earlier, there is the addition in Article 3:305a of the Dutch Civil Code due to the RAD. This Directive allows TPLF under certain conditions, which are adequately guaranteed in the WAMCA. However, within the context of the 'loser pays' rule, it does not allow for sharing of the costs of the proceedings by individual consumers, except for minor contributions. In legal literature, it has been argued that it is unclear to what extent TPLF is compatible with the RAD when the costs of the proceedings are not entirely borne by the losing party but are partially shifted to consumers indirectly because collective organisations do not (adequately) have their own resources.[38] A ruling in favour of the actual costs and not based on capped flat rates would at least resolve this potential tension. Additionally, the European Parliament's initiative for responsible private funding has been mentioned.[39]

It is currently uncertain whether existing European regulations have implications for the current funding practice and whether there will be more legislation in the future, and if so, whether it will lead to strict regulation and/or limitations on TPLF, and if

36 Refer to Chapter 2, Section 2.5.
37 Article 3:305a, Section 3, sub (f) of the Dutch Civil Code, introduced on 25 June 2023, following the implementation of the directive.
38 Refer to Chapter 2, Section 2.5.2.
39 Refer to Chapter 2, Section 2.5.3.

it does, what impact that will have on the WAMCA practice. Stricter regulation can have various effects. First, stricter regulation may make it less attractive for commercial funders to operate in the Dutch/EU market. This could potentially put pressure on WAMCA compensatory cases that currently qualify for financing. Second, this could complicate the existence of a potential revolving litigation fund, which would become more important if TPLF were to partially disappear, as the feeding of such a fund is currently heavily dependent on successful and substantial compensatory cases. If a revolving litigation fund is entirely or significantly dependent on remaining resources from collective damages actions, and collective damages actions, as is currently the case, are fully dependent on TPLF, then a revolving litigation fund would not be viable.

Apart from being fed by successful TPLF-funded compensatory cases, WCAM settlements are another potential source of financing, as allowed under Article 9, Paragraph 7 of the RAD. However, on their own, they also seem insufficient to guarantee the existence of a revolving litigation fund. WCAM settlements (as is already the case) remain relatively rare in Dutch mass damages practice, and it can be expected that a limitation of TPLF will affect not only collective actions but also collective settlements. Moreover, it can be expected that within the context of collective settlements, there will be an increasing use of the option to return remaining resources to the defendant.

Another possibility, supported by Article 20 of the RAD, could be for the fund to receive an initial deposit from the government. If the fund were to select legitimate actions that are financially lucrative and negotiate commercial agreements for these cases (such as negotiating a success fee as a multiple of the investment and/or a percentage of the damages), it could potentially sustain itself. However, there are practical, and possibly more principled, objections to this approach. Practical objections include the need to find independent and commercially experienced individuals willing to lead a public interest organisation as a successful business. Negotiating a success fee per case is time-consuming, and experiences in Ontario have shown that a fixed percentage, regardless of the case's importance and the support provided, is perceived as rigid in practice. A principled objection is that public interest actions in such a system could still be at a disadvantage. Furthermore, government contributions may potentially be seen as prohibited state aid.

7.6 Findings on the Usefulness and Necessity of a Litigation Fund and Possible Alternatives

7.6.1 Usefulness and Necessity of a Litigation Fund

In response to open-ended questions about the utility and necessity of a fund during interviews, the focus group and the expert meeting, different answers emerged as to the usefulness and necessity of a litigation fund for collective actions. Findings from the interviews, as presented in Chapter 4, suggested that there were no apparent issues in obtaining funding for the compensatory cases brought under the WAMCA so far. This is supported by findings from the WAMCA register, which show that one or more third-party funders are involved in these cases. The focus group noted that it seems that the claimant parties have been creative enough to secure financing for cases.[40] However, it is possible that certain cases, especially those with limited scope and low damages, may face difficulties in obtaining funding in the future. Interviews, the focus group and the expert meeting all highlighted the potential for cases to fall through the cracks, especially public interest cases with limited commercial value. Uncertainty in the funding market and regulation was also pointed out. Recent WAMCA case law also shows that funding agreements are scrutinised and if this would eventually lead to (more) claimant organisations being declared inadmissible and conditions that are no longer attractive for funders, it will have a big impact on the prospects for bringing collective actions.

For non-compensatory cases, the situation is different. As indicated by the WAMCA register and interviews, these cases have not received funding from commercial third parties, relying mainly on their own contributions. Many of these cases involve repeat players. Interviews revealed that the available budget is limited, and they must be selective in choosing cases, with the introduction of the WAMCA leading to increased costs.[41]

Overall, the research suggests that a litigation fund could be particularly useful for funding non-compensatory actions, small compensatory actions that are not lucrative for third-party funders and the early stages of large compensatory actions. As concluded earlier, it might also be politically and legally undesirable for TPLF to have a monopoly on funding collective actions, especially when the public interest is at stake. Therefore, a litigation fund could add value, even though it has limitations, and this fund also benefits from a functioning TPLF market.

