CLAIM CODE 2019

Claim Code Committee

Mr. A.H. van Delden Prof.
Dr. E. Bauw Mr. J.H.
Lemstra
R.W. Okhuijsen Mr.
R.W. Polak
Mr. W. Tonkens-Gerkema
J. van Mourik

Boomjuridisch

The Claim Code is a governance code for foundations and associations whose purpose is to achieve collective redress. The code aims to offer guarantees to those who wish to join that the board will always focus on the interests of the collectively aggrieved parties . The first version of the Claim Code was published in 2011. Since it came into effect, its significance in legal practice has grown. At the same time, practice in the field of collective claims has developed significantly in recent years, making a revision and supplement to the Claim Code inevitable. Based on evaluations and consultations, the Claim Code Committee has drawn up the Claim Code 2019. In addition to the new Claim Code, which includes an account of the consultation process and an explanation of the most important changes, it also contains an overview of developments relating to the Claim Code in the areas of politics, legislation, case law, and legal practice in the period 2011-2019.

ISBN 978-94-6290-608-2

Boom juridisch

Claim Code 2019

Claim code 2019

Claim Code Committee
Mr. A.H. (Bert) van Delden (chairman) Prof. E. (Eddy) Bauw
Mr. J.H. (Jurjen) Lemstra, LL.M. Mr. R.W. (Rob) Okhuijsen Mr. R.W. (Rob) Polak, LL.M.
Ms. W. (Wil) Tonkens-Gerkema, LL.M. Mr. J. (Jim) van Mourik (secretary)

The Hague
Boom juridisch
2019

Cover design and layout: Textcetera, The Hague

ISBN 978-94-6290-608-2
ISBN 978-94-6236-908-5 (e-book)
NUR 820

www.boomjuridisch.nl

Table of Contents

Scope of the Code

This code applies to foundations and associations with full legal capacity that act in accordance with Section 3:305a of the Dutch Civil Code or Section 7:907 of the Dutch Civil Code and whose purpose and activities (partly) consist of entering into one or more settlement agreements, acting with a view to entering into and declaring binding a settlementor bringing (other) legal actions aimed at protecting similar interests of a group of (legal) persons, as described in their statutory purpose. The organizations concerned are referred to in the code as "foundations" and "associations" and collectively as "interest groups."

This code does not contain any deviating principles or elaborations for small foundations and associations. If a foundation or association considers a deviation from a principle or elaboration to be justified under the circumstances, it may explain this, for example by means of a statement on its website, in accordance with the 'comply or explain' principle. Deviation may be justified, among other things, in connection with the small number of participants in the foundation or members of the association, or the small amount of average damage per individual and/or the contribution requested from participants or members, respectively.

Principles and implementation

I. Compliance with and enforcement of the code

Principle
The founder(s) is (are) responsible for the governance structure of the interest group and for compliance with this code. After the association has been established, its board and the board and supervisory board of the foundation are responsible for maintaining the governance structure of the interest group and for compliance with the code. The governance structure of the foundation must at least include the establishment of a supervisory board in addition to the board. The founders and, after the establishment, the board of the association and the board and supervisory board of the foundation are accountable for this to the (legal) persons whose interests the interest group represents pursuant to its statutory objective and provide sound justification for any deviations from the code.

The starting point is the recognition that the structure of *governance* is tailor-made and that deviation from the principles and provisions of this code may be justified in special circumstances (in accordance with the 'comply or explain' principle). This does require that the reasons for such deviation are verifiable and made public.

Implementation
1. The main features of the governance structure of the interest group are set out each year, partly on the basis of the principles of this code, in a section of the interest group's website that is accessible to the public. In doing so, the interest group explicitly explains the extent to which it complies with the provisions of this code and, if not, why and to what extent it deviates from them.
2. The information about the governance structure published on the website for each financial year shall remain accessible to the public for as long as the interest group is active.
3. Any proposed changes to the governance structure of the interest group and to compliance with this code shall be submitted for discussion as a separate agenda item to the supervisory board of the foundation and to the general meeting of members of the association.

II. Representation of collective interests on a non-profit basis

Principle
The interest group acts in the collective interest of the (legal) persons on whose behalf it acts pursuant to its statutory objective. The statutory objective, actual activities, and *governance* of the interest group show that the interest group and the legal entities directly or indirectly affiliated with it do not pursue profit in the exercise of their activities.

Elaboration
1. The *governance* of the interest group shows that neither a natural person nor a legal entity can dispose of the assets and income of the interest group, in whole or in part, as if they were its own assets and income. The articles of association of the interest group contain a dual signature system with regard to the representative authority of the board.
2. For-profit does not include the market-based compensation received or stipulated by an interest group for costs incurred or services provided, including any reasonable surcharge for (future) collective representation of interests and costs for the use of equity or loan capital.
3. The articles of association of the interest group stipulate that any surplus liquidation balance must be used in accordance with the purpose of the interest group and must benefit the participants of the foundation or the members of the association or an ANBI institution (established pursuant to Section 6.33(1)(b) of the Income Tax Act 2001, including a charitable institution established outside the Netherlands in a country designated by ministerial regulation).

III. External Financing

Principle
The interest group may enter into an agreement with a solid external financier for the purpose of financing its statutory activities. The board shall ensure that individual directors and members of the supervisory board, as well as the lawyer or other service providers engaged by the interest group, are independent of the external financier and those directly related to it.

or indirectly affiliated (legal) persons, and that the external financier and the (legal) persons directly or indirectly affiliated with it are independent of the other party in the collective action. The agreement provides for a scheme that guarantees the independence and autonomy referred to in the previous sentence. The board shall ensure that the financing conditions (including the amount and system of the remuneration to be agreed) are not reasonably contrary to the collective interests of the (legal) persons on whose behalf the interest group acts pursuant to its statutory objective.

Elaboration

1. The interest group shall investigate the capitalization, any *track record*, and reputation of the external financier.
2. The agreement is laid down in writing and, for the purpose of dispute resolution, provides for a choice of Dutch law and a choice of forum for the Dutch courts or an arbitration institute established in the Netherlands. The agreement contains a choice of domicile for the financier in the Netherlands.
3. The agreement stipulates that control over the litigation and settlement strategy rests exclusively with the interest group.
4. The interest group ensures, and stipulates this in a letter of engagement, that its lawyer and other service providers engaged by it act exclusively for and on behalf of the interestsand its statutory supporters and do not accept any assignments in the relevant case from the external financier and the legal entities or persons directly or indirectly affiliated with it, which does not affect the fact that the financing and actual payment of the lawyer's fees and costs of other service providers on behalf of the interest group can be made directly or indirectly by the external financier.
5. The agreement provides for a scheme that guarantees the confidentiality of information belonging to the interest group and defines the information to which the external financier has confidential access.
6. The agreement provides for a scheme that guarantees that, barring exceptional circumstances, the external financier cannot terminate the agreement before a final judgment has been obtained in the first instance and, for the rest, guarantees that such a notice period is applied that the interest group has a reasonable opportunity to attract alternative financing.
7. The interest group shall state on the publicly accessible part of the website (i) that external funding is involved, (ii) the

identity and place of residence of the external financier, and (iii) the general outline of the remuneration and services agreed with the external financier. If the external financier is entitled to remuneration based on a percentage of a collective (damages) award to be granted in or out of court, the interest group shall also state the relevant percentage.

8. Apart from the provisions of the second sentence of the previous Elaboration, the interest group is not obliged to disclose the amount of the remuneration due to the external financier, the budget available for the case, the financing documentation, or other sensitive information on the website or otherwise, given the nature of its activities. The interest group stipulates with the external financier that it is authorized to disclose this information to the court if the court so orders, whereby the interest group may endeavor to prevent the other party from gaining access to this information.

IV. Independence and avoidance of conflicts of interest

Principle

The board is composed in such a way that its members can operate independently and critically in relation to each other, the supervisory board, any external financiers, and stakeholders in the interest group.

Elaboration

1. There are no close family or comparable relationships, including marriage, registered partnership, and unmarried cohabitation, within the board and the supervisory board or between board members and members of the supervisory board. The same applies to the relationships of directors and supervisors with persons associated with an external financier. Principal or secondary positions of board members and members of the supervisory board that compromise independence must also be avoided.
2. Any interests of members of the board or supervisory board that could give rise to doubts about their independence or critical functioning are published on the interest group's website.
3. The interest group shall not enter into any agreements with a (legal) person or other entity in which a director or member of the supervisory board is involved, whether or not through close relatives as referred to in IV.1 – in the capacity of director, founder, shareholder, supervisor, partner, associate, or employee.

The foregoing does not apply to the remuneration of a personal private limited company or other legal entity of a director or member of the supervisory board for the performance of his duties on behalf of the interest group. This is intended as a clarification and not as a change to the 2011 Claim Code.

V. The composition, tasks, and working methods of the board

Principle
The board is composed in a balanced manner and is responsible for managing the interest group, which means, among other things, that it is responsible for determining and implementing the (financial) policy and the strategy aimed at achieving the statutory objective. The board of the foundation reports on this at least once a year to the supervisory board. The board of the association reports on this at least once a year to the general meeting of members.

Elaboration
1. The board consists of at least three natural persons.
2. The board is composed in such a way that it has the specific expertise necessary to adequately represent the interests described in the statutory objective.
3. At least one member of the board has the specific experience and legal expertise necessary to adequately represent the interests described in the statutory objective of the interest group.
4. At least one member of the board has the specific experience and financial expertise necessary to adequately represent the interests described in the statutory objectives of the interest group.
5. The board represents the interest group. The power of representation is vested jointly in two directors.
6. The board of the foundation submits the balance sheet, the statement of income and expenditure, and the budget to the supervisory board for approval. The board of the association submits the balance sheet, the statement of income and expenditure, and the budget to the general meeting of members for approval.
7. The board submits decisions that may have a significant impact on the interest group and its stakeholders for approval to the supervisory board in the case of a foundation and to the general meeting of members in the case of an association. The supervisory board or the general meeting of members assesses whether a decision is significant.

Far-reaching decisions are in any case understood to mean decisions to amend the articles of association, appoint and dismiss/suspend directors, merge and split, dissolve, initiate legal proceedings, conclude a settlement agreement, and submit a WCAM request. The board shall in any case involve the statutory supporters in the decision-making process regarding a possible settlement agreement.

8. The board of the interest group maintains a publicly accessible website on which it posts information that is relevant to its stakeholders, including in any case
(i) the articles of association of the interest group, (ii) the information referred to in I.1, (iii) the information referred to in III.7, (iv) the information referred to in VII.3, (v) the information referred to in VII.8, (vi) an overview of the contribution(s) requested from participants in the foundation or members of the association, (vii) the CVs of the members of the board and the supervisory board, (viii) any relevant interests of members of the foundation's supervisory board, (ix) the remuneration policy with regard to its directors, (x) the established expense allowance and attendance fee arrangement with regard to members of the supervisory board, (xi) a general plan of action on the basis of which a potential participant can assess whether the nature and working methods of the interest group are in line with his/her interests, (xii) an overview of the status of legal proceedings initiated by the interest group, and
(xiii) an overview of the main points of settlement agreements concluded by the interest group.

VI. Remuneration of directors

Principle
Directors may receive remuneration for the performance of their management duties that is reasonably proportionate to the nature and intensity of their work. In addition, they may receive reasonable expense allowances. Directors shall not perform any remunerated work for the interest group that does not arise from their management duties.

Implementation
1. The remuneration and expense allowances of the directors of the foundation are determined by the supervisory board. The remuneration and expense allowances of the directors of the association are determined by the general meeting of members.
2. Directors shall not accept any remuneration for their work from any party other than the interest group or the party that appointed them as directors or nominated them as directors.

3. All remuneration agreed with directors shall be included as such, with an explanation, in the annual accounts of the interest group. If the remuneration is related to the number of time units spent by a director on those activities, that number shall be stated in the explanation.
4. The interest group publishes the main points of its remuneration policy for its directors on its website.

VII. The Supervisory Board

Principle
The foundation has a supervisory board consisting of at least three natural persons, of whom no more than one may be appointed on the recommendation of a financier. The supervisory board is responsible for supervising the policy and strategy of the board and the general affairs of the foundation. This also includes financial supervision and the exercise of those tasks and powers assigned to the supervisory board in this code and the foundation's articles of association. The supervisory board provides the board of directors with solicited and unsolicited advice on all important matters and focuses on the interests described in the foundation's statutory objectives in the performance of its duties.

Implementation
1. The supervisory board meets at least once a year. In addition, the supervisory board and the board of directors meet at least once a year in a joint meeting to discuss the general lines of the strategy and the policy pursued and to be pursued in the future.
2. The supervisory board is composed in such a way that its members can operate independently and critically in relation to each other, the board of directors, and the interests represented by the foundation. A member of the supervisory board has no direct or indirect personal interest in the foundation and the activities carried out by the foundation or in the legal entity or entities represented by the foundation.
3. In the event of financing by a third party, a member of the supervisory board, other than the chair, may be appointed on the recommendation of that party. Such an appointment shall be published on the foundation's website.
4. At least one member of the supervisory board shall have the specific experience and legal expertise necessary for the adequate representation of, and adequate supervision of, the interests described in the statutory objectives of the interest group.

5. At least one member of the supervisory board shall have the specific experience and financial expertise necessary to adequately represent and supervise the interests described in the statutory objectives of the interest group.
6. The board shall provide the supervisory board with the information necessary for the performance of its duties and powers in a timely manner, including the minutes of the board meetings, and shall also provide each member of the supervisory board with all information concerning matters relating to the foundation that they may require. The supervisory board is authorized to inspect and have inspected all books, records, and other data carriers of the foundation.
7. Before approving the balance sheet and statement of income and expenditure prepared by the board, the supervisory board may instruct the management board to have the balance sheet and statement of income and expenditure examined by a certified public accountant or other expert appointed by the supervisory board, unless the management board has already appointed a certified public accountant or other expert to audit the annual accounts. The certified public accountant or other expert shall report on his audit to the supervisory board and shall present the results of his audit in a statement on the accuracy of the balance sheet and the statement of income and expenditure. He shall bring his report to the attention of the management board.
8. The supervisory board shall draw up an annual document in which it gives a general account of the supervision it has carried out. This document shall be published, together with the information referred to in I.1, on a part of the foundation's website that is accessible to the general public.
9. The joint meeting of the board and supervisory board shall determine a reasonable and not excessive expense allowance and attendance fee arrangement for the members of the supervisory board. The members of the supervisory board shall receive no other remuneration. The determined expense allowance and attendance fee arrangement shall be published on the foundation's website.

