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Collective Redress in Crowdfunding

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I. Introduction

As the European crowdfunding market grows in volume, disputes will unavoidably arise between investors, on the one hand, and project owners or CSPs, on the other hand. Investors, for instance, may claim compensation from the project owner, because of misleading, inaccurate, or missing information in the key investment information sheet. As mentioned in Chapter 9, pursuant to Article 23(9) of the Crowdfunding Regulation, Member States must 'ensure the responsibility of at least the project owner or its administrative, management or supervisory bodies for the information given in a key investment information sheet [KIIS]'. In other situations, as illustrated in Chapter 16, investors may bring a tortious claim under the applicable national law against the CSP, claiming damages for an alleged failure to verify the completeness, correctness, and clarity of the information contained in the key investment information sheet, as required by Article 23(11) of the Crowdfunding Regulation. In yet other cases, investors may bring a claim against the CSP concerning, for example, the individual portfolio management of loans under Article 6 of the Crowdfunding Regulation, or the provision of full access to the platform without a prior assessment of appropriateness, as mandated by Article 21 of the Crowdfunding Regulation. **17.01**

The examples mentioned above are, in many respects, disparate: some of them relate to tortious causes of action, while other ones are contractual in nature. Furthermore, in some cases (such as the liability of the project owner for the information contained in the KIIS) the Crowdfunding Regulation partially harmonizes the content of the applicable national law, requiring the Member States to ensure the responsibility of the project owner, while in other scenarios the viability of the action depends largely on the contents of national law. **17.02**

Nevertheless, one distinctive feature links many of these litigation scenarios: these cases will often involve a high number of claimants. For this reason, investors may choose not to litigate individually but to collectively seek redress against the project owner or crowdfunding service provider (CSP). The losses suffered by different members of the crowd are similar, and easier to quantify than, for example, bodily harm. Moreover, the assessment whether the information provided was misleading is abstract, relying on the notion of the 'average investor' as a touchstone.[1] In fact, most collective proceedings in the last decades have been initiated by investors suffering investment losses as a result of alleged corporate mismanagement or misinformation. These losses normally consist in the decrease in value of equity participations or bonds. The advantage of collective proceedings is that similar questions of law and fact are presented and dealt with by the court in a single procedure. Not only the disputants but also the court system benefits from this efficiency gain.

17.03 In collective proceedings, associations or foundations will typically act as claimants, representing a constituency of investors that allegedly suffered the same type of harm, and taking decisions with (legal) consequences for the individual members of this group. The interests of the group members, thus, need to be adequately protected. It is therefore important to analyse whether and to what extent the procedural law of different EU Member States affords the possibility of collective redress, and how the interests of the group (in this case, crowdfunding investors) are safeguarded within these procedures. To this end, this chapter will scrutinize collective redress under EU, French, German, and Dutch law, and its relevance for crowdfunding dispute resolution. Section II will discuss the recently adopted EU Directive on representative actions.[2] Subsequently, sections III, IV, and V will discuss collective redress in French, German, and Dutch law. Finally, section VI will present some conclusions.

II. Directive on Representative Actions for the Protection of the Collective Interests of Consumers

17.04 On 24 November 2020, the European Parliament adopted the Directive on representative actions for the protection of the collective interests of consumers. This Directive must be implemented in the various national laws of the Member States by 25 December 2022.[3] This instrument aims to ensure that in all Member States at least one effective and efficient procedural mechanism for representative actions for injunctive measures and for redress measures is available to consumers.[4] It explicitly does not seek to replace or harmonize existing

[1] *World Online/VEB* [27 November 2009] Dutch Supreme Court, ECLI:NL:HR:2009:BH2162, JOR 2010/43 annotated by K Frielink; Ondernemingsrecht 2010/21 annotated by H Vletter-van Dort, *NJ* 2014/201 annotated by E Du Perron, AA20100336, annotated by G Raaijmakers [4.10.3]; *De Treek/Dexia* [5 June 2009] Dutch Supreme Court, ECLI:NL:HR:2009:BH2815, JOR 2009, 199 annotated by K Lieverse; *AA* 2010, 188 annotated by W van Boom and S Lindenbergh [4.5.3]. In both cases the 305a-organization based its claim on the regulation of Misleading or Comparative Advertising in the Dutch Civil Code (Art 6:194–6.195 BW) which in its current reading is only applicable to professional investors. Consumer can base their claim on regulation of Unfair Commercial Practices (Art 6:193a up to and including Art 6:193j BW).

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

[3] ibid art 24.

[4] ibid Recital 7.

national procedural mechanisms for collective redress.[5] Only certain aspects of collective redress are harmonized.[6]

17.05 First of all, its scope is limited to consumer to business (C2B) claims concerning infringements of the EU consumer acquis, that is, the corpus of EU legislation on consumer protection (Annex I of Directive). Therefore, although the Crowdfunding Regulation is not expressly included in Annex I at the time of writing, the Directive is relevant to the phenomenon of crowdfunding litigation, inasmuch as the dispute concerns the alleged violation of the EU consumer acquis (eg allegedly unfair contract terms).[7] Member States have to ensure that entities, in particular consumer organizations (including those that represent members from more than one Member State), are eligible to be designated as qualified entities for the purpose of bringing domestic representative actions, cross-border representative actions, or both. A representative action is an action for the protection of the collective interests of consumers that is brought by a qualified entity as claimant on behalf of consumers to seek an injunctive measure (declaratory relief),[8] a redress measure, or both.[9] A domestic representative action is brought by a qualified entity in the Member State in which the qualified entity was designated.[10] Conversely, a cross-border representative action is brought by a qualified entity in a Member State other than that in which the qualified entity was designated.[11] The designated entities must operate on a not-for-profit basis.[12]

17.06 As far as third-party funding is concerned, the Directive provides for the following requirements. A conflict of interest between the third-party funder and the qualified entity that poses a risk of abusive litigation must be prevented.[13] The qualified entity has to provide thereto that it is independent and not influenced by persons other than consumers, in particular by traders, who have an economic interest in any representative action, including in the event of funding by third parties. To that end, it has to establish procedures to prevent such influence, as well as to prevent conflicts of interest between itself, its funding providers and the interests of consumers.[14] Importantly, the Committee on Legal Affairs of the European Parliament submitted on 17 June 2021 a recommendation to the Commission to adopt a Proposal Directive on Responsible private funding of litigation.[15] This Recommendation seeks to introduce a regulatory regime addressing key issues relevant to third party litigation funding, including transparency, fairness, and proportionality so as to ensure that the interests of claimants are protected by establishing a fiduciary relationship between claimants and litigation funders.[16] Furthermore, under the Directive,

[5] ibid Recital 11.
[6] ibid Recital 12.
[7] For an overview of the relevance of the consumer acquis in crowdfunding see Chapter 5.
[8] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L 409/1 Art 6. This declaratory relief may consist of a court order to cease a business practice and a declaratory ruling that the business practice infringes on protected consumer rights.
[9] ibid Art 3(5).
[10] ibid Art 3(6).
[11] ibid Art 3(7).
[12] ibid Art 4(3)(c).
[13] ibid Art 10 and Recital 52.
[14] ibid Art 4(3)(e) and Recital 25, Preamble.
[15] Draft Report with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)), PE680.934. On 16 July 2021, this Committee on Legal Affairs submitted Amendments to this Draft Report, PE695.342.
[16] ibid pp 4–5.

