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CHRONICLE OF CLASS ACTIONS AND SETTLEMENTS 2017

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1. Introduction

As was the case in previous years, in 2017 various aspects relating to the *class action* received considerable attention in the press, literature, and case law. The press not only remarked on *"high profile"* cases, but even addressed specific (social) issues surrounding class actions, such as the commercial aspects related to litigation funding and the *"abuse"* of the Claim Code that occurs. That is why we are pleased to heed Arons and Koster's request to take over the baton in the last issue of this chronicle.

In the legislative field not only the Netherlands but all of Europe is moving towards better facilitation and optimisation of the position of victims and damage causing parties in class actions. This chronicle will consider both the announced and pending legislative proposals in greater depth. In contrast, in 2017 in the United States, the birth place of the class action for damages, Trump launched a countermovement. Trump decided to block laws and regulations on the basis of which financial institutions would no longer be able to demand from their clients to waive to participate in class action, as a consequence of which customers remain obliged to resolve a dispute through arbitration. This (ostensibly) existing practice will no longer be in place, because of which consumer clients of financial institutions no longer enjoy access to efficient and effective legal protection in case of large scale damage.[1]

Before focusing on this (forthcoming) legislation and on national and international developments, this chronicle will first address the case law related to case law from the Dutch courts - insofar as relevant - that emerged in 2017 based on a number of themes.

2. Case law January 2017 - December 2017

2.1. Competent Court

2.1.1. Cross border damage-causing events

With regard to the question as to whether the Dutch court is the competent court to assess class actions, which it must establish *ex officio*[2], last year an important ruling was referred to by the Amsterdam Court of Appeal in the matter of BP's shareholders concerning the explosion on the oil platform Deepwater Horizon.[3] BP is accused of having spread incorrect, incomplete, and misleading information. It involves the question as to which court is competent to rule in this matter, whereby the location of the damage-causing event (the "*Handlungsort*") and where the (purely financial) loss occurred (the *"Erfolgsort"*) are important considerations. Based on the international rules on jurisdiction, both the court of the *Handlungsort* and the *Erfolgsort* are competent to assess the case (Article 7 (2) Brussels I Regulation (recast)).[4]

With reference to the Kolassa ruling[5], the Amsterdam Court of Appeal arrives at the opinion that the Handlungsort was located outside of the Netherlands, because the advanced facts and circumstances demonstrate that the decision-making process regarding the obligation to provide information is located outside of the Netherlands.[6] Subsequently, the discussion focuses on the question whether the *Erfolgsort* is - also - located in the Netherlands because the shareholders who were deceived by the communications are located (inter alia) in the Netherlands, as a result of which the Dutch courts still have jurisdiction to rule on the claims of the 305a organisation. The Court of Appeal arrives at the - disappointing - conclusion that this is not the case, despite the fact that the financial loss of the shareholders manifested itself in the Netherlands. The reason: there are insufficient special

[1] https://www.reuters.com/article/us-usa-consumers-trump/trump-kills-class-action-rule-against-banks-lightening-wall-street-regulation-idUSKBN1D15WX
[2] Supreme Court 17 April 2015, *JOR* 2015/253, ground 3.3.2 (*Northern River Shipping Company/Kompas*).
[3] Amsterdam Court of Appeal 7 November 2017, JOR 2018/14, with commentary from K. Rutten.
[4] ECJ 30 November 1976, *NJ* 1977/494 (*Kalimijnen*) and Supreme Court 26 February 2016, NJ 2016/344, ground 4.3 (*Reaal/Same Deutz et al.*)
[5] ECJ 28 January 2015, JOR 2015, 109, with commentary from Arons, ground 53 (*Kolassa*).
[6] Amsterdam Court of Appeal 7 November 2017, JOR 2018/14, with commentary from K. Rutten, ground 3.14.

circumstances to justify this.[7] In our opinion, the Court of Appeal could have, and should have, arrived at a different conclusion based on the applicable case law of the European Court of Justice.

The Amsterdam Court of Appeal arrived at this incorrect conclusion[8] by referring to the special case in the Universal Music ruling[9] of the European Court of Justice, whereas the application of the formulated (main) rule in the aforementioned Kolassa ruling would also have been more obvious with regard to the *Erfolgsort*. In the Universal Music ruling all circumstances of the case pointed to the Czech Republic and the injured party suddenly decided - in the last phase of the proceedings - that it would use a Dutch bank account. In this sense, the direct (initial) harmful effects did not manifest themselves immediately after the damage-causing events in the Netherlands. This ultimately required a choice on the part of the injured party. The injured party ordered the payment from a Dutch bank account, as a result of which he claimed to have suffered the damage there. In the Kolassa case, the injured party did not have such a choice. In his case, the damage had a direct effect on his Austrian assets and the Austrian bank account linked to his investment, as we believe is also the case for the Dutch BP shareholders whose Dutch assets were affected by securities accounts held in the Netherlands. In short, the Dutch BP shareholders are very similar to Kolossa and are not at all similar to the exception in Universal Music. Moreover, in this case, the BP shareholders in the Netherlands were contacted by the foreign institution with all kinds of information via the Internet, annual accounts, semi-annual and quarterly figures, trading conditions updates, etc. and subsequently entered into the transaction/agreement in the Netherlands. Furthermore, they made the decision in the Netherlands to purchase the specific share. In view of this, it should have been assumed that the damage occurred *directly* in the Netherlands, even if the events giving rise to the loss (such as the decision to provide incorrect and incomplete information) did not take place in the Netherlands (but in England).[10] In our opinion, therefore, the Dutch court had more than enough reference points to assume jurisdiction, so that it was no longer necessary to apply the Universal Music ruling. In our opinion, special circumstances, as ruled in the Universal Music ruling, were not required in this case.

Even though this outcome, which we advocate, without application of the Universal Music ruling result in various courts being competent in case there are shareholders in different member states, we do not see this as an obstacle.[11] This is also the case, for example, in product liability cases[12] or cases involving cross-border unlawful publications.[13] Anyone distributing a product or publication in several European markets has no claim to a single competent forum. This also applies to a company that wants to attract shareholders or investors and is then called to account for misleading reporting. In other words, a 'global company' is not entitled to address only the court of the member state of the 'own' legal system in which the listed company is established. Nevertheless, this seems to be the result of the incorrect ruling of the Amsterdam Court of Appeal. We believe that this does not serve the proper administration of justice and efficacious conduct of proceedings , since the Dutch court was pre-eminently suitable to render a judgment on the loss of the Dutch shareholders in the Netherlands bundled in a class action. The fact that the Dutch shareholders had to turn to a foreign court, in this case England where BP has is official seat, detracts from this because in England setting up a class action is more complex, in particular because of the towering costs related to the order to pay the actual costs of the proceedings when the proceedings are lost and the security that might be requested in advance (see chapter 4.4 below). While it is true that the jurisdiction of several forums may be ineffective with a view to reaching a (comprehensive) settlement with the party causing the damage, which wants to end all legal actions in one fell swoop, in our view this argument does not outweigh the accessibility to court for the injured parties, which should prevail.

[7] Amsterdam Court of Appeal 7 November 2017, JOR 2018/14, with commentary from K. Rutten, ground 3.14.
[8] Amsterdam Court of Appeal 7 November 2017, JOR 2018/14, with commentary from K. Rutten , ground 3.17.
[9] ECJ 16 June 2016, JOR 2016, 276, with commentary from Arons (*Universal Music*).
[10] ECJ 11 January 1990, NJ 1991/573, ground 20 (*Dumez*). ECJ EU 10 June 2004, *NJ* 2006/335, ground 19 (*Kronhofer*).
[11] Cf. Supreme Court 9 January 2015, NJ 2015, 44, ground 3.4:
[12] ECJ 16 July 2009, *NJ* 2011/349 (*Zuid-Chemie/Philippo's*) and Supreme Court 26 February 2016, *NJ* 2016/344, ground 4.3 (*Reaal/Same Deutz et al.*).
[13] ECJ 7 March 1995, *NJ* 1996/269 (*Shevill*).

2.1.2 Access to administrative-law proceedings

The jurisdiction also plays an - indirect - role in the question whether the 305a organisation has a cause of action before the civil court if administrative-law proceedings are also available. The first example is the class action taken by 305a organisation Milieudefensie and Adem against the Dutch State with the aim of improving air quality. The starting point is that if individual actions are dismissed in civil court due to the inadmissibility of the claims due to the availability of properly safeguarded administrative-law proceedings (and vice versa), class actions share the same fate. According to the District Court, it comes down to the question whether the substantive result that can be achieved with the civil claim can also be achieved before the administrative court. In this case this question is partially answered in the negative, as there can be uncertainty whether the substantive result can also be achieved with a claim before the administrative court, for example if there is no decision and if it is unclear to what extent the violation of public-law legislation can be addressed before the administrative court. In such a case, the 305a organisation should be given the benefit of the doubt in civil court, according to the District Court: *"This uncertainty entails a judicial deficiency that results in admissibility".* In cases wherein it is still uncertain whether administrative-law proceedings can be instituted, a direct 305a action before the civil court therefore seems possible.

In a judgment of the Rotterdam District Court of 21 June 2017, the allocation of duties between the civil court and the administrative court was also a central subject. In the present case, a 305a organisation sues two breeders of pedigree dogs who do not comply with public-law legislation on the keeping of animals, demanding a general ban on breeding with certain dogs. In anticipation of the admissibility requirements, Article 3:303a DCC, contrary to what the literal legislative text suggest, is not strictly limited to the protection of persons' interests. The fact that this also includes animal welfare (as interests attributable to individuals) has already been ruled by the Amsterdam Court of Appeal. The District Court remarks: *"The fact that, strictly speaking, the objects clause is directed at (representing interests of) animals and not person therefore does not prevent a reliance on Article 3:305a DCC."* The fact that class action can not only defend group interests, but also general interests (which cannot be individualised) is also nothing new. The District Court established: *"The breeders' defence that Animal & Law (in Dutch: Dier & Recht) cannot rely on the aforementioned Article, because it has not stated that it will act on behalf of the owners of dogs with a hereditary abnormality, therefore fails."* These admissibility requirements are discussed in more detail in chapter 2.2.

As regards the allocation of duties between the civil court and the administrative court, the District Court rules that the existence of a body responsible (only under public law) for monitoring and enforcing the acts on which the 305a organisation bases its reproaches, in which case the 305a organisation could submit a request for enforcement in order to obtain a decision and bring legal proceedings before the administrative court, does not constitute an obstacle to bringing a class action before the civil court:

"In this case, however, it is certain that there is no decision underlying the claims of Dier & Recht." After all, the breeders have not contested this. It was neither argued nor proven that Dier & Recht submitted a request for enforcement to an administrative body. Therefore, it does not entail an obligation to continue administrative proceedings that have already been initiated. The fact that in the present case administrative proceedings are available to Dier & Recht does not preclude the possibility of initiating civil proceedings and does not alter the fact that the civil court has jurisdiction to hear the present claims based on an unlawful act.

Nor can the breeders' defences be followed that in the present case the administrative route must first be taken before the civil court may hear the dispute. There is no obligation to do so under any rule of law."

With this consideration, the District Court seems to increase the scope of previous Supreme Court decisions that the claims of an interest group are only admissible before the civil court to the extent that it defends the interests of persons who have no access to the administrative court or to the extent that it defends its own interest for which it has no access to the administrative court. Indeed, the judgment of

the Rotterdam District Court appears to entail that the 305a organisation (or its members) also has a cause of action to the extent that it has not made use of an administrative action, in respect of which no (general) obligation to use the administrative route that is open can be assumed. We do not believe that this decision is correct and it is diametrically opposed to the case law of the Supreme Court, in which it was (implicitly) ruled that the question is whether a "*legal action under administrative law*" is open (regardless of whether use is made thereof).

2.2. Cause of action of the 305a organisation

In order for a 305 organisation to have a cause of action, it must meet five requirements (Article 3:305a(1) DCC): (1) it must be a foundation or association with full legal capacity, (2) with an adequate object clause in its articles and (3) the interests which the 305a organisation represents must be similar and thus qualify for consolidation. Furthermore (4) the 305a organisation must, in the given circumstances, have made sufficient efforts to achieve the progress made by conducting consultations with the defendant and (5) the interests of the persons on whose behalf the action is brought are sufficiently safeguarded (Article 3:305a(2) DCC), which includes that the 305a organisation must have sufficient cause of action in the legal action (Article 3:303 DCC).

Despite the considerable degree of clarification of the framework for these requirements, it still occurs in practice that a 305a organisation does not meet these requirements, or a good number of them. Given the overlap in case law of the past year, in which multiple admissibility requirements are often discussed for each decision, this case law will be discussed below in a continuous manner, without further subdivision.

A decision that covers virtually all admissibility requirements concerns the class action against Aegon in respect of the Sprint plan share leasing product. In this case, the Den Haag District Court was requested, following on from previous successful class actions, to render another judgment on the question whether Aegon had violated its duty of care due to a number of specific aspects of this product. For instance, the Supreme Court had already confirmed a judgment by the Amsterdam Court of Appeal, i.e. that Aegon had failed to perform its special duty of care in respect of the offer of this product and the Supreme Court ruled that the so-called court of appeal formula of the Amsterdam Court of Appeal for calculating the damage of the individual investors could withstand the test of criticism. A 305a organisation that was not a party in the class action proceedings previously conducted, brings - briefly put - an action to obtain a more comprehensive judicial declaration than had already been awarded and argues that the former court of appeal formula should be amended.

After the Den Haag District Court, with reference to the parliamentary history, had given an extensive 'lecture' on the (formal) admissibility requirements of Article 3:305a(1) and (2) DCC, the District Court arrived at the following conclusions, which we will summarise below, given the size of this chronicle:

- the 305a organisation has sufficient knowledge and skills to conduct the proceedings, in view of its actual activities in the past, in accordance with its object clause contained in its articles (ground 4.10);
- the fact that the 305a organisation is funded entirely by a commercial organisation that handles the administrative side of the legal action and which has engaged the lawyer, and which has made a no cure, no pay agreement with the individual participants to the amount of 20% of a positive result, does not preclude this, because (i) acting partly or wholly for commercial gain does not (yet) involve "*impure*" commercial motives and (ii) the 305a organisation is transparent about this construction, while it cannot be said that its role is illusory, there is a construction to circumvent the law or abuse of rights (grounds 4.11-4.12);
- a 305a organisation must meet the requirements set out in the Claim Code, even if (i) it was formed 12 years ago, (ii) does not qualify as a "claim or ad-hoc foundation" and (iii) consists solely of volunteers, since its purpose is to conduct class actions and to negotiate settlements (ground 4.13);
- even though the 305a organisation's failure to comply with the Claim Code is undermining its credibility, it need not lead to inadmissibility in the circumstances of the case, for example if it is

established – as in the present case – that the 305a organisation does not have a profit motive, is managed by unpaid volunteers who are themselves partly affected by the outcome of the proceedings, who are transparent about their financing arrangements and the involvement of another company that supports them cannot in itself be considered to be inadmissible (ground 4.14);
- the admissibility, however, also depends on whether the action brought serves the objectives of a class action, namely whether more effective and efficient legal protection can be expected than in individual dispute resolution, and i- as in this case - it should be considered whether the 'new' class action, following on from previous class actions, offers such additional legal protection (ground 4.17);
- which does not apply – as in the present case – in the event of accusations made in previous class actions but which have proved unsuccessful or have not (yet) been assessed, in the absence of new facts or evidence, and in addition, it has not become apparent how many of the parties involved still actually support the class action and have a concrete cause of action in doing so with a claim that has not (yet) become time-barred, in which case the representativeness requirement will not have been met, which is not formally laid down in the law but is nevertheless of material importance (ground 4.16);
- that the absence of authority of res judicata (binding force) of decisions in previous class actions for individual members from the membership and the 305a organisation that was not a party to them does not affect this, because Article 3:303 DCC requires that the 305a organisation (and its members) has sufficient cause of action in the legal action (ground 4.18-4.24);
- that, without the need for additional legal protection, the claim is therefore inadmissible because there is no evidence to suggest "*that the legislator, in the event of a total or partial definitive dismissal of a legal action in the context of a class action, also wished to create the possibility of a repetition of moves in a new class action at the initiative of another interest group on the basis of solely new arguments (essentially: calculation examples), without new facts or evidence. Nor would it justify departing from the normal rule of procedure, which is to defend one's own interests."* (grounds 4.25-4.26).