Accountability

General

When the Claim Code was presented in 2011, it was noted that the Claim Code could count on broad support and backing from the legislature. Since its introduction, its significance in legal practice has grown, particularly after the inclusion of the provision in Section 3:305a(2) of the Dutch Civil Code (in 2013), which states that a foundation is not admissible if the legal action does not sufficiently safeguard the interests of the persons on whose behalf the legal action is brought. The principles and best practices laid down in the Claim Code also feature prominently in the collective compensation action bill (the 'bill') currently being debated in the House of Representatives. A contribution included after this Claim Code provides an overview of the most relevant developments concerning the Claim Code since its entry into force.

When the Claim Code was established, it was agreed that it would be evaluated after five years and it was proposed that the (then) Minister of Justice would set up a monitoring committee as soon as possible to ensure proper compliance with the Claim Code. This did not happen, and therefore the Claim Code Committee ('the committee') took the initiative itself to have two compliance studies carried out in recent years and to evaluate the Claim Code on the basis of a series of consultations. Based on these consultations and the many developments in the field of collective claims since the Claim Code was published, the committee considers it necessary to revise and supplement the Claim Code. In doing so, the committee aims, on the one hand, to address practical issues that have arisen in compliance with the Claim Code and, on the other hand, to expand the Claim Code with principles relating to (third-party) financing of collective actions, a development that has rapidly gained importance in recent years.

The evaluation and consultation that led to the revised version of the Claim Code should therefore be seen as a continuation of the work of the original committee. It is this committee that took the initiative to evaluate the Claim Code it had drawn up.

and has strengthened itself to this end with two new members with backgrounds in science and the judiciary. The new members of the Claim Code Committee are Prof. E. Bauw and W. Tonkens-Gerkema. B Krijnen and Prof. M.J.G.C. Raaijmakers have left the committee. The full composition of the committee is listed at the end of this report (see below). The process established for the evaluation and possible revision and supplementation of the Claims Code does not differ significantly from the process followed in its drafting. The consultation process consisted of eight sessions in which a broad representation of 'the field' and relevant stakeholders provided verbal input. The so-called *'Chatham House* Rule' was applied during these consultations, so that a reference to the list of participants in these consultations is sufficient in this report. In addition, a number of organizations and individuals provided written input. Based on this first round of the consultation process, a draft of the proposed amendments to the Claim Code was then drawn up and sent to the participants for their comments. Finally, taking the responses into account, the committee arrived at a final version of the revised Claim Code on its own authority. Of course, this does not guarantee that all participants will be entirely satisfied with the revision. However, the committee is convinced that the process followed has once again led to a sound and well-supported outcome. It is now up to the organizations involved to further elaborate and implement the revised Claim Code.

The main changes compared to the 2011 Claims Code are explained below. This explanation is a concise summary of the committee's main considerations and therefore serves to justify these changes. This explanation is expressly not intended to elaborate further on the principles laid down in the Claims Code.

The main changes

Principle III – External financing
The 2011 Claim Code does not contain any principles relating to external financing of collective actions. Based on the following considerations, the Claim Code Committee has deemed it desirable to include a principle on this subject in the 2019 Claim Code.

External financing (hereinafter also referred to by the internationally accepted term *'Third Party* Funding', abbreviated to TPF) of collective actions is the subject of considerable interest in the Netherlands and elsewhere. External financing is not regulated in the Netherlands and the bill

does not provide for this either. The explanatory memorandum notes that *third-party funding* is not yet widespread in the Netherlands and that there is insufficient insight into the expected effects to introduce regulations at this stage.[1] It is emphasized that external financing can increase access to justice by making it easier for litigants to (pre)finance proceedings. The legislator also sees risks and considers it important to strike a balance between guaranteeing access to justice and preventing an undesirable claims culture. Through the requirement included in the bill that the interest group must have sufficient resources to conduct the proceedings, in combination with the above-mentioned requirement (in the existing Section 3:305a(2) of the Dutch Civil Code) of sufficiently safeguarded interests, the court can assess financing arrangements and intervene if the interests of victims could be adversely affected.[2]

On April 11, 2018, the European Commission published a proposal for a directive recognizing the possibility of external financing of collective actions.[3]The proposal includes requirements for transparency with regard to the financing and identity of financiers of collective actions.[4]

Recent case law has explicitly addressed the external financing of collective actions. In two recent rulings concerning the binding declaration of the Fortis/Ageas settlement in the context of a collective settlement, the Amsterdam Court of Appeal provided guidance on the discussion about the (need for) transparency with regard to the revenue models of external financiers and the interest groups themselves.[5] The Court considers that, in view of the interests of the entitled parties, it may be appropriate to disclose the identity of the litigation financiers and the (financial) agreements made, so that the Court can form an opinion of the

1 TK 2016/17, 34608, 3, p. 11.

2 TK 2016/17, 34608, 3, p. 11.

3 Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, (COM (2018) 184 final). See also 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 conferred by EU law (2013/396/EU), OJEU L201/60.

4 Proposed Directive, Article 7 (COM (2018) 184 final).

5 Court of Appeal of Amsterdam, February 5, 2018, ECLI:NL:GHAMS:2018:368 and Court of Appeal of Amsterdam, July 13, 2018, ECLI:NL:GHAMS:2018:2422.

good[will], reputation, and revenue models of those financiers, especially with a view to possible conflicts of interest.

In the United Kingdom developments in the field of collective redress financing have led to a "market" for commercial *third-party funders*. The *Association for Litigation Funders* has drawn up a code of conduct for external financiers.

During the consultation for the update of the Claim Code, there appeared to be support for the introduction of a new principle setting out frameworks and standards for the external financing of collective redress actions. The participants in the consultation had different views on the content and implementation of such a new principle. However, there was a significant degree of consensus on the requirement for the independence of interest groups and the need to prevent conflicts of interest between the external funder and the interest groups and their supporters wherever possible.

Taking the above developments into account, the committee believes that the subject of external financing deserves a place in the updated Claims Code.

In drawing up Principle III on external funding, the committee was aware that commercial and legal developments in this area are progressing rapidly. The debate on the regulation of external financing in collective actions continues unabated, both in the Netherlands and Europe and beyond. In Australia, for example, where much more experience has been gained with the financing of collective damage actions, legislation is in preparation that was not yet public when the updated Claims Code was drawn up. [8]

---

6 Court of Appeal of Amsterdam, July 13, 2018, ECLI:NL:GHAMS:2018:2422, ground 5.43.

7 Code of conduct for Litigation Funders; January 2018; http://associationoflitigation funders.com.

8 The Australian Law Reform Commission intended to publish a report around the turn of the year 2018-2019. The Claim Code Committee did not yet have access to this report. However, the Committee was able to take earlier documents into account in its work, such as the discussion paper of May 31, 2018, "*Inquiry into Class Action Proceedings and Third-Party Litigation* Funders," which can be found atwww.alrc.gov.au/inquiries/class-action-funding.

Nevertheless, the committee considers it important not to wait for further developments, but to supplement the Claims Code with a principle now. In formulating this principle, the committee was guided in part by the sources mentioned above and by the input received during the consultations. It has limited itself as much as possible to establishing a number of broadly supported principles. A detailed regulation, as advocated by some in the consultations, would not do justice to the complexity of the subject, the various forms that the financing of collective actions can take, and the rapid developments taking place in the 'market for the financing of collective actions'.

In formulating the principle and the accompanying elaboration, the committee sought to do justice to, on the one hand, the importance of interest groups and their supporters in the effective, financeable, collective settlement of mass damage, and, on the other hand, the importance of defendants and injured parties in preventing the abuse of collective actions and preventing conflicts of interest between external financiers and interest groups and their supporters.

In the committee's view, the new principle III provides guidance for legal practice and leaves room for further developments.

Principle VI – Remuneration of directors
The 2011 Claims Code contained the principle that directors of interest groups could receive reasonable attendance fees and reasonable expense allowances, but no remuneration (referred to as 'honoraria') unless the work was not directly related to their management duties.

The committee has found that this principle has met with little response in practice. Several respondents have indicated that it is difficult to find good directors for interest groups of a certain size and with the associated dynamics if no proper remuneration is offered. The committee therefore considers it desirable to formulate the principle in such a way that, within certain limits, there is scope for remunerated board work.

The committee considers it desirable, partly to prevent conflicts of interest, that directors within the interest group do not engage in remunerated activities that do not arise from their management duties, so that they can concentrate on those management duties. On this point, the 2019 Claim Code is more stringent than the 2011 Claim Code.

The Claim Code Committee

The members of the Committee all have extensive experience in the field of collective actions and represent claim organizations, the business community, academia, and the legal profession.

The members of the Committee are:

Mr. A.H. (Bert) van Delden (chair),
former chair of the Council for the Judiciary and former president of the District Court of The Hague.

Prof. E. (Eddy) Bauw,
Professor of Private Law, specializing in liability law, and Judicial Procedure, also chair of the Molengraaff Institute for Private Law and director of the Montaigne Center for the Rule of Law and Judicial Procedure at Utrecht University, professor of judicial procedure at the University of Amsterdam, and deputy justice at the Court of Appeal in The Hague and the Court of Appeal in Arnhem-Leeuwarden.

Mr. J.H. (Jurjen) Lemstra,
lawyer at Lemstra Van der Korst.

Mr. R.W. (Rob) Okhuijsen,
strategic advisor and director of claim and settlement foundations.

Mr. R.W. (Rob) Polak,
former lawyer, legal advisor, and Mf N-register mediator.

Ms. W. (Wil) Tonkens-Gerkema,
former vice president of the Amsterdam District Court and arbitrator.

Mr. J. (Jim) van Mourik (secretary),
Master's student in Legal Research at Utrecht University.

consultation participant list

Roelien van den Berg (Omni Bridgeway) Johan Bil (Vereniging Woekerpolis.nl) Simon Boersen (Stibbe)
Edwin Borghs (Legal Aid Board)
Ramona van den Bosch (VNO-NCW/MKB Nederland) Dick Bouma (board member of various interest groups) Dirk-Jan van den Broek (Claimshare)
Fred Broens (Achmea Legal Aid) Anne-Luut Dijkstra (Arag)
Charles Fitz Verploegh (SRK)
Ab Flipse (Woekerpolis.nl Association)
Adriaan de Gier (De Gier Business Finance Law)
Pauline van der Grinten (audience member on behalf of the Ministry of Justice and Security)
Bonne van Hattum (University of Amsterdam)
Willem Heemskerk (Pels Rijcken & Droogleever Fortuijn)
Rutger ten Heeuw (ConsumentenClaim and MKB Claim) Femke Hendriks (former employee of PGGM) Ruud Hermans (De Brauw Blackstone Westbroek)
Jeroen van Hezewijk (Freshfields Bruckhaus Deringer) Peter Hoogendoorn (Pels Rijcken & Droogleever Fortuijn) Dennis Horeman (De Brauw Blackstone Westbroek)
Jan-Willem de Jong (BarentsKrans)
Armand Kersten (Association of Securities Holders)
Peter van Kippersluis (Pels Rijcken & Droogleever Fortuijn) Martijn Kloppenburg (Pels Rijcken & Droogleever Fortuijn) Albert Knigge (Houthoff)
Arnold Koopmans (VNO-NCW/MKB Nederland) Piet Koremans (Platform Aandelenlease)
Jeroen Kortmann (Stibbe)
Arco Krijgsman (Just Legal Finance) Huib Lebbing (Houthoff)
Xander van Leeuwen (NautaDutilh)
Pieter Leijesen (board member of various interest groups) Chris Liesker (Liesker Litigation Funding)
Daan Lunsingh Scheurleer (NautaDutilh)

Wieteke Malcontent (Liesker Litigation Funding)
Ronald Oostwouder (DAS)
Frank Peters (Bureau Brandeis)
Rein Philips (Redbreast) Rutger
Rozendal (DAS)
Albert Scheenloop (Platform Aandelenlease) William
Schonewille (BarentsKrans)
Stef Smit (ConsumentenClaim and MKB Claim)
Emile Snijders (Rabobank)
Daniella Strik (Linklaters)
Ilja Tillema (Erasmus University Rotterdam) Harrie
Timmermans (Univé)
Brechje van der Velden (Allen & Overy) Kees de
Visser (Omni Bridgeway)
Marco Vogels (Freshfields Bruckhaus Deringer)
Steven Wayenberg (Homeowners' Association) Flip
Wijers (Lemstra Van der Korst)
Isabella Wijnberg (Houthoff)
Berto Winters (De Brauw Blackstone Westbroek)

The Claim Code from 2011 to 2019

Jim van Mourik & Eddy Bauw[1]

Summary

This study provides an overview of developments surrounding the Claim Code and the relationship between the Claim Code on the one hand and developments in politics, jurisprudence, and legal practice on the other, as well as the relationship between the code and the collective compensation action bill (pending before the House of Representatives).

After an introduction in section 1, section 2 describes developments in practice. Three developments are identified. Firstly, *compliance* with the Claim Code is discussed. An initial assessment in 2013 concluded that compliance with the Claim Code was insufficient. A second assessment in 2016 showed that compliance had improved, but was still only 'average'. A second development is the observed emergence of commercial motives in collective action law. Thirdly, there has been an increase in external funding of interest groups that advocate collective redress.

Section 3 describes developments in the political domain. This shows that the Claim Code has been embraced by politicians. According to the minister, there is 'indirect legal anchoring' of the Claim Code and the Claim Code is an important indicator for determining whether the admissibility requirement of Article 3:305a(2) of the Dutch Civil Code is met.

Section 4 discusses the relevance of the Claim Code in case law. This shows that the courts actively assess claims against the Claim Code. The Claim Code is considered to be indirectly enshrined in law and is seen as an important point of view when assessing whether the interests of the injured parties are sufficiently safeguarded. However, the Claim Code does not play an exclusive role: if an interest group does not comply with the Claim Code, the court does not necessarily declare the claim inadmissible.

---

1 Jim van Mourik is a master's student in Legal Research at Utrecht University. Eddy Bauw is a professor of Private Law at Utrecht University.

Section 5 discusses the literature on the Claim Code. The literature shows that the Claim Code has become established in collective action law. Criticism comes both from those who believe that collective action should be subject to limited regulation and from those who advocate stricter standards in the Claim Code. Various parties have proposed bringing the external financing of interest groups within the scope of the Claim Code.

After an interim conclusion in section 6, section 7 discusses the proposed collective compensation action bill. It is concluded that the Claim Code will remain relevant even after this bill has been accepted and become law following lengthy parliamentary debate. This significance lies primarily in the fact that a number of open standards included in the bill are further elaborated in the code and that standards supplementing the legislation are provided with regard to the governance requirements for interest groups. For example, the bill refrains from establishing rules on *third-party funding* of collective actions. A revised Claim Code could fill this gap. This allows the legislator to keep its hands free to monitor developments in this area and, if necessary, to introduce rules at a later stage, while preventing possible excesses at an early stage.