40 Refer to Chapter 5, Section 5.2.2.
41 Refer to Chapter 4, Section 4.9.5.

The focus group mentioned three potential positive functions of a litigation fund.[42] It could help reduce the agent-principal problem (a tension between the interests of actual claimants and their service providers) by eliminating the commercial interests of third-party funders. Additionally, because certain conditions must be met to access this fund, it could serve as a gatekeeper. Lastly, the existence of a public fund might encourage settlement willingness. It was also suggested that, due to the high costs of settling cases after a settlement, a litigation fund could be desirable, as it could play a role in this process.

For non-compensatory actions and small claims, alternative solutions to a litigation fund are conceivable, as outlined further in Section 7.6.2. Regarding the early stages of large compensatory actions, the question arises as to whether creating a litigation fund alone justifies further facilitating third-party funders in a profit-making model. On the other hand, if the fund effectively acts as a co-financier and can benefit from a favourable result while reducing the success fee of TPLF due to seed funding (funding the early stages) being the costliest, it could have advantages for access to justice. In any case, such conclusions seem premature at this stage and depend on further developments in the funding market, the application of the WAMCA and potential additional regulation. Finally, the question arises as to whether a litigation fund can also play a role in settling collective settlements and compensatory cases, although a litigation fund is not primarily intended for this purpose.

7.6.2 Possible Alternatives for a Litigation Fund

The comparative legal research reveals that, in addition to a litigation fund, there are multiple ways to financially support claimants in collective actions. It is worth noting that the WAMCA already provides for some of these alternatives. We will discuss these alternatives further on and indicate whether they qualify as cost-reducing measures and/or concessions under the RAD in support of collective actions.

(a) Abolishing or Reducing Court Fees

A first alternative could be to reduce or abolish court fees in certain categories of cases, for example, when no compensation is claimed, it concerns a public interest action, and the case is not commercially funded. This alternative aligns with the RAD,[43] although it primarily pertains to consumer cases and may not directly apply to public interest cases. However, this would not lead to a substantial cost reduction since court fees are only a

42 Refer to Chapter 5, Section 5.2.2.
43 Art. 20, Para. 1 of the Directive. Refer also to Chapter 2, Section 2.5.2.

fraction of the total costs in many collective actions. It is not a real alternative, at most a measure that can be applied in combination with other measures.

(b) Expansion of Publicly Funded Legal Aid

As discussed in Chapter 2, publicly funded legal aid under the Legal Aid Act is not available to representative interest organisations in the context of collective actions.[44] Consideration could be given to making legal aid available to interest organisations in the context of collective actions. This raises questions about the criteria that should apply precisely, but this could offer a solution for some collective actions. This measure would also align with the RAD, which mentions more structural support for competent interest organisations as possible measures, including access to legal aid.[45] Although this is limited to consumer cases, expanding access to legal aid does not necessarily have to be limited to this context.

(c) No Cost Order in Case of an Unsuccessful Action

The presence of a cost order against the class representative in case the collective action is unsuccessful has led to the introduction of the litigation fund in Ontario, as it can cover certain risks. The opposite reasoning would be that if the cost order were abolished, there would be no or less need for a litigation fund. In the Dutch mass damages practice, there is currently the possibility of a reasonable cost order in favour of the successful interest organisation. However, if the action is unsuccessful, the defendant can still claim a cost reimbursement according to the fee schedule. Although the amounts awarded under a cost order based on the fee schedule are negligible compared to the total costs of WAMCA procedures, they can still be a significant barrier for interest organisations that do not use commercial litigation financing. If a litigation fund were not a realistic option, consideration could be given to completely abolishing this cost order if an interest organisation is not commercially funded, if it is a matter of general interest and/or if the action is in the interest of legal development and has a fundamental character. This alternative also aligns with the RAD. Unlike the previous measure, this alternative does not divert resources from the judiciary but rather lowers a barrier. This could have an unintended attraction effect.

(d) Real Cost Order

The possibility of a real cost order in favour of the successful interest organisation under Article 1018l Paragraph 2 of the Dutch Code of Civil Procedure (DCCP) could also be seen as an alternative financing measure, as it could attract commercial funding even for pure non-compensatory cases. These cases are currently unattractive for TPLF funders.

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44 Refer to Chapter 2, Section 2.2.2.
45 Art. 20, Para. 2 of the Directive. Refer also to Chapter 2, Section 2.5.2.

More specifically, this would involve the possibility for a successful interest organisation to claim a multiple of the investment as the actual (financing) costs of the defendant. An explicit provision of this in Article 1018l Paragraph 2 DCCP – which it currently does not exclude – could facilitate such a solution more clearly. One disadvantage is that the dependence on TPLF is increased unless organisations that are repeat players can build and manage their own 'war chest' through the possibility of a real cost order.

(e) Allowing No-Win-No-Fee Arrangements in Collective Actions

A final alternative we would like to mention is to allow no-win-no-fee arrangements in collective compensatory actions as an alternative to TPLF, not so much as an alternative to a litigation fund. One clear disadvantage is that this alternative is limited to the same type of cases as those for which TPLF is also available. It may increase competition compared to TPLF and thus possibly reduce financing costs, but it does not fill a gap in terms of the types of cases. It could, however, contribute to removing obstacles that are currently identified with regard to financing the preliminary phase.