Member States have to ensure that the decisions of qualified entities in the context of a representative action, including decisions on settlement, are not unduly influenced by a third party in a manner that would be detrimental to the collective interests of the consumers concerned by the representative action.[17] Representative actions may not be brought against a defendant that is a competitor of the funding provider, or against a defendant on which the funding provider is dependent.[18] Courts must be empowered to assess compliance, in cases where any justified doubts arise in this respect. To that end, qualified entities must disclose to the court a financial overview that lists sources of funds used to support the representative action.[19] Courts must have the authority to take appropriate measures, such as requiring the qualified entity to refuse or make changes in respect of the relevant funding and, if necessary, rejecting the legal standing of the qualified entity in a specific representative action. If the legal standing of the qualified entity is rejected in a specific representative action, that rejection shall not affect the rights of the consumers concerned by that representative action.[20]

III. French Collective Redress Model: *Action de Groupe*

17.07 After lengthy debate in the French Parliament, a collective action procedure was introduced in 2014 in French civil law. This collective action (*action de groupe*) was enacted in the Consumer Code (*Code de la consommation*, hereinafter 'C. consomm.').[21]

17.08 Chapter III of Title II of book IV C. consomm. (Articles L423-1 to L423-26) is titled *action de groupe*. Because of the constitutionally protected right to individual access to court,[22] the *action de groupe* is based on the opt-in model. In other words, the court judgment will bind not all members of the group in whose interest the collective action is brought, but only those that explicitly made themselves known. However, the French legislator has explicitly set forth that the individual group members do not have to be known to the litigating parties nor the courts at the start of the collective action. It is up to the court to define the interested or affected group, and rule upon the defendant's liability towards this group.[23] The French collective action has few formal requirements and regulations.[24] Much is left to judicial autonomy.

[17] Directive (EU) 2020/1828 (n 8) Art 10(2)(a).
[18] ibid Art 10(2)(b).
[19] ibid Art 10(3).
[20] ibid Art 10(4).
[21] Loi no 2014-344 du 17 mars 2014 relative à la consommation. After endorsement by the Constitutional Council (*Conseil consitutionnel*) in its judgment of 12 March 2014, ECLI:FR:CC:2014:2014.690.DC, JORF 2014/65, no 2, 18 mars 2014, p 5450, the law was proclaimed by presidential order, JORF 2014/65, 18 mars 2014, no 2, p 5400.
[22] Judgment of the *Conseil Constitutionnel*, 25 July 1989, ECLI:FR:CC:1989:89.257.DC, JORF 1989, 28 juillet 1989, p.9503; referred to in the following parliamentary document: Sénat, No 809, 24 July 2013, Rapport fait au nom de la commission des affaires économiques (1) sur le projet de loi, adopté par l'Assemblée nationale. relatif à la consommation, M Bourquin and A Fauconnier, pp 34–35.
[23] Assemblée nationale, No 1156, 13 juin 2013, Rapport fait au nom de la commission des affaires économiques sur le projet de loi relative à la consommation, R Hammadi and A Le Loch, p 60.
[24] M Bacache, 'Action de groupe et responsabilité civile' [2014] *Revue trimestrielle de droit civil*, 450; E Claudel, 'Action de groupe et autres dispositions concurrence de la loi consommation: un dispositif singulier' [2014] *Revue trimestrielle de droit commercial*, 339; N Molfessis, 'L'exorbitance de l'action de groupe à la française' [2014] Recueil Dalloz 947.

17.09 On the basis of Article L423-1 C. consomm., associations officially recognized by the French government (*associations agréés*) may act in the common interest of consumers by filing claims, in order to obtain compensation for the individual damages suffered by consumers. The consumers need to have suffered damages in an identical or similar situation. The group's defining common ground (*cause commune*) lays in a violation of the (pre-)[25] contractual legal obligations by (a) person(s) trading in a professional or business capacity (*professionel*)[26] in the context of the sale of a good or service, or in losses incurred as a result of violations of (EU) competition law.[27] In the parliamentary debate it was made clear by the Minister that 'sale of a good or service' must be interpreted so as to encompass pure economic losses incurred by consumer-investors as a result of financial services provided to them or securities and financial products offered to them. The Ministry mentioned the example of a violation of information, advisory, or warning duties by banks or professional service providers.[28]

17.10 The *action de groupe* consists of three stages. At the first stage, the court rules on the admissibility of the association and its claim, as well as the liability of the defendant for its alleged behaviour towards the consumers specifically mentioned as examples by the association in its writ of summons.[29] In its ruling, the court also need to address: (a) a class description and selection criteria; (b) the reimbursable loss items for each (category of) consumer(s); (c) the (individual or categorical) compensation; and (d) the compensation evaluation criteria.[30]

17.11 Once this ruling is no longer appealable, the court will order the manner in which it shall be made public.[31] The court determines the opt-in period (two to six months) in which the individual members of the group have to register at the defendant or at the association.[32] By law, the association has a mandate to act in the interest of the consumers who opt-in.[33] If the identity and number of the consumers involved in the harmful event are known from the start, and the amount of damages is identical, the court may immediately order the defendant to directly pay the compensation to these consumers.[34]

[25] Ministerial reaction to Amendment CE345 of T Benoit. This amendment restricted the scope to contractual obligations. It was rejected by the French Parliament. Assemblée nationale, No 1574, 21 novembre 2013, Rapport fait au nom de la commission des affaires économiques sur le projet de loi, modifié par le Sénat, relatif à la consommation (No 1357), R Hammadi and A Le Loch, p.40.

