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Collective redress and workers' rights in the Netherlands

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Abstract
This contribution discusses the Dutch possibilities of collective redress in the domain of labour law. More specifically, it examines the legal options of bringing collective actions and obtaining collective redress in Dutch courts in labour cases, and elaborates on the relevant legal framework as well as the extent to which these opportunities have been used in practice. Findings imply that the Netherlands was among one of the first European countries to introduce a general collective action system. This general collective action regime allows unions and other interest groups to raise cases to protect workers' rights, even outside the scope of collective labour agreements. Such a collective action regime, however, is not commonly used in practice. Nevertheless, as of January 2020 the admissibility criteria for this general collective redress mechanism have been expanded and it has become an 'opt-out' regime, without the need for individual workers to initiate individual follow-up proceedings in the event of a successful case. The latter could improve the effective enforcement of workers' rights in practice and could provide an incentive for trade unions and other organisations that are active in the protection of workers' rights to incite a collective action.

Keywords
Collective redress, collective action, trade union, workers' protection, enforcement of workers' rights

1. Introduction

Labour Law is the most important instrument to ensure decent work.[1] Standards such as minimum wages, health and safety provisions and social insurance contributions ensure that workers benefit from income security and safety at work. However, employers associate labour laws with costs, and

1. G. Davidov, 'Re-matching Labour Laws with their Purpose', in *The Idea of Labour Law*, 180 (Davidov & Langille eds, Oxford University Press 2013); H. Collings, Justification and Techniques of Legal Regulation of the Employment Relation, in *Legal Regulation of the Employment Relation*, 23 (Collins, Davies & Rideout, Kluwer 2000).

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therefore may be tempted to circumvent these standards. Recently, this problem of non-compliance has exacerbated. As a result of the changing economy, globalisation, enhanced technology and digitalisation, the way many people work has changed significantly.[2] Since labour law particularly applies to the standard labour agreement, employers increasingly use flexible employment relationships and sham arrangements (by misclassifying employees as self-employed) to limit or circumvent labour law protection, causing labour market outsiders such as young people, the elderly or migrants, to work underpaid and underprotected.[3] Hence, robust enforcement mechanisms are indispensable now more than ever.

Traditionally, two types of enforcement mechanisms are distinguished: civil enforcement and public enforcement by the State. This also applies for the enforcement of labour laws in the Netherlands. First, in the traditional civil judicial enforcement mechanism, labour standards are enforced through lawsuits initiated by workers themselves.[4] All worker rights, either statutory or contractual, can be enforced in civil courts by seeking compliance or damages. There is jurisdiction in three instances: district courts hearing cases at first instance, the possibility of appeal to the Court of Appeal and thereafter appeal to the Supreme Court. The Netherlands does not have specialised labour courts. Second, in certain areas of Dutch labour law, enforcement is also assigned to public authorities such as the Inspectorate (*Inspectie SZW*) in addition to, or in place of, civil judicial enforcement.[5] Important examples are the Act on Labour Conditions (*Arbeidsomstandighedenwet*)[6] and the Minimum Wage Act (*Wet Minimumloon*).[7] State enforcement, however, is costly and complicated.[8] In recent decades, as part of a wider strategy of deregulation, there has been a shift from public to private regulation.[9] Major cuts to the Inspectorate have

2. F.C.A. van Haasteren, *De ILO en Flexwerk*, 4 Tijdschrift recht en arbeid (2019); P.T. de Beer & M.J. Keune, *De toekomst van het Nederlandse arbeidsbestel,* 3 Tijdschrift recht en arbeid (2019); M. Kullmann, 'Platform Work, Algorithmic Decision-Making, and EU Gender Equality Law', 34 *International Journal of Comparative Labour Law & Industrial Relations* 5 (2018); H. Johnston & C. Land-Kazlauskas, 'Organizing on-demand: Representation, voice and collective bargaining in the gig economy', 94 ILO Conditions of Work and Employment series 3 (2018); A. Todoli-Signes, 'The End of the Subordinate Worker? The On-Demand Economy, the Gig Economy, and the Need for Protection for Crowdworkers', 33 *International Journal of Comparative Labour Law & Industrial Relations* 243 (2017); V. De Stefano, *The rise of the "just-in-time workforce": on-demand work, crowdwork and labour protection in the 'gig'-economy*, ILO Conditions of work and employment series Working Paper, 2016 no. 71; G. Davidov, 'Addressing the Compliance/Enforcement Crisis', in *A Purposive Approach to Labour Law*, 288 (Davidov ed., Oxford University Press 2016).
3. S. van der Graag, *Als je er wat op te zeggen hebt… Individuele en collectieve arbeidsrelaties van precair werkenden in beeld*, 18 Wetenschappelijk bureau voor de vakbeweging (Amsterdam 2018); V. De Stefano & A. Aloisi, 'Fundamental Labour Rights, Platform Work and Human-Rights Protection of Non-Standard Workers', 1 Bocconi Legal Studies Research Paper Series 3 (2018); Kullmann, *supra* note 3, at 6; N. Kantouris, 'The Legal Determinants of Precariousness in Personal Work Relations: a European Perspective', 34 *CLLP'Y* 6 (2013).
4. M. Kullmann, *Enforcement of Labour Law in Cross-Border Situations*, 1 (Kluwer 2015).
5. See J. van Drongelen, De Ontwikkeling van de Arbeidsinspectie in een Veranderende Wetgeving (Rijksuniversiteit Limburg 1991).
6. See Arts. 27-29a; 32-43.
7. See Arts. 18b-18pa.
8. G. Davidov, 'Addressing the Compliance/Enforcement Crisis', in *A Purposive Approach to Labour Law,* 229 (G. Davidov ed, University Press 2016).
9. See, e.g., M. Barendrecht & Y.P. Kamminga, *Toegang tot recht: de lasten van een uitweg*, RMO-advies nr. 32, Den Haag, 11 and 17 (2004). In labour law, for example, it is clearly visible in the replacement of the public law entitlement to sick pay with a private law obligation for the employer to pay wages in cases of sickness. See on this: A.M. Rijpkema, *Toegang tot het recht bij ziekte en arbeidsongeschiktheid: procedures en rechtsbescherming in de publiek-private mix*, (Groningen: 2013).

resulted in downsizing and a reduction in inspections.[10] Subsequently, employment relations have become increasingly privatised and individualised, and therefore most workers rely on protection afforded by the judicial system. However, a lack of legal awareness, the fear of retaliation by the employer, and the complexity, costs and length of judicial proceedings can make judicial self-enforcement by the worker unrealistic.[11] This is particularly the case for workers facing the most severe breaches of their labour rights, namely vulnerable workers in flexible labour arrangements.[12] In addition, individual claims are not efficient mechanisms for addressing infringements of law that affect a lot of people.[13] Hence, frequent individual recourse to the courts should be avoided. These shortcomings of individual litigation have led to the adoption of collective redress mechanisms in which – within the area of labour law – trade unions are the most important actors.

With the implementation of the Act on collective agreements (*Wet op de collectieve arbeidsovereenkomst*) in 1927,[14] it became possible for Dutch trade unions to participate in collective bargaining and to enforce collective labour agreements – ultimately – in court by seeking compliance or damages.[15] Apart from that, it was not until the 1980s that national legislation created other sectoral collective rights of action, for example, through Article 1416c of the Civil Code (*Burgerlijk Wetboek*, hereinafter, BW) (misleading advertising);[16] Article 6:240 BW (general terms and conditions); and Article 29a Copyright Law.[17] In addition, the Dutch Supreme Court has also granted similar powers - under certain conditions - to interest groups in areas where the legislature has not established a collective right of action.[18] However, at the end of 1986, the House of Representatives decided that it was no longer justified to limit the statutory regulation of the right to collective action of interest groups to certain expressly mentioned areas of law.[19] With the implementation of Article 3:305a BW[20] in 1994, the Netherlands was among the first European countries to introduce a general system of collective redress.[21]

This contribution discusses the Dutch possibilities of collective redress mechanisms in the domain of labour law. In this contribution, by 'collective redress', I mean the various legal possibilities the Dutch law offers to collective entities to institute proceedings in the interest of multiple