The above leads the Den Haag District Court to concluding that "*a situation does not arise in which, without the consolidation of interests as established by the interest group, efficient and/or effective legal protection against the threat of impairment of these interests could be made considerably more difficult",* as Article 3:305(1) DCC requires, whereby *"insufficient facts were put forward to make plausible that a sufficiently representative group of parties involved will ultimately benefit from the class action if the claim is allowed" (*addition by authors*),* as required by the final sentence of Article 3:305(2) DCC.

In outline, we share the outcome of these proceedings. Granting a 'second chance' to 'new' 305a organisations seeking such a second chance on the basis of the same facts and grounds not only undermines the regulations of Article 3:305a DCC, but also legal certainty in general. A never-ending story must be prevented. This does not impair the position of the individuals represented by the 305a organisation, because if they are of the opinion that the 305a organisation does not adequately represent their interests, they can withdraw from the class action to try their luck individually (Article 3:305a(5) DCC). Aegon's defence that the claims in this case had become time-barred, which according to the District Court is relevant to whether the 305a organisation has a cause of action, is discussed below in chapter 2.6.2.

The third requirement - that the interests should be similar and thus suitable for consolidation - was also addressed in another collective usury case against Aegon, in which it was previously held that the claim in respect of 112 of the 115 investment products was inadmissible because the 305a organisation had failed to comply with its obligation furnish facts to the effect that these products had "*very similar product characteristics to (one of) the three sample products and that they had been created in the same, or at least comparable, manner'.* In its judgment of 28 June 2017, the Den Haag District Court ruled on the admissibility of the 305a organisation's claims with regard to the remaining three 'sample products' - *KoersPlan, VermogensPlan* and *FundPlan* - for which it *had* elaborated its statements concretely. The District Court ruled that the interests with regard to these sample products were

sufficiently similar, even though it had been established that these products - which have in common that they were offered by Aegon - differed from each other and could not be mutually equated. In this context, the Den Haag District Court only assesses whether the interests for each sample product are sufficiently similar. This is the case since each sample product had the same product characteristics, was "*predominantly*" concluded through a broker and was offered with "*more or less*" similar documents. The conclusion is that, for each sample product, '*both the manner in which the specific products are offered and concluded and the contract documentation are sufficiently uniform to allow an assessment of the reproaches without examining the situation of the individual policyholders*' (addition by authors). This is not yet sufficient for the 305a organisation, because the fact remains that the three sample product *were* different from each other. However, this is not, or no longer, an impediment, according to the District Court:

"In this way, the Association in any event meets the requirement of a sufficiently similar interest for each sample product. It is in the interests of efficient and effective litigation that the Association submits these three sample products offered by Aegon to the District Court at the same time, especially since the contract documentation of KoersPlan and VermogensPlan is similar in certain respects and a number of reproaches with regard to the various sample products are either identical or are suitable for a joint hearing."

In view of this, there seems to be an informal consolidation of legal actions by means of a single legal action instituted by a 305a organisation. This is intended to prevent that a 305a organisation that wishes to take legal action against a single defendant because of the same reproach with regard to various (investment) products (services or (undisclosed) communications) from having to do so via separate proceedings, provided that for each product the obligation to furnish facts is fulfilled that the actions brought are aimed at protecting similar interests that are suitable for consolidation. In our view, this is a desirable outcome.

Aegon also argued in this case that the 305a organisation had no (or no longer had) cause of action, the fifth requirement, because a 'total solution' had been offered for the products in question in the form of product improvements (rendering the accusations obsolete), which had been approved by a large majority of the foundations' members (97% and 98.6%). With regard to that point, the District Court considers:

"The District Court states first and foremost that it should be reticent in rejecting a claim due to the lack of a sufficient cause of action within the meaning of Article 3:303 DCC. Generally, a sufficient cause of action may be assumed. Only in exceptional cases should a claimant prove that he has a sufficient cause of action. In the opinion of the District Court, such an exceptional situation with regard to the claimed judicial declaration does not occur in this case. It already follows from Aegon's own position that the risk of the sample product identified by Aegon as a regular investment risk and referred to by the Association as a crash risk is not included in the Foundation Agreements and other product improvements. Furthermore, the broad support for Aegon's solution that many have accepted does not mean that the Association does not, or cannot, have a procedural or substantive cause of action in its claims within the meaning of Article 3:303 DCC. Since, moreover, it has neither been argued nor proven that such a cause of action is lacking, it must be assumed to have a sufficient cause of action. This defence of Aegon therefore also fails."

Aegon's defence was therefore rejected on two grounds: on the one hand, the 305a organisations had based the claims on the 'new' reproach that was not included in Aegon's overall solution; on the other hand, the fact that the overall solution was widely supported and accepted by the members of the 305a organisations is not in itself an obstacle to conducting the class actions.

The third requirement was also up for discussion in the class action of the Dutch Section of the International Commission of Jurists against the Dutch State. The 305a organisation claimed a judicial declaration that the Dutch State was liable for unlawful administrative jurisdiction against a former Afghan officer who had fled to the Netherlands and whose application for asylum had been rejected. The Dutch State argues that the claim due to unlawful case law by its nature is not suitable for a class

action, because in such a case the individual circumstances of the case are decisive. The Den Haag District Court rules otherwise:

"The Dutch State is right to point out that unlawful case law often involves specific facts and circumstances of the case. (...)

Although the assessment in proceedings following a rejected asylum application is pre-eminently individual, the alleged unlawful application of EU law by the Division concerns a part of that assessment that is applied in all cases of former KhAD/WAD (non-commissioned) officers. As a result, the claims of [claimant sub 1] et al lend themselves to the consolidation of interests in a class action. Neither the text nor the apparent purport of Article 3:305a DCC prevents a class action from serving a consolidated cause of action of parties in respect of whom, based on the same considerations in respect of facts and circumstances that are the same for them, a court judgment was given."

It therefore follows from this judgment that 305a organisations can represent interests in bundled cases in which the same (consistent) standard has (wrongly) been applied in the government judicial system, in which the relevant (objective) facts and circumstances are the same (such as the nationality and former position of the refugee). The fact that only one specific case is submitted in such a class action is not a hindrance in that context, if it is expected that there are more similar cases in which the (consistent) standard has been applied.

The third requirement is also under discussion in the above-mentioned class action by the 305a organisation Milieudefensie and Adem against the Dutch State with the aim of improving air quality:

It is certain that these limit values were not met by the deadlines (applicable after the derogation). This establishes that the Dutch State has violated its first obligation. However, that in itself is not sufficient for claim III to be allowed. The District Court explains this as follows.

The cause of action in the judicial declaration sought under III concerning the violation of the first obligation can only lie in its meaning for any liability of the Dutch State for damage arising from an unlawful act. After all, this is a failure that has already taken place. In this situation, in which the judicial declaration sought is only relevant to the damage, the judicial declaration may only be allowed if it relates to persons who are immediately affected and in respect of whom there is sufficient reason to believe that they have suffered damage as a result of the unlawful act described in the judicial declaration. It has neither been argued nor proven that this is the case with respect to claimants 3 to 23 as far as the violation of the first obligation by the Dutch State is concerned. They have pointed out extensively, but only in general terms, the (very) serious consequences that air pollution with NO2 and PM10 may have for public health. However, they have not stated anything concrete about the consequences that they will (possibly) suffer individually as a result of violating the first obligation.

The same applies to the persons whose consolidated interests are represented by Milieudefensie and Adem. In addition, the question of whether the Dutch State (...) acted unlawfully towards persons whose consolidated interests they represent in these proceedings can only be answered on the basis of the concrete circumstances of the individual case, which can greatly vary per person. However, no concrete circumstances were put forward. Important factors are, for example, the specific locations where the violations took place, the concrete harmful effects of non-compliance with the limit values for PM10 and NO2 on 11 June 2011 and 1 January 2015 and the fulfilment of the requirement of a causal link between the Dutch State's violation of this obligation and the damage. This inextricable link with the special circumstances of the individual cases means that there is a cause of action at this point that cannot be sufficiently generalised in order to be considered as one of the similar interests covered by Article 3:305a DCC. See Supreme Court 13 October 2006, ECLI:NL:HR:2006:AW2080 (Vie d'Or). These class action proceedings on the basis of Article 3:305a DCC therefore do not lend themselves for the (further) determination as to whether the violation of the first obligation is unlawful towards Milieudefensie and Adem."

It follows from these considerations that the 305a organisation rejected the judicial declaration sought on two grounds (even though the District Court that the Dutch State had acted in violation of the European Directive by failing to comply with limit values for air quality in the Netherlands in due time). First of all, it is ruled that the damage suffered by the members of the 305a organisation had was not made sufficiently plausible, as a result of which there was no cause of action in the judicial declaration sought. That ruling is In itself correct. After all, insofar as the members does not suffer any damage (or at least that this has not been made sufficiently plausible), the judicial declaration sought will not offer any added value to the members. Only if the 305a organisation (also) represents its own (patrimonial) cause of action in the class action on the basis of its articles could this be different, for example in the Urgenda climate case, but according to the District court such an (idealistic) interest on the basis of the articles did not occur in this case. It follows from the second ground for rejection, i.e. that the claim is of such individual nature - given the concrete circumstances of the case for each individual - that a class action is unsuitable for consolidating the interests, that even if the damage suffered by the members had been made sufficiently plausible, the 305a action still could not succeed. This is because the legal position of individuals is not sufficiently equal.
In our opinion, the District Court took a detour here, leading to a confusing outcome; it should have been concluded that the 305a organisation had no cause of action because the interests were not suitable for consolidation in view of the individual nature of the claim, in respect of which it could subsequently be left undecided whether the damage had been made sufficiently plausible by the 305a organisation, which is the basis of the District Court's consideration. After all, the District Court will not discuss that legal issue.

Finally, there is the fourth requirement: prior consultations, on pain of inadmissibility. In the above-mentioned judgment on the class action instituted by Dier & Recht against two dog breeders, the Rotterdam District Court ruled that this requirement should not be interpreted too strictly:

It should be assumed that Article 3:305a(2)DCC does not fully require prior (constructive) consultation. (...) The arguments between the parties have sufficiently shown that, in view of the positions adopted on both sides, constructive and substantive prior consultations could not have prevented proceedings from being instituted, which means that such consultations would have been pointless in the given circumstances. The parties also recognized this at their appearance at the hearing."

The fact that the requirement for prior consultation referred to in Article 3:305a(2) DCC is or has become more of a formality is also evident from the judgment of the Gelderland District Court on the class action of trade unions against Monuta: *"It must be admitted to Monuta that consultations between the parties were not found to be constructive to any extent. In the opinion of the Subdistrict Court, the aforementioned provision does not, however, fully require prior consultation."* A judgment of the Den Haag District Court regarding the foundation Stichting We Gaan Ze Halen also confirms that the requirement is handled flexibly if it is expected that prior consultation would not have led to any results:

"The Dutch State is in itself right to argue that the Foundation was established very recently. Actions that preceded the establishment of the Foundation cannot, in principle, fulfil the Foundation's consultation obligation. It can be deduced from these actions, however, that consultations between the Foundation and the Dutch State would not have resulted in the claim being granted. After all, the Dutch State has always taken the view that it fulfils the obligations arising from the Decrees. In these proceedings, too, the Dutch State recognized that consultation with the Foundation would not have led to any result. In view of this, the preliminary relief court is of the opinion that consultation should no longer be required of the Foundation, so that the Foundation's claims can be allowed."

Consequently, last year's case law again confirms that the requirement for prior consultation to guarantee a "serious invitation to consult" is not (or no longer) judged too strictly. The only purpose of the requirement still seems to be to prevent interest groups from taking any action that might result in an attack on another party. Sufficient for the content of the prior consultations was that the defendant was informed by the 305a organisation of its position. The fact that the exact positions are only

tightened up later in the summons and during the 305a proceedings does not impede this, if the reproach remains the same in essence. It would be wise for the 305a organisation to send its (translated) correspondence by registered post (in the defendant's language), because it bears the burden of proof in the event of a dispute about receipt (Article 3:37 DCC) on pain of inadmissibility.

2.3. Convergence with a class action

2.3.1. Subproceedings

In last year's chronicle, the case of FNV against Smit Draad was already noted, in which a claim was submitted under Article 3:305a DCC to establish employer's liability. Consolidating the interests of the employees with a view to (protective) preliminary relief pursuant to Article 233 DCC was permitted, but in the claim for a declaration that Smit Draad, as an employer, is liable for the related damage on account of a breach of its duty of care, it was declared that the 305a organisation had no cause of action (in view of the individual nature of the reproach). Appeal proceedings are still pending against the latter judgment before the Arnhem-Leeuwarden Court of Appeal, which we expect to be successful.

Another relevant decision in this matter was rendered this year. In separate subproceedings after the start of the class action, an employee of Smit Draad claimed that she had suffered health problems as a result of exposure to various chemical substances and asked the court to determine that Smit Draad was liable for her damage by virtue of Article 7:658 DCC because it had violated its duty of care. The Subdistrict Court Judge rejects the claim and considers:

"Although the proceedings before the Arnhem-Leeuwarden Court of Appeal are - formally - between FNV and Smit Draad and the current proceedings are between [employee] and Smit Draad, the same legal issue is addressed in the opinion of the Subdistrict Court Judge. Namely the question if Smit Draad, as employer is liable in respect of its (former) employee(s) due to an unlawful exposure to hazardous substances.

In the class action, FNV, as stated by the (lawyer) representative ad litem of [employee], also lawyer of FNV, acts on behalf of the employee whose interests it represents. These proceedings therefore concern a so-called class action. [employee] is part, and this has been established, of the group of (former) employees whose interests FNV represents. Its situation can even be taken as an example in the class action, as can be deduced from the judgment in the first instance of 29 July 2016 and has insufficiently been contested by it (in a substantiated manner).

Although a decision in a class action only has force of res judicata between the parties involved in these proceedings, pursuant to Supreme Court case law it would make sense to take an opinion regarding unlawfulness acquired in a class action as a starting point in possible separate follow-up proceedings. This in order to prevent conflicting decisions with regard to the issue of unlawfulness (Supreme Court 27 November 2009, World Online ECLI:NL:HR:2009:BH2162).