[26] At the request of the French Senate the possibility was introduced that consumer associations can claim against multiple defendants in one procedure for identical or similar matters. See Sénat, No 282, 15 janvier 2014, Rapport fait au nom de la commission des affaires économiques (I) dur le projet de loi, adopté pas l'Assemblée nationale, relatif à la consommation, M Bourquin and A Fauconnier.

[27] C. consomm., Art L423-1. Please note that the Act of 18 November 2016 (*Loi de modernisation de la justice du 21e siècle*), Art 85, the material scope has be broadened to include actions for the protection against harms to (a) discrimination; (b) environment; (c) health; (d) personal data. Furthermore, this Act also introduced an identical collective procedure before the administrative court (Chapter X–XII of Title VII of Book VII Code de justice administrative).

[28] Ministerial reaction to Amendement CE31 of D Abad, Assemblée nationale, No 1574, 21 novembre 2013, Rapport fait au nom de la commission des affaires économiques sur le projet de loi, modifié par le Sénat, relatif à la consommation (n° 1357), R Hammadi and A Le Loch, p 42.

[29] C. consomm., Art L423-4.

[30] C. consomm., Art L423-1.

[31] C. consomm., Art L423-8.

[32] C. consomm., Art L423-5.

[33] C. consomm., Art L623-5.

[34] C. consomm., Art L423-10 '*Procédure d'action de groupe simplifiëe*'.

17.12 At the second stage, the court will determine which type of losses will be compensated either for each individual consumer, or for defined categories of consumers. In the same ruling, it will also establish the method to calculate the damages to be awarded either individually or categorically.

17.13 The third stage centres on the compensation schemes execution. In principle, the French legislator assumes that the defendant will, in accordance with the stage one ruling, pay the compensation due to the individual consumers.[35] Should there be any conflict as to how the compensation should be carried out, the court will issue a single ruling on all outstanding compensation claims.[36] The individual claimants will be represented by the association involved in the proceedings.[37]

17.14 In sum, if the litigating association and defendant do not settle, the court will give a ruling at the second stage, determining how the individual members of the group must be compensated. It can provide for a calculation mechanism of damages to be awarded on an individual basis, or per category. This ruling is quite similar to the one the Dutch courts give under the new collective action proceedings (*Wet Afwikkeling Massaschade in Collectieve Actie*, WAMCA), which will discussed below in section V. Unlike Dutch law, however, French law specifically provides how courts have to solve problems concerning the execution of the judgment (third stage).

17.15 The litigating parties may, at any stage before and during the court proceedings, conclude an out-of-court settlement. This settlement needs court approval in order to bind the group. The court will assess whether the settlement is in the interest of the consumers affected. The settlement has only binding effect on those consumers that opt in during the term set by the court in its approval ruling.[38] Thus, unlike the Dutch proceedings, the French collective proceedings does not provide for an opt-out settlement model where all group members are bound by the settlement unless they explicitly refuse it.

IV. German Collective Redress Model

1. Capital Markets Model Case (KapMuG) Proceedings

17.16 Collective proceedings were introduced in German law in 2005 with the Capital Markets Model Case Proceedings Act (*Kapitalanleger-Musterverfahrensgesetz*, KapMuG).[39] One of the major driving forces behind the KapMuG was the *Deutsche Telekom* case.

17.17 In 2000, Deutsche Telekom, the state (mobile) phone operator, was privatized by issuing shares on the Frankfurt Stock Exchange. In order to inform potential investors a prospectus was published. The initial issuing price was set at EUR 66.50 per share. Soon after floating,

[35] C. consomm., Art L423-3.
[36] C. consomm., Art L423-12.
[37] C. consomm., Art L423-9 and Art L623-5. The legal costs of the association will be borne by the defendant (C. consomm., Art L423-8).
[38] C. consomm., Art L423-16.
[39] BGBl. I 2005, S. 2437. This Act has been replaced by the entry into force of KapMuG-ReformG (*Gesetz zur Reform des Kapitalanleger-Musterverfahrensgesetzes und zur Änderung anderer Vorschriften*), BGBl. I 2012, S. 2182.

the share price fell considerably. Many investors suffering losses initiated individual court proceedings against Deutsche Telekom, claiming damages for the losses incurred as a result of allegedly misleading statements in the prospectus.

17.18 In order to alleviate the German courts from the burden to deal with a vast number of identical individual claims against the same defendant, the KapMuG was introduced.[40] Without the KapMuG, traditional *res judicata* rules would prevent a court judgment from binding the members of a group that are not a formal parties to the proceedings.[41]

17.19 In KapMuG proceedings (*Musterverfahren*), Higher Regional Courts (*Oberlandesgericht*) rule with binding effect on factual and legal issues that these claims have in common. The use of this method of collective redress in mass claims is limited to damage claims for losses suffered as a result of misleading information disseminated on public capital markets.[42]

17.20 A district court (*Landgericht*) may at the request of (one of the) litigating parties initiate a collective procedure.[43] A precondition is that the individual dispute needs to be solved by answering questions of law and/or fact that it has in common with other claims. If the *Landgericht* rules that there is sufficient ground to establish that its decision in the pending case depends on establishing an element of liability or an answer to a legal question that is common to more court proceedings,[44] it stays proceedings and makes a public announcement in the KapMuG register of the electronic version of the German State Gazette (*Bundesanzeiger*).[45] In the case that, within six months of registration, at least nine requests to initiate model case proceedings have been made in cases concerning similar claims, the *Oberlandesgericht* selects one of the claimants as the model case claimant.[46] In the model case proceedings, the *Oberlandesgericht* rules with binding effect on the common factual and legal issues.

17.21 During the model case procedure before the *Oberlandesgericht*, other cases concerning claims in which one of these common factual and/or legal issues also arise are stayed *ex officio* until the *Oberlandesgericht* has given its model case ruling (*Musterentscheid*).[47] This ruling is binding in the sense that the *Landgerichte* have to apply this ruling in their decisions on the pending claims.[48] The individual circumstances of each claimant will be dealt with by the *Landgerichte* when they resume the pending proceedings after the model case

[40] German scholars were not convinced that this Act would solve the problem of overburdening the courts as long as all claimants would, as third parties to the model case proceedings, have the right to participate in those proceedings. According to them, the only practical solution would be to introduce an opt-out procedure which happened in the KapMuG Reform Act 2012. See J Jahn, 'Der Telekom-Prozess: Stresstest für das Kapitalanleger-Musterverfahrensgesetz' [2005] ZIP 29, 1317. In practice, these problems seem to be overcome quite efficiently by the use of electronic means. See the KapMuG evaluation: A Halfmeier, P Rott, and E Fees, *Kollektiver Rechtsschutz im Kapitalmarktrecht: Evaluation des Kapitalanleger-Musterverfahrensgesetzes* (Banking & Finance aktuell, Band 40 Frankfurt School 2010) 30, 54–55. In particular, the uniform provision of evidence and the enhancement of legal certainty by the factual binding effect of early decisions by the German Court of Justice are regarded advantageous.