10. J. Popma, 'Inkrimping Arbeidsinspectie in strijd met ILO Verdrag 81', *ARBAC* 2011, oktober-december.
11. Davidov, supra note 3, at 226 and 288; J. Cremers & M. Bulla, *Collective redress and workers' rights in the EU*, 118 AIAS Working Paper, 30 and 33 (2012); V. De Stefano, *Smuggling-in Flexibility: Temporary Work Contracts and the 'implicit Threat' Mechanisms. Reflections on an New European Path*, 4 Labour Administration and Inspection Programme LAB/ADMIN Working Document (ILO 2009).
12. Van der Graag, supra note 4, at 19 and 37; A. Vives et al., 'The employment Precariousness Scale (EPRES): psychometric properties of a new tool for epidemiological studies among waged and salaried workers', 67 *Occupational and Environmental Medicine*, 548-555 (2010).
13. N. Frenk, *Kollectieve akties in het privaatrecht*, 3 (Kluwer 1994).
14. Act of 24 December 1927, *Stb*. 1927, 415.
15. A.T.J.M. Jacobs, *Collectief arbeidsrecht*, 151 (Kluwer 2017).
16. Act of 6 June 1980, *Stb*. 1980, 304.
17. See Frenk, supra note 14, at 103; Parliamentary Papers II 1991/92, 22 486, nr. 3, p. 2.
18. See Supreme Court 1 July 1983, *NJ* 1984, 360; Supreme Court 27 June 1986, *NJ* 1987, 743; Supreme Court 11 December 1987, *NJ* 1990, 73; Supreme Court 2 April 1993, *NJ* 1993, 573; Supreme Court 2 september 1994, NJ 1995/369; Supreme Court 2 december 1994, *NJ* 1996, 246.
19. Parliamentary Papers II 1986/87, 19 754, nr. 6.
20. Act of 6 April 1994, *Stb*. 1994, 269.
21. I. Tzankova & H. van Lith, 'Class Actions and Class Settlements Going Global: the Netherlands', in *Extraterritoriality and Collective Redress*, 67 (Fairgrieve & Lein eds, Oxford University Press 2012).

employees. First of all, the sectoral collective redress mechanisms will be discussed in the area of labour law (section 2), specifically, collective litigation pursued by trade unions and works councils in the enforcement of collective labour law agreements and other workers' rights. The general system of collective litigation, as provided by Article 3:305a BW, will then be considered, including recent amendments and its role in labour law (section 3). The contribution will finish with a summary of conclusions (section 4).

2. Sectoral collective redress mechanisms in labour cases

2.1. Collective agreements and collective litigation by trade unions

A large part of the Dutch economically dependent working population (80–85%) is covered by an industry-wide or company collective labour agreement,[22] whether through union membership, incorporation of said agreement in their employment contract or by means of a declaration of universal applicability.[23] Monitoring and enforcing (generally binding) collective agreements is a task for the social partners (trade unions and employers' organisations) that concluded the agreement. In the Netherlands, there is almost no involvement of public authorities.[24]

2.1.1. Act on collective agreements (Wet cao)

Collective agreements are based on the law of contract. In line with the law of contract in general, a trade union, as contracting party, is entitled to demand compliance with the (mandatory provisions of the) collective agreement by its counterparty: an individual employer or an employers' organisation.[25] However, according to Article 9, paragraph 1, of the Act on collective agreements (*Wet op de collectieve arbeidsovereenk*omst; hereinafter, *Wet cao*) all those who are, or become, members of an association that entered into the collective agreement and are involved by means of that agreement, are also bound by that agreement. According to paragraph 2, all members are mutually obligated to carry out all terms of the agreement in good faith, as if they had individually committed themselves to do so. The Dutch Supreme Court confirmed that by virtue of Article 9 *Wet cao*, a contracting trade union has its own right to seek compliance with the collective agreement of the member employers of the contracting employers' association.[26] Such a claim does not have to be initiated on behalf of (with a power of attorney of)

22. The Dutch definition of a collective agreement: an agreement between one or more employers or organisations of employers and one or more organisations of workers, which mainly or exclusively regulates working conditions to be observed in employment contracts (Article 1 of the Act on Collective Agreements).
23. N. Jansen, *Een juridisch onderzoek naar de representativiteit van vakbonden in het arbeidsvoorwaardenoverleg*, 1 (Kluwer 2019).
24. With exception of Article 10 *Wet AVV* (see below) and *Wet allocatie arbeidskrachten door intermediairs*; *Wet Arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie*. See Kullmann supra note 5, at 154; Jacobs, supra note 16, at 146.
25. M.M.H. Kraamwinkel, 'De rol van vakbonden bij handhaving van cao's', 1 *Sociaal Maandblad Arbeid*, 23 (2000); W.J.P.M. Fase & J. van Drongelen, *CAO-recht*, 117 (Kluwer 2004); Jacobs, supra note 16, at 149.
26. Supreme Court 19 June 1987, *NJ* 1988, 70. See also: Supreme Court 22 June 2018, ECLI:NL:HR:2018:980 and Supreme Court 19 March 2021, ECLI:NL:HR:2021:413. Kraamwinkel, supra note 26 at 23; C.P. Robben & S.N. de Valk, *Handhaving van cao's en contractsvrijheid (Deel I),* 46 Tijdschrift Recht en Arbeid (2019); C. van den Bor, *Naleving van cao-bepalingen*, Arbeidsrechtelijke Annotaties, 2 (2021).

the employee(s).[27] It is not even required employees have opposed or objected to their employers' conduct.[28]

Moreover, according to Article 12 *Wet cao*, any provision in the individual employment contract that violates the collective agreement is void and automatically replaced by the relevant provisions of the collective agreement. Any *lacunae* in the employment contract are also automatically filled with the relevant collective provisions (Article 13 *Wet cao*). This is called the 'normative function' of the collective agreement, which applies to both the individual employer and employee who are bound by the collective agreement since they are (or have become) members of the contracting organisations to the agreement.[29] However, according to paragraph 2 of Article 12 *Wet cao* the nullity of any clause in the employment contract contrary to the collective agreement may also be invoked by any of the contracting parties at any time. Therefore, this is, apart from the claim based on Article 9 paragraph 2 *Wet cao*, another way for collectively enforcing the collective agreement for multiple employees by trade unions.

Furthermore, it is also possible for trade unions to claim (immaterial) damages not only for themselves, but also for employee members, in cases where another party or its members acts in violation of the collective agreement (Article 15 and 16 *Wet cao*).[30]

Collective agreements are not binding for employees who are not members of a contracting trade union. However, according to Article 14 *Wet cao*, an employer who is bound by a collective agreement is obliged to apply the agreement to the so-called non-unionised employees as well. Most employers fulfil this obligation by agreeing an incorporation clause of the collective agreement in the employment contract. Article 14 employees - unlike their unionised colleagues - cannot claim compliance in court with the collective agreement themselves.[31] However, the parties to the collective agreement can do so based on Article 9 paragraph 2 *Wet cao*.[32]

2.1.2. Act on declaring collective agreements generally binding (Wet AVV)

An important way of broadening the scope of applicability of collective agreements is to declare them generally binding. In the Netherlands, under Article 2, paragraph 1 of the Act on declaring collective agreements generally binding (*Wet tot het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten*, hereinafter, *Wet AVV*), the Minister can declare a collective agreement generally binding to all workers and employers with respect to their employment contracts. This extends the applicability of the collective agreement to those employers and employees who are not bound by membership of the contracting parties, but then nevertheless fall within the scope of the collective agreement. It becomes binding on all employers and employees in the relevant sector of the collective agreement. Therefore, in the Netherlands, generally binding collective agreements come close to legislation, even though there is almost no state intervention in the enforcement of such agreements. Hence,

27. See also Jacobs, supra note 16 at 152.
28. Supreme Court 22 June 2018, ECLI:NL:HR:2018:980 and Supreme Court 19 March 2021, ECLI:NL:HR:2021:413. See Van den Bor, supra note 27.
29. See also: M.M. Olbers, 'Handhaving van de cao', *Sociaal Maandblad Arbeid*, 218 (1988).
30. Jacobs, supra note 16, at 151-152; Fase & Van Drongelen, supra note 26, at 118-119; Kraamwinkel, supra note 27, at 23; Robben & De Valk, supra note 27.
31. Supreme Court 7 June 1957, NJ 1957/527 (*Suk/Brittannia*).
32. Fase & Van Drongelen, supra note 26, at 117; Olbers, supra note 30, at 219; Robben & De Valk, supra note 27.

it is essentially for the social partners to monitor and enforce generally binding collective agreements.[33]

According to Article 3, paragraph 2 *Wet AVV*, employers' and employees' associations whose members are party to an employment contract governed by a universally applicable collective agreement can invoke the nullity of a clause in an individual employment contract that contravenes a generally applicable collective agreement. They can do so whether or not they are one of the parties to the original collective agreement and whether or not the opposite party is a member of one of these associations.[34] Furthermore, a claim for compliance by these associations is also possible under Article 3 *Wet AVV* in cases of violation of generally binding provisions of the collective agreement.[35] In addition, paragraph 4 of Article 3 *Wet AVV* contains a comparable provision to Articles 15 and 16 *Wet cao* in respect of claiming damages.[36] However, this goes even further by stating that *any* association of employers or employees may claim damages from any employer or employee who contravenes the provisions declared universally applicable. So even trade unions that are not a contracting party to the generally applicable collective agreement can claim damages in cases of violation of the agreement. It is not necessary that a violation affects one of its members.[37]