FNV also has the intention to use the judgment acquired in the class action as a starting point for possible separate subsequent proceedings. As demonstrated by the explanation of the (lawyer) representative ad litem of [employee], FNV instituted the class action to immediately proceed to negotiate about the damage in the individual cases with a - collective - liability claim, using the aforementioned starting point of the Supreme Court in this respect.

The above does involve, however, that although formally there are proceedings between various parties, substantively the same legal question is submitted in two different instances. In this respect there is a risk of conflicting decisions regarding the issue of liability, which should be prevented. Taking this into account, the request for a decision in the subproceedings is contrary to the requirements of due process of law in the opinion of the Subdistrict Court Judge."

How desirable this outcome may be, it is not correct from a legal perspective. In the pending class proceedings of FNV, the first substantive question to be addressed is after all if a 305a organization can

at all claim the judicial declaration sought with a view to the individual nature of the underlying claim (which may differ from employee to employee). If this question is answered in the negative, as it was in the first instance, the class action will be declared inadmissible and the rejection of the request of the employee in the subproceedings therefore cannot be based thereon. If this question is answered in the affirmative, still after the class action it should be assessed for each individual employee if there was any exposure to hazardous substances and that the employee in question suffered damage as a consequence. The subproceedings already anticipate this, in which the employee demonstrated that she had worked with the hazardous substances and had suffered damages as a result (apart from its extent). We would not know why an employee would not be allowed to do this. In principle every employee is entitled to withdraw from the class action (Article 3:305a (5) DCC). What is more, this decision affects the principle of party autonomy in civil procedure law (Article 17 of the Dutch Constitution and Article 6 ECHR). In our opinion, therefore, there is no conflict with due process of law. There is at most a lack of cause of action on the part of the employee (Article 3:303 DCC). In our opinion, the court could only have rejected the claim in this case - as the court superfluously considered - because award thereof could insufficiently contribute to the realization of a settlement agreement (with a view to the absence of any out-of-court negotiations until the proceedings). If necessary, he could have suspended the case pending class action, provided that there was no unreasonable delay (Article 20(1) DCCP).

2.3.2. Representation on the basis of a mandate

In practice, a class action pursuant to Article 3:305a DCC may be combined with action on behalf of a number of specific parties on the basis of a mandate agreement (Article 7:414 DCC). In addition, these parties have given the mandate to the 305a organisation to collect a claim in its own name on behalf of said claimants and to act as such at law. The 305a organisation that acts at law is in that case, being the mandatory, the procedural party and the claimant(s) as mandator is the substantive party. In the practice, this construction is also referred to as "an assignment for the purpose of collection", even though there is no actual assignment within the meaning of Article 3:94 DCC (see further in chapter 2.3.3. below).

Insofar as it should be ruled that the mandate is not valid, the interests of the same parties are still - alternatively - represented in the proceedings by virtue of Article 3:305a DCC. In addition, an advantage of this combination of mandate and class action is that, even on behalf of parties who have not given a mandate (the members of the 305a organisation) a judgment can be obtained in advance on the acts or omissions of the defendant in the form of a judicial declaration. The reason to also act on behalf of a number of mandators is, in particular, that those mandators may already be the subject of a claim for damages, which - in addition to the 305a action - can also be assessed in the class action. That judgment regarding the damages with regard to the mandators will then be able to play an important role in the negotiations on behalf of the members who are not represented through a mandate in the proceedings, but by virtue of Article 3:305a DCC and in respect of which a judicial declaration has been obtained that the defendant's liability exists.

The mandate agreement has no prescribed form. On the basis of Article 6:217 DCC, a mandate agreement is realized through an offer and the acceptance thereof in the form of declarations of intent.[14] On the basis of Article 3:37 (1) DCC, these declarations of intent can occur in any form and can be implied in one or several actions.[15] Only if the defence of the other party gives reason thereto, the mandatory should state and if necessary prove that by virtue of a mandate it is authorized to act in its own name for the benefit of the party entitled.[16] Usually, prior to the proceedings a written mandate agreement is concluded with every mandator. The signing of this agreement will constitute proof of the mandate (Article 156 DCCP). Last year's case law shows that it must be clear from the text of the mandate that it was issued for the purposes of the proceedings instituted and relates to the claim (for damages) as it was instituted, and that the various (supporting) documents must form a "*well-organised whole*" as proof thereof. The fact that the power of attorney is not dated, that the power of attorney mentions an affiliated company other than the one involved in legal proceedings and that the power of

[14] Asser/Hartkamp & Sieburgh 6-III 2014/165.
[15] Asser/Hartkamp & Sieburgh 6-III 2014/165.
[16] Supreme Court 26 November 2004, *NJ* 2005/41, ground 3.3 and Supreme Court 26 February 2010, ECLI:NL:HR:2010:BK4995.

attorney is signed by the lawyer of the mandators (without enclosing the underlying power of attorney) is not sufficient in itself to dispute the existence and/or validity of this power of attorney, according to the Court of Appeal in Den Bosch. On the other hand, the Gelderland District Court is of the opinion that a missing signature of a party of which the authority has not been proven *is* an impediment.

In the context of the convergence between a class action and a mandate, reference can be made to a decision of the Preliminary Relief Judge of the Den Haag District Court in preliminary relief proceedings of Loterijverlies against Staatsloterij. The private company Loterijverlies previously collaborated with a 305a foundation, in which the 305a foundation successfully claimed a judicial declaration - briefly put - that Staatsloterij made misleading announcements about its games of chance. Subsequently, an amicable settlement was not reached. A dispute arose behind the scenes at Loterijverlies, in which the founder and the director of the 305a foundation was temporarily suspended. In that context the Amsterdam Court of Appeal ruled that the founder and director of the 305a foundation without its own capital failed in its duty under the articles to supervise Loterijverlies as financier, whereby actions were performed under joint name and in which the 305a foundation completely depended on said financier because it provided the financing for the proceedings (originating from the individual participants), paid the lawyer and managed the finances. The suspended director of the 305a foundation subsequently commenced the proceedings on the merits against Staatsloterij as director of Loterijverlies, in which damages are claimed on behalf of the individual participants from the members of the 305a foundation, and levies a prejudgment attachment against Staatsloterij in respect of said claims.

In the preliminary relief proceedings for the lifting of the attachment, the discussion is whether Loterijverlies is authorized to represent the individual participants, since that previously occurred through the 305a foundation. Loterijverlies adopts the position that it has been the intention from the start that it would have the individual claims of the participants apply and that it obtained a private mandate from the individual participants through its general terms and conditions. The 305a foundation that is not involved in the proceedings but is spokesperson via Staatsloterij states that it is exclusively authorized to institute the claims, in which context it had previously obtained a private mandate for collection. The Preliminary Relief Judge held:

"that a private debt collection order only ends with cancellation, so that only after such cancellation the participants who gave the mandate to the Foundation can be represented by a party other than the Foundation. Within the scope of these preliminary relief proceedings, it has not been evidenced that participants who gave the Foundation a private mandate for collection have cancelled this mandate.

Since it was not established that the private mandate to the 305a organization had been terminated, the Preliminary Relief Judge ruled that the authority of Loterijverlies to act in the proceedings on the merits - for which the attachment was levied - could not be answered within the scope of the preliminary relief proceedings. This consideration should be taken into account because this confirms that participants of a class action which also provide a mandate to the 305a organization can no longer automatically act independently or through another representative at law to have their loss determined after completion of the class action, before they have terminated the previously given mandate (in which framework a remuneration and/or damages may be due). This prevents that a 305a organization, which acts for instance on the basis of a no cure no pay construction and makes serious investments in the class action, ultimately cannot not benefit from it (in the form of a profit-dependent remuneration). The disadvantage of a mandate in respect of the transfer of the claim through assignment to the 305a litigation party, namely that upon assignment an individual participant can no longer make any claims for compensation (albeit that an assignment should involve notification or registration pursuant to Article 3:94 DCC) is already overcome by this, even though in practice that will already be solved by means of excluding that authorization by contract (Article 7:423 DCC). Until the termination of the private mandate the participants, but also third parties (such as defendants in proceedings), bound to this exclusion.

In addition, having a legally valid mandate construction in a legal action does not mean that there is no longer a cause of action in the assessment of an - independent - 305a action in said proceedings.

Indeed, it is possible that the mandators are represented in part, and damages are claimed, and the 305a members are represented in part as well. This is demonstrated by a decision from the Rotterdam District Court regarding the class action of former bondholders of company car manufacturer DAF against EY as well as from a decision of the Court of Appeal in Den Bosch regarding a class action of De Nederlandse Zuivelorganisatie. In that case both claims should be assessed separately, as long as this occurs independently and in parallel (not principally and alternatively). Nevertheless, in another decision the Rotterdam District Court arrived at a different conclusion: *"If it should turn out in respect of the mandators that they have acted unlawfully, it follows, of course, that they may be held to have acted unlawfully. VbV does not need Article 3:305a DCC for this, it has sufficient cause of action by virtue of the powers of attorney."* With this consideration of the District Court, that the 305a claim does not need to be assessed anymore because the claim on behalf of (in this case) the authorized persons is already successful, the court fails to regard the independent character of the 305a claim for the benefit of the interested parties that have not yet given a mandate (and power of attorney) and in respect of which actions can already be taken in the proceedings.

In the proceedings on the merits of Loterijverlies against Staatsloterij, the Den Haag District Court takes a completely different approach than the Preliminary Relief Judge. Briefly put, according to the District Court it does not need to be decided if the private company with limited liability Loterijverlies did in fact obtain the private mandate in a legally valid manner because said private mandate contains an authority for Loterijverlies to initiate proceedings on behalf of the victim lottery participants, which are abused in this case (Articles 3:13 and 3:15 DCC). It not only bases its judgment on the fact that the lottery participants could presume that their interests were exclusively promoted by the 305a organization, but also (among other things) on the consequential effect of the regulation laid down in Article 3:305a DCC in respect of the private company with limited liability Loterijverlies which institutes the claim for damages on behalf of the collective and does not comply with the arrangement contained therein:

"Another factor that contributes to the conclusion that the interests of the participants in Lotterijverlies B.V. are insufficiently safeguarded is that Loterijverlies B.V. does not operate in accordance with the principles of the Claim Code that came into effect on 1 July 2011. Although strictly speaking this code applies only to associations and foundations, the District Court has sufficient reason, on the grounds stated in 5.3 and based on the fact that Loterijverlies B.V. now presents itself as an independent claims organisation and for the first time involved Staatsloterij in a class action, which essentially amounts to a class action for damages, to also attach significance to the code with regard to the private company Loterijverlies B.V. This is because the fact that Loterijverlies B.V. claims to litigate on the basis of private mandates and not by virtue of Article 3:305a DCC does not affect the scope of the present proceedings. The Claim Code sets out a number of elementary principles relating to good governance and transparency and sets requirements for, among other things, the duties and working methods of the board of claims organisations. For example, the Claim Code requires the representation of collective, non-profit interests, the establishment of an independent supervisory board for financial supervision and the avoiding of conflicts of interest. The Claim Code also provides rules on the remuneration of board members. Although the Claim Code does not have a formal status, the literature and case law demonstrate that it is in line with prevailing social views on, among other things, claims organisations, their working methods and the supervision in respect of their directors. In this respect it must be remarked that, as set out in 5.8 et seq., the legislator, further to these societal views, sought to codify various principles from the Claim Code with the legislative proposal for the amendment of Article 3:305a DCC and has formulated general requirements of admissibility, which relate to the setup of the interest group and apply both to the regular class action and to the class action for damages, including the admissibility requirement that the directors involved in the incorporation of the legal entity, and their legal successors, have no direct or indirect profit motive, that is realized through the legal entity."

We do not believe that this consequential effect of Article 3:305a DCC can also be applied outside of this specific case in cases where a class of claimants is not represented via Article 3:305a DCC but rather on the basis of a mandate or assignment (even though the "*purport*" of these proceedings is similar to a certain degree). On the one hand, a - limited - consequential effect could be desirable in

order to guarantee the quality and rights of injured parties who are represented at law by commercial organisations, while on the other hand this is contrary to the parties' freedom of contract. We believe that the latter should prevail as long as the legislator does not intervene, whereby this form of consequential effect should be reserved for specific cases where the conduct of the representing party - in this case the director behind Loterijverlies - cannot bear the light of day and proceedings are commenced on improper grounds - to avoid the suspension of said director in the 305a foundation.

2.3.3. Representation by virtue of an assignment

An assignment can also be combined with a class action pursuant to Article 3:305a DCC. Based on an assignment, the assignee exercises its own right of claim and is both the procedural and the substantive party in the proceedings. This requires the parties to envisage an actual transfer (Article 3:84(3) DCC). From a property-law perspective, the claim from that moment on will be part of the acquirer's capital; the (305a) organisation. The transfer must be effected in a deed drawn up for that purpose and the transfer should be announced to the party against whom the right can be exercised (Article 3:94(1) DCC). This is a public assignment. In addition, the transfer could occur by means of an authentic or registered private deed drawn up for that purpose (Article 3:94(3) DCC). This is an undisclosed assignment. In the proceedings, the defendant can desire that a certified extract of the deed of assignment and the title are made available by the original creditor (Article 3:94(4) DCC).

It is no longer possible to institute a class a19ction on behalf of parties who have already transferred their claims by assignment to the (305a) party in the proceedings, because they no longer possess the claim for damages. In that case it is only possible to institute a class action on behalf of these parties as an alternative insofar as it is not principally established that the assignment was not effected in a legally valid manner. This does not alter the fact that, as is the case with a mandate, a convergence is conceivable if partially on the basis of assignment action is taken indirectly on behalf of a number of parties mentioned by name for the benefit of which it is already desirable to claim damages and partially by virtue of Article 3:305a DCC to acquire a judicial declaration for members of the 305a organisation that have not (yet) assigned their claim to the (305a)organisation. In that context, compared to a mandate, assignment has the added advantage that new 'assigned' claims can be added on the part of a 305a party after the proceedings have been instituted - through an increase of claim - while that is not allowed in the event of an expansion of the membership based on a mandate for the 'new' members added after the summons has been issued.

An interesting decision regarding assignment in which there is no convergence with a class action (but it could have been conceivable) concerns the decision of the Amsterdam District Court dated 13 September 2017 regarding an aviation cartel. On the basis of assignment, the foundation had acquired the claims from a large number of injured parties.[17] This decision focuses on, among other things, the obligation to furnish facts and the burden of proof with regard to the legal validity of the assignment to the foundation. In the context of this chronicle, we will not further address the discussion regarding the prohibition on fiduciary transfers and whether the claims were sufficiently determinable.

After challenging the admissibility and authority of the foundation to act on behalf of the injured parties, the foundation entered into the proceedings the signed assignment documentation. The District Court rules as follows:

"The District Court starts from the starting point that if the documentation entered into the proceedings for each shipper contains: (i) the assignment agreement (title) and (ii) the deed of the assignment, and (iii) it is clear that these were signed/provided by the assignor, this does sufficiently establish that Equilib is the entitled party to the claims, unless there are concrete indications to be advanced by the aviation companies that no legally valid assignment occurred.