[41] A Stadler, 'Group Actions as a Remedy to Enforce Consumer Interests' in F Cafaggi and H-W Micklitz (eds), *New Frontiers of Consumer Protection: The Interplay Between Private and Public Enforcement* (Intersentia 2009) 313.

[42] KapMuG, § 1.

[43] KapMuG, § 2(1). The Landgericht may not ex officio start the KapMuG proceedings.

[44] KapMuG, § 3(1).

[45] KapMuG, § 3(2).

[46] KapMuG § 6(1) and § 9(2).

[47] KapMuG, § 8.

[48] KapMuG, § 22.

ruling. Issues of fault on the part of the claimant, and of causation, which are not common to all claimants, remain to be decided by the lower courts when they rule upon the claim for damages.

17.22 An example is again the *Deutsche Telekom* case. On 21 October 2014 the German Supreme Court (*Bundesgerichtshof*, BGH) upheld the *Oberlandesgericht*'s KapMuG decision that the prospectus was indeed misleading.[49] The BGH also ruled that individual circumstances (such as causation) cannot be decided in model case proceedings. The questions need to be addressed by the *Landgericht* in the individual cases.

17.23 One of the basic features of the KapMuG is the opt-in character. Only similar claims against the common defendant(s) brought before the *Landgericht* are subject to the binding effect of the *Musterentscheid*. Furthermore, only in regard of claims brought before the courts, or registered at the OLG,[50] is the limitation period of the claim interrupted.[51] The KapMuG's material scope is limited to claims for damages related to corporate misinformation in a prospectus, violation of disclosure duties by listed companies,[52] and contractual claims regarding the offer and sale of securities.[53]

17.24 On 1 November 2012 the KapMuG Reform Act entered into force.[54] This Reform Act introduced the possibility for the model case parties to settle their dispute during the proceedings and have the *Oberlandesgerichte* declare the settlement agreement binding for all pending cases. The individual claimants may opt out of the binding effect of the settlement and continue the stayed proceedings against the defendant in the individual proceedings before the *Landgericht*.[55]

2. Model Declaratory Proceedings (*Musterfeststellungsverfahren*)

17.25 In July 2018, the German legislator adopted the model declaratory proceedings (*Musterfeststellungsverfahren*) in book 6 of the German Code of Civil Procedure (*Zivilprozessordnung*, ZPO).[56] Qualified consumer associations may file a collective declaratory claim regarding questions of law and fact common to claims of consumers against a business or company.[57]

[49] BGH, 21.10.2014, Az. XI ZB 12/12.

[50] KapMuG, § 10(2).

[51] F Reuschle, § 77, in P Derleder, K-O Knops, and H G Bamberger (eds), *Deutsches und europäisches Bank- und Kapitalmarktrecht* (Springer 2017) 1416.

[52] KapMuG, § 2(2)(3) as modified by Act of 30 June 2016 (§ 16 van Erstes Gesetz zur Novellierung von Finanzmarktvorschriften auf Grund europäischer Rechtsakte (1. FiMANoG) vom 30 Juni 2016 (BGBl. I S. 1514)). Violations by listed companies of their duty to disclose inside information to the public as required by the EU Market Abuse Regulation (Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L173/1, Art 17) are brought under the material scope of the KapMuG.

[53] KapMuG, § 1(1).

[54] BGBl.I S.2182.

[55] KapMuG, § 23(3).

[56] BGBl.I S.1151.

[57] ZPO, § 606(1). Qualified consumer associations include non-German associations registered for at least four years at the European Commission on the basis of art. 4 of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version) [2009] OJ L110/30, see ZPO, § 606(2).

The writ of summons must detail at least ten consumer claims.[58] The issue may concern the (non-)existence of a legal relationship between a consumer and a business.[59] In the case that at least fifty such claims are filed at the court registry (*Klageregister*)[60] within two months of registering the collective declaratory claim, the model declaratory proceedings will start.[61] If individual consumers brought claims to court in individual proceedings concerning the same matter before the collective declaratory proceedings were initiated, these consumers may register their claim on the basis of § 607 ZPO, and their individual proceedings are stayed.[62]

17.26 The declaratory judgment (*Musterfeststellungsurteil*) is published at the court registry.[63] If a declaratory judgment can no longer be appealed,[64] it is binding on all registered consumers and the defendant.[65] If the consumer has withdrawn his registration before this judgment, the latter has no binding effect.[66]

17.27 A settlement concluded between the association and the defendant needs court approval.[67] Upon approval, it has binding effect on the consumer claims registered.[68] Every consumer has the right to opt out of this settlement within one month after being notified of the court approval of the settlement.[69]

17.28 The structure of these model declaratory proceedings is similar to the Dutch collective proceedings when declaratory relief is sought by the claimant organization (see paragraph 7). An important difference is that not all associations may file such a claim. Access to the *Musterfeststellungsverfahren* is restricted to officially recognized consumer associations. Like the KapMuG, it is an opt-in model. The binding effect of the declaratory judgment is limited to consumer claims registered.

V. Dutch Collective Redress Models

17.29 Given the prominence of the Netherlands as a crowdfunding market, Dutch courts seem to be in a promising position as a forum for the resolution of crowdfunding-related disputes. For this reason, this section will present an in-depth case-study of the Dutch collective action scheme, which could be potentially used by crowdfunding investors in the future.[70]

17.30 The Dutch collective action was first codified in 1994 in the Dutch Civil Code in Article 3:305a BW. This legislation has been thoroughly renewed as at 1 January 2020. Under the

[58] ZPO, § 606(2)(2).
[59] ZPO, § 606(1).
[60] ZPO, § 607.
[61] ZPO, § 606(3).
[62] ZPO, § 613(2).
[63] ZPO, § 612(1).
[64] ZPO, § 614.
[65] ZPO, § 613(1).
[66] ZPO, § 613(1) last sentence.
[67] ZPO, § 613(3).
[68] ZPO, § 611(1).
[69] ZPO, § 611(4).
[70] It should incidentally be noted that Dutch law also allows collective action for public interest, non-commercial litigation. This facet of the phenomenon, however, is not directly linked to the resolution of disputes between investors, project owners, and CSPs, and will therefore not be discussed in this chapter.

new regime, as subsection V.3 will illustrate in detail, it is possible to collectively claim damages, so that the court will order a collective damage schedule, in cases where the parties fail to reach a collective settlement. The defendant will be obliged to perform this judicially ordered damage schedule by paying accordingly to the victims.