Paragraph 8 concludes that the Claim Code has become an inevitable part of collective action law. Both the courts and the minister refer to 'indirect anchoring'. The Claim Code is not an absolute requirement for admissibility within the meaning of Section 3:305a(2), third sentence, of the Dutch Civil Code, but it is an important consideration. There is no call to abolish or radically change the Claim Code. A number of the principles in the Claim Code will be enshrined in law if the bill is accepted.

1 Introduction

1.1 Reason

In 2019, it will be seven and a half years since the Claim Code (hereinafter also referred to as 'code') came into force, a self-regulatory instrument for associations and foundations that initiate collective action on the basis of Article 3:305a of the Dutch Civil Code or the Collective Settlement of Mass Damage Act (hereinafter also referred to as WCAM).[2] On the occasion of the presentation of the revised Claim Code 2019, this article looks back on the period from 2011 to 2019 from a broad perspective: what did academia, politics

2 Claims Code 2011, p. 5.

and case law of the code and how did interest groups deal with it in practice? The overview thus provided was used to evaluate the 2011 Claim Code for the purpose of revising the code and to facilitate the considerations that had to be made by the Claim Code Committee in that context.

1.2 The Claim Code

The collective action is made possible by Article 3:305a of the Dutch Civil Code. Pursuant to this provision, a foundation or association (hereinafter also jointly referred to as an 'interest group') may bring legal proceedings before the civil court for the protection of similar interests of other persons, insofar as it represents these interests in accordance with its articles of association. The legal action cannot seek compensation in the form of monetary damages. However, a declaration of law may be sought stating that a company or institution is liable for the damage suffered by a group of injured parties. In addition to this collective procedure, there is the WCAM, which enables the binding declaration of collective settlements relating to the settlement of damage suffered by a large group of injured parties, as laid down in Articles 7:907-7:910 of the Dutch Civil Code and Articles 1013-1018 of the Dutch Code of Civil Procedure. The number of interest groups making use of these options to recover damages on behalf of a group of injured parties increased sharply at the beginning of the millennium. In order to represent the interests of these injured parties, the 2011 Claim Code aimed to establish principles for the *governance* of interest groups.[3]

In 2013, following an evaluation of this legislation, the legal provisions governing the WCAM and collective action were expanded.[4] The most important change was the admissibility requirement: Article 3:305a(2) of the Dutch Civil Code was amended to state that a legal entity bringing a collective action is inadmissible "if the legal action does not sufficiently safeguard the interests of the persons on whose behalf the legal action is brought."[5] The legislator's intention here is to give the court a basis for 'critically assessing the admissibility of a collective action if it has doubts about the motives for bringing that action'.[6] As is apparent from the sections on the reactions in the political

3 Class actions based on powers of attorney are disregarded.

4 See, among others, D. Omnis & I.N. Tzankova, 'The evaluation of the WCAM: the key themes highlighted', *TCR* 2012, pp. 33-42.

5 *Parliamentary Papers II* 2011/12, 33126, 2 (bill to amend the Mass Claims Settlement Act).

6 *Parliamentary Papers II* 2011/12, 33126, 3 (Explanatory Memorandum to the Bill to amend the Mass Claims Settlement Act).

domain (section 3) and case law (section 4), the Claim Code is used to further elaborate on this requirement.

The Claim [Code] is a form of self-regulation and is structured according to the 'comply or explain' principle: an interest group may deviate from the established principles, but must then explicitly report and explain this on its website or in a document that is provided free of charge.

At the time of completing this contribution, a bill was before the House of Representatives to extend collective action (hereinafter also referred to as the 'collective compensation action bill'):[8] This bill also makes it possible to bring legal action for monetary compensation, further expanding the possibilities for interest groups to obtain compensation. In addition, the aforementioned second paragraph of Article 3:305a of the Dutch Civil Code is also expanded.

1.3 Research question

This contribution is the result of a study that focused on the following question: what developments have taken place in politics, literature, practice, and case law concerning the Claim Code in the period from 2011 to 2019, and what is the relationship between the Claim Code and the bill on collective compensation actions?

The answer to this research question serves, on the one hand, to inform the Claim Code Committee about developments relating to the Claim Code in the aforementioned period and, on the other hand, to provide insight into the considerations that led to the revised 2019 Claim Code.

To answer the first question, developments that have occurred in the field of collective actions are first outlined, insofar as they are relevant to the Claim Code (section 2). Next, developments in the political arena (section 3) and in case law (section 4) with regard to the code are discussed. Furthermore, the views on the Claim Code in academic literature will be discussed (section 5). This section concludes with a synthesis of developments in practice, politics, case law, and literature (section 6).

The second part discusses the collective compensation bill in light of these developments: to what extent does the bill align with the Claim Code and what role is (still) reserved for the

7 Principle I of the Claim Code?

8 *Parliamentary Papers II* 2016/17, 34608, 2. See also: Bauw & Voet 2017; De Geus 2017.

code if the bill is introduced (para. 7)? The study concludes with a conclusion (para. 8).

1.4 Methodological remarks

This contribution is based primarily on desk research. The focus has been on the Claim Code and not on the broader themes touched upon by the Claim Code, such as collective actions, mass damage claims, the WCAM, or the bill.

In addition, use was made of the findings from the consultations of the Claim Code Committee in the context of the evaluation of the code. These consultation rounds in particular provided information and insights into the functioning of interest groups in practice. The consultations were conducted under the *Chatham House* Rule, which means that the information from the consultations could be used as long as it could not be traced back to specific individuals or organizations. The list of those who participated in the consultations is included as an appendix to the Claim Code.

2 Collective actions in practice

This section focuses on developments in the practice of interest groups and the effect of the Claim Code on these developments during the research period. First, the findings of two studies into compliance with the Claim Code are presented (section 2.1). It then discusses commercial motives in collective actions (section 2.2) and *third-party funding (*section 2.3).

2.1 Compliance with the Claim Code

Compliance with the Claim Code by stakeholder organizations was measured in both 2013 and 2016. In 2013, Bauw and Bruinen wrote that the results were "not very promising": the vast majority scored "low" to "very low," with only one organization scoring "very high" and a smaller number scoring "high" or "average." The authors also noted that it was striking that 'the traditional interest groups scored only slightly better than the new interest groups (set up specifically for a particular collective action)'. In addition, it appeared that the newcomers to the 'claims market' (established after the Claims Code came into force on July 1, 2011), who were able to take the Claims Code into account when setting up their organization from the outset, scored even lower than the existing interest groups. At the time, they concluded: 'the Code has not yet had much formal legal effect, in the sense of establishing the principles of that Code in the articles of association

.'[9] A second measurement by Bauw and Van der Linden in 2016 shows some improvement, but the level of compliance is still only 'average'.[10] The authors note that the improvement in compliance is almost entirely attributable to traditional interest groups.

Furthermore, Bauw and Van der Linden's research shows that various organizations 'seem to reject the Claim Code entirely'. This is partly due to dissatisfaction with the way in which the Claim Code was developed (people feel they were not sufficiently involved), but the authors note that it is difficult to determine whether these are genuine objections or whether they are being used as an excuse to avoid having to comply with a number of basic rules of *good governance*.[11] The criticism raised can also be found in the media: on EenVandaag and Follow the Money, various representatives of interest groups respond critically to the Claim Code. [12]

A new measurement will have to determine whether compliance has improved further since 2016. Developments in case law could play a role in compliance: as judges attach greater significance to the principles in the Claim Code when determining the admissibility requirements for a class action, more interest groups will feel compelled to take the Claim Code seriously. Section 4 discusses in more detail how judges dealt with the status and requirements of the Code during the research period. Another way to give the Claim Code more meaning is to inform those who intend to join an interest group about the importance of such an organization complying with the Claim Code. If this translates into a choice for one organization or another, the incentive to comply with the Claim Code will become stronger.

---

9 Bauw & Bruinen 2013.

10 Bauw & Van der Linden 2016, p. 30. See also: Bauw & Van der Linden *TOP* 2016.

11 Bauw & van der Linden 2016, p. 27.

12 J. Salden, 'Wild West in the claims industry', *EenVandaag*, https://eenvandaag.atavist.com/claimindustrie, last accessed on November 22, 2018; M. van den Eerenbeemt, 'Maximaal verdienen aan de gedupeerde consument' (Maximizing profits from aggrieved consumers), *de Volkskrant,* February 27, 2016, www.volkskrant.nl/economie/maximaal-verdienen-aan-de-gedupeerde-consument~ b1e19e4b/; A . de Vos, 'Elke klacht zijn eigen claim' (Every complaint has its own claim), *Het Financieele Dagblad* 1 , October , 2016, https://fd.nl/werk-en-geld/1167748/elke-klacht-zijn-eigen-claim; E. Smit, 'Class Action Hero Jurjen Lemstra', *Follow the Money* September 30, 2010,www.ftm.nl/artikelen/class-action-hero-jurjen-lemstra?share=1 .

It should also be noted that the admissibility requirements of Article 3:305a(2) of the Dutch Civil Code and the Claim Code could be circumvented by initiating a type of procedure other than a class action. For example, a legal entity—which is not limited to foundations or associations—could act as an authorized representative on behalf of a (large) number of victims or act as an assignee in its own name in order to obtain compensation. Because the scope of the Claim Code is limited to foundations and associations that initiate collective actions on the basis of Article 3:305a of the Dutch Civil Code or the WCAM, legal entities that operate solely on this basis are not covered by the Code. The consultations revealed that these practices occur (regularly). One example is the company Loterijverlies B.V., where the court did not allow this detour (see also paragraph 4).[13]

2.2 Commercial motives

A striking development is the emergence of commercial motives in collective actions. With regard to the WCAM, Tillema notes that '(entrepreneurial) advocates' seem to have found a market.[14] With regard to the collective action under Section 3:305a of the Dutch Civil Code, Tillema concludes, on the basis of 'systematic case law research', that the number of collective actions has increased over time and that the number of actions brought by commercial advocates – defined by Tillema as advocates who, in addition to representing the interests of the members of the collective (known as *class members)*, have their own interest in the outcome of the proceedings by means of a results-based remuneration[15] – has increased, but that these commercial interest groups are not solely responsible for the increase in the total number of collective actions. She concludes that there are no indications that commercial interest groups are fueling or reinforcing a claim culture in the sense of an increase in frivolous claims.[16]

2.3 Third-party funding

A third development that is growing in significance is that external financing—also known as *third-party* funding—is playing an increasingly important role in collective actions. This should come as no surprise: Tillema has already observed an increase in claims filed by commercial interest groups. After all, these often 'ad hoc' interest groups incur costs for, for example, internal organization and

13 District Court of The Hague, December 13, 2017, ECLI:NL:RBDHA:2017:14512 (*Loterijverlies BV*).

14 Tillema *MvO* 2016, p. 97.

15 Tillema *AA* 2016 p. 342.

16 Tillema *AA* 2016, p. 346.

paying a lawyer, and the costs come before the benefits.[17] Consultations conducted in the context of the Claim Code show that a financial contribution from stakeholders constitutes such a barrier that individuals are less likely to join the interest group. In addition, this arrangement is susceptible to abuse. Once the money has been paid in, it is difficult to check whether it is actually being used in all cases to represent the interests of the individuals who have suffered damage.

Although empirical studies on Dutch practice are lacking, various authors have observed that external financing is a growing phenomenon. Philips, director of a litigation funder, states that litigation financing is "on the rise."[18] Bauw and Voet refer to it as a 'rapidly spreading practice'. [19] Van Boom and Luiten also note the phenomenon: they write that it is used in the Netherlands, but to a lesser extent than in neighboring countries and in international arbitration. In addition, they note that Dutch law "has hardly any regulations that directly relate to the legal relationships between the litigation funder, the funded claimant, and his lawyer."([20]) Litigation funding was the subject of the 2016 annual meeting of the Dutch Association for Procedural Law (NVvP). The report notes that external financing has 'gained a foothold' in the Netherlands.([21]) Visscher argues that third-party funding and other forms of financing fulfill an important social function by increasing access to justice. According to Visscher, restrictive regulations such as the ban on *contingency fees* should therefore be abolished.[22] Lemstra argues that there is no need for regulation/legislation with regard to TPF of collective actions in the Netherlands, as the rules of conduct for lawyers and the Claim Code, in conjunction with Article 3:305a(2) of the Dutch Civil Code, provide sufficient safeguards against undesirable claim behavior. He adds that if rules are needed at all, they should be established through self-regulation (e.g., the Claim Code). ([23])Van der Krans is also of this opinion. ([24])Bauw considers regulation of TPF desirable and leaves open the question of whether self-regulation

17 Tillema *AA* 2016, p. 339.
18 Philips 2017.
19 Bauw & Voet 2017, p. 243.
20 Van Boom & Luiten 2015, p. 199.
21 Dammingh & Van den Berg 2017, p. 78.
22 Lemstra, Philips & Visscher 2018, p. 25 ff.
23 Lemstra, Philips & Visscher 2018, p. 15 ff.
24 Van der Krans 2018, p. 156.

whether this is sufficient or whether legal anchoring is necessary.[25] Developments in practice will have to show this.[26]

The consultation rounds in the context of the Claim Code also confirm the picture of the emergence of external financing. Moreover, it has emerged that external financing takes various forms: for example, it may involve a cash loan or the pre-financing of costs.[27] In addition, it is often decided that an external party will not only pre-finance the costs, but also provide advice and/or perform certain services for the interest group, such as providing a back office for administrative tasks. In all these variants, a litigation financier can exert a certain influence on the litigation strategy and settlement behavior and stipulate a percentage of the proceeds. Usually, the (external) financier is paid on a *no cure no* pay basis. ([28])

Although litigation financing is sometimes associated with a 'claim culture' or 'American conditions',[29] the literature is less fearful. Van Boom, for example, writes that external financing does not lead to an increase in 'unmeritorious' claims, but rather to a filtering effect, because financiers select their cases thoroughly.[30] In addition, various authors argue that external financing increases access to justice and contributes to a level playing field.[31]

2.4 Conclusion

Compliance with the Claim Code increased between 2013 and 2016, but is still only 'average'. There has been an increase in the number of collective actions brought by commercial interest groups and in external financing of collective redress in various forms.

---

25 Bauw 2018, p. 174.

26 However, he considers it desirable that the rules relating to third-party financing also apply if use is made of the above-mentioned constructions, which formally do not involve collective redress but assignment.

27 See also: Van Boom & Luiten 2015, p. 189. Note that this article focuses on litigation financing in general and does not go into detail about the specifics of litigation financing in collective actions.

28 An example is provided by the District Court of The Hague, October 18, 2017, ECLI:NL:RBDHA:2017:11807.
Paragraphs 4.11 and 4.12.