7.7 Requirements for and Possible Design of a (Revolving) Litigation Fund

7.7.1 A (Revolving) Litigation Fund

In a report from the General Court of Audit in 2019, it was observed that revolving funds are increasingly used by governments to organise and finance new initiatives collectively.[46] The concept of a litigation fund is that it is established by a public authority, partly funded with public money, and used to finance third parties, with the financing flowing back into the fund over time.[47] In the case of a revolving litigation fund for collective actions, this would involve, among other things, compensation obtained in a collective action, with a portion – the remaining or a percentage – flowing back into the fund and being used to finance other collective actions.

Regarding the possibilities of a revolving fund, it is clear from the report mentioned that there should always be an (initial) contribution from the government. This would also apply to a litigation fund and seems necessary to start such a fund. However, it is theoretically possible that the government is not involved at all, and the fund is funded from the beginning by collective actions and settlements. This last scenario seems

46 With other government bodies, businesses, social organisations or individuals. Algemene Rekenkamer 2019, p. 5.

47 van den Brink 2018, p. 11. Refer also to Chapter 1, Section 1.2.3 (c).

unrealistic given the limited number of compensatory cases and the time involved in their settlement. It is also possible that there is an annual structural contribution from the government. In Israel, for example, the litigation fund is entirely funded by the government.[48] However, this is not the approach of this study, where the idea is that the fund may be able to revolve. It is also possible that a fund entirely financed by government contributions could be problematic if the collective action is directed against the State or a semi-public entity. For the majority of funds, desired benchmarks have been set for the degree of revolving. In the case of a litigation fund, it may be difficult to establish benchmarks, and there will be a great deal of uncertainty about income, especially since it depends on the number of compensatory cases and their size.[49]

A criticism of the use of revolving funds is that there is uncertainty about whether the contributions will actually return, and it can lead to market distortions and unauthorised state aid. For a litigation fund, an initial contribution from the government would be necessary to establish the fund and bear the necessary costs of its management. Whether this contribution will come back, and the fund will not be depleted but can be used to finance other cases, will depend on the fund's funding. As shown by the study of foreign systems, there are various possibilities.[50] In Quebec, the fund is funded by contributions (a certain percentage) from all class actions, regardless of whether those cases had been (partly) financed by the fund. This requires a high level of solidarity. In Ontario, there is only a fixed contribution of 10% from those cases financed by the fund. In this case, especially given the relatively small market for collective actions, revolving may be more difficult unless the contributions from the fund per case are significantly limited. We will address the financing of the fund and its consequences further on.[51]

In our view, there should be no risk of market distortion or unauthorised state aid in the case of a litigation fund. First, guaranteeing the right to access to justice is primarily a government task and not a task of a commercial market. Second, the litigation fund is not intended to replace commercial funding but to complement it. They are communicating vessels: the litigation fund is only necessary where there are no other means, and the fund's funding also depends on successful cases financed by commercial funders. It is only when it is decided to finance cases that qualify for third-party litigation funding from the fund, competing with commercial funders, that there could be unauthorised state aid. This is not assumed in this case, and further

48 Refer to Chapter 6, Section 6.5.
49 See also Algemene Rekenkamer 2019, pp. 30-34.
50 Refer to Chapter 6.
51 Refer to Section 7.7.2 (c) and (e).

elaboration of this option is beyond the scope of this study. It is worth noting that if the fund is complementary to third-party litigation funding and not competitive with it, a higher degree of solidarity may be needed for it to revolve.

Regarding revolving funds in general, the General Court of Audit reached several conclusions and recommendations, only some of which are relevant to this study.[52] For example, it was concluded that it is currently unclear where responsibilities lie for the setup and regulation of revolving funds. There is also currently no separate legal framework, no clear criteria for how a fund can revolve and no central oversight. No concrete follow-up has yet been given to recommendations in these areas to make improvements.

As for a litigation fund, it would be reasonable for the primary responsibility for its establishment to lie with the Ministry of Justice and Security. Depending on the relationship between the fund and the government, it will be either a public law fund making financing decisions, or the fund's allocation of financing will be based on a private law funding agreement. This also has implications for the applicable (public and/or private law) rules.[53] Regarding the design, as concluded in the aforementioned report, this can vary from one revolving fund to another. This book does not delve into these aspects but will only address some considerations that need to be taken into account for the design of a litigation fund for collective actions.