17.31 Collective redress in the Netherlands has many different legal structures. The legal person representing the class may:

- claim on the basis of agency or proxy (agency model);
- bundle individual claims transferred to it by assignment (assignment model); or
- bring a claim in its own name, in the interest of their constituency (305a-collective model).

In the agency model, the claim vehicle[71] is the formal party to these proceedings, and the individual victims are the material party; in the other two models (assignment model and collective model) the claiming entity is the formal as well as the material party to the proceedings.[72] When acting on a mandate from an undisclosed principal, the formal party to the proceedings acts in its own name on behalf of the represented principal (in this case, the individual victims). The latter are the material parties to the proceedings.

17.32 The first two models (agency model and assignment model) amount to bundling individual claims. Even though these claims are dealt with in a single procedure, the individual relationships between the alleged tortfeasor and his victims are central. In the 305a- or 'collective' model, this is different. The organization claims in his own right (a collective claim), in the interest of other parties. In a 305a-model, legal action and claims instigated by the organization must serve the protection of similar interests of other persons. On the basis of Article 3:305a of the Dutch Civil Code (*Burgerlijk Wetboek*, or BW) a foundation or association (often referred to as a '305a-organization') with full legal capacity may institute a legal action for the protection of similar interests of other persons, provided that it represents these interests in accordance with its articles of association and these interests are adequately safeguarded.[73] The 305a-organization does not have a cause of action if the case only benefits its own members or constituency; all victims suffering losses as a result of the event must benefit.[74] As a necessary condition for such a collective claim, the court must be able to judge this claim in a sufficiently abstract manner, without involving the individual circumstances of the members of the group of persons whose interests are protected.

17.33 As will be discussed in the next paragraphs, these different models each have their own judicial review framework to assess admissibility. Especially the obligation to furnish facts and give evidence for each individual claim, the service of a list of represented persons to the defendants, and the assessment of third-party funding differs per model. Some organizations

[71] Unlike in the 305a-model no formal restriction to certain types of legal persons is applicable in the agency model and assignment model. In principle, every (legal) person may instigate an action on the basis of agency or because of the claim has been assigned to that party by the original claimant. In practice, collective action proceedings of any kind are instigated by foundations.

[72] See on the difference between formal and material parties to proceedings J Biemans, *Rechtsgevolgen van stille cessie* (Kluwer 2011) para 3.5.2.1.

[73] Until 1 January 2020 it was prohibited to claim damages in a collective action (former Art 3:305a(3) BW).

[74] *Stichting GIN schade/IDM Financieringen BV* [25 April 2018] Amsterdam District Court, ECLI:NL:RBAMS:2018:2693 [4.6]; *NAM/Christelijke Woningstichting Patrimonium Groningen* [23 January 2018] Arnhem-Leeuwarden Court of Appeal, ECLI:NL:GHARL:2018:618 [6.2–6.8].

have their own funds or receive (government) subsidies to bring a collective claim; typically, they will choose the 305a-model. Conversely, *ad hoc* foundations are dependent on commercial litigation funders. These foundations will only act on behalf of their own clients and more often opt for an agency or assignment model.

1. Safeguard Assessment

17.34 To safeguard the interests of the organization's constituency, the court will check if the legal person is sufficiently representative, both in view of its constituency and the value of the claims represented.

17.35 Claims brought by a 305a-organization are inadmissible if the action is not sufficiently in the interest of the constituency. The test involves issues of corporate governance, appropriateness, and effectiveness of mechanisms for participation or representation in decision-making by persons whose interests are the subject of the legal action, and sufficiency of resources to bear the costs of instituting a legal action, which ensures that the legal person has sufficient control over the legal action. Furthermore, the court can prevent 305a-organizations and their affiliated litigation funders from using the collective redress mechanisms mainly to enlarge their commercial litigation business.[75] In order to be able to assess whether the interests are properly safeguarded, the interests (including the possible commercial ones of third-party litigation funders) involved in the collective proceedings have to be known. The 305a-organization has to show how many persons it represents and must demonstrate that it fulfils certain organizational requirements.[76]

17.36 This test safeguards the interests of all parties involved on the claimant side, including the 305a-organizations itself. If the collective proceedings are financed by a third party, the conditions set in the finance agreement are subject of judicial scrutiny as well.[77] In particular, the control and decision-making powers of this funder and the fee conditions are tested. The judiciary, as well as the Dutch legislator, recognize the useful function of third-party funding in collective litigation.[78]

17.37 Such a judicial scrutiny of third-party financing has not (yet) occurred in collective proceedings involving a foundation or any other (legal) person demanding damages for claims assigned to it. Unlike in the agency model, the claiming party is in this case the formal as well as the material party in the proceedings.

17.38 In some situations, another third party is involved in the collective proceedings. The foundation agrees to claim on behalf of the victims, in exchange for a success fee. The victims

[75] Parliamentary Papers I 2012/13, 33126, C, pp 1–2.
[76] See Parliamentary Papers II 2011/12, 33126, 3, pp 12–13.
[77] Parliamentary Papers II 2017/18, 34608, 6, p 25.
[78] *Stichting Petrobras Compensation Foundation/Petrobras* [29 January 2020] Rotterdam District Court ECLI:NL:RBROT:2020:614, *JOR* 2020 /119 annotated by T Arons, *Ondernemingsrecht* 2020/49 annotated by L van Bochove [5.15]; *Stichting Union des Victimes des déchets toxiques Côte d'Ivoire/Trafigura Beheer BV* [14 April 2020] Amsterdam Court of Appeal ECLI:NL:GHAMS:2020:1157, Ondernemingsrecht 2020/117 annotated by T Arons [2.13] and [3.28]; *PAL/Aegon* [4 February 2020] The Hague Court of Appeal, ECLI:NL:GHDHA:2020:102, JOR 2020/116 annotated by T Arons [19]; *VEB/Steinhoff* [26 September 2018] Amsterdam District Court, ECLI:NL:RBAMS:2018:6840, JOR 2019/121 annotated by F Kroes [4.21].

agree that the foundation can outsource this task of bringing a claim to a third party, the subagent. In most cases, this will be a company or other commercial organization.