29 For example, Minister Opstelten of Security and Justice wrote a letter about the 'claim culture in the Netherlands' based on *third-party litigation funding*. Letter from the Minister of Security and Justice dated June 26, 2012, *Parliamentary Papers II* 2011/12, 33126, 6.

30 Van Boom 2017, p. 22 with further references.

31 Van Boom 2017, p. 22; Van Boom & Luiten 2015, p. 193; see also: Visscher et al. 2018; Dammingh & Van den Berg 2017, pp. 83-84.

3 The Claim Code in the political domain

This section discusses how the Claim Code has been responded to in the political domain, the domain of policymakers and legislators.[32]

3.1 The admissibility requirement of Section 3:305a(2) of the Dutch Civil Code

In the context of the bill to amend the Collective Settlement of Mass Claims Act (WCAM), the minister commented on the Claim Code. In the context of this bill, the admissibility requirement was added to the second paragraph of Article 3:305a, which stipulates that an interest group must sufficiently safeguard the interests of the victims.[33] In the explanatory memorandum, the Minister wrote that he wholeheartedly welcomed the drafting of the Claim Code. [34] According to the Minister, the Claim Code can be used as a guideline to determine whether the interests of the injured parties are sufficiently safeguarded. [35]

In the memorandum accompanying the report, the Minister confirms these words: he welcomes the initiative of the profession to regulate itself. [36] The Minister also discusses the legal status: although the Claims Code has no legal status, it does have 'indirect legal anchoring'. [37]

3.2 Other responses

In response to media attention surrounding the Lottery Loss Foundation, Member of Parliament Mei Li Vos asked questions in the House of Representatives. She asked whether the Lottery Loss Foundation complies with the Claim Code. She also asked questions in response to the results of the (second) compliance investigation by Bauw and Van der Linden. The Minister of Security and Justice replied that the Claim Code had not yet had the desired effect and indicated that he had 'legally enshrined part of the requirements of the Claim Code' in the collective compensation action bill.([40])

---

32 This was investigated by searching for the word 'claim code' in the database of parliamentary documents.

33 *Parliamentary Papers II* 2011/12, 33126, 2 (Bill to amend the Collective Settlement of Mass Damage Act).

34 *Parliamentary Papers II* 2011/12, 33126, 3 (Explanatory Memorandum), p. 5.

35 *Parliamentary Papers II* 2011/12, 33126, 3 (Explanatory Memorandum), pp. 11-12. See also: *Proceedings II* 2012/13, 61, item 9, p. 77.

36 *Parliamentary Papers II* 2012/13, 33126, 7 (memorandum in response to report), p. 9.

37 *Parliamentary Papers II* 2012/13, 33126, 7 (memorandum in response to report), p. 11.

38 See, for example, the website of the consumer program Radar: https://radar.avrotros.nl/dossiers/detail/stichting-loterijverlies/.

39 *Appendix to Proceedings II* 2016/17, 1124.

40 *Appendix Proceedings II* 2016/17, 412.

3.3 Regarding the bill on **collective compensation actions** This bill is discussed in more detail in section 6, but in the context of the response in the political arena, it is relevant to note that the bill seeks to align itself with the principles of the Claim Code in further elaborating the new Article 3:305a(2) of the Dutch Civil Code, which, according to the parliamentary debate on the bill to date, can count on political support.[41] It is also interesting to note that, during the period surrounding the written debate on the bill, it was stated that only a single case had been assessed against the Claim Code. [42] The following section will examine in more detail how judges assess cases against the Claim Code.

3.4 Conclusion

An analysis of developments in the political arena suggests that the Claim Code can count on the necessary political support. The minister spoke of 'indirect legal anchoring' and referred to the Claim Code as an important indicator for determining whether the admissibility requirement of Section 3:305a(2) of the Dutch Civil Code has been met.

4 The Claim Code in case law

The previous paragraph showed that the legislator intended the Claim Code to play a role in determining whether the legal action brought by an interest group sufficiently safeguards the interests of the persons on whose behalf the legal action is brought. If the answer to this question is negative, the legal action brought by the interest group is inadmissible. It also became clear that, at the time the collective compensation bill was being debated, the view was that the code would only be applied in a few cases.

This section examines how the above criterion and the Claim Code have been applied in a more general sense in case law. By searching the Rechtspraak.nl case law database for the keyword 'Claim Code', the judgments in which the Claim Code is mentioned have been inventoried. The database of Recht-spraak.nl was then searched using a few additional search terms to analyze where the court did safeguard the interests of the constituency.

41 At the time of completion of this contribution, the bill had not yet been accepted by the House of Representatives. However, it can already be concluded that the objections to the bill do not relate to the principles adopted from the Claim Code.

42 For example, in the committee meeting on the bill (Report of the Committee on Security and Justice, *Parliamentary Papers II* 2016/17, 34608, 5) and the Further Report (*Government Gazette* 2016, 63872, p. 27). Also: Tillema 2016, p. 337.

without explicitly mentioning the Claim Code. [43] This yielded a total of 25 results on November 22, 2018. These judgments are first discussed briefly below (section 4.1). An attempt is then made to form a picture based on these judgments (section 4.2).

4.1 The judgments inventoried

WCAM Converium[44]
The first case in which the Claim Code is mentioned dates from 2012 and concerns proceedings in which a request was made to declare a settlement binding on the basis of the WCAM. In its ruling, the Amsterdam Court of Appeal considered that the interest group complied with the Claim Code. Although the foundation did not have a Supervisory Board, other appropriate forms of supervision were in place. The interest groups – the ad hoc foundation and the VEB – are therefore sufficiently representative to declare the settlement binding (grounds for the judgment 10.4). It is interesting to note that in WCAM proceedings, the Claim Code plays a role in the assessment of the settlement proposal. This ruling was issued before the introduction of the legal provision that the interests of injured parties must be sufficiently safeguarded. The Claim Code was therefore already taken up by the Amsterdam Court of Appeal in this ruling before it was 'indirectly enshrined in law' by the minister. This is the first ruling in which importance is attached to the Claim Code. ([45])

43 First, a search was conducted for '3:305a sufficient safeguards'. This yielded 81 results, three of which did indeed assess whether the interests of the injured parties were sufficiently safeguarded. These are included in the overview below. Next, a search was conducted using the search terms '3:305a BW bestuur' (3:305a BW management), but this yielded such a large number of diverse results that further refinement was necessary. Therefore, further searches were conducted using '3:305a governance', '3:305a transparent' and '"3:305a lid 2 BW"' (with quotation marks). After further selection of the results – i.e., a focus on cases that actually tested the safeguarding of the interests of the injured parties – no judgments remained other than those included in the overview. In other cases, for example, there was a reference to the management or *governance* of the defendant, or a foundation was declared inadmissible because it did not meet the first requirement of Article 3:305a(2) of the Dutch Civil Code, namely that the foundation must first have attempted consultation. Incidentally, the literature cited in this study did not bring any further judgments to our attention. The study described here was completed on November 22, 2018; the search mentioned above was carried out several times separately in the period prior to that date.

44 Court of Appeal Amsterdam, January 17, 2012, ECLI:NL:GHAMS:2012:BV1026, *JOR* 2012/51 with commentary by B.J. de Jong (*WCAM Converium*).

45 B.J. de Jong, *JOR* 2012/51.

Stichting Loterijverlies [Lottery Loss Foundation)](46
In this case, the Court of Appeal in The Hague considers – prior to the entry into force of the requirement to sufficiently safeguard the interests of the persons represented – that, given the affiliation of approximately
23,000 natural persons, it cannot be said that there is abuse of Article 3:305a of the Dutch Civil Code, 'even if the commercial interests of Loterijverlies.nl B.V. and its indirect founder/DGA (...) (and the circumvention of the no cure no pay prohibition) also play a role' (grounds for the judgment 2.4). In other words, the fact that the collective action by a legal entity other than the claimant legal entity generates profit does not constitute an abuse of law. The defendant, the Staatsloterij, is therefore rejected on the grounds of inadmissibility.

This ruling is in line with the contested judgment of the District Court of The Hague.[47] An appeal in cassation has been lodged against the judgment, but this was not directed against this admissibility ruling.[48]

WCAM DSB[49]
As in the Converium case, it is also clear in this WCAM case that the Amsterdam Court of Appeal considers the Claim Code to be relevant in WCAM proceedings. Without further justification, the court considers that it has been sufficiently demonstrated that the interest groups comply with the Claim Code (grounds for the judgment 6.2.4).

Stichting Asbest[50]
In this case, the Gelderland District Court dismissed the appeal against Achmea's failure to comply with the Claim Code. The court considers that Achmea has not provided sufficient evidence to conclude that the Asbestos Foundation has a commercial purpose (grounds for the judgment 5.4) and that the interests of the injured parties are insufficiently safeguarded (grounds for the judgment 5.5). The court concluded that the Claim Code could not benefit Achmea (ground 5.7).

46 Court of Appeal of The Hague, May 28, 2013, ECLI:NL:GHDHA:2013:CA0587, *NJF* 2013/308 (*Lottery loss*).
47 District Court of The Hague, March 31, 2010, ECLI:NL:RBSGR:2010:BL9558.
48 Supreme Court, January 30, 2015, ECLI:NL:HR:2015:178, *NJ* 2015/377 with commentary by S.D. Lindenbergh (*State Lottery/Lottery Loss*).
49 Court of Appeal Amsterdam, May 15, 2014, ECLI:NL:GHAMS:2014:1690, *JOR* 2015/9 (*WCAM DSB*).
50 Gelderland District Court, September 3, 2014, ECLI:NL:RBGEL:2014:5645 (*Asbestos Foundation*).

Earthquakes in Groningen[51]
In the class action against NAM concerning the earthquakes in Groningen, the District Court of Northern Netherlands considers that, according to the explanatory memorandum to the WCAM, the Claim Code is one of the factors that is important in determining whether the interests of the injured parties are sufficiently safeguarded (grounds for the judgment 4.1.21). The court finds that the claims foundation, the WAG Foundation, does not comply with the Claim Code on all points because there is no governance structure set out in a separate document each year and there is no supervisory board (grounds for the judgment 4.1.26).

The court then ruled that this was insufficient to declare Stichting WAG inadmissible, because the Claim Code is '(only) a point of view' and the court ruled that the interests of the injured parties in this case were sufficiently safeguarded. The court considers it important that the WAG Foundation itself has no commercial interests and is not a foundation that is 'purely commercially driven' (grounds for the judgment 4.1.27).

SDB Foundation[52]
In this case between Stichting SDB et al. and ABN AMRO, the inadmissibility based on the requirement of sufficiently safeguarded interests was discussed, but the court did not assess the substance of the case. ABN AMRO did not refute the further substantiation provided by Stichting SDB, so that the correctness of the position of the claim foundations must be assumed (grounds for the judgment 5.10).

Milieudefensie/Shell[53]
In the case brought by Milieudefensie against Shell for pollution in Nigeria, the admissibility requirement of Article 3:305a(2) of the Dutch Civil Code was also invoked. Shell argues that Milieudefensie's case is inadmissible. Shell argues that Milieudefensie has no or only a small support base among the group of directly interested parties and that Milieudefensie does not have sufficient knowledge and skills. The court rejects these arguments: the first argument misrepresents the admissibility requirement. The court refers to the parliamentary history, in which the Consumers' Association is mentioned. The support base of the Consumers' Association is also only

---

51 District Court of Northern Netherlands, September 2, 2015, ECLI:NL:RBNNE:2015:4185, *JA* 2016/25 with commentary by J.W. Silvius (*Earthquakes in Groningen*).

52 District Court of Amsterdam, November 11, 2015, ECLI:NL:RBAMS:2015:7848, *JOR* 2016/96
with commentary by B.T.M. van der Wiel & A. Stortelder (*SDB Foundation*).

53 Three judgments of the Court of Appeal in The Hague December 18, 2015, ECLI:NL:GHDHA:2015:3588 (grounds for judgment 3.4), ECLI:NL:GHDHA:2015:3587 (grounds for the judgment 3.4) and ECLI: NL:GHDHA:2015:3586 (grounds for the judgment 4.4), *JOR* 2016/119 with commentary by J. Fleming.

a small group of all consumers on whose behalf it acts. The argument of insufficient knowledge 'lacks proper substantiation', according to the court.

The court notes that the condition that the interests of the persons represented must be sufficiently safeguarded is intended 'as a tool for critically assessing admissibility in cases where there are doubts about the motives for bringing a collective action', and serves to prevent 'claim foundations from using the right to collective action to pursue their own commercially driven motives'.

In the first instance, the District Court of The Hague also considered Milieudefensie admissible because Milieudefensie meets the requirements of Section 3:305a of the Dutch Civil Code. Shell had argued that Milieudefensie had not sufficiently safeguarded the interests of its supporters, but according to the court, there is no reason to believe that Milieudefensie's demand, namely that measures be taken to prevent oil spills, could be contrary to the interests of its supporters. ([54])

Furthermore, this ruling shows that bringing a collective action on the basis of Article 3:305a of the Dutch Civil Code – and thus its interpretation by the Claim Code – is considered a matter of procedural law under Dutch private international law. This means that it is applied by the Dutch court as *lex fori processus* and is therefore applied regardless of the choice of law made by the Dutch court (grounds for the judgment 4.2).

Interest rate swap damage claim[55]
The District Court of East Brabant ruled that the Interest Rate Swap Damage Claim Foundation was inadmissible because the interests of those involved were insufficiently safeguarded. The court considered that the following factors, among others, could be taken into account in its assessment: the other activities of the foundation to promote the interests of the parties involved, whether it is an ad hoc organization or whether it was established by an existing organization that has successfully represented the interests of the parties involved in the past, how many injured parties are affiliated with the organization, and to what extent they represent the collective

54 District Court of The Hague, January 20, 2013, ECLI:NL:RBDHA:2013:BY9845 (grounds for the judgment 4.2. 4.14), and ECLI:NL:RBDHA:2013:BY9854 (grounds for the judgment 4.13) and ECLI:NL:RBDHA:2013:BY9845 (grounds for the judgment 4.14).

55 District Court of East Brabant, June 29, 2016, ECLI:NL:RBOBR:2016:3383, *JOR* 2016/278 with commentary by
J.H. Lemstra (*Interest swap damage claim*).

support the action and whether the organization supports the principles set out in the Claim Code (grounds for the judgment 5.15).

The Interest Rate Swap Damage Claim Foundation argues that the Claim Code 'is of only minor significance because it is not a statutory regulation and can only count on limited support' (grounds for the judgment 5.18). The court does not agree with this, because the legislative history shows that the Claim Code has 'indirect legal anchoring' (grounds for the judgment 5.19). According to the court, compliance or non-compliance with the principles of the Claim Code is therefore 'an important consideration in assessing whether the interests of the injured parties are sufficiently safeguarded', in addition to the other factual factors (ground 5.21).