In this context it is relevant that the debitor cessus (and the District Court) can establish on the basis of the documentation that the assignor and assignee actually envisaged to transfer the claim(s). Furthermore it is relevant that both the assignment agreement as the deed of assignment were realized

[17] Amsterdam District Court 13 September 2017, ECLI:NL:RBAMS:2017:6607.

before the announcement of the assignment, since the transfer of the claim is not completed until the announcement (Article 3:94(1) DCC). Nevertheless it is not correct - different from what the airline companies have argued - that there can be no valid assignment if the deed of assignment is first signed and only afterwards the title is recorded in a document (assignment agreement).

Although providing the assignment documentation is not a condition for the validity of the assignment (cf. Article 3:94(4) DCC), this does not mean that Equilib is not obliged to demonstrate that the claims that it institutes in these proceedings were actually transferred to it, in other words, that it is the party entitled to said claims. This applies all the more in cases like the present one, where the statement was made by the assignee rather than the assignor. In that case due care is required as the aviation companies accurately argue. Nevertheless, it is logical for the aviation companies to concretely dispute that the assignments occurred in a legally valid manner. They will have to present concrete indications that the assignor is not duly represented, did not want the assignment, or that the assignment did not have a legal consequence for any other reason.

In other words: after entering the assignment documentation into the proceedings it is up to the defendant to advance "*concrete indications*" in the context of its substantiated obligation to furnish facts that "*the assignor is not duly represented, did not want the assignment or that the assignment did not have a legal consequence for any other reason*".[18] Despite a large number of defences against the legal validity of the assignment, the cartel members in this case failed to meet said obligation to furnish further facts.[19] In absence of concrete indications, the District Court therefore concluded that "*it has neither been stated nor proven that the assignment documentation was drawn up falsely or that the signatures placed thereon are falsified*."[20]

2.3.4 Joinder of class actions

Finally, reference can be made to two decisions regarding the joinder of class actions pursuant to Article 222 DCCP. At Rotterdam District Court it concerned two legal actions relating to the same insurance company and the same product. The District Court held:

"Both cases are class actions within the meaning of Articles 3:305a DCC et seq. Although the claims and the legal points in dispute are not identical, the District Court is of the opinion that the points in dispute demonstrate such cohesion that consistency is required. This means that there is connexity, so that simultaneous handling is desirable in principle.

A consideration of the interests of parties mutually, however, does at this time bar the joinder of cases. NN announced in the present proceedings that it would advance motion proceedings before its statement of defence to the extent that claimant sub 1, the Foundation Wakkerpolis NNClaim is declared inadmissible. If that defence is successful, the present proceedings, different from the proceedings of the Consumentenbond (Dutch Consumer Association), will no longer have the character of proceedings within the meaning of Article 3:305a DCC. In that case, the scope of the legal and the factual debate in the present proceedings will deviate strongly from the one in the proceedings of the Consumentenbond.

Taking this into account, given that the decision in respect of the inadmissibility defence cannot be anticipated and since in any event the debate in this respect can still be conducted and will take some time, the District Court sees reason to reject the present claim for joinder.

The above does not affect the fact that after the inadmissibility defence to be raised by NN, the District Court can still decide for the cause list joinder of the present proceedings and those of the Consumentenbond against NN. In that case a simultaneous hearing could be possible."

It is regrettable that the decision turns out like this. In cases with connexity, it seems simpler for

[18] Amsterdam District Court 13 September 2017, ECLI:NL:RBAMS:2017:6607, grounds 4.14-4.15.
[19] For an elaborate assessment of said defences, see Amsterdam District Court 13 September 2017 ECLI:NL:RBAMS:2017:6607, grounds 4.28 et seq.
[20] Amsterdam District Court 13 September 2017, ECLI:NL:RBAMS:2017:6607, ground 4.17.

defendant parties to avoid a joinder by simply advancing motion proceedings for the inadmissibility in the second case. The alternative that the District Court mentions, to join the cases *after* having heard the motion proceedings, does not seem efficient. The case that was already pending, will indeed already be at a more advanced stage than the time that joinder was requested, as a consequence of which 'double' proceedings are imminent, because certain steps had to be repeated or even redone altogether. This benefits no one, nor the defendant which will then have to advance a defence twice, in the worst case both orally and in writing (instead of doing this at once in a focused manner). In our view it would have been more efficient if the District Court would have allowed joinder and - insofar as there would be a case of inadmissibility - would disconnect the cases still. Although this involves a delay for first case that was pending, but this delay does in our view not weigh up against the chance that the case will later still be subjected to joinder (with the possibility of step being taken twice). In addition, one joined case guarantees that all arguments and grounds have been advanced and can be assessed (considered in mutual relation), instead of being spread over two separate proceedings (with different outcomes as a possible result).

The above does not change the fact that we recognise that cases nevertheless exist in which the request for joinder has no or little added value in the field of (procedural)economy and, since a substantial delay that would follow from it can no longer be justified. As formulated by, for instance the Amsterdam Court of Appeal regarding a joinder of class actions against Aegon regarding the Sprintplan agreements:

"Both cases are at such a different stage of the proceedings - the case between Mr Jurgens and 4i Trust Integrity Services B.V. is already ready for ruling, while in the present case the statement of defence should still be submitted - that one cannot say that the judicial efficiency is served by joinder and a (further) stay of the decision in the proceedings of Mr Jurgens and 4i Trust Integrity Services B.V. Under these circumstances the Court of Appeal does not consider the joinder of cases appropriate."

In addition it should be remarked that Article 3:305a (6) DCC also provides that officially, joinder of class actions is no longer possible if the date for decision is already scheduled for one of the cases.

2.4. Disclosure of documents (Article 843a DCCP)

On 19 July 2017 the Rotterdam District Court rendered a decision in the collective usury case against Nationale Nederlanden, which focused on the question whether Nationale Nederlanden had met its duty to disclose and its duty to warn in respect of investment insurance policies sold from 1992 until the end of 2008. In a general sense - barring specific individual cases - that question is answered in the affirmative by the District Court, since Nationale Nederlanden observed the rules applicable at the time and - when the rules were tightened - adjusted its work method accordingly. This rightly prevents hindsight bias. Also, the reproach made to Nationale Nederlanden regarding the charging of various types of costs for the investment insurance policies is unsuccessful, because the District Court starts from the assumption that there is a sufficient contractual basis for that - barring specific individual cases. Whether the amount of those costs is also reasonable is not assessed, given that this should be established on an individual basis, and that is not compatible with a class action.

However, the District Court's judgment about the 843a claim brought by the 305a organisation to be granted disclosure of so-called quotation software is interesting. That quotation software contained the costs and deductions, and thus the amount and calculation method of the costs of an investment product. The 305a organisation stated that disclosing that software allowed it to refute Nationale Nederlanden's defences against the claim and, as the 305a organisation apparently emphasised later during the hearing, the quotation software would allow it to further calculate the damage of the (individual) participants from its members in the individual cases expected to follow after the class action. The District Court dismissed the 843a claim and held:

"It follows from the statements of the Association that its cause of action in disclosing the quotation software is based on calculating the damage its individual members (possibly) suffered. The

Association also confirmed this at the hearing of 11 April 2017. It explained that it wished to use the quotation software to calculate the damage in the individual cases expected to follow after this class action. Consequently, in the present class action the Association has no legitimate interest in the furnishing of the requested documents.

In the event that it is held that NN has a liability for compensation, it could be assessed insofar as necessary in the individual cases whether the quotation software and the description thereof must be entered into the proceedings. The Association therefore suffers no unreasonable procedural disadvantage and NN has no unreasonable benefit. A proper administration of justice is therefore safeguarded without NN presently being ordered to provide the quotation software and the description thereof."

We consider this finding to be incorrect and diametrically opposed to the legal framework of Article 843a DCCP, as established in standard case law. On the one hand the District Court holds that the 305a organisation has no legitimate interest in the requested documents (Article 843a(1) DCCP), while on the other hand it holds that a proper administration of justice is safeguarded without the inspection (Article 843a(2) DCCP). To start with the first approach: the 305a organisation clearly did have a legitimate interest in the inspection. Not only because it had (also) indicated it could refute important defences of Nationale Nederlanden regarding its negligent acts and failures to act on the basis of the documents, but also to (further) substantiate the disputed statements that the conditio sine qua non relationship is established with a *"reasonable degree of certainty"* and that the damage for the class of victims *"is plausible"*. Already in the 305a proceedings, wherein a judicial declaration is sought - as is the case here - of unlawful conduct, the 305a organisation will have to substantiate its statements in that regard - insofar as disputed by the other party and of importance for resolving the dispute - for the claim to be allowed, apart from the incidental circumstance - favourable for the 305a organisation - that it also allows the exact damages of its individual members in the subsequent proceedings. The District Court appears to overlook this fact in the present case. Only if the claim of the 305a organisation is insufficiently plausible (or: certain to fail) will there be no right to inspection. The same is true if the claim cannot be allowed because it is too broadly formulated. None of these exceptions applied in the present case.

In an earlier decision on the 305a action against Fortis in connection to Van den Berg's Ponzi scheme, the Rotterdam District Court seemed to acknowledge that evidentiary interest can arise in regard to inspection of documents in 305a proceedings for the substantiation of all elements of an unlawful act. In that context it should be noted that the case about Nationale Nederland differs from the Den Haag District Court's earlier decision regarding the class action usury case against Aegon, in which a request based on Article 843a DCCP was also dismissed. In the Aegon case, in which inspection of quotation software was claimed, a lack of legitimate interest was based on the fact that Aegon had put forward an insufficient defence against the assertions of the 305a organisation, because of which no evidentiary interest arose with respect to the inspection claimed - except the *mere* calculation of the damage of the individual members for the purposes of subsequent proceedings.

As far as the second approach is concerned, which is a guarantee of the proper administration of justice even without inspection, it should be noted that that ground should be given superfluously. The lack of a legitimate interest in fact entails that the claim based on Article 843a DCCP also fails. Apart from that consideration, that approach is also unconvincing. In our view, a proper administration of justice would precisely entail that the 305a organisation can make a claim for inspection, so that the individual members are not required to institute costly 843a claims themselves first before they are able to exercise their rights, which neither serves their interests nor those of Nationale Nederland above all else. A proper administration of justice points then to the opposite. That also serves the purpose of 305a proceedings: lowering the threshold for access to court and effective and efficient legal protection, which the court seems to have lost sight of in this case.

2.5. Proportional liability and the doctrine of loss of opportunity

It is not (yet) possible to claim compensation in class action based on Article 3:305a(3) DCC. After successful class action, individual members are entitled to institute proceedings independently in order to have the damage assessed. Nevertheless, the Den Haag Court of Appeal keeps anticipating those individual damage assessments in the Srebrenica case. In this case, a 305a organisation represented approximately 6,000 surviving relatives of the victims of the fall of Srebrenica. It has been decided that the Dutch State acted unlawfully because in 1995 Dutchbat continued to cooperate in the evacuation of refugees out of the enclave and failed to give them the choice of remaining in the compound. The (estimated) compensation has been rejected, since the 305a organisation is not authorised to institute that claim, however in the judicial declaration that has been allowed, it has in fact been established that the male refugees were deprived of a 30% chance of not being made vulnerable to inhumane treatment and executions at the hands of the Bosnian Serbs. The Court of Appeal considers the following in this regard:

"As previously indicated (...) the District Court decided that it has been established to a sufficient degree of certainty that the men would have survived if they had been kept back in the compound (...). The court of appeal does not agree. What would have happened is too uncertain on the basis of all the foregoing to be able to conclude 100% liability for damage. Nor can the court of appeal establish that the chance that the men would have survived was so small that it ought to be deemed unrealistic. The court of appeal considers thereby in particular that (...) the Bosnian Serbs had left the UN soldiers in the compound unaffected up to that point. All arguments considered, the court of appeal determines the chance that the men would have escaped inhumane treatment and execution at the hands of the Bosnian Serbs if they could have remained in the UN compound at 30%. By failing to offer the men the choice of remaining in the compound on 13 July 1995 - under reference to the risks that they would run by leaving the compound-, the Dutch State (Dutchbat) deprived them of that chance.

The foregoing means that the surviving relatives of the men who remained in the compound on 13 July 1995 are entitled to claim compensation for their damage in proportion to the chance that those men would have made it to a safe area alive if Dutchbat had not acted unlawfully, that is 30% of the damage suffered."

The Court of Appeal applies the doctrine of loss of opportunity in this instance, that should be considered proper to the so called extent-phase of the causal relationship and pertains to the damage (Article 6:98 DCC), for which there is no room in a 305a action (yet). Only the doctrine of proportional liability, that should be considered proper to the establishment phase of the causal relationship, lends itself for the application in a 305a action. Proportional liability does not apply in this instance, however, since the conditio sine non qua relationship between the violation of standards (the failure to hold the men back in the compound) and the damage (death) has been established (as the District Court rightly determined in the first instance). Nor was there any other circumstance that arose at the risk of the victims that could also possibly have caused the damage in this case. The fact that proportional liability must be applied cautiously is another factor. In this case, there was only uncertainty as to whether the unlawful deed itself had caused damage, since it was impossible to establish whether and to what extent the chance of 'success' (in this case, survival) would actually have materialised in the hypothetical situation where the unlawful act had not occurred. This pertains to the doctrine of loss of opportunity, which does not have to be applied cautiously, and which has to do with establishing the substance and extent of damage. As mentioned previously, that falls outside of the scope of a 305a action, which means the Court of Appeal should not have anticipated it and should have limited itself to the questions of whether (i) the conditio sine qua non relationship had been established in this case *"to a reasonable degree of probability"* (and if not, dismissal should have followed) and (ii) it *"is sufficiently plausible" that* damage was suffered by the class of victims as a group (which does not necessarily require that the damage has to be 100% attributable to the liable party within the meaning of Article 6:98 DCC).

2.6. Prescription

2.6.1 Interruptive effect of a class action and settlement according to the Class Action (Financial Settlement) Act ("CAFS Act")

On 19 May 2017, the Supreme Court once again delivered an interesting decision on the class action against Dexia concerning securities lease cases. The decision pertained to the question as to whether proceedings seeking a declaration that an agreement according to the Dutch Class Action (Financial Settlement) Act (*Wet collectieve afwikkeling massaschade*; hereinafter CAFS Act) is binding, following a withdrawn class action, have an interruptive effect within the meaning of Article 3:316(2) DCC in respect of spouses who wish to institute a claim or wish to take the step to annul securities lease agreements extrajudicially. That a class action has an interruptive effect within the meaning of Article 3:316(1) DCC, also with regard to the authority to annul extrajudicially, was already known. If a class action does not lead to allowance of the claim, a new claim has to be instituted in order to maintain the interruptive effect within six months after the proceedings have ended, either due to the decision acquiring the force of *res judicata* or in another manner. It seemed as if this rule would make it difficult for the spouses, since the class action ended on 25 August 2005 without any allowance of the claim upon settlement between the parties on the basis of a settlement agreement (or even earlier upon reaching the settlement). That turned out not to be the case, since the Supreme Court found that the CAFS proceedings following the class action were to be deemed as falling under the same *"proceedings"*, even though an interruption of nearly three months had come between, because of which those proceedings were only deemed to have ended with the decision on the request seeking a declaration that the CAFS agreement was binding. The six month period contained in Article 3:316(2) DCC only began to run from that moment onward, according to the Supreme Court. This moreover pertains only to the power to annul on the part of the spouses, regardless of whether they are members of the 305a organisation or not. The prescription of a claim for compensation was in fact interrupted during the handling of the CAFS request on the basis of Article 9:907(5) DCC, whereby after the CAFS proceedings had ended a new prescription two year period started to run.