Furthermore, according to Article 10, paragraph 1 *Wet AVV*, a trade union or employers' association can engage the Inspectorate of Social Affairs and Employment (*Inspectie Sociale zaken en Werkgelegenheid*) to investigate an alleged violation of a universally binding collective agreement. Investigation is only possible in consideration of a lawsuit by these associations under Article 3 *Wet AVV* - not for the benefit of a possible claim of the members of that association.[38] After the investigation, the Inspectorate compiles a report of findings. The Inspectorate may also provide information on compliance with the Minimum Wage and Minimum Holiday Allowance Act (*Wet minimumloon en minimumvakantiebijslag*), the Workers Allocation Act (*Wet allocatie arbeidskrachten door intermediairs*), the Working Hours Act (*Arbeidstijdenwet*) and the Working Conditions Act (*Arbeidsomstandighedenwet*).[39] With this report, the trade union (or employers' organisation) can initiate civil proceedings to enforce compliance with the universally binding collective agreement.[40]

33. Kullmann, supra note 5, at 200.
34. Jacobs, supra note 16, at 150.
35. Supreme Court 19 March 2021, ECLI:NL:HR:2021:413S. See also Mok, *Het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten*, 96 and 142 (Haarlem 1939); P.W. Kamphuisen, *De collectieve en de individuele arbeidsovereenkomst*, 58 (Universitaire Pers Leiden 1956); H.L. Bakels, *Het arbeidsrecht en het sociaal-economisch recht. Enige opmerkingen over de 'zelfstandige actie' van privaatrechtelijke organisaties*, in *Hedendaags arbeidsrecht*, 23 (Samson N.V. 1966); Olbers, supra note 30, at 217; M.M. Olbers, *Collectieven als procespartij in het arbeidsrecht*, in *Collectieve actie in het recht*, 31 (Ars Aequi Libri 1990); Fase & Van Drongelen, supra note 26, at 182-184; Van den Bor, supra note 27.
36. Olbers, supra note 36, at 26.
37. Bakels, supra note 36, at 23.
38. Supreme Court 11 July 2014, ECLI:NL:HR:2014:1632.
39. Article 10, paragraph 1 Wet AVV. See Act of 4 June 2015, *Stb*. 2015, 233; Parliamentary Papers II 2014/15, 34 108, nr. 3, p. 38. Conversely, where the Inspectorate, when monitoring compliance with the Minimum Wage and Minimum Holiday Allowance Act also finds indications of non-compliance with a collective agreement, it must provide this information to the contracting parties of the collective agreement. See Article 18p paragraph 7 Wet minimumloon en minimumvakantiebijslag.
40. J.H. Bennaars, 'Artikel 10 Wet AVV: over recht hebben en recht krijgen', 38 *Tijdschrift Recht en Arbeid* (2018).

Lastly, it should be noted that social partners may also delegate their enforcement powers to an organisation created by them.[41] Examples are the Foundation for Compliance with the Collective Labour Agreement for Temporary Agency Workers (*Stichting Naleving CAO voor Uitzendkrachten*), the Foundation for the Observance of Professional Freight Transport (*Stichting naleving beroepsgoederenvervoer*) and the Taxi social fund (*het Sociaal Fonds Taxi*).[42] These foundations can act on behalf of the parties to the collective agreement, both in and out of court, if necessary, in order to obtain measures against employers who fail to comply with the provisions of the collective agreements and can request the Minister for Employment and Social Affairs to commence investigations (Article 10, paragraph 2 *Wet AVV*). The legal standing of the foundation derives directly from the collective labour agreement and no separate power of attorney is needed.[43]

2.1.3. Practical use of collective litigation by trade unions on behalf of the Wet Cao/Wet AVV

There is not a lot of published litigation relating to cases taken by trade unions to enforce collective agreements, even though the number of procedures by trade unions seems to have increased in recent years. For example, Groenendijk has observed that until 1980 there were only 10 judgments concerning this type of trade union action.[44] Kraamwinkel has reported between 1980 and 1998, 18 judgments were found in which a trade union litigated in order to enforce the collective agreement.[45] In the published case law from the past five years that I examined (January 2015 up to January 2020), I found 69 collective actions of trade unions based on the instruments of the *Wet Cao*/*Wet AVV* in order to enforce normative provisions[46] of a collective agreement for multiple employees (see Annex 1 to this contribution). In nearly all cases, a claim for compliance with the collective agreement, either on the basis of Article 9 or 12 *Wet Cao* or Article 3 *Wet AVV* was combined with a claim for damages. In almost all cases, the claim for damages related to damages for the trade union itself because of the loss of prestige and recruitment power due to the violation of the collective agreement by the employer.[47] In only one case the trade union claimed compensation for their member employees.[48] The vast majority of all claims were initiated by (one of the organisations affiliated with) the FNV. The FNV is one of the Dutch largest federations, together with CNV and De Unie, at a central level into which most unions are organised.

The relatively low number of proceedings in civil court may be explained by the fact that in most cases compliance with the collective agreements can be achieved through proper consultation and

41. Supreme Court 28 November 2014, ECLI:NL:HR:2014:3458 (*Tido/Vesta*). See M. Kullmann, *Privaatrechtelijke handhaving door de Stichting Naleving CAO voor Uitzendkrachten*, 3 Arbeidsrechtelijke Annotaties, 45 (2015).
42. See Jacobs, supra note 16, at 154.
43. Supreme Court 28 November 2014, ECLI:NL:HR:2014:3458 (*Tido/Vesta*); Court of Appeal Arnhem-Leeuwarden 31 August 2010, *JAR* 2010/248; District Court Bergen op Zoom 2 March 2011, *JAR* 2011/117. See also: Supreme Court 18 December 2015, ECLI:NL:HR:2015:3620.
44. C.A. Groenendijk, *Bundeling van belangen bij de burgerlijke rechter*, 139 (W.E.J. Tjeenk Willink 1981).
45. Kraamwinkel, supra note 26, at 25.
46. Normative or horizontal provisions are provisions in a collective agreement that relate to the relationship between the individual employer and his employees. Such provisions mainly concern working conditions. See Jacobs, supra note 16, at 131.
47. See also Kraamwinkel, supra note 26, at 25, for the period 1980-1998.
48. District Court Overijssel 25 September 2018, ECLI:NL:RBOVE:2018:3615 (number 57 of annex 1).

an amicable settlement between employer and trade union.[49] Moreover, a lot of collective agreements contain provisions on dispute commissions, binding advice or arbitration.[50] In addition, only published case law was examined. In reality, therefore, the number of proceedings initiated by trade unions in order to enforce collective agreements is likely to be higher than that previously indicated. A good example of this is the proceedings brought by the Foundation for Compliance with the Collective Labour Agreement for Temporary Agency Workers (SNCU), established by the social partners in 2004 to enforce the collective agreement. The SNCU's website lists 121 proceedings involving court ruling in the last five years,[51] while in the published case law I examined in the same period, I only found 14 published court rulings.[52]

The number of requests made by the Inspection SZW based on Article 10 of the *Wet AVV* to initiate an investigation has also risen in recent years. In the period 1937–2013, only four requests were made on the basis of Article 10 *Wet AVV*.[53] Since 2014, there has been an increase in the number of the investigations initiated by the Inspection SZW. In 2014 and 2015 39 investigations were completed.[54] In 2016 alone, there were 29 such investigations.[55] This turnaround can be explained by the Social Agreement 2013. It was agreed that the support of the Inspection SZW in enforcing compliance with collective agreements would be strengthened. This led, among other things, to the allocation of additional temporary resources for the period 2014–2018 and to the establishment of the programme entitled 'Tackling sham arrangements and collective agreement compliance'. This brought the initially cautious attitude on the part of the Ministers for Social Affairs and Employment in respect of investigations initiated pursuant to Article 10 *Wet AVV* to an end.[56]

2.2. The right of inquiry

Another collective action right for trade unions is the right of inquiry (*enquêterecht*) in the event of alleged mismanagement by an employer.[57] According to Article 2:345 BW, the Enterprise Chamber (*Ondernemingskamer*) of the Amsterdam Court of Appeal may, upon a legitimate written request by virtue of Articles 2:346 and 2:347 BW, appoint one or more persons to conduct an investigation into the policy and state of affairs of a legal entity, either wholly or in part or during a certain period. A number of stakeholders may initiate such an inquiry procedure. Important for this contribution is that trade unions may request an investigation (Article 2:347 BW). Although, the trade union must have had full legal capacity for at least two years, must