In this case, the breach of the Claim Code relates, in particular, to a board consisting of two instead of three persons, with one person clearly having the upper hand. The supervisory board also carries insufficient weight (grounds for the judgment 5.24).

The court further considers: 'However, the court will not base its decision to declare the claim inadmissible solely on this ground. As will be discussed below, the nature and content of the claims submitted by the Foundation also mean that the Foundation's claims cannot be upheld' (ground 5.27).

Privacy Claim Foundation[56]
In this judgment, the District Court of East Brabant reiterates its considerations regarding the 'indirect anchoring' of the Claim Code (grounds for judgment 4.7.3). The Privacy Claim Foundation is inadmissible because it has only one board member and does not have the expertise required by the Claim Code (grounds for judgment 4.10.3). Furthermore, there is no explanation on the website as to why the Claim Code is being deviated from (4.10.1). In addition to non-compliance with the Claim Code, the court also considers that the collective action is not supported by the victims (4.11.1).

Trafigura I[57]
In this case, it was also ruled that the interest group in question was inadmissible because the interests of the injured parties were insufficiently safeguarded. The District Court of Amsterdam considered, in almost identical terms to the judgments of the District Court

56 District Court of East Brabant, July 20, 2016, ECLI:NL:RBOBR:2016:3892 (*Privacy Claim Foundation*).

57 Amsterdam District Court, November 20, 2016, ECLI:NL:RBAMS:2016:7841, *JOR* 2018/201
m.nt. D.F.H. Stein (*Trafigura I*).

Oost-Brabant, that compliance with the principles of the Claim Code is not a legal condition for admissibility, but that the Claim Code does have indirect legal anchoring (grounds for the judgment 5.17).

Here too, the board consists of two persons, one of whom has the upper hand. The board has not demonstrated that the board members are sufficiently qualified, and there is no supervisory board. Nor is there a website where the supporters can be informed about these deviations (grounds for the judgment 5.19). There are also close ties with an association under Ivorian law that was established by the director of the foundation (grounds for the judgment 5.21).

Stichting Loterijverlies [58]
This judgment of the District Court of North Holland does not concern a claim under Section 3:305a of the Dutch Civil Code or the WCAM, but rather the dismissal and appointment of new board members of the Lottery Loss Foundation. The Claim Code is mentioned in passing here: two board members are appointed, one from each side, who can jointly appoint a third board member to comply with the Claim Code (grounds for the judgment 2.4). This judgment was upheld on appeal.[59]

Interim decisions WCAM Fortis[60]
In the WCAM proceedings in the Fortis case—in which a request was made to declare the settlement between the interest groups VEB and Deminor, FortisEffect, and SICAF on the one hand and Ageas on the other hand binding—it was established that the latter three interest groups are "commercial interest groups that do not comply with the Claim Code in all respects' (ground 8.33) and that VEB sends a 'mixed message' about the Claim Code (ground 8.40). In its ruling, the court emphasizes that during the oral hearing, attention was paid to the question of whether the interest groups comply with the Claim Code (grounds for the judgment 10.6 and 10.7).

Based on a number of considerations the court decides not to declare the settlement binding and gives the parties the opportunity to amend it. However, it is clear that the Amsterdam Court of Appeal will also take the Claim Code into account in WCAM proceedings. In a second interim ruling, the court requests further information. [61]

---

58 District Court of North Holland, June 8, 2017, ECLI:NL:RBNHO:2017:4695 (*Stichting Loterij-verlies*).

59 Court of Appeal of Amsterdam, January 31, 2018, ECLI:NL:GHAMS:2017:210.

60 Court of Appeal of Amsterdam, June 16, 2017, ECLI:NL:GHAMS:2017:2257, *JOR* 2018/10 with commentary by J.S. Kortmann (*Interim ruling WCAM Fortis I*).

61 Court of Appeal of Amsterdam, February 5, 2018, ECLI:NL:GHAMS:2018:268, *JOR* 2018/246 with commentary by I.N. Tzankova (*Interim ruling WCAM Fortis II*).

In addition, the court also inquires about the "various revenue models used and/or common in the market by interest groups" (grounds for the judgment 2.6).

Appeal Trafigura I[62]
In the appeal in *Trafigura I*[63] the Amsterdam Court of Appeal ruled that admissibility on the basis of Article 3:305a(2) of the Dutch Civil Code should not be determined at the incidental stage, thereby immediately precluding substantive consideration, but rather in the final judgment. The assessment forms an important part of the proceedings in the main action (grounds 2.5 and 2.6).

Stichting PAL[64]
The District Court of The Hague cites the explanatory memorandum to the bill on collective settlement of mass claims and, on that basis, considers that the Claim Code is relevant in assessing whether the interests of injured parties are sufficiently safeguarded (grounds for the judgment 4.8). The PAL Foundation argued that it did not have to comply with the Claim Code because it is not a claim or ad hoc foundation, but was established twelve years ago and consists of volunteers. The court rejected this argument and considered that PAL should be regarded as a claim foundation to which the Claim Code applies (ground 4.13). The court then stated that PAL does not comply with the Claim Code because it does not set out its governance structure annually in an accountability document and does not have a supervisory board. Interestingly, the court then considered that this detracts from the credibility of the PAL Foundation, but 'is not decisive for its assessment of whether PAL meets the requirements that Section 3:305a of the Dutch Civil Code imposes on a collective interest organization', because PAL is a non-profit organization and is transparent about a commercial party involved (grounds for the judgment 3.14). The court also takes the view that the involvement of a commercial party as a financier and advisor does not preclude the admissibility of an interest group: a legal entity that acts (partly) for commercial gain does not necessarily have *impure* commercial motives (ground 4.11).

Ultimately, the court declares PAL's claim inadmissible on other grounds: 'in this case, insufficient facts have been presented to conclude that the collective action in question would lead to a

62 Court of Appeal of Amsterdam, October 3, 2017, ECLI:NL:GHAMS:2017:4063, *JBPR* 2018/51 m.nt. D.L. Barbiers (*appeal Trafigura I*).
63 District Court of Amsterdam, November 20, 2016, ECLI:NL:RBAMS:2016:7841, *JOR* 2018/201
m.nt. D.F.H. Stein.
64 District Court of The Hague, October 18, 2017, ECLI:NL:RBDHA:2017:11807 (*Stichting PAL*).

more effective and efficient legal protection can be expected than individual dispute resolution' (ground 4.15).

Loterijverlies B.V.[65]
After turbulent proceedings between Stichting Loterijverlies and the Staatsloterij[66] Loterijverlies.nl B.V., the previously suspended director of Stichting Loterijverlies, attempted to bring an action for damages itself, not by means of Section 3:305a of the Dutch Civil Code, but by means of a private mandate for collection (grounds for judgment 4.2). The court considers that this claim cannot, nevertheless, be viewed separately from the collective action (grounds for judgment 5.3). The court therefore declares the claim inadmissible on the grounds of abuse of procedural law as referred to in Articles 3:13 and 3:15 of the Dutch Civil Code, with the considerations being colored by the requirement of sufficiently guaranteed interests under Article 3:305a(2) of the Dutch Civil Code. In this assessment, the court examines the Claim Code in detail. The court considers: 'There is no evidence that Loterijverlies
B.V. complies with one or more of the principles of the Claim Code'.

Brexit[67]
British citizens living in the Netherlands are bringing summary proceedings against the State to ensure that they retain their EU citizenship after Brexit. The plaintiffs are five individuals, a foundation, and an association, who are bringing proceedings on the basis of Section 3:305a of the Dutch Civil Code.

The preliminary relief judge mentions a number of issues that are important in determining whether the interests of the persons on whose behalf the claim has been brought are sufficiently safeguarded. The court mentions a number of factors and writes: "It may also be significant whether the claimant organization complies with the principles set out in the Claim Code" (ground 4.3). The preliminary relief judge continues in his judgment: 'Although the Claim Code and the criteria contained therein are not decisive in this respect, it appears from the legislative history of Section 3:305a of the Dutch Civil Code that the legislator does wish to attach a certain weight to it (as *soft law)*' (ground 4.4).

The preliminary relief judge declares the foundation inadmissible in this case because all management functions are combined in one person and because the advisory board also consists of one person, as a result of which the 'balanced composition of the management advocated by the Claim Code, which

65 District Court of The Hague, December 13, 2017, ECLI:NL:RBDHA:2017:14512, *JBPR* 2018/12
m.nt. I.J.F. Wijnberg (*Loterijverlies B.V.*).

66 Previously, reference was made in this context to the website of the consumer program Radar: https://radar.avrotros.nl/dossiers/detail/stichting-loterijverlies/.

67 Amsterdam District Court, February 7, 2018, ECLI:NL:RBAMS:2018:605 (*Brexit*).

according to this code, can in principle be guaranteed by appointing three board members, is insufficiently assured' and because it has not been demonstrated that the foundation has sufficient support among the stakeholders it claims to represent (grounds for the judgment 4.4).

The association is declared admissible because it has 'made it sufficiently plausible that it meets the conditions set out in Section 3:305a of the Dutch Civil Code' (grounds for the judgment 4.5).

Reprimand Earthquake case[68]
This case is a follow-up to the aforementioned earthquake case. In this case, a law firm acted on behalf of the NAM to obtain compensation for earthquake damage. In order to initiate Article 3:305a proceedings, a director of the law firm established a foundation – the WAG Foundation mentioned in that case. After this director resigned as a director of the foundation and other directors were appointed in his place, lawyers from this director's firm acted as lawyers for the WAG foundation (grounds for the judgment 2.1-2.3).

The WAG Foundation would pay the lawyers on an hourly basis. Those affected by the earthquake damage would pay a fixed amount of €100 to the foundation, plus a *success fee* of 5 to 10 percent of the individual compensation (grounds for the judgment 2.5). According to the Dean of the Bar Association in the Northern Netherlands district, this arrangement is contrary to the independence of lawyers (Articles 46 and 10a of the Lawyers Act) and to the prohibition on *no cure, no pay (*Article 2(1) of the Regulation on the Practice of Law). The Dean substantiates this on the basis of the Claim Code. He argues that the Claim Code may not have a direct effect on foundations, but it does reflect the integrity standards that claim foundations must comply with (grounds for the judgment 3.1). The prohibition on *no cure, no pay* has been violated, and due to the intertwining of the foundation and the law firm, there is no independence of the lawyers. This leads to the lawyers in question being reprimanded.

In the appeal to the Disciplinary Court, this ruling by the Disciplinary Council was upheld. [69] The Disciplinary Court explicitly assessed the Claim Code and considered that the WAG Foundation did not comply with the code (grounds for the judgment 5.32). The claim code thus indirectly influences a standard of conduct for lawyers.

---

68 Disciplinary Council Arnhem-Leeuwarden January 8, 2018, ECLI:NL:TADRARL:2018:1.

69 Disciplinary Court of the Northern Netherlands, September 7, 2018, ECLI:NL:TAHVD:2018:178.

Picture tube claim[70]
The case known as 'Beeldbuisclaim' concerns (among other things) the question of whether the cooperation between the Consumers' Association and the organization Consumenten-Claim B.V. is in violation of principle II of the Claim Code. This principle requires that the interest group and all legal entities associated with it are non-profit organizations. This case concerns a request to hold a pre-trial hearing.

The plaintiff in these proceedings is the Consumers' Association, which has initiated this claim in collaboration with ConsumentenClaim B.V. and Stichting Beeldbuisclaim. The Consumers' Association also refers to the ConsumentenClaim website (grounds for appeal 2.3).

The defendant, Philips, argues that the Consumers' Association, the claimant, plays only a modest role in bringing the claim, and that the underlying organizations ConsumentenClaim B.V. and Stichting Beeldbuisclaim "contrary to the Claim Code, are pursuing the objective of making a considerable profit with the claim against Philips et al. without the consumer ultimately benefiting from this" (ground 4.4).

Without further justification, the court considers – after briefly citing principle II of the Claim Code – that 'the Consumers' Association, with the (amended) text on its website (see 2.3 above) sufficiently allayed concerns that ConsumentenClaim B.V. might be pursuing a profit motive with the Picture Tube Claim campaign and that the Consumers' Association might be facilitating this' (ground 4.6).

According to the court, cooperation with a commercial party does not automatically lead to a conflict with principle II of the Claim Code. It should be noted, however, that this case only concerns a request for a pre-trial hearing (Article 1018a of the Dutch Code of Civil Procedure) and that this request is still rejected on other grounds.

Trafigura II[71]
In a second case concerning the issue of the ship Probo Koala against Trafigura, the Claim Code is again discussed at length. The interest group in this case is a different foundation from the interest group in the case previously referred to as *'Trafigura I'*. This judgment is a ruling on Trafigura's incidental claims.

70 Amsterdam District Court, March 29, 2018, ECLI:NL:RBAMS:2018:1682 (*Picture tube claim*).
71 Amsterdam District Court, April 18, 2018, ECLI:NL:RBAMS:2018:2476, *JOR* 2018/202 (*Trafigura II*).

In short, an incidental proceeding concerning jurisdiction and an incidental claim to declare the interest group involved inadmissible (grounds for the judgment 4.1).

The court assesses the admissibility of the interest groups against the requirement of sufficiently guaranteed interests. The court divides its assessment of this into two elements: (1) whether the injured parties will ultimately benefit from the claim being granted, and (2) whether the interest group has sufficient knowledge and skills. The Claim Code applies here, the court considers, as one of the three factors in answering the second question. The other two factors are representativeness and track record. This track record is determined on the basis of (1) the other activities that the organization has carried out to promote the interests of those involved, (2) whether the organization 'has actually been able to achieve its objectives', and (3) 'in the case of an ad hoc organization, whether it was established by an existing organization that has successfully represented the interests of the parties concerned in the past' (grounds for the judgment 5.6).

The court declares the foundation inadmissible. It considers the following in this regard. In line with previously cited case law, the Amsterdam District Court refers to an indirect legal anchoring of the Claim Code. Due to this indirect legal anchoring, compliance with the principles of the code is important in determining whether the interests of the injured parties are sufficiently safeguarded (grounds for the judgment 4.25). With regard to governance, the court considers that, following amendments to its articles of association, the Foundation now complies with the principles of the Claim Code: earlier in the proceedings, the Foundation did not yet meet the governance requirements of the Claim Code (4.27). However, the articles of association have now been amended and the structure complies with the requirements of the Claim Code. According to the court, it can therefore be assumed that the Foundation has sufficient knowledge and skills (grounds for the judgment 4.27).