By way of substantiation of this part, the Supreme Court considers that it was not the aim of the parties in the 305a proceedings to end the class action before the CAFS agreement was declared binding. The eligible parties under the agreement are only then able to assess whether they want to be bound thereto. Therefore, effective and efficient legal protection entails that victims are not required to conduct interruption (or nullification) proceedings every time a CAFS settlement is reached in (and after) class action proceedings. This outcome is consistent with the regulations regarding interruption and suspension contained in Article 7:906(5) DCC and Article 1015 DCCP with respect to claims for compensation. It is a ruling with a desirable outcome, which clarifies the limitations of the regulation contained in Article 3:316(2) DCC.

Case law of the past year makes it clear that in addition to its defence based on Article 3:316(2) DCC, Dexia also attempts to stymie the interruptive effect of the class action via another route, namely with its defence that the claim for invalidity was not covered by the claim instituted in the class action, and that the interruptive effect described in the foregoing is without basis for that reason. Thus the Zeeland-West-Brabant District Court rejects the defence that the product transaction was concluded with another party, because Dexia is the legal successor of that other party. The defence that the name of the investment product was not completely identical to the relief sought in the summons also fails, because *"that to which its purpose pertains does not differ"* from products which were stated in the relief sought, according to the Den Haag Court of Appeal. Both the Gelderland District Court and the Oost-Brabant District Court, both of which had to assess Dexia's defence that the class action claim only pertained to 98 specific securities lease agreements concluded between 29 January 2000 and 2 May 2002, made short work of it. In addition, the Gelderland District Court decided with reference to the Supreme Court ruling that the decisive standard is whether individual claims (concerning the nullification of securities lease agreement(s)), which do not "align" with the judicial declaration claimed in the class action, are at play. That requirement was met, because the class action was aimed at a judicial declaration that Article 1:88 DCC was applicable to all kinds of security lease agreements with Dexia relevant in this context.

2.6.2 Assessment of the prescription defence

In the context of the prescription, further reference can be made to two decisions of the Rotterdam District Court, which seem to be diametrically opposed to one another. The first decision concerns the case mentioned previously regarding the collective usury case against Nationale Nederlanden. In these class action proceedings, instituted 19 December 2013, a judicial declaration that certain stipulations contained in the 1990 and 2001 versions of the general terms and conditions of Nationale Nederlanden were unfair to consumers was claimed among other things along with the nullification of those stipulations. Nationale Nederlanden asserted in vain that the 305a organisation did not have a cause of action in the claim because the claims had supposedly prescribed.

"In the District Court's assessment, the question as to whether a particular claim has become time-barred does not lend itself to handling in class action proceedings like the current proceedings. The answer to that question depends in fact on the special circumstances in individual instances, for example as regards the question of when the prescription period commenced and/whether it was interrupted in time. Furthermore, reliance on prescription may be inadmissible according to the standards of reasonableness and fairness under certain circumstances (which by definition differ on a case to case basis and must be established. In the context of these class action proceedings and bearing the assertions of the parties in mind, the District Court will therefore disallow the reliance on prescription and will operate on the assumption in what follows that (at least some of) the individual claims for nullification of the aforementioned stipulations have not become time-barred, with the consequence that the Association does have the required cause of action.

In its second decision on the class action previously mentioned against EY for errors made its statement approving the annual accounts for 1990 at the company car manufacturer DAF the Rotterdam District Court reached the opposite conclusion. In that case, the District Court reached the preliminary judgment that the claim against EY has become time-barred, because diverse newspaper articles prior to 2004 force the conclusion that the bondholders - on whose behalf action was undertaken - were already aware of EY's errors and damage. The 305a organisation, which acts based both on a private mandate (on behalf of part of the bondholders) and on the basis of Article 3:305a DCC, must produce counter evidence against that preliminary opinion, i.e. that they have not read the newspaper articles, in which it will not succeed. The claim is subsequently dismissed in respect of the named bondholders who have given a private mandate to the 305a organisation.

Apart from the question as to whether such an evidentiary presumption in favour of EY (that relied on prescription and that subjective knowledge on the part of each bondholder ought to be demonstrated, which moreover, is possible in more concrete circumstances) was justified, this individual assessment of the prescription defence is right insofar as action was taken on the basis of private mandate. In fact, in that case, as assessment of each individual claim must be made. That is otherwise if the claim is instituted on the basis of Article 3:305a DCC for bondholders who did not provide any private mandate, as was the case in this instance. The District Court points that out too, in which context it decides that the prescription defence is proper to individual damage (state) proceedings that follow on the class action. The considerations that *"the claims instituted by Finidaf as an interest group do not pertain to compensation of damage within the meaning of Article 3:310 DCC"* and the *"the determination of Article 3:310 DCC is therefore not applicable to the relationship between Finidaf as an interest group and EY"* are actually unfortunate opinions. Article 3:310 - that not only pertains to a claim for compensation, but also to a claim for a judicial declaration - may in fact remain relevant for the question as to whether a 305a organisation's claim can become time-barred, which will in fact be the case if the 305a organisation waits more than five years after it has become aware of the liable party and the damage in that regard (subject to timely interruption). In any event, the District Court's opinion takes a 180 degree turn:

"The above does not automatically mean that the claims of Finidaf, as an interest group, are inadmissible. The purpose of these claims is to enable the other bondholders to bring an action for damages against EY arising from an unlawful act; this already follows from Finidaf's objects stated in

the articles of association. In the relationship between the other bondholders and EY, the question arises as to whether their claim has become time-barred under Article 3:310 DCC. Finidaf rightly argued in this respect that an answer to this question should in principle be given in the proceedings to be instituted by the other bondholders against EY. However, if it is plausible that the claim of almost every bondholder has become time-barred, this question may have a bearing on whether Finidaf still has a sufficient cause of action in its claims, in its special capacity as an interest group, in view of the legal framework. (...)

The fact that, in these proceedings, it is not possible to establish with regard to the other bondholders when each of them obtained sufficient certainty that the damage suffered by him or her was or may have been caused by EY's actions does not in itself mean that it must therefore be assumed that Finidaf has sufficient cause of action for its claims. It must be investigated whether Finidaf, in the light of the prescription period set by EY and in view of what has been considered in this respect with regard to the individual bondholders in the interim judgment, has put forward sufficient concrete facts and circumstances demonstrating the existence of that cause of action. (...)

The District Court considers that there is little chance that the other bondholders - unlike the individual bondholders - will be able to defend themselves adequately against EY's then highly likely reliance on prescription. (...)

The path of the class action is not intended to be a comprehensive action, with apparently expert reports and the provision of evidence, for the benefit of a very small part of the members, namely one or a few bondholders.

As a result of the above, the District Court is of the opinion that Finidaf's claim is not aimed at protecting similar interests of the other bondholders of DAF, which interests are suitable for consolidation. It therefore has insufficient cause of action in bringing the action (...); it will be declared to have no cause of action."

It remains unclear exactly what the District Court's argument is for assessing the individual prescription period in the context of the 305a claim.: is it because of the (imminent) lack of sufficient cause of action or because (the expected chance of success of) the prescription defence leaves too few individuals in the members of the 305a organisation who, combined, can justify the extent (and costs) of a 305a action? The two judgements of the Rotterdam District Court show that the assessment and outcome differ, whereas in both cases the case was based on facts that occurred a very long time ago (in the early nineties), which detracts from the legal certainty. After all, this threatens to make it unclear to 305a organisations what they do and do not have to say (and prove) in the area of time-barring of claims of individual participants from its members.

In our view, therefore, it is desirable to formulate a more general assessment criterion for these types of cases. However, with that criterion, it should be borne in mind that, in principle (save for specific exceptional cases), it is impossible for courts to determine in a class action for each individual case whether the defendant is entitled to invoke prescription (or to violate the obligation to complain); such an assessment depends on all the circumstances of the individual case and cannot, as a rule, be made in general terms (having regard to the lack of nuance with regard to individual cases) After all, this requires subjective familiarity with the person liable and the damage (and the causal link between them). Where one injured party may still be unfamiliar with these elements, because his damage only occurs or arises later or he only later obtains "sufficient certainty" (which does not have to be an absolute certainty) that the damage was caused by the actions of the party allegedly liable (only a suspicion in this respect is insufficient), this may be different for the other injured party. Moreover, the restrictive effect of reasonableness and fairness (Article 6:248(2) DCC) could cut off a reliance on prescription for some individuals but not for others.

In addition, a complicating factor is that the members of the 305a organisation is, in a certain sense, undetermined, so that such an assessment cannot (completely) be carried out in the proceedings. Therefore, the reliance on prescription should in principle be dealt with in the subsequent individual

proceedings following the class action, in which the court - if called upon - can still assess whether the claim in question has become time-barred. The desirability of this is also underlined by the above-mentioned judgment in the Srebrenica case, in which 22 years after the damaging event the court ruled that the Dutch State is liable for the murder of 350 Muslim men and in which (only) on 4 June 2007 class actions were initiated, because it was only shortly before this that people had started to realise what had actually happened.

In the above-mentioned judgment on the class action against Aegon concerning the Sprintplan share leasing product, the Den Haag District Court also - contrary to the main rule - anticipated the prescription period in the class action. This District Court, too, considers, with reference to the above-mentioned first judgment of the Rotterdam District Court on the class usury case against Nationale Nederlanden, that a reliance on prescription is generally not suitable for treatment in a class action, but - just like the Rotterdam District Court in the second judgment - it continues that such a reliance is relevant to the question of whether the 305a organisation has a cause of action. In this case, in which a 305a organisation initiates a second class action following a first class action by other 305a organisations that proved (partially) successful, the District Court seems to make a distinction between the 'old' reproaches from the earlier class actions and the 'new' reproached that were not discussed in these proceedings.

With regard to the 'old' reproaches, the District Court ruled that the prescription period in any event started “no later than” in 2007, after all the 305a organisations involved - including the claimant in this case who had sat idle for years in anticipation of the class actions initiated by the other 305a organisations - had consultations with (the legal predecessor of) Aegon, while the Sprintplan agreements also expired in 2007. The prescription period therefore expired in 2012, as the judgment implies, unless the prescription period was interrupted in good time. That judgment is in itself correct and confirms that the period referred to in Article 3:310 DCC also plays a role for 305a organisations. The District Court held:

“Insofar as the Sprintplan participants were not (yet) familiar with all components or the full extent of their damage at the time [in 2007], this does not lead to a different judgment. Indeed, this is not required for the commencement of the prescription period. The fact that Sprintplan participants only became aware of the charging of management costs and the income from collateral in 2016, because PAL only started to conduct further investigations after the proceedings instituted by GeSp and VCG, is a circumstance for which they are responsible. As regards the reproach concerning the client remisiers, the commencement of the prescription period does not require that the injured party is not only actually aware of the facts and circumstances relating to the damage and the person liable for it, but also of the legal assessment of those facts and circumstances (see Supreme Court 26 November 2004 and Supreme Court 5 January 2007, ECLI:NL:HR:2007:AY8771).”

After this interim step, in which the District Court rightly ruled on the one hand that familiarity with all components or the full extent of the damage is not required - provided that the injured party could have foreseen such damage - and on the other hand that ostrich tactics do not cause the commencement of the prescription period to be postponed as a result of inadequate research, the District Court considers that the prescription period "on the part of the party entitled" may be interrupted by a class action by a 305a organisation (Article 3:316(1) DCC), in respect of which it is irrelevant which claim has been brought We believe that this judgment is correct, as long as the requirement set - no matter how it is formulated - does, of course, relate to the same damage-causing event If such a claim does not result in the allowance of damages, the interruption continues to have effect if, within six months of the dispute having obtained force of res judicata or otherwise having been terminated, a new claim is brought which still leads to the allowance of damages. In the words of the District Court:

“The interruptive effect of the requirements set at the time is to the benefit of the individual participants and the collective interest groups that were parties to the previous proceedings. Contrary to what PAL argues, however, as a new collective interest group it cannot 'free-ride' on the interruptive effect of those class actions at the initiative of GeSP and VCG. (...)

There are no compelling reasons why PAL, as other collective interest group, should also benefit from this interruptive effect."

It remains unclear whether the District Court formulates a rule of principle for (only) the case in which a second class action is initiated by another 305a organisation, or whether the case affects the failure to comply with the obligation to furnish facts. In our view, it should be just the second ground. There are situations in which a 305a organisation could best be required to institute a class action, which would be followed by a subsequent class action by another 305a organisation, acting on the basis of new facts or evidence that could no longer be addressed in the first action. In such a case, it is desirable that the second 305a organisation (which is not bound by the res judicata authority of the first judgment) benefits from the interruptive effect of the class action by the first 305a organisation, if only to prevent several 305a organisations from conducting proceedings simultaneously (without joinder) on the same issue, albeit on different grounds, purely from a certainty point of view, and with the risk of different outcomes as a result. In other words: if it turns out during or (within six months) after the class action that new facts or evidence would have led to a different outcome, we consider it justified in circumstances for another 305a organisation to be able to take action to that end (which individual participants are also able to do by withdrawing from the class action in good time pursuant to Article 3:305a(5) DCC.

Finally, the District Court considers as follows with regard to the "new" reproaches:

"Insofar as PAL could benefit from the interruptive effect of the previous class actions at all, this cannot be done without further factual evidence showing that it represents a group of participants who, in view of the prescription period of their claims against Aegon, have a concrete cause of action in a substantive assessment of PAL's (new) reproaches. Apart from the prescription period of the claims of the individual participants, the class action proceedings conducted earlier also make it all the more likely that, in the context of this new class action, PAL can be expected to provide factual support for the existence of members who have a sufficiently concrete cause of action in a substantive assessment of the 'new' reproaches. (...)"

Again, the District Court first seems to refer to its previous opinion on the prescription period that has already commenced. As stated above, this judgement seems incorrect to us, because a 305a organisation should also be able to benefit from the interruptive effect of a class action previously initiated by other 305a organisations (provided that a new class action is initiated within six months of the initiation of that action). The opinion on the lack of cause of action in the claim within the meaning of Article 3:303 DCC, because the 'new' approaches were insufficiently factually substantiated, also seems incorrect to us. This cause of action may well be present, even if this was not established in the proceedings The District Court therefore could and should have dismissed the case only on the basis of the 305a organisation's failure to comply with its (increased) obligation to furnish facts with regard to the new reproaches, also in the light of the judgments previously given in class action proceedings on the same issue.