49. Groenendijk, supra note 45, at 142-145; Olbers, supra note 30, at 215; Kraamwinkel, supra note 26, at 24-25; Olbers, supra note 36, at 33.
50. L.C.J. Sprengers, 'Cao-geschillencommissies: doekje voor het bloeden of volwaardige rechtsbescherming?', 61 *Tijdschrift Arbeidsrecht Praktijk (*2019); Jacobs, supra note 16, at 147-148; Olbers, supra note 30, at 220.
51. https://www.sncu.nl/vonnissen-en-arresten/.
52. Numbers 3, 15, 17, 21, 23, 33, 37, 42, 44, 47, 49, 61, 67 and 69 of annex 1.
53. M. van Essen & W. Brinkman, *Toezicht op de naleving van cao-afspraken*, 16 (A-advies 2013); Bennaars, supra note 41.
54. Cao-nalevingsonderzoek van de Inspectie SZW dragen bij aan eerlijk werk, Inspectie SZW Ministerie van Sociale Zaken en Werkgelegenheid August 2017. See also: Bennaars, supra note 41.
55. Cao-nalevingsonderzoek van de Inspectie SZW dragen bij aan eerlijk werk, Inspectie SZW Ministerie van Sociale Zaken en Werkgelegenheid August 2017. See also: Bennaars, supra note 41.
56. Bennaars, supra note 41. J. Cremers et al., *Drie jaar ervaring met intensievere cao-naleving*, (Tilburg University 2017).
57. Olbers, supra note 36, at 31; W. Zeijlstra, *Vakbonden en het recht van enquête*, in, *Collectieve actie in het recht*, 37 (Ars Aequi Libri 1990); Jacobs, supra note 16, at 258.

have stipulated in its articles of association that it actively protects the interests of its members in the economic sector concerned, and must have members in the relevant undertaking.[58] However, trade unions do not make frequent use of this right of inquiry.[59] The published case law of the past five years contains only one request from a trade union.[60]

2.3. Collective redress in the works councils Act

Another collective entity in labour law is the works council (*ondernemingsraad*), which is an internal body representing employees that promotes and protects the interest of the employee. Article 2 of the works councils Act (*Wet op de ondernemingsraden*, hereinafter, WOR) sets out the legal requirements of any entrepreneur who maintains an undertaking in the Netherlands with at least 50 employees.[61] One of the main rights of the works council is the right to consultation in respect of certain significant proposed management decisions that can affect the company as a whole (Article 25 WOR).[62] Furthermore, such councils have specific rights of approval in respect of intended company decisions regarding employment policies (Article 27 WOR).[63] In case of non-compliance, the works council may request compliance by the employer with the obligations of the WOR in court (Article 36, paragraph 2, WOR). The Court may further, upon request of the works council or the employees, force the employer to perform certain activities or to refrain from performing certain activities (Article 26, paragraph 6, WOR). Where a decision is made contrary to the works councils' advice based on Article 25 WOR, the works council can lodge an appeal against the decision with the Business Chamber (*Ondernemingskamer*) of the Amsterdam Court of Appeal which has the competence to order (depending on the circumstances) the employer to withdraw its decision and reverse actions taken as a result thereof; and/or forbid the employer from performing activities implementing the decision taken (Article 26 WOR).[64] The annual report of the Business Chamber shows that every year, around 40 requests are submitted by works councils based on Article 26 WOR.[65]

3. General collective redress mechanisms

3.1. Collective action based on Article 3:305a BW

There is also a general litigation mechanism that trade unions or other associations can use to protect and enforce workers' rights collectively. Since 1994, Article 3:305a BW provides a general collective right of action to be litigated in courts. As of January 2020, some amendments have been made to the procedure as a result of the enactment of the Act on collective damages in class actions (*Wet afwikkeling*

58. OK 16 April 1987, *NJ* 1988/183; OK 17 March 1994, *NJ* 1995/408; OK 10 September 1999, Ondernemingsrecht 1999/83; OK 18 May 2004, ARO 2004/74; OK 27 May 2010, *JOR* 2010/189. See also: Jacobs, supra note 16, at 258.
59. Olbers, supra note 36, at 32; Zeijlstra, supra note 58, at 37; K. Cools, *Het recht van enquête. Een empirisch onderzoek*, 79 (Kluwer 2009); Jacobs, supra note 16, at 260.
60. Court of Appeal Amsterdam 2 November 2015, ECLI:NL:GHAMS:2015:4454.
61. Jacobs, supra note 16, at 283.
62. Jacobs, supra note 16, at 299-312.
63. Jacobs, supra note 16, at 313-318.
64. Jacobs, supra note 16, at 309. See also: M. Meyer, *The Position of Dutch works councils in Multinational Corporations*, 89 (Eleven International Publishing 2018).
65. Jaarveslag Ondernemingskamer 2018, p. 18. https://www.rechtspraak.nl/SiteCollectionDocuments/jaarverslag-ondernemingskamer-2018.pdf.

massaschade in collectieve actie, hereinafter, WAMCA).[66] Main reason for the amendments is to facilitate a collective action for monetary damages (Article 3:305a, paragraph 3, BW) and to limit the rise of commercial driven Article 3:305a organisations.[67] The following section will focus on both the old and new regimes of general collective litigation in the Netherlands based on Article 3:305a BW.

3.1.1. Conditions for standing and admissibility

Article 3:305a BW states that a foundation or association with full legal capacity may institute legal proceedings aimed at protecting similar interests of other persons, insofar as it represents these interests under its articles of association. Characteristic of the Article 305a procedure is that there is no concrete dispute between the defendant and the Article 305a organisation. The organisation does not litigate on (primarily) its own interests, but (only) represents the interests of a(n) (unknown) group of 'others' whose interests are represented by its articles of association.[68] 'Others' may be natural or legal persons. It is not necessary to clearly define the persons on whose behalf the organisation brings a claim.[69] The Article 305a organisation litigates on its own behalf and acts as an independent litigant.[70] The interests it represents may relate to group interests or more ideological public interests.[71] Nevertheless, the articles of association must cover the protected interests. For instance, the claim of trade union ABVA/KABO was inadmissible as the representation of interests of domestic workers (also taking into account the fact that these workers were not trade union members) fell outside the statutory objective of ABVA/KABO.[72]

Furthermore, the protected interests must be of a similar nature.[73] The fact that a (considerable) part of the group disagrees with, or even takes an opposite position in, (the purpose of) the legal action, does not in itself mean that the claim is not aimed at protecting similar interests.[74] Under the old regime of Article 3:305a BW the legislator deliberately refrained from including representativeness requirement in respect of the claimant organisation as a condition under the law. It could not be demanded that the collective action had to be supported by a substantial part of the eligible interested parties.[75] However, according to the regime, those who objected to the action should be able to evade the effect of an admissible claim.[76] Therefore, the claim of the FNV trade union for the establishment of a works council was held inadmissible, as the establishment of a works council affects all employees and was not supported by a substantial part of the member

66. Act of 20 March 2019, Stb. 2019, 130
67. T.M.C. Arons & G.F.E. Koster, *Op weg naar collectief schadeverhaal in het Nederlands recht*, 86 *Ondernemingsrecht* (2017).
68. W. van Eekhout, *Opties voor collectief procederen – het bundelen van vorderingen*, 7 *Beslag, executie & rechtsvordering in de praktijk, 16 (*2018).
69. Parliamentary Papers II 1991/92, 22 486, nr. 3, p. 19-22. See also: T. Bleeker, *Voldoende belang in collectieve acties: drie maal artikel 3:303 BW*, 20 *NTBR* (2018).
70. Van Eekhout, supra note 69, at 17.
71. Parliamentary Papers II 1991/92, 22 486, nr. 3, p. 22. See also: Van Eekhout, supra note 69, at 16.
72. Supreme Court 1 July 1992, ECLI:NL:HR:1992:ZC0659. See also: Court of Appeal Amsterdam 7 June 2007, ECLI:NL:GHAMS:2007:BD4011 (The FNV trade union claim for compliance with the collective agreement on behalf of temporary agency employees was not admissible, because they were not members of the FNV. According to the articles of association at that time, the FNV could only claim compliance on behalf of its members).
73. Parliamentary Papers II 1991/92, 22 486, nr. 3, p. 23.
74. Supreme Court 26 februari 2010, ECLI:NL:HR:2010:BK5756.
75. Parliamentary Papers II 1991/92, 22 486, nr. 3, p. 21; Parliamentary Papers I 1993/94, 22 486, nr. 103b, p. 3. See Supreme Court 26 February 2010, ECLI:NL:HR:2010:BK5756; Supreme Court 9 April 2010, *NJ* 2010/388.
76. Supreme Court 26 februari 2010, ECLI:NL:HR:2010:BK5756.