The court then considers whether the Foundation complies with Principle II of the Claim Code, which stipulates that legal entities affiliated with the Foundation may not be profit-oriented. The court then considers the question of whether other organizations involved—which the defendant claims are profit-oriented—should be regarded as legal entities directly or indirectly affiliated with the Foundation as referred to in Principle II of the Claim Code. The court considers that this can only be assessed 'on a case-by-case basis' and that the history of the Foundation may play a role in this (ground 4.37). The court first considers that the Foundation cannot represent the interests of the victims without cooperating with certain local

victim organizations (grounds for judgment 4.39), particularly due to logistical problems in Ivory Coast: a number of victims live in slums, without an official address, and do not have access to banking facilities.

The court considers that the impression arises that these local organizations "are trying, or at least tried in the past—before the Foundation became involved in the case—to profit (and have profited) from the alleged claims of (alleged) victims and that it is difficult to control this" (ground 4.44). In the remainder of the judgment, the court expresses its skepticism: is it really possible to pay out only a maximum of 5 percent of the awarded damages to the local victim organizations by way of compensation? How will the money reach the victims? This leads the court to conclude that the interests are insufficiently safeguarded (ground 4.47).

In addition, the court considers that a settlement, which can then be declared binding through the WCAM procedure, is not obvious in this case (ground 4.48).

This case is particularly interesting for the Claim Code because the court extensively assessed Principle II of the Claim Code. It did so based on the specific circumstances of the case, taking into account the entire history of the interest group and the other organizations involved. Stein rightly notes: 'The court is therefore applying an "ex nunc" test and believes that non-compliance with the Claim Code at the time of the summons should not be given too much weight'.[72] Rutten is critical of this ruling. He argues that victims do indeed benefit from a declaration of law. After all, this also has consequences for other proceedings involving other interest groups. By definition, this benefits the victims.[73]

Sexual abuse in the Roman Catholic Church[74]
Recently, large-scale sexual abuse within the Roman Catholic Church has come to light. The Foundation for Management & Supervision of Sexual Abuse in the Roman Catholic Church in the Netherlands (Stichting B&T) was established to handle and assess complaints about this abuse. The Sint Jan Foundation for a Fair Trial has initiated proceedings and, in short, claims that the B&T Foundation has handled complaints in a manner that is contrary to Article 6 of the ECHR (the right to a fair trial) (ground 3.1). The B&T Foundation defends itself with, among other things,

72 Stein, note on *Trafigura II*, *JOR* 2018/202.
73 Rutten 2018, p. 35.
74 Gelderland District Court, April 18, 2018, ECLI:NL:RBGEL:2018:1743, *JBPR* 2018/38 with commentary by
R.M. Hermans (*sexual abuse in the Roman Catholic Church*).

the assertion that the Sint Jan Foundation does not comply with the Claims Code. The court rejects this defense: the requirement that the Sint Jan Foundation must comply with the Claims Code goes 'too far'. 'The Sint Jan Foundation is not concerned with financial claims and mass damage, but with idealistic goals. It is a non-profit organization and it has not been argued or proven that any financial interest is at stake in this case,' the court considers (grounds for the judgment 4.7).

In this ruling, the court therefore considers that the Claim Code cannot be deemed applicable when there is no financial interest involved and the claimant is pursuing purely idealistic goals.

GIN Schade[75]
This case concerns financing arrangements and participations in the cultivation of trees for timber production. The claimant foundation, Stichting GIN Schade, is seeking a declaration from both the financier and the notaries who executed the deeds that the arrangements are null and void or dissolved (grounds for the judgment 3.1). The defendants take the position that Stichting GIN Schade does not comply with the claim code, and have substantiated this (ground 4.15). After discussing the indirect legal basis of the Claim Code with reference to the relevant legislative history (grounds 4.13 and 4.14), the court considers that the foundation has not sufficiently substantiated its objection and that the claim must therefore be declared inadmissible (grounds for the judgment 4.16).

The court clearly regards compliance with the Claim Code as a factual question. The question of whether a claimant complies with the Claim Code must therefore be answered on the basis of the main rule of Article 150 of the Code of Civil Procedure.

SEKAM[76]
In this case, the SEKAM foundation, supported by film producers, is seeking a declaration under Article 3:305a of the Dutch Civil Code that the State is not taking sufficient measures to prevent illegal downloading (grounds for the judgment 3.1). The State defends itself by arguing, among other things, that the SEKAM foundation does not comply with the Claim Code because the foundation does not have a supervisory board and because none of its board members is 'the lawyer referred to in the Claim Code with specific experience and legal expertise necessary for the adequate representation of the interests described in the foundation's statutory objectives' (ground 4.18).

---

75 Amsterdam District Court, April 25, 2018, ECLI:NL:RBAMS:2018:2693, *JOR* 2018/202 with commentary.
D.F.H. Stein (*GIN Schade*).

76 District Court of The Hague, September 5, 2018, ECLI:NL:RBDHA:2018:10645 (*SEKAM*).

However, the court considers that the foundation can be declared admissible: the State refers to effects that, according to the court, should be regarded as 'examples'. The 'principled requirements' are met, as SEKAM is supervised by the Copyright Supervisory Board and complies with the requirements of the Code of Good and Ethical Governance for Collective Management Organizations. The court considers: 'SEKAM thus meets the fundamental requirements of the Claim Code for balanced and responsible management that is accountable to a supervisory body'.

In this ruling, the District Court of The Hague therefore considers that interest groups must essentially comply with the principles of the Claim Code and that the details are examples.

Final ruling WCAM Fortis[77]

In its final ruling in the WCAM proceedings concerning the Fortis case, the Amsterdam Court of Appeal declared the settlement with Fortis' legal successor Ageas to be binding. The court first considered that not all applicants in the interim rulings complied with the Claim Code. At the time of the final ruling, one of those applicants had initiated a transition to comply with the Claim Code, but this had not yet been completed (ground 5.11). The court further reiterates its considerations from the interim decisions that 'if an interest group requests compensation for costs incurred or for running a litigation risk, that is not yet a reason to assume that the interests of the injured parties are or will be insufficiently represented. The mere fact that an interest group operates wholly or partly on a commercial basis does not mean that it cannot be a claimant in WCAM proceedings'. The court considers that every financing model, whether for-profit or non-profit, has advantages and disadvantages: it is particularly important that interest groups are transparent about their income and expenditure. 'Adequate information' must be provided in this regard. The court further considered: 'The Claim Code pursues the same objectives, albeit with a particular emphasis on the governance structure of an interest group' (ground 5.12). In doing so, the court laid down its most important criterion for assessing the financing of interest groups: transparency.

The court further considers that the remuneration for the interest groups cannot be viewed separately from the settlement and is therefore included in the assessment of whether the settlement can be declared generally binding (grounds for the judgment 5.19 and 5.20). The court considers that

77 Court of Appeal of Amsterdam, August 13, 2018, ECLI:NL:GHAMS:2018:2422, *JOR* 2018/246 m.nt. I.N. Tzankova (*WCAM Fortis II*).

these fees are 'justified' (grounds for judgment 5.47, grounds for judgment 5.49) and not unreasonable (grounds for judgment 5.48) for most claim entities. However, this is different for one of the applicants, the VEB. In this regard, the court considers 'that in the absence of actual costs or expenses that offset the additional compensation, no objective justification can be found for awarding it to the members of the VEB' (grounds for the judgment 5.53). In addition, the court considers the distinction between active supporters (VEB members) and non-active supporters (investors not known to the VEB) to be unjustified and contrary to the Claim Code. The VEB wants to award active members additional compensation 'without any actual costs or expenses being incurred' (grounds for the judgment 5.58). The Claim Code aims, according to the court, 'to ensure that an interest group represents collective interests on a non-profit basis, operates independently and avoids conflicts of interest' (grounds for the judgment 5.59).

Taking all this into consideration, the court declares the settlement binding on all applicants except the VEB (ground 8.1). The court emphasizes, 'in order to avoid misunderstandings', that the agreement as a whole will be declared binding. The rejection with regard to the VEB 'has no consequences for the validity of the agreement between the VEB and the other applicants, nor for the practical implementation, compliance, and execution of the agreement after the declaration of binding force has become irrevocable' (ground 8.3). This rejection can therefore be regarded primarily as a 'slap on the wrist' that has no consequences.

This ruling shows that the Claim Code is also important when assessing the compensation of interest groups. The code prevents inactive members of the constituency from being disadvantaged if the distinction made in treatment cannot be objectively justified.

VEB[78]
In this ruling, in which the Association of Securities Holders (VEB) brought a class action against a furniture manufacturer, the defendant filed an incidental appeal and argued that the VEB was not admissible, partly on the basis of the Claim Code. The furniture manufacturer argues that the VEB has its own commercial interest, because the VEB's supporters must pay 9 percent of the awarded damages. The VEB argues that this only applies to institutional investors and that its members only pay membership fees (grounds for the judgment 4.21). Since the defendant does not dispute this, it must be concluded that the VEB does not have an improper

78 Amsterdam District Court, September 26, 2018, ECLI:NL:RBAMS:2018:6840 (*VEB*).

commercial motives. The court therefore ruled that the VEB's claim was admissible (grounds for judgment 4.22).

Wakkerpolis[79]
This judgment concerns a decision on an incident in the Wakkerpolis case. The District Court of Rotterdam considers that the Wakkerpolis NNClaim Foundation does not comply with the Claim Code: the governance structure does not meet the "requirements that may be imposed on it to prevent the commercial interests of [person 1] from prevailing over the interests of the policyholders affiliated with the Foundation." 'Person 1' is a board member of the foundation and is also affiliated with a litigation financier. In addition, the court has doubts about the extent to which the supervisory board and the participants' council can counterbalance the board (grounds for the judgment 4.11).

Nevertheless, the District Court of Rotterdam declared the foundation's claim admissible. The court put forward four arguments in support of this: first, the commercial interests of the persons behind the foundation are not contrary to, but rather parallel to, the interests of the supporters. Both those persons and the supporters benefit from the requested declaration of law. In addition, the court considered that since the 2011 Claim Code, 'developments have taken place in, among other things, the financing of this type of procedure and a revised version is currently being worked on'. The third argument is the 'comply or explain' principle of the Claim Code, which means that failure to meet the requirements does not necessarily mean that the claim is inadmissible. Finally, the court considers that if the Claim Code is not complied with, it is possible that the safeguards of Section 3:305a(2) of the Dutch Civil Code may be complied with in another way (ground 4.12).

The court further emphasizes that it is possible that the assessment may be different in the case of an action for damages or a request for a general binding declaration on the basis of the WCAM (ground 4.14).

4.2 Analysis

4.2.1 Assessment against the Claim Code
The Claim Code is playing an increasingly significant role in case law. Its application has clearly increased with the entry into force of the second sentence of Article 3:305a(2) of the Dutch Civil Code, which stipulates that the 3:305a organization must adequately safeguard the interests of the persons it represents. This is also evident from the case law analysis

79 Rotterdam District Court, July 18, 2018, ECLI:NL:RBROT:2018:9219 (*Wakkerpolis*).

by Rutten also shows that courts assess cases against the Claim Code. He argues that this is not yet done in an 'unambiguous manner'.[80]

In view of the comments in the political debate surrounding the collective compensation action bill – around 2016, it was noted that the Claim Code had only been assessed to a limited extent (see paragraph 3.3) – it is relevant that the significance attached to the Claim Code by the courts has increased significantly: seven judgments date from before 2016, eighteen from 2016 and later. In seventeen of the twenty-five cases, the Claim Code was actually applied. Only in the Milieudefensie case was there explicit assessment of the 'sufficient safeguards', but the Claim Code was not applied. In other cases, for example, there was insufficient evidence to even proceed to review. In one case, the Claim Code was not considered applicable because it concerned purely an idealistic action without a financial component (sexual abuse in the Roman Catholic Church). It is also interesting to note that the Claim Code can also play a role in cases other than a 3:305a claim, for example in the appointment of directors at an interest group (Lottery Loss) or in the conduct of lawyers (Reprimand Earthquake Damage).

The Claim Code is given meaning both in a claim under Section 3:305a of the Dutch Civil Code and in a request for a binding declaration under the WCAM. The courts refer to the indirect legal anchoring of the Claim Code and thus assign the code an important role in the criterion that the interests of 'the injured parties' must be sufficiently safeguarded. Under the WCAM, the Claim Code is used to assess whether the interest groups are sufficiently representative (Article 7:907(3)(f) of the Dutch Civil Code). In the context of the WCAM, it is also interesting to note that the applicable rules of procedure require information to be provided on, among other things, whether and how supervision is provided to safeguard the interests of the constituency. ([81]) The assessment of adequate representation of interests, which is the subject of the Claim Code, is therefore integrated into the handling of the petition.

It is clear, however, that compliance with the Claim Code is not a legal requirement: there are also judgments in which it is ruled that an interest group does not comply with the Claim Code, but the court nevertheless declares the claim admissible. All in all, the Claim Code can therefore at least be regarded as a relevant and important point of reference for the court.

---

80 Rutten 2018, pp. 33-34.

81 Art. 2.2.2.3 under c sub ii, Rules of Procedure for petition proceedings in commercial and insolvency cases before courts of appeal, tenth version, January 2018.

The preliminary relief judge in Amsterdam referred to *soft law* to which a certain weight should be attached.

It is also striking that the indirect legal anchoring of the Claim Code has become more or less established case law in the courts. It is worth noting that the Gelderland District Court did not apply the Claim Code in the context of a claim in which no financial interest was at stake.

It is also interesting that the District Court of The Hague stipulates that an interest group must comply with the principles of the Claim Code. If the requirements are not met, but the organization complies with the principles in another way, an interest group may still be declared admissible.

4.2.2 Apply or explain

During the consultation round, concerns were raised that the court would apply the Claim Code too rigidly and would not allow sufficient scope for deviation and transparency ('comply or explain'). This case law study gives no reason to assume this will be the case.

Firstly, there are cases where non-compliance with the Claim Code is compensated for by organizing other forms of supervision (Stichting WAG, SEKAM). There are also cases where, in addition to non-compliance with the Claim Code, there are other reasons for inadmissibility (Interest Rate Swap Damage Claim, Stichting Privacy Claim, Brexit). In one case, the 305a organization did not comply with the Claim Code and this was sufficiently compensated, but a completely different reason prevented the foundation from being admissible (Stichting PAL). In the WCAM proceedings concerning Fortis, the court considered that it was sufficient for the applicants to be transparent about their revenue model, as this is also the purpose of the Claim Code. The fact that the applicants did not strictly comply with the Claim Code was thus remedied, as it were.

In other cases of non-compliance with the Claims Code, the court does consider whether the deviations are sufficiently explained (Trafigura, Stichting Privacy Claim).

4.2.3 Court of first instance

It should also be noted that all judgments in which the Claim Code is mentioned concern judgments in courts of fact. No judgments have yet been handed down in cassation appeals in which the Claim Code is mentioned. It therefore remains to be seen how the Supreme Court will rule on compliance with the Claim Code.