17.39 The judiciary seeks to establish an equitable balance between all parties involved in collective redress. If the claimant organization opts to pursue collective proceedings under Article 3:305a BW, its claim has to be sufficiently collective so as to enable the court to deal with it without regard of any individual circumstances (abstractness of the claim). To this end, the claim has to be structured in an 'abstract' fashion, so as to enable scrutiny of multiple individual positions within a single procedure. Furthermore, the organization has to comply with the organizational and governance requirements, and any agreements with clients and/or funders will be subject to judicial review.

2. Collective Proceedings: Declaratory Relief

17.40 Collective proceedings based on the alleged violation of information duties (such as the ones relating to the key investment information sheet) are structured as follows. A 305a-organization instigates a claim for declaratory judgment that the project owner or CSP acted tortiously towards the group of clients or investors, thus causing financial losses. As already mentioned, the claim has to be capable of being dealt with in a 'bundled' way. The court will abstract from any individual circumstances, and rule on the legal relationship between the defendant and the constituency as a group.

17.41 If the court rules that the defendant (eg the project owner, or the CSP) acted tortiously towards the group of investors, and this judgment is no longer subject to appeal, the defendant and the claimant organization will seek a settlement out of court. A settlement concerns either the constituency of the 305a-organization (partial settlement) or the entire group of persons equally affected by the same tortious behaviour and suffering similar losses (worldwide settlement). In the latter case, the 305a-organization and the defendant may jointly request the Amsterdam Court of Appeal to declare the settlement binding upon the entire group, except for those who opted out of it within the time limit set by the Court of Appeal.

3. Collective Damage Claims

17.42 Alongside the possibility to seek declaratory relief through a collective action, the Dutch lawmaker has introduced a new collective action regime, as of 1 January 2020. The most notable innovation of the WAMCA is the possibility for 305a-organizations to claim damages collectively, rather than only seeking a declaratory judgment and then seeking an out-of-court settlement.

A. Stages in the New Collective Action Regime

17.43 The new Dutch collective action procedure consists of the following steps:

(1) *Invitation to consult the defendant*:[79] The 305a-organization is under a duty to make sufficient efforts to achieve its claims by entering into consultations with the defendant. In any case, a time limit of two weeks after receipt by the defendant of a

[79] BW, Art 3:305a(3)(c).

request for consultation, stating the alleged claim against the defendant, is sufficient for this purpose.

(2) *Writ of summons*:[80] The writ of summons must contain the following: (a) a description of the event or events to which the collective claim relates; (b) a description of the persons whose interests the collective claim aims to protect; (c) a description of the extent to which the questions of fact and of law to be answered are shared; (d) a description of the way in which the cause of action requirements of Article 3:305a BW are met; (e) information that enables the court to appoint an exclusive representative for this collective claim, in the event that other collective claims for the same event are instituted.

(3) *Registration and time limit*: A 305a-organization submits the writ of summons at the central register for class actions.[81] Thereafter, a time limit of three months starts; the court may extend this time limit with a maximum of three months.[82] Other 305a-organizations wishing to instigate a collective claim for the same event or events as those concerned in the first submitted claim involving similar questions of fact and of law have to submit their writs of summons within the time limit of three months.[83]

(4) *Admissibility test*: The court will test each registered 305a-organization on the following: (a) whether the organization fulfils its admissibility conditions under Article 3:305a BW; (b) whether the organization has been able to show that its collective claim is a more efficient and more effective way instead of dealing with the individual claims; and (c) whether it is summarily apparent that the collective damage claim is unfounded.[84] At this stage, the defendant can limit its defences to the aforementioned issues.

(5) *Appointment of the exclusive representative/limitation of group and claim*: The court appoints the exclusive representative for this collective claim.[85] It can also appoint more than one exclusive representative, if the respective constituencies are too dissimilar to be represented by a single party. Furthermore, the court will also determine (a) the exact content of the collective claim and (b) the group of persons in whose interest the exclusive representative will act.[86]

(6) *Individual opt-out (minimum one month)*: Individual members of the group have a possibility to opt out from this collective action within a one-month period after the appointment of the exclusive representative and the determination of the exact content of the collective claim and the group.[87]

(7) *Negotiating a settlement*: If the claimant organization and the defendant reach a collective settlement in the sense of Article 7:907(2) BW, a second opt-out possibility exists.[88] In case the parties do not reach a settlement, the exclusive representative

[80] The conditions for the write of summons can be found in Art 1018c(1) of the Dutch Code of Civil Procedure.

[81] <https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen>.

[82] Dutch Code of Civil Procedure, Art 1018c(3); other organization may register at the court on the basis of Art 1018d Dutch Code of Civil Procedure.

[83] Dutch Code of Civil Procedure, art 1019d(2).

[84] Parliamentary Papers II 2016/17, 34608, 3, p 46. The purpose of Art 1018(5)(c) Dutch Code of Civil Procedure is to enable the court to dismiss, in exceptional circumstances, unfounded claims before the stage at which the substantive claim is being heard.

[85] Dutch Code of Civil Procedure, Art 1018e(1).

[86] Dutch Code of Civil Procedure, Art 1018e(2).

[87] Dutch Code of Civil Procedure, Art 1018f.

[88] Dutch Code of Civil Procedure, Art 1018h(5) and Art 1018f(1).

may add to the grounds of the claim. The defendant may of course also add to its defences.[89]

(8) *Substantive hearing*: The court may order the parties to submit their settlement proposals.[90]

(9) *Judgment*: The court will determine the collective damage scheme.[91]

(10) *Announcement*: The members of each constituency of the 305a-organizations will be informed about the aforementioned judgment.[92] On the basis of Article 1018j(1) Dutch Code of Civil Procedure, the defendant has to make this announcement, unless otherwise decided by the court. In addition to this, an announcement of the judgment shall be made as soon as possible in one or more newspapers designated by the court. This announcement shall give a brief description of the collective claim settlement, in particular as to the way in which compensation can be obtained from the defendant or how the collective claim settlement can otherwise be invoked and, if the collective claim settlement so determines, the time limit within which a claim to such settlement should be made.