employees.[77] According to the Supreme Court, the requirement of similar interests is met if the interests are suitable for bundling the claim. The points of contention and claims raised by the legal action must be adjudicated in the course of proceedings, without having to involve the special circumstances of the individual parties concerned in the process.[78] This requirement is often subject to litigation,[79] also in labour law.[80] In general, a claim will be suitable for bundling, if the defendant's alleged action is the same with regard to each interested party.[81] The different consequences of that action for the interested parties do not prevent the existence of a similar interest.[82] Even a claim from the FNV trade union seeking a declaratory judgment that employment contracts exist between Deliveroo and its delivery drivers has lent itself to bundling, whereas according to established case law, the qualification issue relating to the question of whether there is an employment contract depends on an assessment of all the circumstances of the case.[83] A claim of the FNV trade union seeking to order an employer to pay all employees the personal allowances to which they were entitled after the transfer of undertaking, however, was held as not lending itself to bundling.[84] In fact, this claim amounted to an attempt to determine the extent to which each employee concerned was entitled to a personal allowance. The same applied in the case of a claim by the FNV to declare that certain working conditions may have been harmful to a set of employees.[85] Such a declaration will be (almost) meaningless for employees who will hold the employer liable for the health damage they have suffered because it will have to be established to which dangerous substances and/or circumstances each individual employee has been exposed, and a causal link proven between that specific exposure and the health damage.

Moreover, Article 3:305a, paragraph 2 BW requires that the organisation has attempted with sufficient effort to reach a settlement with the defendant. The issuing of a letter requesting consultation and setting out details of the claim, giving the defendant a period of two weeks to respond, is regarded as sufficient. Labour case law deals with this requirement in a flexible way.[86] If it is clear that the unions dissented and would not resign themselves to the action being taken, the fact that no consultation was held prior to the issuing of the summons does not preclude admissibility.[87]

Until 2013, these were the only restrictions on access to justice for Article 305a organisations. To limit the rise of – mostly commercially-driven – *ad hoc*-created 305a organisations, in 2013, an

77. District Court Rotterdam 14 November 2014, ECLI:NL:RBROT:2014:10878.
78. Supreme Court 5 October 1984, *NJ* 1985/445; Supreme Court 13 October 2006, ECLI:NL:2006:AW2077 (Vie d'Or); Supreme Court 26 februari 2010, ECLI:NL:HR:2010:BK5756 (Stichting Baas In Eigen Huis/Plazacasa). See also: Parliamentary Papers II 1991/92, 22 486, nr. 3, p. 27.
79. K. Rutten, 'Ontvankelijkheid van een 305a-organisatie', 278 *TOP* (2018).
80. C. Van den Bor & D.M.A. Bij de Vaate, *Collectief procederen door de vakbond*, 12 Tijdschrift Recht en Arbeid (2020).
81. Van Eekhout, supra note 69.
82. Supreme Court 26 February 2010. ECLI:NL:HR:2010:BK5756; Court of Appeal Amsterdam 19 January 2016, ECLI:NL:GHAMS:2016:113. See also: T. Arons & G. Koster, '20 jaar collectieve actie in het Nederlands BW', 68 *Ondernemingsrecht* (2014).
83. District Court Amsterdam 15 January 2019, ECLI:NL:RBAMS:2019:198.
84. District Court Zaanstad 12 April 2018, ECLI:NL:RBNHO:2018:3068.
85. District Court Nijmegen 25 March 2016, ECLI:NL:RBGEL:2016:4141 and confirmed in appeal: Court of Appeal Arnhem-Leeuwarden 26 March 2019, ECLI:NL:GHARL:2019:2624.
86. District Court Oost-Brabant 8 January 2015, ECLI:NL:RBOBR:2015:19 (the fact that FNV already defined its position and did not leave any room for consultation, is not relevant). See also Van den Bor & Bij de Vaate, supra note 81.
87. District Court Apeldoorn 30 January 2017, ECLI:NL:RBGEL:2017:559.

additional admissibility condition was added.[88] An organisation has no legal standing on the base of Article 3:305a BW 'if it does not sufficiently safeguard the interests of the other persons it represents'.[89] According to the parliamentary explanation, two questions have to be answered to verify that the organisation meets this 'sufficiently safeguard-condition': first, to what extent will the represented persons benefit from the collective action if the claim is awarded? And second, to what extent has the organisation sufficient knowledge and skills to bring the claim in court?[90] Several factors may play a role in the assessment by the court, e.g., the other activities undertaken by the organisation to promote the interests it intends to represent, whether the organisation has actually achieved his own objectives, the number of affected persons that are members of the organisation (representativeness), and the extent to which the affected persons support the collective action.[91]

3.1.2. Extended standing and admissibility conditions as of January 2020

With effect of 1 January 2020, the admissibility conditions have again been extended as a result of the enactment of the Act on collective damages in class actions (*Wet afwikkeling massaschade in collectieve actie,* hereinafter, WAMCA).[92] Once again, the motive behind this was mainly to limit the rise of *ad hoc*-created commercially-driven 305a organisations.[93] The enhanced conditions relate to representativeness, governance and funding.[94] These extra preconditions are set out in paragraphs 2 and 3 of Article 3:305a BW.[95]

Before January 2020, the representativeness of the claiming organisation was not a hard admissibility condition.[96] It was only one of the relevant factors that should be taken into account by the court when assessing whether the organisation 'sufficiently safeguards the interests of injured parties'.[97] In the new regime the first sentence of paragraph 2 of Article 3:305a BW states that the court has to assess whether an interest group is sufficiently representative, in view of its constituency and the extent of the claims represented. This prevents a foundation or association from instituting legal proceedings without the required support of a constituency. It must be clear, in quantitative terms, that it represents a sufficiently large proportion of the group of victims affected. What is sufficient, differs from case to case and can only be determined in relation to the total number of victims. This can be tested, for example, on the basis of the members of an association or by means of the number of victims who have actively registered for the claim (see hereafter).[98]

Moreover, the WAMCA introduced some checks and balances to prevent unmeritorious litigation (Article 3:305a, paragraph 2 under a - e BW). Claimant organisations must meet certain criteria

88. Act of 26 June 2013, *Stb.* 2013, 255. See also: Van Eekhout, supra note 69, at 19; W. van Eekhout, Opties voor collectief procederen – het huiswerk van een 3:305a-organisatie, 1 *Beslag, executie & rechtsvordering in de praktijk* (2019).
89. Act of 26 June 2013, *Stb.* 2013, 255. See also: Van Eekhout, supra note 69, at 19.
90. Parliamentary Papers II 2011/12, 33 126, nr. 3, p. 12. See also: Van Eekhout, supra note 89.
91. Parliamentary Papers II 2011/12, 33 126, nr. 3, p. 13. See also: Arons & Koster, supra note 83; Rutten, supra note 80.
92. Act of 20 March 2019, Stb. 2019, 130
93. Parliamentary Papers II 2016/17, 34 608 , nr. 3, p. 6-7
94. Van Eekhout, supra note 89; Arons & Koster, supra note 83; Van den Bor & Bij de Vaate, supra note 81.
95. Parliamenary Papers II 2016/17, 34 608, nr. 3, p. 18.
96. Parliamentary Papers II 1991/92, 22 486, nr. 3, p. 21; Parliamentary Papers I 1993/94, 22 486, nr. 103b, p. 3. See Supreme Court 26 February 2010, ECLI:NL:HR:2010:BK5756; Supreme Court 9 April 2010, NJ 2010/388.
97. See for example District Court Den Haag 18 October 2017, ECLI:NL:RBDHA:2017:11807.
98. Parliamentary Papers II 2016/17, 34 608, nr. 3, p. 19.

in terms of governance and funding before they can bring a collective action into court. The claimant organisation is required to have a supervisory board, a mechanism for the participation or representation of those whose interest are represented in the decision-making process, and sufficient financial means to fund a collective action.[99] Moreover, the organisation must meet various transparency requirements in order to ensure that the interests of those affected are sufficiently safeguarded. The organisation is obliged to set up a generally accessible website containing information about its functioning.[100] Here, it is required to publish: (i) the articles of association, (ii) the management structure of the legal entity, (iii) in outline, its most recently adopted annual report of the supervisory body, (iv) a management report, (v) information on its website about the remuneration of the management board members and members of the supervisory body, (vi) the objectives and working methods of the legal entity, (vii) an overview of ongoing procedures, (viii) detail on whether a contribution is requested from persons who join a certain action, (ix) as well as details on how the person can join the organisation or terminate his or her affiliation.[101] In addition, the claimant organisation must have sufficient experience and expertise with regard to legal proceedings. This gives the court the opportunity to test the track record of interest groups that institute legal proceedings.[102]