4.3 Conclusion

The Claim Code is actively assessed in case law. The Claim Code is considered to be indirectly enshrined in law and is seen as an important point of view when assessing whether the interests of those whose interests are represented by a collective action are sufficiently safeguarded in accordance with the standard of Article 3:305a(2) or when bringing legal proceedings. However, the Claim Code does not play an exclusive role in this regard: if an interest group does not comply with the Claim Code, the court will not necessarily declare the claim inadmissible. The assertion made in the literature that case law does not make sufficient use of the possibility of interpreting rather than applying the code is difficult to sustain on the basis of case law research. This does not preclude interest groups from hesitating to make use of the possibility of deviation, because they are unable to assess ex ante whether the court will accept the reasoning for doing so.

5 Reactions in the academic literature

At the seminar where the (first version of the) Claim Code was presented in draft form, the general consensus was that self-regulation in the form of the Claim Code was "welcome," but also "not yet sufficient."[82] Questions were raised as to whether the *governance* of interest groups was not 'too important to be left to part of the market' and whether the Claim Code was 'sufficiently binding'. On the other hand, it was argued that 'the Claim Code can fulfill a function, but that the threshold for obtaining justice should not be too high'. De Jong, who wrote the report, agreed with this analysis.

Reactions have also varied in the literature since the Claim Code came into force. This section outlines the reactions to the Claim Code around and since its introduction up to and including 2018. These reactions can be roughly divided into two groups. The first group takes the view that restraint is called for with regard to the regulation of collective actions, in whatever sense, or that (self-)regulation should be taken in a different direction (section 5.1). A second group argues that the Claim Code is a step in the right direction, but does not go far enough (section 5.2). This classification serves primarily to structure the argument and not to divide authors into camps. As will become apparent from the description of the positions, the views are far too varied and nuanced for that.

82 De Jong 2010.

5.1 Critical of regulation

The following authors are critical of (self-)regulation.

Tzankova (2017) seems to be the most outspoken critic of regulation of collective interest groups. She argues that in the Netherlands and Europe, commercial incentives in civil proceedings are wrongly considered 'taboo' and calls the Claim Code – together with the European recommendation[83] – 'an exponent of this way of thinking'. According to her, this conceals a 'certain internal contradiction'. Regulation would require interest groups to dig deep into their pockets, but access to financing is restricted.[84] The Claim Code forces interest groups to pre-finance 'the considerable costs of administration, member recruitment, and case investigation by lawyers and experts' without being able to negotiate market-based terms.[85] In addition, she draws a clear link between the high costs of litigation and the Claim Code. [86] According to Tzankova, it is therefore 'not unlikely that [interest groups] will abandon collective action altogether and continue to work with the currently widely used assignment model'.[87] She mentions the nuance that the Claim Code applies the 'comply or explain' principle in a footnote, in which she argues that explaining rather than applying places the interest group 'in the dock'. [88]

Rutten (2015) is also critical. In his article with the telling title 'Art. 3:305a BW misses its mark', he argues that the purpose of the admissibility requirement was to exclude impure commercial motives, but in reality 'only benefits the defendant'.[89] He argues that the admissibility criteria should therefore be applied with restraint.[90] He also proposes an alternative, namely an independent judicial body that assesses the motives of an interest group. Compliance with the Claim Code could be an indication of this.[91] Pavillon and Althoff agree with the plea for a

83 Commission Recommendation of June 11, 2013 on common principles for collective redress mechanisms in the Member States concerning violations of rights conferred by EU law (2013/396/EU).
84 Tzankova 2017, p. 112.
85 Tzankova 2017, p. 117.
86 Tzankova 2017, p. 113 and p. 112.
87 Tzankova 2017, p. 117.
88 Tzankova 2017, p. 112, footnote 57.
89 Rutten 2015, p. 326.
90 Rutten 2015, p. 324.
91 Rutten 2015, p. 327.

restrictive admissibility test[92] and advocate the preservation of commercial interest groups.[93] However, they do endorse the recommendations of the Lawyers' Group, and thus the codification of principles from the Claim Code.[94]

Van der Heijden responded critically to the creation of the Claim Code (2011). On the one hand, he implied that the Claim Code was unnecessary because the court can check whether the 305a organization is sufficiently representative even without the Claim Code. At the time, the requirement to adequately safeguard interests had not yet been incorporated into law. He writes that the code affects organizations that "were already operating in accordance with the code of conduct," while it remains to be seen whether it will effectively eliminate profit-seeking behavior. In addition, Van der Heijden mentions the risk that the Claim Code will discourage interest groups from going to court, because it would restrict access to the courts too much. He also proposes an alternative, namely to encourage interest groups and defendants to seek consultation. ([95])

5.2 Strengthening the Claim Code

This category discusses responses that are positive or seem to accept the Claim Code as a given, but which propose giving the Claim Code teeth, or propose expanding the Claim Code.

In 2012, Lemstra, one of the initiators of the Claim Code, proposed that the Claim Code be enshrined in law.[97] Even before the Claim Code came into being as such, he was in favor of a code of conduct designated by the minister as an additional condition for admissibility.[98]

Bauw and Van der Linden (2016) are positive about the Claim Code, but note in their research that (voluntary) compliance leaves something to be desired. If this situation does not change, legal enshrinement of the principles in the Claim Code should be considered.[99] They also argue for an active role for regulators ACM and AFM in a collective

92 Pavillon & Althoff 2017, p. 106.
93 Pavillon & Althoff 2017, p. 107.
94 Recommendations by the group of lawyers implementing the Dijksma motion, December 7, 2015, appendix to *Parliamentary Papers II* 2016/17, 34608, 3.
95 Van der Heijden 2011.
96 According to Tillema 2014.
97 Lemstra 2009, p. 42, footnote 5.
98 Lemstra 2012, p. 120.
99 Bauw & Van der Linden 2016, p. 2311.

procedure on the basis of Article 3:305b of the Dutch Civil Code, which enables public-law legal entities to bring collective action.[100]

In the same vein, Arons (2017) proposes strengthening compliance with the Claim Code. He points to the possibility that a Monitoring Committee Claim Code foundation, yet to be established, could use civil law under Article 3:305d of the Dutch Civil Code to enforce compliance with the Claim Code by interest groups.[101] He also agrees with Bauw and Van der Linden's plea for a more active role for public-law legal entities and Article 3:305b of the Dutch Civil Code.

Tillema (2017) is clearly positive about the Claim Code. She argues that the Claim Code can offer those involved in collective action 'more certainty and better insight into the functioning of claim foundations'.[102] From the perspective of the European Recommendation she makes a number of proposals to strengthen the Claim Code (2014). She mentions the fact that external financing falls outside the scope of the Claim Code as 'a point of attention'. [103] After all, the recommendation does propose restrictions on *third-party funding*. [104]In addition, like the authors mentioned above, it believes that the Claim Code should be strengthened. One of the measures it mentions is to provide the Claim Code with disciplinary, civil, or criminal sanctions. It also sees a role for the Claim Code in regulating undesirable recruitment activities by supporters of an interest group.[105] In addition, she believes that a Wft licensing requirement and an active role for the courts are options.[106] In this context De Geus (2017) refers to a letter from the Minister of Justice proposing that, although external financing should not be regulated by the legislator, it could be brought within the scope of the Claim Code. [107]

According to Heltzel (2012), the Claim Code is "a good step in the right direction," but "not (yet) sufficient." She advocates "efficient self-regulation or adaptation of the current legal framework." She also makes recommendations, which generally boil down to stricter regulation. Like Tillema and De Geus, she believes that financing must be regulated.

---

100 Bauw & Van der Linden 2016, p. 2312.
101 Arons 2017, p. 436.
102 Tillema *MvO* 2016, pp. 97-98.
103 Tillema 2014.
104 Art. 14-16 Recommendation.
105 Tillema 2018, 481.
106 Tillema 2014.
107 De Geus 2017, p. 188; *Parliamentary Papers II* 2011/12, 33126, 6, pp. 7-8.

in which the agreements between the financier and the interest group must be transparent. In terms of content, it recommends that stakeholders should have influence on the composition of the board and any supervisory board,[108] and that the term of office and remuneration of the board should be limited.[109]

Van Doorn (2013) focuses on tightening up the content of the Claims Code. She argues that the Claims Code focuses primarily on the administrative structure and less on the interests of injured parties, and that the Claims Code could focus more on the latter by incorporating quality standards. These quality standards should relate to the provision of information about procedures and working methods, the type of assistance offered to injured parties and the costs involved, and opportunities for injured parties to have their say.[110]

Bauw (2018) argues that third-party financing should be regulated in the Claim Code.[111] In addition, he believes that the Claim Code should also apply if Article 3:305a of the Dutch Civil Code is circumvented by an assignment model. However, he notes that the law does not yet provide for this; it is up to the legislator to make it possible to review the governance model in this regard. [112]

5.3 Analysis

The literature is mainly divided into two 'camps': on the one hand, there are calls for less regulation in order to enable collective actions and strengthen access to justice. On the other side, it is argued that the Claim Code should be tightened up. Two elements recur on this side: the Claim Code should also regulate external financing, and the Claim Code should be enforceable by a private or public supervisory authority. For these authors, the admissibility requirement seems to be insufficient.

Some of the suggestions for strengthening the Claim Code must be viewed in the context of the times. Heltzel's criticism was expressed when there was no mention of the 'indirect legal anchoring' referred to by the minister and when the admissibility requirement of sufficiently safeguarding the interests of the constituency had not yet been included in Article 3:305a(2) of the Dutch Civil Code. Other suggestions for

108 Heltzel 2012, p. 154.
109 Heltzel 2012, p. 155.
110 Van Doorn 2013, p. 555.
111 Bauw 2018, p. 184.
112 Bauw 2018, p. 185.

Calls for strengthening the Claim Code were made when it was still being applied cautiously by the courts, a situation that, according to the analysis of case law, changed in 2016 and 2017. With a broader application of case law to the Claim Code, the desire to strengthen the Claim Code may have been partially met. However, this does not go as far as the enforcement mechanisms proposed by Arons, Tillema, and Bauw & Van der Linden. For a number of authors, the desire to 'give teeth' to the Claim Code may therefore still exist.

Case law also appears to address the concerns of authors who argue against regulation. Case law shows that the Claim Code is not a strict benchmark, but that the 'comply or explain' principle is indeed applied in case law. In addition, case law only considers the Claim Code as one of the factors – albeit an important one – to be taken into account, which means that non-compliance with the Claim Code does not necessarily lead to inadmissibility. However, this does not alter the fact that the 'comply or explain' principle can lead to uncertainty, as it is still unclear exactly what standards the explanations provided by interest groups should meet.

In terms of substantive suggestions, it is striking that the proposal to regulate external financing in the Claim Code is a recurring element.

A review of the literature shows that the existence of the Claim Code is not in question. There is criticism in various areas, but the literature does not show any researchers advocating its abolition or radical changes.

5.4 Conclusion

The literature shows that the Claim Code has become established in collective action law. Criticism comes both from those who believe that collective action should be subject to limited regulation and from those who advocate strengthening it. In terms of content, it has been suggested, among other things, that external financing should also be brought within the scope of the Claim Code.

6 Interim conclusion: developments surrounding the Claim Code

This section links developments in practice, politics, case law, and literature.

6.1 Position of the Claim Code

In all fields, the Claim Code seems to have become an integral part of collective action law. In politics, both the minister and members of parliament have embraced the Claim Code.

have embraced the Claim Code. That is why case law refers to indirect legal anchoring and the Claim Code is used as one of the points of view when considering whether the interests of the injured parties are sufficiently safeguarded (Section 3:305a(2) of the Dutch Civil Code). Whereas at the beginning of 2016 there still seemed to be a cautious assessment of the Claim Code by the courts, its significance in case law has since increased significantly.

6.2 Compliance and enforcement

Compliance research into the Claim Code shows that compliance with the code has improved, but still needed improvement in 2016. In response to this, proposals have been made in the literature to enforce better compliance, such as public law supervision and private enforcement. It is possible that the increased significance of the Claim Code in case law since the compliance study was conducted has already resulted in interest groups complying more closely with the Claim Code.

6.3 External financing

A new substantive topic that was not addressed in the 2011 Claim Code is the emergence of external financing of collective actions. Several authors propose that the Claim Code be expanded to include principles relating to this topic. On the other hand, other authors believe that external financing should not be regulated, or only to a limited extent. We note that not regulating external financing at all may also create some uncertainty. Without regulation, it is difficult for interest groups or financiers to predict how the courts will assess their financing agreement in light of Section 3:305a(2) of the Dutch Civil Code.

7 The collective compensation action bill

As mentioned earlier, the bill on collective redress [113]includes further admissibility requirements in addition to the possibility of claiming monetary compensation in a collective action. This partly concerns a codification of several principles in the Claim Code.This raises the question of how the Claim Code and the bill will relate to each other after the bill comes into force. This question is discussed below.

---

113 This study is based on the proposal as amended in January 2018. *Parliamentary Papers II* 2017/18, 34608, 7 (amendment memorandum); *Parliamentary Papers II* 2016/17, 34608, 2 (bill).

114 *Appendix to Proceedings II* 2016/17, 412.

7.1 The admissibility requirements in the Claims Code

7.1.1 The bill

In the current law, the admissibility criterion of 'sufficient guarantee' is formulated in open terms. The third sentence of Article 3:305a(2) of the Dutch Civil Code reads:

> 'A legal entity as referred to in paragraph 1 is also inadmissible if the legal action does not sufficiently safeguard the interests of the persons on whose behalf the legal action is brought.

This criterion is further elaborated in the bill. In the proposed Article 3:305a of the Dutch Civil Code, the 'sufficient safeguards' criterion is included in the first paragraph. The new paragraphs 2 and 3 further elaborate on this open standard:

> *'2. The interests of the persons whose interests are protected by the legal action are sufficiently safeguarded if the legal entity referred to in paragraph 1 is sufficiently representative, taking into account the constituency and the size of the claims represented, and has:*
> *(a) a supervisory body, unless Article 9a, paragraph 1, of Book 2 of the Civil Code has been implemented;*
> *(b) appropriate and effective mechanisms for the participation or representation in decision-making of the persons whose interests the legal action is intended to protect;*
> *(c) sufficient resources to bear the costs of bringing legal action;*
> *(d) a publicly accessible internet page on which the following information is available:*
> *(i) the articles of association of the legal entity;*
> *(ii) the management structure of the legal entity;*
> *(iii) the most recent annual report by the supervisory body on the supervision it has carried out;*
> *(iv) the most recent management report;*
> *(v) the remuneration of directors and members of the supervisory body;*
> *(vi) the objectives and working methods of the legal entity;*
> *(vii) an overview of the status of ongoing proceedings;*
> *(viii) if a contribution is requested from the persons whose interests are protected by the legal action: insight into the calculation of this contribution;*

(ix) an overview of the manner in which persons whose interests are protected by the legal action can join the legal entity and the manner in which they can terminate this membership;

(e) sufficient experience and expertise with regard to bringing and conducting the legal action.