7.7.2 Design and Organisation of a (Revolving) Litigation Fund

The comparative legal research on litigation funds in other jurisdictions, supplemented by qualitative research, including the focus group and expert meeting, provides insights into four aspects that are important in the design and organisation of a litigation fund. These aspects include the following:

(a) Type of Cases That Should Be Financed

Regarding the type of cases that could be financed by a litigation fund, a fundamental choice is to be made concerning the relationship between TPLF and a litigation fund. In one scenario, a litigation fund is not just a supplement to TPLF but also enables financing for cases that qualify for TPLF but under more attractive conditions. For example, the Ontario model uses a standard 10% success fee, although it applies only to certain types of costs, while TPLF can generally cover all types of costs. However, this scenario could

52 Algemene Rekenkamer 2019, pp. 52-54.
53 For example, van Waarde 2021.

potentially lead to unlawful state aid, and further investigation would be required if this scenario were chosen.

A more plausible approach is that the litigation fund is complementary to TPLF, which appears to be the preference that emerged from the interviews and focus group discussions. The advantage of the 'complementary model' could be that not only litigation funders benefit from funding extensive and less risky cases (which are typically the cases of interest to litigation funders), and in this case, less extensive forms of solidarity would be required because the fund could be more self-sufficient. Extensive forms of solidarity to make the litigation fund revolving might not garner enough support from stakeholders. The disadvantage of a 'complementary model' could be that litigants would need to demonstrate that they do not qualify for TPLF before they can benefit from the litigation fund, which could introduce various practical challenges.

Regarding the types of cases that could be financed by a litigation fund, particular attention has been given to cases involving a public interest, such as climate cases, although it is challenging to define what falls under public interest cases. This aligns with litigation funds in other countries. Funds in Ontario and Israel focus on cases with a public interest. In Ontario, this has led to approximately 10% of cases being financed in this manner.

To avoid excluding specific cases prematurely and to prevent delineation issues, an option could be to allow financing for all types of cases, as suggested in the expert meeting. However, whether this is realistic will also depend on the available funds. A filtering mechanism should, in any case, be in place, ensuring that no other means of financing are available and that the case is not manifestly without merit. In this regard, alignment with the criteria of the Legal Aid Act could be sought. An example that aligns with this approach is the fund in Quebec, where, in principle, all potentially successful cases can draw from the fund, resulting in approximately 50% of class actions being financed in this manner.

(b) Type of Costs That Should Be Covered

Regarding the type of costs that can or should be reimbursed from the litigation fund, it also depends on the available funds. Ideally, as discussed in the expert meeting, various categories of costs should be eligible for coverage, including court costs, legal fees, expert fees, potentially the costs of the opposing party if a case is unsuccessful, and expenses related to communication and the distribution of damages among claimants/stakeholders. Different models exist in other countries. In Ontario, legal fees are not covered because they operate on a no-cure-no-pay basis, but in the Netherlands, legal fees and the costs of interest organisations (including claim foundations) constitute a substantial part of the expenses. In Quebec, legal fees are eligible for financing. The same

applies to Israel, but they have chosen to provide only a small contribution, funded by the government, to cases. In line with what was also highlighted in the interviews, it is essential to have an understanding of the extent of the costs. This is also crucial for settlement willingness. The exact magnitude of the costs cannot be determined precisely based on this research and remains unclear due to the relatively limited experience with the WAMCA and certain procedural uncertainties.

(c) Methods of Financing the Litigation Fund

There are various possible sources of funding for a litigation fund, and these sources can coexist. However, each potential funding method also has certain potential drawbacks, and the method of financing directly affects the sustainability of a litigation fund and whether it can be revolving.

The most substantial method of contributing would consist of a percentage of the proceeds from successful collective actions. This can involve choosing a specific percentage, as seen in Ontario. An important choice is whether to allow only cases funded by the fund to contribute or all successful collective actions, as in Quebec. While the latter obviously benefits the fund's income, it requires a high degree of solidarity and may receive less support from the market. Additionally, this may also have implications for the amount of compensation for claimants if the contribution takes place before payments have been made to victims. Such premature contributions could potentially be in violation of the RAD, as it could be seen as a form of 'own contribution' by consumers to legal actions (of other victims) and imply that victims are not fully compensated.

Another source of funding is cy pres contributions, consisting of leftover funds from collective actions and settlements. Cy pres contributions are made after victims have submitted their claims, making them compatible with the RAD. They are allowed under the RAD,[54] and there is some experience with alternative destinations for leftover funds under the WCAM. Repayment to the defendant is unlikely to gain much societal support, as was evident in the expert meeting.

In addition, private donations, whether from targeted crowdfunding campaigns or not, are a possibility. This is likely to be a limited and uncertain source of income, although it may be different in certain cases involving a public interest. Private donations and crowdfunding campaigns for a public litigation fund would require some degree of regulation.

54 See Art. 9(7) of the Directive.

Finally, a litigation fund can also be funded partially by public funds. Contributions from fines in the context of public enforcement have been mentioned as a possible source of funding because they have a more direct link between a breach of a norm and potential redress actions. However, this approach also faces the challenge that significant costs are associated with public enforcement, and it may lead to a shift of problems. At the very least, an initial contribution from the government for the start-up of a litigation fund is likely, from whatever budget is available. As already mentioned, in the case of the litigation fund in Israel, it is entirely funded by the government.