In short: in principle, the assessment of the reliance on prescription should not be handled in the 305a action and should, on the basis of all the circumstances of the case, be handled per individual participant in the following action for (damages). However, we do not rule out the possibility that there may be specific cases in which the prescription of (all) claims from the members is so evident in advance that the court can already prejudge the assessment of the prescription period in order to avoid having to go through costly class action that ultimately cannot produce any results. Think, for example, of the case where the (circumstances with regard to the) individuals from the members of the 305a organisation are fully transparent and (also) the long prescription period of 20 years has expired. In such a case, we believe it should be possible for the court to declare that the 305a organisation has no cause of action due to a lack of cause of action, leaving the way open for victims to individually initiated proceedings (and to put forward a defence against the prescription). The court can only make use of this reserved power if the defendant has thoroughly substantiated the prescription defence (and the subjective knowledge of the injured parties) and the prescription period is clear.

2.7. CAFS

2.7.1. The settlement in the Ageas case (the legal successor of Fortis)

The 2017 Dutch Chronicle on Class Actions would be remiss[21] if it did not include a discussion of the decision of 16 June 2017 on the application that a declaration be made that the settlement agreement made on 14 March 2016 between Ageas (the legal successor of Fortis) and five interest groups[22] was legally binding. This settlement agreement was concluded against the background of the events which occurred at Fortis in 2007 and 2008 and which may have been of influence on the price of the shares in Fortis. In that period the former Fortis group developed both bank and insurance activities. The Fortis shares were listed on Euronext Amsterdam, Euronext Brussels and the Luxembourg stock exchange. The total settlement amount that Ageas had made available in the framework of this settlement was €1,203,700,000.[23] We will summarise the main points of the arrangement laid down in the settlement agreement, in so far as relevant for this Chronicle.[24]

The parties had identified three time periods, demarcated by different stock exchange dates. These time periods aligned with the various reproaches made against Fortis. The parties entitled to compensation are those shareholders who held one or more ordinary Fortis shares at any time in the period from 28 February 2007 to 14 October 2008 (close of business); the "Eligible Shareholders". For this Chronical it is relevant that the Eligible Shareholders consisted of, inter alia, "Active Claimants" and "Non-Active Claimants". Active Claimants are the eligible shareholders who - in short - instituted proceedings against Ageas before the settlement was announced and/or who prior to 31 December 2014 joined an organisation which had instituted legal proceedings against Ageas. Non-Active Claimants are those who did not do so. Compensation was paid per share that an eligible shareholder purchased ("Buyer shares") or held ("Holder shares") in one or more of the three aforementioned periods. In schedule form, the compensation component of the arrangement can be represented as follows:

Period	Category Fortis shares	Non-Active Claimants	Active Claimants
Period 1	Buyer 1 Share	€0.38	€0.56
	Holder 1 Share	€0.19	€0.28
Period 2	Buyer 2 Share	€0.85	€1.28
	Holder 2 Share	€0.43	€0.64
Period 3	Buyer 3 Share	€0.25	€0.38
	Holder 3 Share	€0.13	€0.19

An amount of €795,900,000 ("Box 1") was made available for all Active Claimants and an amount of €407,800,000 ("Box 2") for all Non-Active Claimants. If the approved claims of all Active Claimants and Non-Active Claimants were to exceed the total amount of these maximum amounts, the compensation per Fortis share (as set out in schedule form above) would be reduced pro rata.

An important basis of all elements of the above-summarised arrangement was that the Active Claimants received a higher compensation than the Non-Active Claimants, because they (contrary to the Non-Active Claimants) had put in time, effort and expense to reach a settlement. The compensation which was paid per Buyer share was higher than the compensation which was paid per Holder share. According to the applicants, this was justified because the legal position of the Buyer shareholders was

[21] Amsterdam Court of Appeal 16 June 2017, ECLI:NL:GHAMS:2017:2257, *JOR* 2018/10, with commentary from J.S. Kortmann.
[22] It is also pointed out that the authors represent the interests of one of the interest groups in these proceedings, consequently they are forced to limit themselves to a summary of the judgment.
[23] This was allegedly the biggest settlement ever agreed in Europe. At the time the settlement agreement was made, it would have held eighth place in the top 10 of large settlements in the United States (see http://securities.stanford.edu/top-ten.html). This settlement now holds ninth place.
[24] See also Court of Appeal 16 June 2017, ECLI:NL:GHAMS:2017:2257, JOR 2018/10, with commentary from J.S. Kortmann, points 7.1 - 7.9 and additional documents available on https://www.rechtspraak.nl/Uitspraken-en-nieuws/Bekende-rechtszaken/WCAM-Verzoekschrift-Ageas-SA-NV.

stronger than the position of the Holder shareholders. For Ageas it was still relevant in that framework that all Eligible Shareholders would support the arrangement, not just the Buyers. In addition, all Eligible Shareholders were to receive additional compensation for the highest number of shares held in the relevant period(s); said compensation was €0.50 per Fortis share held, with a maximum of €200 per Non-Active Claimant and €400 per Active Claimant. In addition, the Active Claimants could make a claim to additional compensation which was to be determined on the basis of the highest number of shares held in one of the periods. Lastly, it was agreed that if the total amount of the approved claims was lower than the maximum amounts for Box 1 and Box 2, the compensation per Fortis share was to be increased by a maximum of 15% pro rata.

ConsumentenClaim objected to this arrangement. In essence, ConsumentenClaim's objection entailed that equal cases were treated unequally, as an Active Claimant would receive higher compensation than a Non-Active Claimant. According to ConsumentenClaim this was all the more pressing, because it believed that the interest groups had received a significant payment from Ageas to accept the settlement, whereby the Non-Active Claimants received much less compensation than other claimants without valid reason, while the extent of the loss suffered and the cause thereof was the same.[25]

The Amsterdam Court of Appeal came to - in short - the conclusion, on the following grounds, that the interests of the persons on whose behalf the settlement agreement was made, had not been sufficiently safeguarded in this case within the meaning of Article 7:907(3) under e DCC and that the compensation arrangement laid down in the settlement agreement was not reasonable within the meaning of Article 7:907(3)(b) DCC:

- the difference in how the Active Claimants and Non-Active Claimants are treated cannot be reconciled with the goal and purport of Article 3:305a DCC and the Dutch Collective Settlement of Mass Claims Act (CAFS). According to the Court of Appeal, the purpose of both 305a actions and the CAFS proceedings is that their primary goal is to avoid that victims of large-scale losses should have to bring individual legal action.[26] The goal of these settlements is to wind up mass claims collectively as much as possible. The judgments of 28 March 2014[27] and 9 October 2015[28] of the Supreme Court make it possible for victims to await the outcome of a collective settlement, by preventing loss of their rights in a fairly easy way, without having to carry out acts of interruption. According to the Court of Appeal it would be contrary to this position to believe that the shareholders who have awaited the outcome of class actions are "free-riders" and that a "free-rider situation" is undesirable and must be prevented. According to the Court of Appeal, this is contrary to the intention of the legislator and the case law of the Supreme Court (grounds 8.22 and 8.24). According to the Court of Appeal a "run to the court" must be avoided in order to get a seat at the negotiating table as quickly as possible, so that higher compensation can be demanded (ground 8.23);[29]
- the Court of Appeal held that a difference between two groups of eligible shareholders can be justified by (i) the nature and severity of the loss which may have arisen as a result of the events described in the agreement or (ii) a difference in capacity between relevant shareholders which is deemed legally relevant. A distinction in compensation between eligible shareholders who have suffered exactly the same (alleged) loss, could only be made if there is an objective justification therefore. According to the Court of Appeal, such a justification could not be found in the time, efforts and costs of the Active Claimants in relation to bringing the settlement about. In addition, this is contrary to Articles 7:907(1) and (2) DCC on the basis of which an application to declare a settlement to be legally binding must (inter alia) relate to an agreement which extends to compensation of loss caused by one or more events. As according to the Court of Appeal there was no objective justification for the distinction, the compensation per share was not deemed reasonable (grounds 8.24 - 8.28);

[25] Amsterdam Court of Appeal 16 June 2017, ECLI:NL:GHAMS:2017:2257, *JOR* 2018/10, with commentary from J.S. Kortmann, ground 8.11.
[26] ConsumentenClaim referred to Parliamentary Papers II 2003-2004, 29414, no. 3, p. 1.
[27] Supreme Court 28 March 2014, ECLI:NL:HR:2014:766.
[28] Supreme Court 9 October 2015, ECLI:NL:HR:2015:3018.
[29] Tzankova outlined the contrary phenomenon on her LinkedIn page in 18 June 2017, which is occurring more and more often: *"there are increasingly entities whose business model is to collect clients, wait for other parties to make the costs of litigation and when it 'starts looking good' appear to claim a share of the proceeds at lower fees*". See: https://www.linkedin.com/pulse/dutch-court-temporarily-derails-wcam-settlement-ianika-tzankova/?trk=v-feed

- in addition, according to the Court of Appeal a distinction had been made between the Active Claimants and the Non-Active Claimants on insufficient grounds, because the box system entails that in principle the Active Claimants will be assured that they will receive the higher compensation awarded to them per share and the Non-Active Claimants only have a possibility of obtaining the lower compensation allocated to them. The chance that the Non-Active Claimants will receive the compensation stated in the agreement, is influenced by the turnout percentage. For that reason alone they cannot make a responsible decision about an opt-out, because they cannot estimate in advance the amount they will receive in compensation. In the words of the Court of Appeal: *"The more Non-Active Claimants who claim compensation, the greater the chance that the compensation they receive is lower than the amounts stated in the agreement."* (ground 8.29).
- by jointly accepting compensation of €45 million, the interest groups created the impression that they had their own interest in obtaining a declaration that the settlement agreement was legally binding. The Court of Appeal had the impression that the interests of Non-Active Claimants in the making of the agreement had been subordinated to the interests of the interest groups and their members. This opinion was based on the following considerations, which transcend this case:

  "*The basic principle for the assessment* [within the meaning of Article 7:907(3)(e) DCC] *is that if an interest group asks for compensation for costs made or for running litigation risk, this is not in itself a reason to assume that the interests of victims have been or are being inadequately represented. The mere fact that an interest group operates on a commercial basis in whole or in part, does not mean that it cannot act as applicant. The Court of Appeal fully realises that class action involves high costs. The "free-rider problem" outlined by the applicants is naturally related to this. The interest groups have had to incur costs to agree a settlement. This settlement will benefit more people than just their members. If the agreement is declared to be legally binding, third parties will be able to benefit therefrom, without having had to incur costs in the meantime. In this respect the interest groups have asked that extensive attention be paid to the fact that their representation efforts would not have been possible without contributions from the members and/or litigation financiers. The Court of Appeal recognises that it is of social importance that class action is possible. Financing has to be found for this. This cause of action is also legally acknowledged. A legal entity which brings a class action within the meaning of Article 3:305a DCC to determine liability for loss with regard to the persons whose interests are being represented, can itself, in principle, present a claim to the liable party for compensation of reasonable costs to determine loss and liability as referred to in Article 6:96(2), beginning and under b, DCC (Netherlands Supreme Court 13 October 2006, ECLI:NL:HR:2006:AW2077). Every financing model has advantages and disadvantages. It is necessary for interest groups to be transparent and open (this also applies to the Claim Code: "comply with the law or explain why not").* (…)

  The interests of the eligible shareholders are the focal point when assessing a CAFS application, in particular the interests of those persons who were not involved in the negotiations or who were not represented, in this case the Non-Active Claimants. They are bound by a negotiating result over which they did not have any influence. The Court of Appeal is therefore safeguarding their interests in particular with regard to the question whether the requested declaration that the settlement is legally binding can be awarded. (…)"[30]

In order to safeguard the interests of the members of the interest groups, the Court of Appeal made the interest groups subject to the obligation that in the settlement of the payments, be made of an escrow account (point 9.3). The Court of Appeal was furthermore of the opinion that the clause relating to discharge from liability was too broad. According to the Court of Appeal, discharge from liability can only be granted for the loss as a result of the events stated in the agreement in so many words. This is another reason why the settlement agreement could not be declared binding (point 9.8).

The Court of Appeal lastly made use of its power pursuant to Art. 7:904(4) DCC by giving the parties the opportunity to supplement or amend the agreement. In that framework the Court of Appeal asked

[30] Amsterdam Court of Appeal 16 June 2017, ECLI:NL:GHAMS:2017:2257, *NJ* 2018/10, with commentary from J.S. Kortmann.

the parties to consider a new arrangement, whereby the parties could involve the following elements in their consultation:

- an adjustment of the system that a maximum amount of compensation would be made available for Active Claimants and a maximum amount for Non-Active Claimants (the box system);
- if compensation was awarded to an Active Claimant, said compensation must in principle be connected to specific loss or costs made;
- a modification of the clause regarding the discharge from liability;
- a reconsideration of the compensation for the interest groups, e.g. to reasonable costs incurred (possibly with a reasonable (profit) mark-up).

The Court of Appeal informed the parties that the mere circumstance that compensation was paid for Holder Shares, while it was highly uncertain whether said shareholders did suffer loss as a result of price loss or price inflation, did not mean that the agreement had to be modified on this point. According to the Court of Appeal, this circumstance did play a role when assessing whether the compensation was reasonable. If Ageas' total compensation obligation were to be fixed at a maximum amount, while the biggest part of that amount is allocated to shareholders in respect of whom it is highly uncertain whether they are entitled to compensation (shareholders with Holder Shares), this finds its reflection in the question whether the compensation for the other category of shareholders, for whom it is a priori likely that they did suffer loss, is reasonable (shareholders with Buyer Shares, which the Court of Appeal deemed included the share issue in September 2007) (point 10.10).

On the basis of these instructions the parties again entered into negotiation to achieve an adjustment of the arrangement. The Amended and Restated Settlement Agreement was made on 12 December 2017 and presented to the Court of Appeal on the same day.[31] Shortly before the completion of this Chronicle the Court of Appeal made an interim ruling in connection with the amended agreement in which it - in short - asked the interest groups to be transparent about their earnings model.[32] The Court of Appeal announced it would pass judgment on 13 July 2018.