Paragraph 3 contains a number of additional admissibility requirements for interest groups that do not concern the governance or transparency of the organisation. In paragraph 3a, it is proposed that directors involved in the formation of a legal person and their successors may not have a direct or indirect profit motive, realised by the claimant organisation.[103] Part b contains the requirement that the collective action has a sufficiently close connection with the Dutch jurisdiction. This connection exists if (i) the majority of the persons on whose the collective action is initiated are Dutch residents, (ii) the defendant resides in the Netherlands, or (iii) the events underlying the collective action took place in the Netherlands.[104] According to part c, a collective action cannot proceed unless the representative organisation has made a reasonable attempt to settle the case. A letter in which the defendant is given two weeks to respond is sufficient.[105]

If an organisation does not comply with any of the foregoing requirements, the court will declare the collective action inadmissible. However, paragraph 6 contains an exception clause. According to the legislator, it is not always appropriate to impose such demanding admissibility requirements on an organisation representing a collective interest. This applies, in particular, where the claim has an idealistic purpose and a very limited financial interest or where the nature of the claim is such that it cannot be achieved. It is ultimately up to the court to assess *ex officio* whether an exception to the admissibility requirements should apply in a specific case.[106]

Paragraph 7 provides for the establishment of a register in which all collective actions will be listed. The claimant must list the collective claim in the register within two days of the submission of the claim. This starts a three-month period, during which other representative organisations can file alternative collective actions that are based on the same event(s). Should there be more than one

99. Parliamentary Papers II 2016/17, 34 608, nr. 3, p. 19-20.
100. Parliamentary Papers II 2016/17, 34 608, nr. 3, p. 20.
101. Parliamentary Papers II 2016/17, 34 608, nr. 3, p. 20-21.
102. Parliamentary Papers II 2016/17, 34 608, nr. 3, p. 21.
103. Parliamentary Papers II 2016/17, 34 608, nr. 3, p. 21.
104. Parlementary Papers II 2016/17, 34 608, nr. 3, p. 24.
105. Parlementary Papers II 2016/17, 34 608, nr. 3, p. 28.
106. Parlementary Papers II 2016/17, 34 608, nr. 3, p. 29.

collective action registered, the court will appoint an 'Exclusive Representative' to represent the interests of the class.[107]

3.1.3. Available remedies and res judicata

When examining available remedies, all causes of action and forms of relief may be pursued in a collective action. As of 1 January 2020, it is also possible to claim momentary compensation.[108]

Before January 2020, the judgment obtained by a 305a organisation was only binding for the organisation and the defendant, not the interested parties.[109] A declaration of law in such a procedure served as starting point for individual claims.[110] In the new regime of Article 3:305a BW the court decision is binding on all members of the class who reside in the Netherlands and did not use their right to 'opt-out' of the action. The court will decide on the scope of the action and give a proper definition of the class. This will be notified to all members of the class by post to those parties known to the court and by publishing the notice in one or more national daily newspapers. In the notice, class members will be given the opportunity to opt-out of the collective action by giving notice to the court registrar. The minimum opt-out period is one month.[111]

3.2. Meaning and practical use of article 3:305a BW in labour law

The general collective action regime is also important in the field of labour law. The added value of the 3:305a regime relates to two situations.[112] First of all, trade unions can use Article 3:305a BW when there is no applicable collective agreement between employer and represented employees. In this way, trade unions or other interest groups can also represent the interests of employees outside the scope of a collective agreement, for instance, to make sure the employer complies with certain statutory regulations. The second situation in which Article 3:305a BW may be of importance is in the case that there is an applicable collective agreement (not generally binding) and the initiating trade union is not a party to it.[113]

It should be noted, however, that Article 3:305a BW is not frequently used in labour law practice.[114] The published case law suggests that a total of 101 collective actions have been instigated in the field labour law in the period from the entry into force of Article 3:305a BW in 1994 until January 2020 (see Annex 2 to this contribution). Fourteen of these 101 rulings concerned appeals against previous collective judgments. Ninety actions were initiated by a trade union, almost all trade unions affiliated with the FNV. In addition, other interest groups initiated 12 collective actions.[115] The claims initiated by trade unions related partly to compliance with statutory

107. Parlementary Papers II 2016/17, 34 608, nr. 3, p. 33 and 40-46.
108. Parliamentary Papers II 1991/92, 22 486, nr. 3, p. 30. See also Van Eekhout, supra note 69, at 18.
109. Parliamentary Papers II 1991/92, 22 486, nr. 3, p. 26. See also Van Eekhout, supra note 69, at 17 and District Court Oost-Brabant 1 March 2018, ECLI:NL:RBOBR:2018:1001.
110. Supreme Court 29 November 2009, LJN BH2162 (*VEB/World Online*).
111. Parliamentary Papers II 2016/17, 34 608, nr. 3, p. 33 and 46-47.
112. Kraamwinkel, supra note 26, at 23. See also C. van den Bor, *Inhoudelijke aspecten van handhaving op grond van artikel 3:305a BW en de verhouding tot het cao-instrumentarium*, 45 Tijdschrift Recht en Arbeid (2021).
113. W.J.P.M. Fase & J. van Drongelen, *CAO-recht*, Deventer: Kluwer 2004, p. 124; M.M.H. Kraamwinkel, supra note 26, at 23; Supreme Court 27 March 1998, *NJ* 1998/709 (*FNV/Kuypers I*); Supreme Court 25 February 2000, JAR 2000/85; Jacobs, supra note 16, at 154; Van den Bor & Bij de Vaate, supra note 81.
114. Van den Bor & Bij de Vaate, supra note 81.
115. Numbers 1, 19, 24, 40, 46, 48, 55, 61, 62, 67, 71, 78 of annex 2.

employment law.[116] Examples are claims concerning compliance with an EU Directive and the Workers Allocation Act (*Wet allocatie arbeidskrachten door intermediairs*).[117] The claims related partly to the contractual obligations between employer and employees outside the scope of a collective labour agreement.[118] Examples include claims relating to unilateral changes to employment conditions.[119] The remainder of the claims related (mainly) to compliance with a collective labour agreement.[120] It is unclear why trade unions based such claims on Article 3:305a BW, as these claims can also be based on the instruments of the *Wet cao*/*Wet AVV* with fewer admissibility requirements. Answering this question requires further (empirical) research.[121]

Furthermore, the consequences of the amendments in the Article 3:305a procedures as of January 2020 should be considered, including first, the effect of the extended admissibility conditions, in particular the requirement of representativeness, now that the number of trade unions members is increasingly declining.[122] Will this make collective action by trade unions more difficult? I do not think so. In view of the background of this representativeness requirement (and the other enhanced admissibility conditions), whose purpose is to protect those who are involved in a collective action and to serve, in particular, as a filter for mainly commercially driven organisations, I think this requirement will not affect collective action by trade unions. This notion is supported by the case law I examined on collective actions by trade unions on the basis of the old regime of Article 3:305a BW. The representativeness of the trade union was not discussed in any of these proceedings, whereas it was already one of the factors that should be taken into account assessing the 'sufficient guarantee' requirement. Moreover, paragraph 6 of Article 3:305a BW contains an exception clause. The court can declare an interest organisation admissible without all cumulative admissibility requirements being met.

It seems that the Article 305a ruling, according to which under the new regime is binding on all persons whose interests are involved in the procedure and have not opted out, is a significant improvement in the collective enforcement of workers' rights. In contrast to the previous collective action procedure, employees no longer have to lodge individual follow up-proceedings in order to enforce their rights in the event of a successful collective action.[123] As a downside to this is, I can imagine that the court will assess more strictly than before if the claim is suitable for collective action ('suitability for bundling'), as it is no longer possible to take into account some specific individual circumstances in individual follow-up procedures.