3. A legal entity as referred to in paragraph 1 is only admissible if:

(a) the directors involved in the establishment of the legal entity, and their successors, have no direct or indirect profit motive that is realized through the legal entity;

(…).'

7.1.2 Relationship between the bill and the Claim Code

The bill is largely based on the recommendations of the so-called 'Legal Experts Group'. This group was formed in response to criticism of an earlier version of the bill in the internet consultation and consisted of a number of practicing lawyers. The recommendations were intended to improve the bill.[115] The first recommendation was to clarify the admissibility requirements. The current paragraph 2 of Article 3:305a of the Dutch Civil Code was considered 'too vague and too general'.[116] They recommended codifying requirements 'inspired by the Claim Code' in the law.

Following these recommendations, a number of principles and elaborations from the Claim Code have been incorporated into the bill. A notable difference is that the 'comply or explain' principle of the Claim Code (included in principle 1 of the Claim Code) has not been included in the text of the bill.

Incorporated from the Claim Code

The requirement for a supervisory body (paragraph 2(a)) is a codification of part of principle I and principle IV of the 2011 Claim Code.[118] The obligation to disclose certain information also stems from the Claim Code. The specific information to be disclosed is bundled in paragraph 2(d) of the bill and stems from various

115 Recommendations of the Legal Experts Group on the implementation of the Dijksma motion, December 7, 2015, appendix to *Parliamentary Papers II* 2016/17, 34608, 3. The recommendations were also published in *MvO* 2016, issues 3 & 4, pp. 74-80. The following refers to the version included as an appendix to the Parliamentary Document.

116 Recommendations by the Legal Experts Group implementing the Dijksma motion, December 7, 2015, p. 3.

117 Recommendations by the Legal Experts Group on the implementation of the Dijksma motion, December 7, 2015, p. 3.

118 See also: *Parliamentary Papers II* 2016/17, 34608, 3 (Explanatory Memorandum), p. 22.

principles in the bill (I, II, III, V, and VI).[119] The bill requires a website (paragraph 2(d) preamble); an alternative to a website (elaboration I.1 Claim Code) is not included in the bill.

The fact that the supporters of an interest group must be able to participate in decision-making (paragraph 2(b)) is not laid down as such in the 2011 Claim Code, but is in line with it: the minister writes in the explanatory memorandum that an interest group that complies with the Claim Code can be assumed to meet this requirement.[120]

The legal entity must also have sufficient experience and expertise (paragraph 2(e)). This is a codification of elaboration II.2 of the 2011 Claim Code, but is formulated less stringently. After all, the Claim Code requires that one board member be a lawyer with specific experience and expertise (elaboration III.3 Claim Code); this specification has not been included in the bill. The minister writes in the explanatory memorandum that the expertise required will vary 'from case to case',[121] and thus opts for a more open approach than the 2011 Claim Code.

The requirement that an interest group may not be profit-oriented, either directly or indirectly, also originates from the 2011 Claim Code (principle I).

Regulation on top of the Claim Code
The requirement that an interest group must be able to bear the costs of legal proceedings (paragraph 2(c)) does not originate in the Claims Code.

Implications and principles from the Claim Code that are not codified
With the inclusion of the aforementioned principles from the 2011 Claims Code in the bill, most of the principles from the 2011 Claims Code would have become law after its entry into force. However, the legislator has left untouched those principles that are regulated in more detail by the 2011 Claims Code. These include, for example, the availability of assets

119 *Parliamentary Papers II* 2016/17, 34608, 3 (Explanatory Memorandum), p. 23.
120 *Parliamentary Papers II* 2016/17, 34608, 3 (Explanatory Memorandum), p. 22.
121 *Parliamentary Papers II* 2016/17, 34608, 3 (Explanatory Memorandum), p. 24.
122 Other additional admissibility requirements do not relate to subjects that affect the Claim Code, namely safeguarding the interests of a claim organization's supporters. This concerns, for example, a sufficient connection with the Dutch legal sphere (paragraph 2(b)).

of the foundation (elements II.1 and II.2 of the 2011 Claim Code), specific provisions on the board (principle III) and specific provisions on the supervisory board (principle VI).

Principle IV, concerning independence and the avoidance of conflicts of interest, is not included in the bill at all. Nor are the principles relating to the remuneration of the board (principle V) included in the bill. However, the bill does stipulate that remuneration must be disclosed on the website (paragraph 2(d)(v)). The 2011 Claim Code only stipulates that this remuneration must be included in the foundation's annual reports (elaboration V.3 Claim Code 2011).

7.1.3 Interim conclusion

Now that a number of requirements of the 2011 Claim Code are being incorporated into law, the question may arise as to whether the Claim Code still has any added value. The above comparison between the bill and the 2011 Claim Code indicates that this is indeed the case: the 2011 Claim Code still provides more detailed rules on a number of points where the bill sets broader standards. Furthermore, the principle of independence and the avoidance of conflicts of interest is not included in the bill at all. The added value of the Claim Code alongside the bill also follows from the explanatory memorandum to the bill: the minister sees compliance with the Claim Code as an indication of compliance with the requirement that the supporters of an interest group can participate in decision-making.[123] In addition, the Claim Code also remains important in cases where interest groups act on behalf of their statutory supporters but do not yet initiate proceedings. In such cases, too, it is in the interests of injured parties and potential defendants that the interest groups concerned operate independently, are competent, and act transparently.

7.2 Third-party funding

Research into developments surrounding the Claims Code shows that external financing is on the rise and that there are calls to regulate this in the Claims Code as well (see section 6.3). The legislator has explicitly chosen not to regulate external financing in the bill at this stage.[124] The minister has made this decision because he believes that there is not yet a clear picture of the expected positive and negative effects. The minister

123 *Parliamentary Papers II* 2016/17, 34608, 3 (Explanatory Memorandum), p. 22.
124 *Parliamentary Papers II* 2016/17, 34608, 3 (Explanatory Memorandum), pp. 12-14.

also mentions that the general requirement of sufficiently safeguarded interests (Section 3:305a(2) preamble to the Bill) still provides the court with a means of preventing external financing from adversely affecting the interests of the interest group's supporters.[125]

Various authors propose regulating external financing by means of the Claim Code (cf. section 5.2). This provides more clarity to financiers and 3:305a organizations than leaving open the question of whether external financing is desirable. Moreover, this would leave the legislator free to monitor further developments and introduce legislation at a later stage. The Minister of Justice does not seem to rule out regulating external funding by means of the Claim Code; in 2012, he even referred to this as a possible measure with regard to external funding.([126])

On the other hand, there is the argument used by legislators: a complete picture of the advantages and disadvantages of external financing is not yet available. Further research—for example, comparative legal research—could provide useful insights in this regard.

7.3 Conclusion

After the introduction of the collective redress bill, the Claim Code will remain a useful addition to Section 3:305a of the Dutch Civil Code, particularly in cases where claims based on that provision are not (yet) being made. After all, interest groups are still bound by the principles of the Claim Code, albeit on a voluntary basis. Even after the amended law comes into force, the code will continue to provide concrete examples of open standards from the legal system and will provide additional regulation of the independence of interest groups.

Third-party funding of collective actions is not yet regulated in the bill. The Claim Code could fill this gap. This would allow the legislator to keep its hands free to monitor developments in the Netherlands and form a more detailed opinion, while also preventing excesses at an early stage. This is in line with the views of various authors.

125 *Parliamentary Papers II* 2016/17, 34608, 3 (Explanatory Memorandum), p. 13.
126 *Parliamentary Papers II* 2011/12, 33126, 6, p. 7 and p. 8.

8 Conclusion

This article provides an overview of developments surrounding the Claim Code in politics, case law, and practice, as well as the relationship between the Claim Code and the proposed collective compensation action bill.

The impression that emerges is that the Claim Code has become firmly established in collective action law. Although compliance could still be improved in 2016, there is talk of indirect legal anchoring, both by the legislator and by the courts. Compliance with the Claim Code is not an absolute requirement for admissibility within the meaning of Section 3:305a(2), third sentence, of the Dutch Civil Code, but it is an important point of reference for the court in its judgment on this matter. It can be assumed that the increased significance of the Claim Code will further promote compliance. Although some are critical of strict regulation of collective actions, this criticism does not go so far as to advocate the abolition of the Claim Code. Others argue for further strengthening the status of the Claim Code through private or public enforcement.

The collective redress bill codifies parts of the Claim Code. However, the detailed elaboration of the principles is not included. In addition, the principle of independence and the avoidance of conflicts of interest is not adopted by the legislator. There is therefore still room for the Claim Code, even if the bill becomes law.

The bill does not impose any rules on the external financing of collective actions, although the European Recommendation does call for this. For this reason, the literature argues that external financing should be brought within the scope of the Claim Code.

Literature

Arons 2017
T.M.C. Arons, 'Protection of the interests of interest groups and collective redress by supervisory authorities', *WPNR* 2017, pp. 429-440.

Bauw & Bruinen 2013
E. Bauw & T. Bruinen, 'Slow start or sweeping gesture? Poor compliance with the Claim Code requires intervention', *NJB* 2013, 140, issue 3, pp. 164-168.

Bauw & Van der Linden 2016
E. Bauw & T. van der Linden, *Research 'Compliance with the Claims Code'*, Utrecht University, June 2, 2016.

Bauw & Van der Linden *TOP* 2016
E. Bauw & T. van der Linden, 'Interest groups between proliferation and regulation', *Journal of Corporate Law Practice* 2016, issue 7,
pp. 26-33.

Bauw & Van der Linden *NJ* 2016/1652
E. Bauw & T. van der Linden, 'Sleeping beauties, plea for a more active role for regulators in collective redress', *NJB* 2016/1652, pp. 2310-2314.

Bauw & Voet 2017
E. Bauw & S. Voet, 'From big stick to straitjacket? An initial exploration of the bill to introduce collective redress actions', *NJB* 2017/206.

Bauw 2018
E. Bauw, 'Third-party financing of collective compensation actions. About old wine and deep pockets', in: T.M.C. Arons et al. (eds.), *Collective compensation*. (Business and Law No. 105), Deventer: Wolters Kluwer 2018, pp. 157-179.

Van Boom 2017
W.H. van Boom, 'Litigation costs and Third-Party Funding' in: W.H. van Boom (ed.), *Litigation, costs, funding and behavior, implications for the law*, New York: Routledge 2017.

Van Boom & Luiten 2015
W.H. van Boom & J.L. Luiten, 'Procesfinanciering door derden' [Third-party litigation funding], *RM Themis* 2015, issue 5, pp. 188-199.

Damming & Van den Berg 2017
J.J. Dammingh & L.M. van den Berg, 'Third-party litigation funding: a solution or a problem?' Report of the 2016 autumn meeting of the Dutch Association for Procedural Law, *TCR* 2017, issue 2,
pp. 78-87.

De Geus 2017
F.W. de Geus, 'Collective compensation claims: an effective weapon for claim foundations in times of war?', *TvOB* 2017/5.

Van der Heijden 2011
M.J. van der Heijden, 'Breathing space (II)', *Nederlands Tijdschrift voor Burgerlijk Recht* 2011/61.

Heltzel 2012
M.L.M.N. Heltzel, 'Checks and balances at interest groups', *Journal for Financial Law* 2012, pp. 148-156.

De Jong 2010
B.J. de Jong, 'A Claim Code for foundations that initiate collective actions?', *Business Law* 2010, 46.

Lemstra 2009
J.H. Lemstra, 'Interest groups as parties to legal proceedings', in: F.M.A. 't Hart (ed.), *Collective actions in the financial sector* (Financial Law series 1), The Hague: NIBE-SVV 2009.

Lemstra & Okhuijsen 2010
J.H. Lemstra & R.W. Okhuijsen, 'Consultation document on self-regulation of claims foundations', *Journal of Financial Law* 2010, pp. 158-163.

Lemstra 2012
J.H. Lemstra, 'Claims foundations', in: G. van Solinge et al., *Relativering van rechtspersoonlijkheid* (Relativisation of legal personality) (Series published by the Van der Heijden Institute, part 114), Deventer: Kluwer 2012.

Lemstra 2018
J.H. Lemstra, 'External financing of mass damage cases', in: J.H. Lemstra, R.J. Philips & L.T. Visscher, *Third-party litigation funding:*

a solution or a problem? (Dutch Association for Procedural Law, vol. 37), The Hague: Boom juridisch 2018, pp. 15-23.

Van der Krans 2018
A. van der Krans, 'Third party litigation funding', in: T.M.C. Arons et al. (eds.), *Collective redress. Companies, interest groups and their supporters* (Business and Law Series, vol. 105), Deventer: Kluwer 2018, pp. 163-185.

Philips 2017
R.J. Philips, *Civil Procedure Case Law* 2017/911.

R.J. Philips 2018
R.J. Philips, 'What is litigation funding and where does it come from?', in:
J.H. Lemstra, R.J. Philips & L.T. Visscher, *Third-party litigation funding: a solution or a problem?* (Dutch Association for Procedural Law, vol. 37), The Hague: Boom juridisch 2018, pp. 11-14.

Rutten 2015
K. Rutten, 'Art. 3:305a(2) of the Dutch Civil Code misses the mark', *Maandblad voor Vermogensrecht* 2015, pp. 319-327.

Rutten 2018
K. Rutten, 'Admissibility of a 305a organization', *Journal for Corporate Law Practice* 2018(4), pp. 29-35.

Tillema *AA* 2016
I. Tillema, 'Commercial motives in private law collective actions: fueling the claim culture?', *Ars Aequi* 2016, pp. 337-346.

Tillema *MvO* 2016
I. Tillema, 'Ten years of WCAM: an overview', *Monthly Journal for Corporate Law* 2016, pp. 90-99.

Tillema 2018
I. Tillema, 'Exclusive and competing advocates: walking on thin ice?', *Ars Aequi* 2018, pp. 476-481.

Tzankova 2017
I.N. Tzankova, 'Legislative proposal for collective compensation action: a solution to what problem again?', *Journal for Personal Injury* 2017, pp. 107-119.

Visscher et al. 2018
L.T. Visscher, J.P.B. de Mot, and M.G. Faure, 'Third-party litigation funding – a legal-economic approach', in: J.H. Lemstra, R.J. Philips & L.T. Visscher, *Third-party litigation funding: a solution or a problem?* (Dutch Association for Procedural Law, vol. 37), The Hague: Boom juridisch 2018, pp. 26-39.