2.7.2. Reserved assessment of opt-out cases

The previously described share-lease product offered by Dexia was also the focal point of a judgment of 1 August 2017 of the Court of Appeal of Amsterdam. The claimant in this case had presented a timely opt-out statement within the meaning of Art. 7:908(2) DCC, so that he was not bound by the CAFS settlement which had been declared to be legally binding pursuant to the class action. The claimant claimed, primarily, setting aside of the agreement with Dexia and alternatively compensation. The Court of Appeal of Amsterdam considered the court must show reserve in its assessment with regard to opt-out cases in a CAFS settlement (outside of test cases), with reference to the parliamentary history relating to the CAFS scheme:

"*These proceedings between [respondent] and Dexia is one of the thousands of disputes relating to the securities lease agreements made by Dexia. The case is part of a class action lawsuit and that "colours" these proceedings. By declaring the Duisenberg arrangement to be legally binding in 2007, an important part of this class action ended in a settlement. According to the history of the CAFS legislation, one of the objectives of the CAFS procedure is to prevent individual disputes from having to go to litigation (...) The latter applies mutatis mutandis to test cases which are in part brought with an eye on the cases in which an opt out was presented. Test cases also involve the social advantage of preventing the costs and efforts involved in conducting a large number of civil cases in which identical questions will have to be answered.*"

The Court of Appeal of Amsterdam then draw a distinction between the (misled) customers of Dexia in different categories, whereby it was considered that it must be possible to explain a higher payment than stipulated in the CAFS settlement, as allocated in test case proceedings with regard to opt-out

[31] The document containing the amended agreement can be consulted via https://www.rechtspraak.nl/Uitspraken-en-nieuws/Bekende-rechtszaken/WCAM-Verzoekschrift-Ageas-SA-NV
[32] Court of Appeal 5 February 2018, ECLI:NL:HR:2018:368.

cases, by the deviating (to a considerable degree) factual and legal position of those specific cases. The Court of Appeal continued:

"*that in the assessment of a dispute such as this one, substantial weight must be attributed to the circumstance that it forms part of a class action. The court must take account of what ensues from an arrangement in a CAFS agreement and must take a reserved position in the event of deviation of the outcome of test cases. In view of the intention of this type of action - offering clarity and security in the shortest possible term for large numbers of people and the societal interest in preventing many individual actions - in principle a deviation will only be relevant in specific cases, e.g. if certain circumstances were not discounted to a relevant degree in a CAFS agreement or in earlier judgments. In this respect - in particular - with regard to the CAFS procedure it is the case that if the court made a declaration that the settlement is legally binding, it must be assumed that the settlement has adequate social support and the compensation which is made available, in view of the scope of the loss, the ease and speed with which the compensation can be obtained and the possible causes of the loss, is not unreasonable (see Article 7:907(3), beginning and under b and f, DCC). With regard to test cases, the parties were given the opportunity therein to present as many relevant arguments as possible, on which a decision (definite, if litigation continues up to the Supreme Court) was then made.*

Furthermore, the following additional circumstances are relevant which entail that the court must take a reserved attitude in class actions:
- If the persons who did not acquiesce in a CAFS agreement and/or judgments in test cases (which were litigated up to the Supreme Court) continue litigation and without (sufficient) substantial reasons receive higher compensation in court, this would be contrary to the aforementioned social interest that new and individual proceedings must be prevented. Continuing litigation should only be "rewarded" if the particulars of the case can justify this. It would otherwise be appealing for an eligible shareholder to present an opt-out statement and to await the outcome of the further cases with an eye on obtaining higher compensation.
- The victims who did acquiesce in a CAFS agreement or the outcome of test cases - as intended - will feel they have been disadvantaged by the new deviating judgments if they found themselves in the same position as the persons who ultimately received higher compensation. This negatively affects a CAFS judgment and the judgments in test cases.
- The CAFS procedure is losing its appeal. The CAFS procedure does not offer certainty for a loss-causing party in a class action, nor a prospect of the termination of all disputes if the risk is run of being confronted, many years after a declaration that the settlement is legally binding, with a considerably higher compensation obligation for a large group of eligible shareholders than that which ensued from the agreement which had been declared to be legally binding and the outcome of the test cases for the opt-out cases."

So far, so good, or not? Critical questions can be asked as to whether this reserve does not detract from the right of a victim to withdraw from a CAFS settlement (or class action) and obtain a full individual assessment of his case. The Court of Appeal of Amsterdam then dismissed the claim, in deviation from the opinion of the Netherlands Supreme Court in the test case of Beckers/Dexia regarding a comparable (individual) Dexia case. The Court of Appeal of Amsterdam concluded that the matter in Beckers/Dexia, in which the victim could claim a higher compensation than in the CAFS settlement because there was a client remisier without the necessary permit, although it was similar, did not apply the legal rule formulated therein, even though the claimant in this case was in (virtually) the same factual and legal situation. In short the matter came down to the Court of Appeal of Amsterdam not agreeing with the outcome in the earlier test case and deeming it unjustified with regard to victims who had (previously) agreed to the CAFS settlement. The above-cited reserve in the assessment of opt-out cases therefore appears to serve as an excuse. A case of judicial disobedience, with - ironically enough - the result that the underlying goal of the CAFS scheme and test cases identified by the Court of Appeal being nullified: preventing different outcomes in mass claim cases. The Den Haag Court of Appeal did follow the line established in Beckers/Dexia in another similar case, so that the outcome for both cases was different.

With regard to judicial reserve, the parliamentary history of Art. 7:908(2) DCC in fact recognises that victims must retain the right to be able to individually present their case in order to claim (full) damages.[33] Otherwise the legal principles of party autonomy in civil procedural law and the right of access to court laid down Article 17 Dutch Constitution are at stake. In addition, it is explicitly laid down in Art. 6 of the European Convention on Human Rights that every individual, when determining his civil rights and obligations, is entitled to a fair and public handling of his case by an independent and impartial court established by law. With an eye on these legal principles it is therefore of vital importance that the agreement the victims the possibility to withdraw from the declaration that the settlement is binding within a specific term by means of an explicit statement to this effect. The persons who make use of this possibility thus retain full freedom to separately present their claim and go to court in this respect.[34] It is not appropriate in this respect that the court in such proceedings for damages should focus on the CAFS agreement which has been declared to apply, because the parties to such an agreement, intentionally after considering all the pros and cons, in order to avoid (long-term) proceedings and (thus) litigation costs, made concessions in order to settle mass claims within the short term. The actual loss suffered by the victim will not be compensated, even though the victim would have been compensated in an individual action for damages (if the victim has chosen to present an opt-out statement). The Netherlands Supreme Court made a similar finding in the De Treek/Dexia case.

In our view the judgment of the Court of Appeal of Amsterdam therefore cannot be maintained, because (aside from not following the outcome in the test case) there was no ground for a reserved review in opt-out cases, both in the framework of a CAFS settlement and 305a proceedings.

3. National developments

In the previous issue of this Chronicle, Arons and Koster described the Bill of 16 November 2016 in detail and commented on it. Not only in that Chronicle, but also in other literature and the press the bill was met with considerable criticism. If we are not mistaken, very few are in favour of introduction of the bill with a "short, sharp shock". The objections to the bill have already been summarised in the literature. We will not repeat them. Shortly before the completion of this contribution, the Dutch Minister for Legal Protection gave the bill a new lease of life on 15 January 2018, after it had been declared controversial on 11 April 2017, by proposing a number of changes and clarifying the bill on a number of points. We will briefly discuss these changes and the most interesting clarifications below.

In the Amendment Memorandum, the Minister let go of the concentration of the class actions before the Amsterdam District Court and repealed Art. 1018b(3) DCCP. The Minister followed the Dutch Council for the Judiciary which, contrary to De Bie Leuveling Tjeenk and Van der Velden, believes that a statutory concentration of class actions for achieving the necessary coordination and build-up of expertise in these kinds of cases would not be necessary. In addition, the Minister created a second opt-out possibility after approval of the collective settlement. Consumers and companies must have an extra possibility to decide against participating in the settlement, because they might not be satisfied with the realised settlement. A misled consumer reserves the right to claim full damages in separate proceedings instead of accepting lower compensation. With this the Minister explicitly aligns with Art. 7:908(2) DCC of the CAFS procedure. In addition, with this amendment the Minister has dealt with the continually recurring criticism in the literature of the bill that an extra opt-out possibility was lacking. The Minister also introduced a scheme whereby foreign victims explicitly had to opt for participation in the Dutch class action (opt in), with which the requirements for foreign victims to participate in a class action have been further tightened in the Netherlands. According to the Minister this will prevent the introduction of collective compensation actions from having the effect of attracting cases involving foreign victims who have no knowledge of the suit. In that framework the Minister added a new paragraph 5 to Article 1018f DCCP. The new paragraph 5 also regulates that even if there is a sufficiently close connection with the Netherlands, foreign defendants will not automatically participate in the proceedings. Within a term stipulated by the court (of at least one month), after appointing an exclusive representative they must explicitly agree to participation in the class action (opt in).

[33] *Parliamentary Papers* II 2003-2004, 29414, no. 3, p. 4 and 18.
[34] *Parliamentary Papers II* 1992/93, 22 486, no. 5, p. 13.

The stringent admissibility requirements for a 305a organisation in the new bill apply both to 305a organisations which present a claim for damages and to 305a organisations claiming an injunction, order or judicial declaration. Academics had some criticism for this part of the bill. In the Amendment Memorandum the Minister came back to the fact that these stringent admissibility requirements also apply if an injunction is claimed. According to the Minister this is an example of a claim which is excepted on the basis of Art. 3:305a(6) DCC, which reads: "*The court can declare a legal entity as referred to in paragraph 1 to be admissible, without the requirements of paragraphs 2, 3 and 5 having to have been met, if the legal claim is brought with an ideal goal and a very limited financial interest or if the nature of the claim of the legal entity as referred to in paragraph 1 or of the persons whose interests the legal action is intended to protect, give rise to such.*"[35] We assume that this exception also applies if a 305a organisation only claims an order, despite the Minister not explicitly stating this in the Memorandum. In our view there is no justification to make a 305a organisation which brings action to obtain an order subject to more stringent admissibility requirements than a 305a organisation which brings action seeking an injunction. The Minister maintained that a claim based on the exception of Art. 3:305a(6) DCC will not be honoured if a judicial declaration is claimed as a stepping stone toward a collective compensation action.

In a general sense too, in the Amendment Memorandum the Minister pays more attention to the exceptions to the stringent admissibility requirements as mentioned in Art. 3:305a(6) DCC. According to the Minister this exception applies when this is contrary to the claim. A 305a organisation which is not geared to obtaining compensation, but which plays an important role in protecting collective interests in class actions, can successfully claim the exception of paragraph 6. It is not the intention of the bill to make it unnecessarily difficult for these 305a organisations to continue the work. The Minister furthermore clarifies that the terms "very limited financial interest" in the exception of paragraph 6 refers to both the financial stake of the victims and to the scope of the total compensation for the defendant. Just as under the Claim Code, the more stringent admissibility requirements do not apply to small mass claim cases involving lower financial stakes.

The Minister furthermore provides clarity about the transition legislation. A class action which is brought before the new law enters into force, must be would up on the basis of the existing arrangement in 3:305a DCC. This prevents interest groups in ongoing 305a proceedings all of a sudden having to satisfy the requirements of the new law, such as the more stringent admissibility requirements, and the court all of a sudden having to appoint an exclusive claim representative.

When determining the loss to be compensated, the Minister gives the court the possibility to take account of the costs which an injured party must incur in order to join an interest group. This is an elaboration of the reasonable costs which the injured parties have made to determine the loss and the liability within the meaning of Article 6:96(2)(b) DCC. This can lead to these affiliated injured parties being eligible for higher compensation than non-affiliated injured parties who can benefit from the determination of the collective compensation, but who did not incur any costs in this respect. "Free-riders" do not benefit from this, so that the advantages of a collective settlement are retained. The Minister goes even further by emphasising that injured parties who have contributed to the financing of the litigation, must be rewarded therefore in the event of a collective settlement and should even be eligible for higher payments than other parties. With reference to the above-discussed Ageas ruling, according to the Minister the higher compensation should be proportional.

The new Art. 3:305a(2)(c) DCC gives the court, if necessary, the power to request inspection of the financing construction of the interest group. The Minister clarifies why this information does not have to be shared with the other party. The court will marginally review on the basis of the received information whether there are sufficient funds to litigate. That requirement, in conjunction with the general requirement of sufficiently safeguarded interests, also offers the court the possibility of reviewing in what manner the influence of the financier on the proceedings is arranged and whether said arrangement stands in the way of careful representation of the interests of the injured parties. It is nevertheless not the intention that the defendant party gain insight into these details, because this

[35] Parliamentary Papers II 2016/17, 34608, no. 6, p. 17.

would provide insight into the "war chest" of the 305a organisation. Such an inspection is not desirable, as the party against which the claim is brought can adjust its proceedings strategy accordingly. According to the Minister it cannot have been the intention that the defendant should try, on the basis of these details, to approach the financiers to stop the financing or delay the proceedings, because it has knowledge of the limited financial means of the 305a organisation. The financial report of the 305a organisation therefore need only be shared with its members and not with the defendant.

4. International developments

a. Introduction

Nor have developments in the rest of Europa stood still. Hereafter, we will discuss the most noteworthy developments in the European Union and the countries around the Netherlands, in this case Germany and the United Kingdom, which have occurred since the publication of the last Chronicle.

b. European Union

On 22 May 2017 the European Commission launched the "*Call for evidence on the operation of collective redress arrangements in the Member States of the European Union*". The European Commission wished by means of this call to gain insight into the way in which the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law, is applied in practice. The general goal of the consultation was to gather information on the practical experience of stakeholders in class actions. In addition, the consultation had a number of specific goals, including the gathering of specific quantitative and qualitative data on class actions which have been conducted after approval of the Recommendation of 11 June 2013. On 28 September 2017, during the presentation of an American report of the Institute for Legal Reform[36] (part of the U.S. Chamber of Commerce) regarding the requirements which European consumers set for class actions, the EU Commissioner of Justice, Jourava, announced that the findings in connection with the consultation would be published in the report "On the Practical Implementation of the Principles of the Recommendation". On 31 October 2017 the European Commission announced that the report would be published in the short term. In so far as we have been able to determine, the report has not yet been published. According to initial reporting, the research has indicated the following:

"The 2013 EC Recommendation on Collective Redress explicitly called Member States to ensure, in their legal systems, injunctive and compensatory collective relief in all areas of EU law, without prejudice to the ID [Injunction Directive[37]]. *However, as shown by the assessment of its implementation, the impact of this Recommendation has been limited. Only a few Member States have introduced or amended their legislation and nine Member States still do not provide for any possibility of claiming compensation collectively. In Member States where compensatory redress exists, it is still reported to be too complex, costly and lengthy to fully reach its objectives"*[38]
(addition by authors)

According to the European Commission, the consultation has demonstrated that the efficient and equal enforcement of EU rules, which are intended to protect the interests of consumers, is impeded because within the European Union there are wide range of and/or insufficient legal proceedings or recovery options for consumers in mass claim cases. As a result thereof, the level of protection of EU consumers depends on the member state they are based in, while businesses acting in bad faith are not scared off consistently and in the same manner within the entire EU. Tortious acts thus continue, causing considerable losses for EU consumers, while businesses which are acting in accordance with the law

[36] Regarding the lobby activities of the Institute for Legal Reform to limit class actions, see: I.N. Tzankova, 'Legislative proposal class action: what problem was it meant to solve again?', *TVP* 2017/4, p. 110-112.
[37] Directive 2009/22/EC of the European Parliament and the Council of 23 April 2009 on the cessation of infringement in the framework of protecting consumer interests.
[38] The revision of Directive 2009/22/EC on injunctions for the protection of consumers' interests' of 31 October 2017, Inception impact assessment, to be consulted via: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5324969_en See also: http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-new-deal-for-consumers

do not enjoy a level playing field in the EU. The "dieselgate" affair and the mass cancellation of flights in 2017 illustrate on the one part the scope of the loss which can be suffered by consumers and on the other the limits of existing national procedures to stop these kinds of enormous infringements and recover collective loss. According to the European Commission this justifies a package of measures to reinforce the position of consumers in such mass claim cases. These measures also form an elaboration of the above-mentioned Recommendation of 11 June 2013 of the European Commission. If we are to believe Juncker and Timmersmans, the package of measures will be launched and implemented in 2018. Contrary to what the Institute for Legal Reform would like to have seen, the European Commission continues to facilitate and optimise the options for consumers to collectively recover their loss, as has been confirmed by Jourova. A suitable mechanism for compensation of mass claims provides advantages for both claimants and defendants. Access to the law for victims is improved and loss-causing parties are better protected against abuse of class actions.