(d) Embedding and Organisation of the Litigation Fund

In designing a fund, it is important that members of a committee responsible for case selection have sufficient expertise while also preventing potential conflicts of interest, given the relatively limited pool of experts. A selection committee with a mixed expertise could possibly be led by a retired judge to mitigate the risk of conflicts of interest, as mentioned in the expert meeting. The Legal Aid Board and the Public Prosecution Service have been mentioned as possible organisational units, with the question raised in the focus group as to whether the former has sufficient expertise. External experts may also play a role in such a selection committee.

The choices made regarding the first two aspects (types of cases and types of costs) have implications for the implementation of the other two aspects (and vice versa). It is important to keep this interaction in mind as it determines the effectiveness and viability of a litigation fund. Since the findings of this research are preliminary, only a few examples that illustrate the implications of certain choices regarding the types of cases and types of costs for the funding methods and embedding of the litigation fund are discussed further on.

(e) Options for Organisation and Examples

Using the following examples, insight is provided into how the various options and choices interact with each other. Going forward, a similar assessment can be made in specific cases.

Example 1:

Regarding the type of cases that could be financed by a litigation fund, particularly general public interest, such as climate cases, were mentioned. Let us assume that this is a workable definition, and only this type of case would qualify for funding through the litigation fund.

All costs related to these cases could be funded by a litigation fund, or only certain types of costs, such as expert costs and/or a possible cost order if the case is unsuccessful. In the first case, a larger budget would be needed.

If these cases do not bring back much or nothing to the litigation fund in case of success, which is not unlikely, it would be very difficult if not impossible to sustain the fund. It would not be revolving. The only way to make it revolving is to request a contribution (percentage) from the proceeds of all successful compensatory cases (as in Quebec) and/or to rely on cy pres or leftover funds in commercially financed damages claims. The first (Quebec model) assumes solidarity, which is not self-evident. There seemed to be little support for this in the interviews and focus group. The second assumes that there is a healthy and dynamic market for commercially financed collective (compensatory) claims. If TPLF becomes less accessible, this will also affect the leftover funds flowing into the fund.

In this example, it may be more appropriate to place the litigation fund under the Legal Aid Board, as no commercial decisions need to be made, and the nature of the cases is more in line with what the Legal Aid Board deals with.

Example 2:
This example is the same as Example 1, except that the type of cases funded through the fund is expanded to include small compensatory cases that are not attractive to litigation funders. This assumes that there is no competition with this type of financing. This could mean that in the case of success, some success fees flow back to the fund. This would not be at the same level as commercially operating litigation funders but would encompass more than a real cost order: for example, a percentage of the damages and/or a multiple of the investment.

This is relevant to the organisation because it assumes making commercial decisions in selecting cases and determining funding terms. This could be facilitated by imposing a fixed percentage for all cases (as in Ontario), but this has been perceived as a disadvantage of the litigation fund elsewhere. In this example, the organisation could still be under the Legal Aid Board, but this institution does not have the required experience and expertise to maintain a commercial funding practice. External expertise is needed not only for case selection but also for determining funding terms.

7.8 Final Conclusion and Recommendations for Follow-Up Research

7.8.1 Usefulness and Necessity: Some Conclusions

The research has shown that a wide variety of WAMCA cases have been initiated, with the majority of them being non-compensatory cases. Regarding financing, it is clear that for compensatory cases, funding from a commercial litigation funder is necessary due to

the high costs, and such funding has been obtained for the cases brought so far. There is no evidence that compensatory cases could not be initiated due to a lack of funding, but it is conceivable that there are or there will be cases that, due to low compensation amounts or higher risk, are not lucrative for funders. For non-compensatory cases, the situation is entirely different: there is currently no commercial third-party funding for these cases, and they are financed, after selection, from contributions from the membership base and other sources (private donations or crowdfunding).

A litigation fund appears to have added value primarily for low-value compensatory cases and non-compensatory cases. It should be noted that there may be certain disadvantages to relying on commercial third-party funding for even large compensatory cases, especially if they are riskier or involve new legal issues. The question arises as to whether the commercial market should determine whether a case can be brought with the necessary funding, especially for cases with a public interest. There are also (economic) uncertainties in the rapidly evolving funding market, and future (European) regulation may affect further developments.

As mentioned in the previous section, the establishment of a litigation fund involves a number of challenges. Choices must be made regarding the financing of such a fund, including the need for an initial or even more structural contribution from the government, especially in light of the currently low number of compensatory cases. Choices must also be made regarding the types of cases and which costs should be financed. Additionally, the establishment, organisation and maintenance of such a fund raise questions about integration, expertise and research into the viability of the submitted cases, all of which involve significant costs.

Based on the limited experience with the WAMCA, which has not yet resulted in final judgments in compensatory cases, the rapidly evolving funding market, the not yet evident problems in obtaining funding (for compensatory cases) and the uncertainties regarding (European) regulation, it appears premature to establish a litigation fund at this time. However, the researchers acknowledge that there are uncertainties in financing, and for certain cases and in the preparation phase of cases, there is a need for more options and, especially for non-compensatory cases, more structural financing. Adequate financing is crucial for a healthy collective action market and the success of the WAMCA. However, some of the problems also appear to be related to the WAMCA procedure itself or the procedural uncertainties that currently exist. Furthermore, some of the financing issues may be resolved in a different way for the time being.