4. Summary of conclusions

In the Netherlands, there are several mechanisms for collective redress in the area of workers' rights. Trade unions are the most important actors for that purpose. The *Wet cao* allows trade unions to

116. See Van den Bor, supra note 113.
117. Numbers 92 and 97-99 of annex 2.
118. See Van den Bor, supra note 113.
119. Numbers 72, 75, 82 of annex 2.
120. See van den Bor, supra note 113.
121. See also Van den Bor, supra note 113.
122. Jansen, supra note 24 at 60-61. See https://opendata.cbs.nl/statline/#/CBS/nl/dataset/80598ned/table?ts=1560933770111. See also: K. Vandaele, *Will trade unions survive in the platform economy? Emerging patterns of platform workers' collective voice and representation in Europe*, Working Paper 2018.05 European trade union institute, 8 (2018).
123. See also Van den Bor and Bij de Vaate, supra note 83 and Van den Bor, supra note 115.

enforce collective agreements for multiple employees and to claim damages not only for themselves but also for their members. Trade unions also have this authority in case of a generally binding collective agreement (*Wet AVV*). They can even do so regardless whether or not they are one of the parties to the original collective agreement and whether or not the opposite party is a member of one of these associations. There is not a lot of published litigation relating to cases taken by trade unions to enforce collective agreements, although the number of procedures seems to have increased over the years. Moreover, social partners may also deligate their enforcement powers to an organisation established by them. The Foundation for Compliance with the Collective Labour Agreement for temporary agency workers (*Stichting Naleving CAO voor Uitzendkrachten*) is a quite successful example of this. Besides this, trade unions also have a right to initiate an inquiry. An option hardly uses in practice, however. Then, the works council is another collective entity in labour law, which can lodge an appeal in court in defence of workers' rights. In the case of non-compliance by the employer with the works councils Act or in cases where the employer takes a business decision contrary to the advice of the works council or without the required approval by the works council, the works council may request compliance by the employer with their obligations in court . Lastly, the Dutch legal framework also provides a general collective right of action, which trade unions or other associations can use to protect and enforce workers' rights collectively. The added value in labour law of this regime based on Article 3:305a BW for trade unions is that it also offers the possibility of achieving collective redress outside the scope of a collective agreement and also in cases where the litigating trade union is not a party to a collective agreement that is not declared generally binding. However, based on the published case law it seems that it this mechanism is not much used in labour law practice. As of January 2020, the admissibility conditions for the use of Article 3:305a BW have been extended. Particular focus should be placed on the requirement of representativeness of the claimant organisation in the context of trade unions and their declining membership. In addition, the 3:305a ruling under the new regime is binding on all interest parties that have not opted out. Individual employees no longer have to lodge individual follow-up proceedings to enforce their rights following a successful 3:305a ruling in case the employer does not cooperate. This can be viewed as a significant improvement in the collective enforcement of workers' rights. However, the downside of the *res judicata* for all the persons whose interests are involved with the 3-305a-claim is that is to be expected that the court will assess more strictly whether the claim is suitable for collective action, as it is no longer possible to take care of any individual circumstance in an individual follow-up procedure. It remains to be seen whether the recent changes to Article 3:305a BW will result in more collective actions concerning workers' rights being taken in the future.

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Appendix

Annex 1. Published case law of collective litigation by trade unions under *Wet Cao/Wet AVV*.

Year	Specifications
2015	1. District Court Zwolle 20 January 2015, ECLI:NL:RBOVE:2015:1741;
	2. Court of Appeal Arnhem-Leeuwarden 20 January 2015, ECLI:NL:GHARL:2015:333;
	3. Court of Appeal Arnhem-Leeuwarden 3 February 2015, ECLI:NL:GHARL:2015:670;
	4. Court of Appeal Arnhem-Leeuwarden 3 February 2015, ECLI:NL:GHSHE:2015:338;
	5. Court of Appeal 's-Hertogenbosch 3 February 2015, ECLI:NL:GHSHE:2015:294 and HR 23 June 2016, ECLI:NL:HR:2016:2171;
	6. District Court Amsterdam 11 February 2015, ECLI:NL:RBAMS:2015:889;
	7. District Court Groningen 4 March 2015, ECLI:NL:RBNNE:2015:1076;
	8. District Court Utrecht 13 March 2015, ECLI:NL:RBMNE:2015:1701;
	9. Court of Appeal Arnhem-Leeuwarden 17 March 2015, ECLI:NL:GHARL:2015:1915;
	10. Court of Appeal Arnhem-Leeuwarden 17 March 2015, ECLI:NL:GHARL:2015:1933 and HR 25 November 2016, ECLI:NL:HR:2016:2687;
	11. Court of Appeal Den Haag 26 May 2015, ECLI:NL:GHDHA:2015:1386;
	12. Court of Appeal 's-Hertogenbosch 26 May 2015, ECLI:NL:GHSHE:2015:1881;
	13. District Court Apeldoorn 25 June 2015, ECLI:NL:RBGEL:2015:4171;
	14. District Court Zwolle 24 August 2015, ECLI:NL:RBOVE:2015:3865;
	15. Supreme Court 9 October 2015, ECLI:NL:HR:2015:3019;
	16. District Court Noord-Holland 29 October 2015, ECLI:NL:RBNHO:2015:9755;
	17. District Court Gelderland 4 November 2015, ECLI:NL:RBGEL:2015:6807;
	18. District Court Zutphen 5 November 2015, ECLI:NL:RBGEL:2015:6830;
	19. District Court Overijssel 13 November 2015, ECLI:NL:RBOVE:2015:5017;
	20. Court of Appeal 's-Hertogenbosch 15 December 2015, ECLI:NL:GHSHE:2015:5229;
	21. Supreme Court 18 December 2015, ECLI:NL:HR:2015:3620;
2016	22. Court of Appeal Arnhem-Leeuwarden 9 February 2016, ECLI:NL:GHARL:2016:891;
	23. Court of Appeal Amsterdam 08 March 2016, ECLI:NL:GHAMS:2016:860;
	24. District Court Rotterdam 4 April 2016, ECLI:NL:RBROT:2016:2549;
	25. District Court Rotterdam 06 April 2016, ECLI:NL:RBROT:2016:2548;
	26. Court of Appeal Arnhem-Leeuwarden 17 May 2016, ECLI:NL:GHARL:2016:3792;
	27. Court of Appeal Arnhem-Leeuwarden 17 May 2016, ECLI:NL:GHARL:2016:3811;
	28. District Court Utrecht 8 June 2016, ECLI:NL:RBMNE:2016:3052 and Court of Appeal Arnhem-Leeuwarden 29 November 2016, ECLI:NL:GHARL:2016:9561;
	29. Court of Appeal Arnhem-Leeuwarden 21 June 2016, ECLI:NL:GHARL:2016:5037;
	30. District Court Arnhem 29 June 2016, ECLI:NL:RBGEL:2016:3813 and Court of Appeal Arnhem-Leeuwarden 23 April 2019, ECLI:NL:GHARL:2019:3554;
	31. District Court Overijssel 11 October 2016, ECLI:RBOVE:2016:4136;
2017	32. Supreme Court 6 January 2017, ECLI:NL:HR:2017:19;
	33. Court of Appeal 's-Hertogenbosch 10 January 2017, ECLI:NL:GHSHE:2017:32;
	34. District Court Assen 7 February 2017, ECLI:NL:RBNNE:2017:343;
	35. Court of Appeal Den Haag 7 February 2017, ECLI:NL:GHDHA:2017:151;
	36. District Court Haarlem 5 April 2017, ECLI:NLRBNHO:2017:2911;
	37. Court of Appeal 's-Hertogenbosch 11 April 2017, ECLI:NL:GHSHE:2017:1575;
	38. District Court Haarlem 12 April 2017, ECLI:NL:RBNHO:2017:2954;
	39. District Court Rotterdam 14 April 2017, ECLI:NL:RBROT:2017:2839;
	40. Supreme Court 21 April 2017, ECLI:NL:HR:2017:772;

(continued)

Annex 1. Continued.

Year	Specifications
	41. Court of Appeal 's-Hertogenbosch 2 May 2017, ECLI:NL:GHSHE:2017:1873;
	42. District Court Midden-Nederland 10 May 2017, ECLI:NL:RBMNE:2017:2407;
	43. District Court Haarlem 17 May 2017 ECLI:NL:RBNHO:2017:4119;
	44. District Court Midden-Nederland 19 May 2017, ECLI:NL:RBMNE:2017:2407;
	45. District Court Den Haag 20 June 2017, ECLI:NL:RBDHA:2017:7087;
	46. District Court Arnhem 28 June 2017, ECLI:NL:RBGEL:2017:6958;
	47. Court of Appeal Den Haag 22 August 2017, ECLI:NL:GHDHA:2017:2340;
	48. Court of Appeal 's-Hertogenbosch 12 September 2017, ECLI:NL:GHSHE:2017:3998;
2018	49. Court of Appeal Amsterdam 6 February 2018, ECLI:NL:GHAMS:2018:404;
	50. Court of Appeal Arnhem-Leeuwarden 27 February 2018, ECLI:GHARL:2018:1942;
	51. Supreme Court 4 May 2018, ECLI:NL:HR:2018:668;
	52. District Court Rotterdam 4 June 2018, ECLI:RBROT:2018:6877;
	53. Court of Appeal Hof 's-Hertogenbosch 19 June 2018, ECLI:NL:GHSHE:2018:2681;
	54. Supreme Court 22 June 2018, ECLI:NL:HR:2018:980;
	55. District Court Amsterdam 29 June 2018, ECLI:NL:RBAMS:2018:4617;
	56. Court of Appeal Arnhem-Leeuwarden 31 July 2018, ECLI:GHARL:2018:6962;
	57. District Court Overijssel 25 September 2018, ECLI:NL:RBOVE:2018:3615;
	58. District Court Arnhem 17 October 2018, ECLI:NL:RBGEL:2018:5784;
2019	59. District Court Amsterdam 15 January 2019, ECLI:RBAMS:2019:210;
	60. District Court Utrecht 16 January 2019, ECLI:NL:RBMNE:2019:406;
	61. District Court Rotterdam 17 January 2019, ECLI:NL:RBROT:2019:2783;
	62. Court of Appeal Amsterdam 19 February 2019, ECLI:NL:GHAMS:2019:479;
	63. Court of Appeal Den Haag 2 April 2019, ECLI:GHDHA:2019:681;
	64. Court of Appeal Amsterdam 30 April 2019, ECLI:NL:GHAMS:2019:1520;
	65. District Court Den Haag 29 May 2019, ECLI:NL:RBDHA:2019:6490;
	66. Court of Appeal Arnhem-Leeuwarden 11 June 2019, ECLI:NL:GHARL:2019:4895;
	67. District Court Haarlem 7 August 2019, ECLI:NL:RBNHO:2019:7043;
	68. Court of Appeal 's-Hertogenbosch 20 August 2019, ECLI:NL:GHSHE:2019:3098;
	69. District Court Amsterdam 16 October 2019, ECLI:NL:RBAMS:2019:8279.