2.8. Germany

Van Boom and Weber recently provided a clear overview of what was possible and what was not with regard to starting class actions in Germany. Said overview shows that for the time being Germany does not view class actions favourably. The reason for this is the primary principle that in Germany, in principle, only individuals have access to the courts. There is reluctance to deviate from that principle. For example, in Germany it is not easy to litigate on the basis of a power of attorney, and it is very much the question whether litigating with the help of a collection assignment will be permitted.

The Kapitalanleger-Musterverfahrensgesetz ("KapMuG") legislation of 2005 applies to litigation in which an investor claims compensation for loss suffered due to inaccurate, misleading or incomplete public information regarding securities. Both the claimant and the defendant can present a petition, with reasons, to bring a test case. The goal of the petition is to determine facts or make decisions on certain points of dispute which also play or role or may play a role in other proceedings on the same information which has been made public. For example, the test case may discuss whether information which has been made public is or is not misleading. If the request for a test case is awarded, it will be included in the Klageregister nach dem Kapitalanleger-Musterverfahrensgesetz. This federal register will include the details of the parties. If a similar petition is presented in at least nine other suits, the court which received the first petition will refer the common points of dispute to the competent Oberlandesgericht for adjudication in a test case.

The Oberlandesgericht then determines who is the claimant and who is (are) the defendant(s) in the test case and what the points of dispute are regarding which a decision will be made in the test case. When determining who may act as claimant, the amount of the relevant claimant's claim and whether the claimant's attorney is assisting other investors also plays a role. It is also possible to appoint a claimant who is nominated by the defendant. It is thus not the case that the claimant who is the first to present a claim, also automatically becomes the claimant in the test case. Since the legislative amendment in 2012, misled investors can stop time from running on the claim by registering the claim with the Oberlandesgericht where the test case has been brought. It is thus no longer necessary to start up fully-fledged proceedings in order to stop time from running. In addition, the judgment in the test case is binding for all misled investors with regard to whom the same points of dispute play a role, unless they make an opt-out statement.

That this law is not efficient, is confirmed by the Deutsche Telekom case which gave rise to the introduction of this law. In this case, shareholders litigated against Deutsche Telekom in relation to a (misleading) prospectus published in 2000 in consequence of which they had suffered loss. After approx. 12 years of litigation, the Oberlandesgericht determined in this case in 2016 that the prospectus was misleading. This judgment is open to appeal, so that it could be some time before the investors are compensated for the loss they suffered.

How are things going for the investors in Volkswagen following 'dieselgate'? Approximately 1,470 actions have been brought before the Braunschweig District Court. In August 2016 the District Court referred ten test cases to the Oberlandesgericht in Braunschweig. On 8 March 2017 the

Oberlandesgericht of Braunschweig then appointed DEKA Investment GmbH as the claimant for the test case.[39] The first oral arguments will be heard on 9 April 2018 before the Braunschweig Oberlandesgericht. The expectation is that the Oberlandesgericht will not pass judgment before the end of 2018, so that these investors too will have to wait a while for their compensation.[40]

The foregoing shows that it is not possible in Germany to easily and quickly obtain compensation for mass claims. The topic has been on the German legislator's agenda since 2014. In December 2016 this resulted in the "*Referentenentwerf zu Musterfestellungsklagen"; a draft for the introduction of a 'test case to obtain a judicial declaration*'. The draft was never discussed in parliament, as it failed to make it past the federal governments. The draft was succeeded in July 2017 by a "Diskussionsentwurf zur Musterfeststellungsklage".[41] Contrary to the draft of December 2016, this draft focuses on consumer matters. On the basis of the draft, a number of already registered consumer organisations have the right to bring a test case for the purpose of having a key legal question answered or to establish specific facts and circumstances on which a claim is based.

The draft does not indicate how such organisations can finance a class action. In Germany parties are not quick to bring legal action due to the 'loser pays' system. The draft limits such compensation of costs to €250,000, which means litigation is still not that appealing. Contrary to the previous proposal, interest groups representing SMEs cannot bring a class action. The claim is admissible if at least ten consumers have a cause of action in the requested judicial declaration. Stakeholders can register their claim with the "Klägerregister" by means of an opt-in statement, which will stop time from running with regard to the time limits for bringing a claim. In addition, such a stakeholder is bound by both a positive and a negative judgment on the claim for a judicial declaration. The case can also end in a settlement. The claimants have one more month to make use of their opt-out right. The settlement approved by the court will enter into force, if fewer than 30% of the claimants have made use of their opt-out right. It will in any event be some time before consumers can present a claim pursuant to this legislation, as it will only enter into force 2 years after publication and it still has to be approved by parliament.

The topic does now seem to have definitely been placed on the German political agenda due to the public outrage following the diesel scandal and the fact that it has proven difficult to obtain compensation for the loss from the relevant car manufacturers. Partly for this reason, the question whether class actions should be permitted formed part of the debate between the political parties prior to the Bundestag elections in September 2017.[42]

2.9. United Kingdom

In addition to the class action pursuant to Section 404(1) of the Financial Services and Markets Act 2000[43] described by the previous chroniclers, as of 2015 the United Kingdom has also had the Consumer Rights Act 2015. Pursuant to this statute, consumers can bring class actions for breach of competition law. The Consumer Rights Act 2015 has both an opt-in and an opt-out arrangement.[44] On 6 September 2016 Merricks presented an application to the Competition Appeal Tribunal ("CAT") to, pursuant to Section 47B of the Competition Act 1998, part of the Consumer Rights Act 2015, bring opt-out proceedings on behalf of 46.2 million customers against MasterCard for breach of competition law, in consequence of which these customers suffered loss.[45] The reason for these proceedings was the

[39] OLG Braunschweig 08 March 2017, 3 KAP 1/16. See also http://www.oberlandesgericht-braunschweig.niedersachsen.de/aktuelles/presseinformationen/anlegerklagen-gegen-volkswagen-ag---oberlandesgericht-braunschweig-bestimmt-musterklaeger-151819.html

[40] See http://frtservices.com/case-spotlight-volkswagen-shareholder-class-action/

[41] https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Musterfeststellungsklage.html. For an explanation of this draft, see a public contribution by Prof. Axel Halfmeier: http://globalclassactions.stanford.edu/content/collective-redress-discussed-german-electoral-campaign

[42] Financial Times 31 July 2017, *"Germany prepares road for class action lawsuits against carmakers"* and http://www.zeit.de/2017/37/musterfeststellungsklage-defintion-wahlkampf

[43] T.M.C. Arons and G.F.E. Koster, 'Chronicle of class actions and settlements 2016', in: Y. Borrius e.a. (ed.), Geschriften vanwege de Vereniging Corporate Litigation 2016-2017, Serie vanwege het Van der Heijden Instituut (dl. 141), p. 132.

[44] See article 47B sub 10 and 11 of the Competition Act 1998, to be consulted via http://www.legislation.gov.uk/ukpga/2015/15/schedule/8/enacted.

[45] The procedural documents and rulings can be found via http://www.mastercardconsumerclaim.co.uk

decision made by the European Commission in December 2007 that the interbank fees which MasterCard charged companies distorted competition.[46] The companies, mainly retailers like supermarkets, passed on these fees in the prices to customers. In order to be part of this "class", in the period from May 1992 through June 2008 the customers had to: (i) have resided in the United Kingdom for an uninterrupted period of at least three months and (ii) be 16 years of age or older. According to Merricks, when purchasing goods and services in the relevant period using a MasterCard credit card, these customers collectively suffered £ 14 billion in loss, because they had to pay higher prices to the retailers as a result of MasterCard's tortious acts.

The CAT dismissed Merricks' application on 21 July 2017 in this landmark case in a properly-substantiated judgment.[47] Pursuant to Section 79 of the Competition Appeal Tribunal Rules 2015, the application to bring action for collective damages must satisfy the following three requirements: (i) the claims must be submitted on behalf of an identifiable group of persons, (ii) each action must raise common factual or legal issues and (iii) the claims must be suitable for adjudication in a class action.[48] The CAT came to the conclusion that, contrary to Merricks' arguments, the individual actions were not identical to a considerable degree. In itself this was not sufficient to dismiss the application, as it is not a prerequisite that all important issues which play a role in each of the actions must be identical. Nor is it a prerequisite, just like in US law, that the common issues must predominate the individual questions.[49] Merricks' application nevertheless failed on the basis of the third requirement set out above, because the actions were not suitable for adjudication in a class action. Neither the total loss suffered nor the loss in an individual case could be calculated. The CAT considered as follows in that framework with regard to the damage calculation method applied by Merricks:[50]

"We accept that in theory calculation of global loss through a weighted average pass-through (…) *is methodologically sound. But making every allowance for the need to estimate, extrapolate and adopt reasonable assumptions, to apply that method across virtually the entire UK retail sector over a period of 16 years is a hugely complex exercise requiring access to a wide range of data. We certainly would not expect that analysis to be carried out for the purpose of a CPO application, but a proper effort would have had to be made to determine whether it is practicable by ascertaining what data is reasonably available. Given the massive size of the claim, a difference of even 10% in the average pass-through rate makes a very substantial difference in financial terms.*

Accordingly (…) *we are unpersuaded on the material before us that there is sufficient data available for this methodology to be applied on a sufficiently sound basis. It follows that we are not satisfied, and indeed very much doubt, that the claims are suitable for an aggregate award of damages* (…)."

Even if it had been possible to calculate the total loss according to this method, it still would not have been possible to determine the loss per individual customer, because it is dependent on the individual circumstances of the case and cannot be answered in a general sense. In the words of the CAT:[51]

"(…) *even if it were possible to determine with some broad degree of accuracy the weighted average for pass-through and thus to estimate the aggregate loss for the class each year, it is the significance of the individual issues remaining which mean that it is impossible in this case to see how the payments to individuals could be determined on any reasonable basis. As we have explained above, there are three sets of issues which are relevant: individuals' levels of expenditure; the merchants from whom they purchased; and the mix of products which they purchased. There is no attempt to approximate for any of those in the way damages would be paid out. The governing principle of damages for breach of*

[46] This decision led to various successful actions of retailers against MasterCard, including the action of the Sainsbury's supermarket chain, which led to MasterCard being ordered to pay damages of £ 68.6 million (to be increased by interest) to Sainsbury's (Sainsbury's Supermarkets Ltd. v. MasterCard, Inc. [2016] CAT 11, see point 549). For the entire 310-page judgment in the matter of Sainsbury's Supermarket Ltd. v. MasterCard, Inc.: http://www.catribunal.org.uk/files/1241_Sainsburys_Judgment_CAT_11_140716.pdf

[47] To be found on the website www.mastercardconsumerclaim.co.uk

[48] CAT 21 July 2017,[2017] CAT 16, ground 22.

[49] In this context, see: B.J. de Jong, *Schade door misleiding op de effectenmarkt*, series on behalf of the Van der Heijden Instituut, Kluwer, 2010, part 103, p. 349-351.

[50] CAT 21 July 2017,[2017] CAT 16, ground 77.

[51] CAT 21 July 2017,[2017] CAT 16, ground 88.

competition law is restoration of the claimants to the position they would have been in but for the breach. The restoration will often be imprecise and may have to be based on broad estimates. But this application for over 46 million claims to be pursued by collective proceedings would not result in damages being paid to those claimants in accordance with that governing principle at all."

Merricks' application was dismissed. The CAT also dismissed Merricks' application to be granted leave to appeal on 28 September 2017. On 27 October 2017 Merricks announced it would be appealing this judgment before the Court of Appeal. In addition, Merricks intends to present an application to the administrative court to assess the CAT decision.

Pursuant to § 19.10 of The Civil Procedural Rules ("**CPR**") it is possible in the United Kingdom to bring a class action pursuant to a "Group Litigation Order", in which claims involving common questions of a legal or factual nature can be answered. In a remarkable judgment of 23 May 2017 in the long-running case of SG Claimant Group versus RBS, the High Court of Justice awarded a conditional claim of RBS to order a party which was not a party to the litigation to give security for the litigation costs. RBS had previously successfully applied to the High Court of Justice to order SG Claimant to disclose by which "*third party funders*" it was financed.[52] RBS presented said application as a stepping stone toward an application to order the third party funders to give security for the costs of the proceedings. The High Court of Justice awarded the conditional claim for the giving of security for the litigation costs against one of the two parties, even though said party was not involved in the litigation.

Under special circumstances, pursuant to Article 25.14(2)(b) CPR in conjunction with Section 51, it is possible that a party which is not a party to the proceedings is ordered to give security for the costs of the proceedings.[53] In this case the matter concerned a commercial party, Hunnewel Partners, based on the Cayman Islands. It was uncertain whether Hunnewel Partners, in the event the case was not decided in its favour, would be able to pay the costs of the proceedings. Another important element was that losing parties were individually liable for their individual share in the costs of the proceedings and were not severally liable for the full costs of the proceedings, so that recovery of said costs of the proceedings would be more difficult. In addition, it was relevant that Hunnewel Partners, due to commercial motives, financed the proceedings, so that it would be possible to recover these costs "on the adventurer" according to the High Court of Justice. The other party was affiliated with a philanthropist who had himself suffered loss. A salient detail was, furthermore, that the costs of the proceedings on the part of RBS had (allegedly) already run up to £ 100 million. In the end Hunnewel Partners was ordered to give security for an amount of £ 7.5 million.[54]

This case confirms that it is a fairly unappealing prospect for the misled Dutch investors in BP (see chapter 2.1.1 above) to try to get justice in the United Kingdom. They run the risk of being ordered to pay the costs of the proceedings in this order of magnitude.

5. Finally

This Chronicle confirms that class actions, whether or not resulting in a collective settlement agreement, are still drawing a great deal of attention in legal practice, both nationally and internationally. Legislators continue to look for a happy medium to do justice to both the position of victims on the one part and defendants on the other in class actions. In addition, this year a series of interesting judgments of the Dutch court appeared again, in which the legal framework was given further shape. The prediction of the previous chroniclers that the subject-matter would continue to keep the ink flowing for many lawyers in 2017, thus came true. In 2018 too the developments will undoubtedly be continued in view of the CAFS ruling in Ageas and the judgment which will probably be passed in the interlocutory proceedings on jurisdiction in the Petrobras case.

[52] RBS Rights Issue litigation 9 March 2017, to be consulted via: http://www.bailii.org/ew/cases/EWHC/Ch/2017/463.html
[53] RBS Rights Issue litigation 23 May 2017 [2017] EWHC 1217 (Ch), sub 19; to be consulted via: http://www.bailii.org/ew/cases/EWHC/Ch/2017/1217.html
[54] RBS Rights Issue litigation 23 May 2017 [2017] EWHC 1217 (Ch), sub 143; to be consulted via: http://www.bailii.org/ew/cases/EWHC/Ch/2017/1217.html

This is also desirable. In an increasingly transnational market for products and services of large providers, class actions play an increasingly important role for victims to be able to exercise their rights and/or recover their loss. We therefore hope that this form of legal redress will continue to be given the scope, both nationally and internationally to continue developing.

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