In conclusion, a revolving litigation fund that is not dependent on government funding would currently rely entirely on TPLF and developments in case law under the WAMCA. It is uncertain at this time whether sufficient damages will be awarded, and

whether the financing costs are such that enough 'remains' to flow back into the fund. Sustaining such a fund also assumes some form of solidarity. The question is whether there is sufficient societal support and support among stakeholders for this. All in all, given all the current developments with respect to both TPLF and the WAMCA, the introduction of a revolving litigation fund does not seem feasible at this time. It may be worth considering explicitly recognising the possibility of cy pres so that practical experience can be gained, and insight can be gathered into the amount of remaining funds. Depending on the results, this could be followed by the establishment of a litigation fund.

7.8.2 Recommendations for Follow-Up Research

An important limitation to this study, as noted earlier,[55] is the lack of a baseline measurement regarding the use of collective actions under the old law, making it impossible to compare the situation under the WAMCA with that under the old law. A systematic empirical study on this remains relevant and necessary and could still be conducted, as previous research – especially the study mentioned by Tillema – does not provide answers to all relevant aspects for the baseline measurement.[56]

The present study can serve as a baseline for further research on developments under the WAMCA. Moreover, in an estimated 3 to 5 years, much more can be said about the number and progress of WAMCA (compensatory) cases, the settlement of compensatory cases and the application of the admissibility requirements and other procedural requirements of the WAMCA. This will provide more insight into the relationship between compensatory and non-compensatory cases, the claimant interest organisations, the amount of awards in collective compensatory actions, the financing, total costs of these cases and the application of the WAMCA requirements in practice. This will also allow for more visibility and further research into European regulations, especially the application and interpretation of the Directive on Representative Actions, any further regulation of third-party commercial financing, further developments in the funding market and potential issues related to the financing of collective actions. Ideally, this should be both quantitative and qualitative research, as interviews, in particular, help interpret the results of quantitative studies.

55 Refer to Sections 7.1 and 7.2. See also Chapter 3, Sections 3.3.1 and 3.3.2.
56 Tillema 2019a. Refer also to Chapter 3, Section 3.2.1.

Further research into experiences in other jurisdictions with cy pres could clarify any potential disadvantages that should be considered in the Dutch context if the mechanism were explicitly recognised under the WAMCA.

Further research is also desirable on the experiences of interest organisations with litigation financing, as recently emphasised by the European Commission in response to the European Parliament's resolution on responsible private financing. Research into the alternatives outlined in Section 7.7.2 would also be desirable. It is not clear why the successful experiment with no cure no pay in personal injury cases could not be expanded to other areas and/or to collective actions. Furthermore, the role of legal expense insurers in the scoping phase and/or in the subsequent pre-phase of mass damage settlement is underemphasised, and further research in this regard is also needed.

If the revolving fund route were ultimately chosen with limited government contributions, any state aid implications would need to be examined, and it would be useful to precisely understand why similar initiatives in England and Germany did not take off at the time. Moreover, Chile is a jurisdiction to watch in terms of experiences with the recently introduced litigation fund for consumer matters for certain interest organisations.

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Annexes

Annex 1 – WAMCA Registry Cases

Annex to Chapter 3: The numbers indicating cases in the footnotes refer to the following cases from the register. The cases marked with an asterisk (*) are collective damages actions; the remaining cases are non-damages actions.

Ongoing cases (as of 1 July 2023):

1. *Stichting Essure Claims c.s./Bayer AG**
2. *Stichting Initiatieven Collectieve Acties Massaschade (ICAM)/Staat c.s.**
3. *Stichting Donorkind c.s./gedaagde*
4. *Coöperatie Laatste Wil c.s./Staat*
5. *Vereniging recreatiepark Ursemmerhof c.s./Ursemmerhof BV*
6. *Stichting Expertisebureau Online Kindermisbruik/Hammy Media Ltd*
7. *Stichting Farma ter Verantwoording/Abbvie inc. c.s.*
8. *Stichting Privacy First/Staat*
9. *Vereniging Union di Konsumidó Boneiru/Staat*
10. *Stichting Bureau Clara Wichmann/Abbvie BV c.s.**
11. *Stichting Sinti, Roma en reizigers/gemeente Den Haag*
12. *Stichting App Stores Claims/Alphabet Inc. c.s.**
13. *Drie verenigingen/gedaagde Repsol**
14. *Stichting Recht op bescherming tegen Vlieghinder/Staat*
15. *Stichting ter bevordering van de fossielvrij beweging/KLM*
16. *Stichting Ukrainian Victims of War/Prosus c.s.*
17. *FNV/Mebin*
18. *Stichting Foodwatch Nederland/Staat*
19. *Stichting Nuon Claim/Vattenfall c.s.**
20. *The Privacy Collective/Oracle en Salesforce**
21. *Stichting Viruswaarheid c.s./Staat*
22. *Namaakbestrijding React/SHLC Technology Co*
23. *Stichting Vredesbeweging Pax Nederland c.s./Staat*