In most collective settlement agreements, a newly instituted foundation ('settlement foundation') will be involved. The victims entitled to compensation will file their claim with this foundation, on the basis of the judicial decision on the collective damage scheme. In case of disputes between these claimants and the settlement foundation, the scheme will provide for alternative dispute settlement. The WAMCA does not provide for any judicial involvement with the execution of the damage scheme.

B. Extra Requirements for all 305a-organizations

17.44 The WAMCA imposes extra requirements for all 305a-organizations. Nevertheless, the court may declare a legal person to have a cause of action without these requirements having to be satisfied, where the legal action is instituted with a non-commercial objective and a very limited financial interest, or where the nature of the claim of the legal person or of the persons whose interests the legal action aims to protect, gives reason thereto. In those cases, the legal action cannot result in monetary compensation.[93]

17.45 On pain of inadmissibility of the claim, 305a-organizations have to be sufficiently representative, both in view of its constituency, and the value of the claims represented. Furthermore, 305a-organizations need to fulfil the following requirements of having (a) a supervisory body; (b) appropriate and effective mechanisms for participation or representation in decision-making by persons whose interests are the subject of the legal action; (c) sufficient resources to bear the costs of instituting a legal action, which ensures sufficient control over the legal action; (d) a publicly accessible Internet page, on which important information concerning governance and financing arrangements is available; and (e) sufficient experience and expertise to commence and conduct the legal action.[94]

[89] Dutch Code of Civil Procedure, Art 1018g.
[90] Dutch Code of Civil Procedure, Art 1018i(1).
[91] Dutch Code of Civil Procedure, Art 1018i(2).
[92] Dutch Code of Civil Procedure, Art 1018j.
[93] BW, Art 3:305a(6).
[94] BW, Art 3:305a(2).

17.46 The requirement that the 305a-organization has to have sufficient control over the legal action is a reaction by the legislator to developments in the mass litigation funding market.[95] The legislator deems it important to stress that the 305a-organization is entitled to determine—after consulting its constituency, but not its funder—the procedural strategy of the collective claim proceedings.[96] The 305a-organization decides on any settlement presented by the defendant and chooses whether judicial decisions are appealed.[97] The court tests *ex officio* the degree of influence and control the funder has on the basis of the financing arrangement with the 305a-organization.

17.47 The legislator recognizes the positive aspects of litigation funding in collective redress proceedings, in terms of enhancement of access to justice for victims. However, the legislator seeks to prevent any excessive litigation. Furthermore, it deems that an excessive fee for the funder would lead to a situation where compensation for victims becomes secondary.[98] It is left to the courts to determine the right balance;[99] the aforementioned admissibility requirement provides the competent court with the tools to test whether the third-party litigation funder submits excessive costs and/or is not transparent about its cost structure. In case the court gets signals of abusive commercial behaviour, it may appoint another 305a-organization as exclusive representative, in order to redress this situation.[100] The court may order the submission of the financing arrangement with the funder, so as to perform the admissibility test.

17.48 A 305a-organization shall only have a cause of action if its directors involved in the formation of the legal person and their successors do not have a profit motive that is achieved directly or indirectly through the legal person.[101]

C. Connection with the Jurisdiction of Dutch Courts

17.49 The new Dutch collective redress procedure is limited to cases that have a sufficiently close connection to the jurisdiction of the Dutch courts. This requirement is fulfilled when:

(1) the 305a-organization person makes it sufficiently plausible that the majority of the persons whose interests the legal action aims to protect have their habitual residence in the Netherlands; or
(2) the party against whom the legal action is instituted is domiciled in the Netherlands, and additional circumstances suggest that there is a sufficiently close connection to the jurisdiction of the Dutch courts; and
(3) the event or events to which the legal action relates took place in the Netherlands.[102]

[95] BW, Art 3:305a(2)(c). See Parliamentary Papers II 2017/18, 34608, 10.
[96] Parliamentary Papers II 2017/18, 34608, 6, 11, 26; Parliamentary Papers II 2017/18, 34608, 9, 2; 9; 10.
[97] See I Tillema, 'Exclusieve en concurrerende belangenbehartigers: balanceren op glad ijs?' (2018) Ars Aequi 0476.
[98] Parliamentary Papers II 2016/17, 34608, 3, 11. The courts has been lenient so far. Success fees between 9 and 20 per cent have been judged no unreasonable. See *VEB/Steinhoff* [26 September 2018] Amsterdam District Court, ECLI:NL:RBAMS:2018:6840 [4.21] and *PAL/Aegon* [4 February 2020] The Hague Court of Appeal, ECLI:NL:GHDHA:2020:102 [27].
[99] *Stichting Petrobras Compensation Foundation*/Petrobras [29 January 2020] Rotterdam District Court, ECLI:NL:RBROT:2020:614 [5.15].
[100] Parliamentary Papers II 2017/18, 34608, 6, p 25.
[101] BW, Art 3:305a(3)(a).
[102] BW, Art 3:305a(3)(b).

D. Opt-out Structure

17.50 As already mentioned, the WAMCA collective action is an opt-out scheme. The parties that wish not to be bound by it may submit a written declaration to this effect to the court registry. This declaration must be submitted within one month after the appointment of the exclusive representative.[103] If the number of opt-outs no longer justifies the continuation of the collective action, the court may order the end of this procedure.[104] As already mentioned, a second opt-out possibility exists, after the claimant organization and the defendant have reached a collective settlement agreement during the procedure.[105]

4. Binding Collective Settlements

17.51 The Dutch legislator expects the parties in collective damage proceedings to often reach a settlement agreement, so that the court will not issue a damage scheme. In order to facilitate collective settlements, the legislator adopted in 2005 the *Wet collectieve afwikkeling massaschade* (WCAM). Under this law, the 305a-organization and the defendant can have their settlement agreement declared binding on the entire group, so as to achieve finality of litigation for all similar claims.

17.52 The Amsterdam Court of Appeal has the exclusive jurisdiction to rule on such a request.[106] The individual members of the group may submit an opt-out declaration to the person designated in the WCAM settlement agreement.[107]

17.53 The court may decline the request on a limited number of grounds.[108] One of these grounds is the reasonableness of the compensation. The court should play an active role,[109] assessing reasonableness in light of the volume of losses, the ease and promptness with which compensation may be obtained, and the possible causes of the loss. The court, however marginally, will need to evaluate liability, and the legal relationship between the defendant and its alleged victims.[110] The court will take into account the costs and expected degree of litigation success, should the case be heard by a court in adversarial proceedings.