24a. *Stichting Investor Loss Compensation/Airbus SE**

24b. *Airbus Investors Recovery Stichting/Airbus SE**

25. *Stichting Clara Wichmann c.s./Staat*
26. *Stichting BREIN/gedaagde*
27. *FNV en CNV/GXO Logistics*
28. *CNV/Consultants on Targeted Security Netherlands*
29. *International Air Transport Association/Airport Coordination Netherlands*

30. *Vakbond in de maritieme sector/Acta Marina Holding*
31. *Stichting Vredesbeweging PAX c.s./Staat*
32a. *Right to Consumer Justice/Apple**
32b. *Stichting Consumenten Competition Claims/Apple**
32c. *Stichting App Store Claims/Apple**
33. *Nationaal Comité tegen verplichte mondkapjes c.s./Staat*
34. *Vereniging Groupe PSA Contractpartners Nederland/Citroen Nederland BV*
35. *Vereniging Groupe PSA Contractpartners Nederland/Peugeot Nederland NV*
36a. *Stichting Emission Claim/Stellantis NV, Peugot Nederland NV c.s.**
36b. *Stichting Carclaim/Stellantis NV, Peugot Nederland NV c.s.**
36c. *Stichting Diesel Emissions Justice/Stellantis NV, Peugot Nederland NV c.s.**
37a. *Stichting Massaschade en Consument/Air BNB Ireland UC**
37b. *Stichting Aequitas belangenbehartiging/Air BNB Ireland UC**
38. *FNV/Wibra Supermarkt BV*
39a. *Stichting Marktinformatie/TikTok Technology Limited**
39b. *Stichting Take back your privacy/TikTok Technology Limited**
39c. *Stichting Massaschade en Consument/TikTok Technology Limited**
40a. *Stichting Emission Claim/Renault SA c.s.**
40b. *Stichting Car Claim/Renault SA c.s.**
40c. *Stichting Diesel Emissions Justice/Renault SA c.s.**
41. *Stichting Republikeins Genootschap e.a./Staat en Willem-Alexander van Oranje*
42. *Stichting BREIN, Talpa en RTL/gedaagde*
43. *Koninklijke Horeca Nederland/Staat*
44. *Stichting Namaakbestrijding React/Contextlogic c.s.*
45. *Stichting BREIN/gedaagde*
46. *Stichting Privacy First/Staat*
47. *Stichting BREIN/gedaagde*
48. *FNV en CNV/Temper BV*
49. *Marktonderzoekassociatie.nl/Staat*
50. *Stichting BREIN/ExpatsIPTV*
51. *Stichting BREIN/Yisp BV, Worldstrem BV, Serverius BV (II)*
52. *Stichting Diesel Emissions Justice/Fiat Chrysler c.s.**
53. *The Privacy Collective/Oracle Nederland BV, SFDC Netherlands BV c.s.**
54a. *Stichting Diesel Emissions Justice/Mercedes c.s.**
54b. *Stichting Car Claim/Mercedes c.s.**
54c. *Stichting Emission Claim/Mercedes c.s.**
55. *Stichting BREIN/gedaagde*
56. *Defence for Children c.s./Staat c.s.*
57. *Stichting Diesel Emissions Justice/Volkswagen c.s.**
58. *Stichting Belangenbehartiging Crediteuren BMA Nederland/BMA Braunschweigische Maschinenbauanstalt*

Completed cases (as of 1 July 2023):

1. *Stichting Huurdersbelang Stadswonen/Stichting Woonstad Rotterdam*
2. *Stichting BREIN/gedaagde*
3. *FNV en vakvereniging voor machinisten en conducteurs/NS*
4. *Stichting Privacy First/Staat*
5. *Stichting Behartiging Belangen Sportscholen/Staat*
6. *Coöperatie Laatste Wil c.s./Staat*
7. *Stichting BREIN/Ziggo, XS4all, Internet BV en KPN*
8. *Ondernemersorganisatie/Staat*
9. *Stop Online Shaming/Stichting Slachtoffers Iatrogene Nalatigheid-Nederland en gedaagde*
10. *Stichting BREIN/Yisp BV, Worldstream BV, Serverius BV (I)*
11. *Stichting Stop Online Shaming en Stichting Expertisebureau Online Kindermisbruik/gedaagde*
12. *Eisers en Stichting Radar c.s./Staat*
13. *Stichting Clara Wichmann c.s./Staat*

Annex 2 – Interview Topic Lists

(1) Interview Topic List for Lawyers and Representatives of Interest Organisations

1. Introduction to the Research

- Introduction of the interviewer
- Explanation of the subject, purpose and main research questions
- Interview procedure and anonymity

2. General Personal Characteristics

- Brief profile description, experience and specialisation in general
- Amount of experience with mass tort procedures
- Experience with WAMCA in particular
- Other relevant experience

3. Description of Experiences with Mass Tort Procedures

- How is a case initiated and developed?
- Which parties are involved in this process?
- How does the approach compare to other types of procedures, and what are the main differences?

4. Costs of Mass Tort Cases

- How are the costs of these cases structured?
- What are the largest cost components?
- Which costs are specifically related to compensation procedures?
- Can you provide an estimate of the total costs of such a procedure?

5. Financing

- In what way(s) are these procedure(s) financed?
- Were other forms of financing considered, and if so, which ones?
- Why was this form of financing ultimately chosen?

For third-party financing:

- At what stage is financing sought?
- Through what channels does this happen?
- What considerations come into play when partnering with a financier?
- How is collaboration with the funder conducted?
- What influence does this have on the further course or settlement of the procedure?

For internal/other financing:

- At what stage is financing sought?
- Through what channels does this happen?
- What are the key considerations when choosing the form of financing?
- How generous or limited is the budget?
- What influence does this have on the chosen strategy?

6. Barriers to Financing

- To what extent does securing financing determine the decision to initiate procedures or make other strategic choices?
- Can you provide examples of cases that, for this reason, did not result in a summons or were otherwise hindered by difficulties related to financing?
- Any other relevant comments

7. Reflections on the 'Utility and Necessity' of a Litigation Fund

- Is there a financing gap that could be filled by such a fund?
- What problems could a fund potentially solve?
- Are there specific cases that would benefit from such a financing option?
- How should such a fund be organised (accountability, selection criteria for financing, which costs are covered, etc.)?
- What considerations are important from the respondent's perspective?

8. Conclusion

- Are there other individuals who should be approached for this research (peers and opposing parties)?
- Are there any further questions from the respondent?
- Review and consent regarding further elaboration and transcript review.

(2) Interview Topic List for Funders

1. Introduction

- Introducing interviewer
- Explanation of subject, purpose of research and main research questions
- Procedure and anonymity interviews

2. General Personal Characteristics

- Brief description of respondent's profile and experience
- Funder profile: history, active jurisdictions, source of funding
- Other research-relevant characteristics

3. Market Segment Funder

- Which part of the market is the funder targeting?
- Which areas of law/type of disputes fall within the portfolio?
- Are there types of matters that by definition fall outside the funder's portfolio?
- What are the average amounts that are made available and is there a minimum or maximum?
- To what extent is the funder focused on the Dutch market?
- Relevant recent and future developments in the Dutch market

4. Practice Financing Mass Damage Procedure

- How are cases brought to funder?
- At what stage of a dispute is the funder involved?
- Which parties/persons are subsequently involved?
- On what criteria are these cases assessed?
- On what criteria can a case be dismissed?
- Can there be co-financing (in combination with, for example, crowdfunding/legal aid)?
- How is the total portfolio determined?

5. Cost and Risk Assessment

- How are the costs of these cases built up?
- What are the biggest cost items?
- Which costs are specifically related to mass damage proceedings?

- Can you give an indication of the total costs that are budgeted per case?
- Is there a limited total budget or is financing sought per case?
- Which criteria are important when making a risk assessment per case?
- How is the success fee determined?

6. Reflections on the Idea of a Public Litigation Fund

- To what extent is there a financing gap that could be filled by such a fund? Are there specific matters that are not covered by the current financing market?
- To what extent would the existence of such a fund influence the financing practice from a funder?
- Which considerations are important from the perspective of funders?
- How would the existence of such a fund affect the way funders determine their fees?
- In case the fund is financed by collecting percentage on claims and settlement amounts: How does this affect the financing practice?
- Would the possibility of co-financing be attractive to the funder (e.g. partial coverage of initial out-of-pocket costs)?
- Would pre-financing of research and scoping be of interest to funders?
- Further considerations from the funder regarding the influence of a possible litigation fund on the financing market

7. Closing

- Are there other people who should definitely be approached for this research?
- Are there any questions from the respondent?
- Repeat further elaboration, review transcript and consent.

Annex 3 – Discussion Points for Focus Group and Expert Meeting

Discussion Points on the 'Utility and Necessity' of a Public Litigation Fund

- What relevant developments/problems for the research can be identified from the perspective of parties being sued in WAMCA procedures?

- How would a public litigation fund contribute (positively or negatively) to the current practice of collective procedures?

- For what issues could a fund provide a solution?

- What cases should a fund finance?
  - All representative claims for compensation
  - Limited to cases of general interest
  - Only cases that cannot obtain financing through other means
  - Other…

- What should a fund finance?
  - Research and preparation costs
  - Costs only after service of process
  - Full cost coverage, including legal fees
  - Limited expenses (experts, overhead costs)
  - Other…

- How should a fund be best financed?
  - Direct government funding
  - Collecting a portion of the recovered damages in other cases financed by the fund
  - Collecting a portion of the recovered damages in all collective actions
  - Cy pres funding from unclaimed damages in other claims
  - Through fines collected in public enforcement
  - Other…

- How should such a fund be organised? (accountability, institutional embedding, etc.)

- What considerations are important from the perspective of parties being sued and their lawyers?