[103] Dutch Code of Civil Procedure, Art 1018f.
[104] Dutch Code of Civil Procedure, Art 1018f (1) last sentence.
[105] Dutch Code of Civil Procedure, Art 1018h(5) and Art 1018f(1).
[106] Dutch Code of Civil Procedure, Art 1013(3).
[107] BW, Art 7:908(2) and Art 7:907(2)(f).
[108] BW, Art 7:907(3).
[109] Parliamentary Papers I 2004/05, 29414, C, p 6.
[110] Parliamentary Papers II 2003/04, 29414, 3, p 13.

17.54 The Amsterdam Court of Appeal has so far declared eight WCAM settlement agreements binding, specifically *Des*,[111] *Dexia* (Duisenberg settlement),[112] *Vie d'Or*,[113] *Shell*,[114] *Vedior*,[115] *Converium*,[116] *DSB*,[117] and *Fortis*.[118]

5. Claimcode 2019

17.55 The Claimcode 2019 is a self-regulatory instrument made by parties involved in collective redress in the Netherlands. In legal practice, there has been uncertainty as to the status of the predecessor of this instrument, the Claimcode 2011. In case law, it has been established that the Claimcode has an indirect legal basis.[119]

17.56 The Claimcode 2019 is applicable to associations and foundations instigating or involved in collective proceedings on the basis of Article 3:305a BW, or in collective settlement agreements, or submitting a WCAM request. While an exhaustive overview of the principles enshrined in the Claimcode falls beyond the scope of this chapter, it is important to highlight that this instrument sets forth a number of important principles for organizations engaging in collective redress procedures in the Netherlands. The Claimcode requires *inter alia* transparency as to the governance structure of the organizations, the safeguard of the interests that the organization is supposed to pursue, transparency as to the role of third-party funders, avoidance of conflict of interests, as well as other provisions aimed to ensure that the organization operates in line with its stated purposes.

VI. Conclusion

17.57 The comparative analysis carried out in this chapter demonstrates that the European landscape of collective redress is far from being harmonized. Under the collective action regimes set forth in the law of some EU Member States (such as the French *action de groupe*

[111] *DES settlement* [1 June 2006] Amsterdam Court of Appeal, ECLI:NL:GHAMS:2006:AX6440-.
[112] *Duisenberg settlement* [25 January 2007] Amsterdam Court of Appeal, ECLI:NL:GHAMS:2007:AZ7033, *JOR* 2007/71 annotated by Leijten.
[113] *Vie d'Or settlement* [29 April 2009] Amsterdam Court of Appeal, ECLI:NL:GHAMS:2009:BI2717, *JOR* 2009/196 annotated by Leijten in *JOR* 2009/197, *NJF* 2009/247.
[114] *Shell* settlement [29 May 2009] Amsterdam Court of Appeal, ECLI:NL:GHAMS:2009:BI5744, *JOR* 2009/197 annotated by Leijten.
[115] *Vedior settlement* [15 July 2009] Amsterdam Court of Appeal, ECLI:NL:GHAMS:2009:BJ2691, *JOR* 2009/325 annotated by Pijls, *Ondernemingsrecht* 2009/162 annotated by De Jong ().
[116] *Converium settlement* [17 January 2012] Amsterdam Court of Appeal, ECLI:NL:GHAMS:2012:BV1026, *JOR* 2012/51 annotated by De Jong.
[117] *DSB settlement* [4 November 2014] Amsterdam Court of Appeal, ECLI:NL:GHAMS:2014:4560, *JOR* 2015/10 annotated by Tzankova.
[118] *Fortis settlement* [13 July 2018] Amsterdam Court of Appeal, ECLI:NL:GHAMS:2018:2422.
[119] See J van Mourik and E Bauw, *De Claimcode van 2011 tot 2019* (BJu 2019) 52.

and the Dutch WAMCA), organizations may bring a collective action, claiming compensation for losses incurred by crowdfunding investors. Under other national regimes (such as the German KapMuG), it is up to the individual investors to initiate a claim for damages; however, if multiple similar cases are brought, model case proceedings can be started. It remains to be seen whether this lack of harmonization at the procedural level will hinder the uniform enforcement of the Crowdfunding Regulation across the EU. As already mentioned, crowdfunding-related cases are often well-suited for collective dispute resolution. Yet, depending on which national courts will have jurisdiction to hear the case (as illustrated in Chapter 16), the availability and distinctive character of collective procedures may vary drastically.

17.58 A further layer of problems concerns the tension between the collective nature of these proceedings (where available), and the 'bilateral' assumptions implicitly underlying the substantive law invoked by the claimants. This tension is particularly visible in the case of the calculation of damages. In a collective procedure such as the Dutch WAMCA or the French *action de groupe*, the court is expected to calculate the damages for the whole group of affected crowdfunding investors, whenever the litigating parties fail to reach a collective settlement agreement. However, the 'traditional' rules on liability and damage valuation are not designed for this purpose, since the lawmaker originally envisaged their application in a two-party litigation, rather than in a mass case.[120] Thus, when the proceedings involve an abstract of a group of persons (eg a group of crowdfunding investors) vis-à-vis the liable party (eg the project owner, or the CSP),[121] the calculation of damages may raise questions that cannot be resolved by reference to 'traditional' liability laws. It will be interesting to see how national courts (eg in the Netherlands and France) will deal with this inherent tension, when establishing a collective damage scheme. Crowdfunding-related disputes may be one of the sectors where the question arises in the future.

17.59 Finally, this chapter has illustrated how some collective redress procedures (such as the Dutch WAMCA) require the appointment of an exclusive representative, which will represent the interests of all constituencies of all representative organizations. In a crowdfunding-related case, such an exclusive representative would play a pivotal role in the enforcement of the Crowdfunding Regulation. In practice, however, this role entails responsibilities that may deter the relevant organization from agreeing to perform this task. For this reason, it remains to be seen whether the requirements set forth by national law for the exclusive representative in a collective procedure may end up hindering the use of these procedures as an enforcement tool for the Crowdfunding Regulation.

[120] Dutch Code of Civil Procedure, Art 1018i(2). Neither the French Civil Code nor the Consumer Code provides for any special provision of substantive liability law for collective actions.

[121] See T Hartlief, 'Massaschaderecht in ontwikkeling' [2019] Tijdschrijft voor Privaatrecht 464–65; M Klein Meuleman, 'Schadeberekening in collectieve acties' and Ronny de Jong, 'Regressieanalyse in het (massa) schadevergoedingsrecht' in M Hebly and others (eds), *Schaalvergroting in het privaatrecht* (BJu 2019) 145.