Annex 2. Published case law of collective litigation under Article 3:305a BW in labour law.

Year	Specifications
1995	1. Supreme Court 20 October 1995, ECLI:NL:HR:1995:ZC1846.
1996	2. District Court Utrecht 22 May 1996, *JAR* 1996/156.
1997	3. District Court Haarlem 3 January 1997, ECLI:NL:RBHAA:1997:AG1497;
	4. District Court Utrecht 25 June 1997, ECLI:NL:KTGUTR:1997:AG1538;
	5. District Court Utrecht 3 December 1997, ECLI:NL:KTGUTR:1997:AG2306.
1998	6. Supreme Court 27 March 1998, ECLI:NL:HR:1998:ZC2614;
	7. District Court Roermond 2 April 1998 ECLI:NL:RBROE:1998:AG2075;
	8. District Court Utrecht 23 December 1998, *JAR* 1999/36.
1999	9. District Court Den Haag 17 March 1999, *JAR* 2000/4;
	10. District Court Utrecht 1 June 1999, ECLI:NL:RBUTR:1999:AH7969;

(continued)

Annex 2. Continued.

Year	Specifications
	11. District Court Amsterdam 8 September 1999, ECLI:NL:RBAMS:1999:AG2561; 12. District Court Utrecht 17 November 1999 ECLI:NL:RBUTR:1999:ZL0904.
2000	13. District Court Apeldoorn 26 January 2000, ECLI:NL:KTGAPD:2000:AJ0030; 14. District Court Den Haag 22 February 2000, ECLI:NL:KTGSGR:2000:AG5292; 15. Supreme Court 25 February 2000, ECLI:NL:PHR:2000:AA4942; 16. District Court Utrecht 3 May 2000, *JAR* 2000/131; 17. Supreme Court 26 May 2000, ECLI:NL:PHR:2000:AA5961; 18. District Court Delft 29 June 2000, ECLI:NL:KTGDEL:2000:AJ0128; 19. District Court Amsterdam 28 September 2000, ECLI:NL:KTGAMS:2000:AG2643; 20. District Court Den Haag 22 November 2000, ECLI:NL:RBSGR:2000:AA8534.
2001	21. District Court Roermond 15 January 2001, *JAR* 2001/122; 22. District Court Den Haag 23 May 2001, *JAR* 2001/124; 23. Court of Appeal Den Bosch 18 June 2001, *JAR* 2003/128.
2002	24. District Court Amsterdam 13 February 2002, ECLI:NL:RBAMS:2002:AG7832; 25. District Court Utrecht 4 September 2002, ECLI:NL:RBUTR:2002:AG8036.
2003	26. District Court Apeldoorn 9 December 2003, *NJ* 2004/58
2004	27. District Court Arnhem 5 April 2004, *JAR* 2004/153; 28. District Court Den Haag 14 April 2004, *NJ* 2004/40
2005	29. Supreme Court 4 February 2005, ECLI:NL:HR:2005:AR6168; 30. District Court Utrecht, 26 July 2005, *JAR* 2005/201; 31. Court of Appeal Arnhem 9 August 2005, ECLI:NL:GHARN:2005:AU3100; 32. District Court Arnhem 9 September 2005, ECLI:NL:RBARN:2005:AU2499; 33. Court of Appeal Arnhem 1 November 2005, ECLI:NL:GHARN:2005:AU8695; 34. District Court Utrecht, *JAR* 2005/242
2006	35. District Court Breda 8 March 2006, *JAR* 2006/88; 36. Supreme Court 14 April 2006, ECLI:NL:HR:2006:AU9722; 37. District Court Haarlem 28 April 2006, ECLI:NL:RBHAA:2006:AW6192
2007	38. Court of Appeal Amsterdam 7 June 2007, ECLI:NL:GHAMS:2007:BD4011; 39. District Court Utrecht 21 November 2007, ECLI:NL:RBUTR:2007:BC2292 40. District Court Amsterdam 18 December 2007, ECLI:NL:RBAMS:2007:BM2942.
2008	41. District Court Utrecht 16 January 2008, ECLI:NL:RBUTR:2008:BC2036; 42. District Court Zutphen 12 March 2008, ECLI:NL:RBZUT:2008:BM2905; 43. Court of Appeal Amsterdam 8 May 2008, *RAR* 2009/29.
2009	44. District Court Utrecht 1 April 2009, *AR* 2009/122; 45. District Court Den Bosch 5 March 2009, ECLI:NL:RBSHE:2009:BH7000; 46. District Court Den Bosch 30 december 2009, ECLI:NL:RBSHE:2009:BK8011.
2010	47. District Court Hilversum, 28 April 2010, *JAR* 2010/206; 48. Court of Appeal Den Bosch 4 May 2010, ECLI:NL:GHSHE:2010:BM3366; 49. District Court Rotterdam 22 October 2010, ECLI:NL:RBROT:2010:BT1867; 50. District Court Almelo 26 October 2010, ECLI:NL:RBALM:2010:BO1943; 51. District Court Tilburg 4 November 2010, ECLI:NL:RBBRE:2010:BO3317
2011	52. Supreme Court 8 April 2011, ECLI:NL:HR:2011:BP0580; 53. District Court Haarlem 6 July 2011, ECLI:NL:RBHAA:2011:BR4049; 54. District Court Middelburg 18 August 2011, ECLI:NL:RBMID:2011:BR5225; 55. Court of Appeal Arnhem 25 October 2011, ECLI:NL:GHARN:2011:BU6019; 56. District Court Utrecht 28 December 2011, ECLI:NL:RBUTR:2011:BV3014.

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Annex 2. Continued.

Year	Specifications
2012	57. District Court Den Haag 3 January 2012, *USZ* 2012/54; 58. District Court Haarlem 9 February 2012, ECLI:NL:RBHAA:2012:BV362; 59. District Court Groningen 5 October 2012, *JAR* 2012/269.
2013	60. District Court Heerenveen, 13 February 2013, *JAR* 2013/112; 61. District Court Amsterdam 13 March 2013, ECLI:NL:RBAMS:2013:BZ4174; 62. District Court Oost-Brabant 11 April 2013, ECLI:NL:RBOBR:2013:BZ6592; 63. Court of Appeal Hof Arnhem-Leeuwarden 18 June 2013, ECLI:NL:GHARL:2013:CA3452; 64. District Court Rotterdam 22 November 2013, *JAR* 2014/7
2014	65. District Court Amsterdam 17 March 2014, ECLI:NL:RBAMS:2014:1262; 66. Court of Appeal Arnhem-Leeuwarden 10 June 2014, ECLI:NL:GHARL:2014:4686; 67. Court of Appeal Amsterdam 7 October 2014, ECLI:NL:GHAMS:2014:4132; 68. District Court Rotterdam 14 November 2014, ECLI:NL:RBROT:2014:10878
2015	69. District Court Oost-Brabant 8 January 2015, ECLI:NL:RBOBR:2015:19 70. Supreme Court 13 February 2015, ECLI:NL:HR:2015:305; 71. District Court 's-Hertogenbosch 16 February 2015, ECLI:NL:RBOBR:2015:785; 72. District Court 's-Hertogenbosch 28 May 2015, ECLI:NL:RBOBR:2015:3873; 73. Court of Appeal Amsterdam 21 July 2015, ECLI:NL:GHAMS:2015:3004; 74. Court of Appeal 's-Hertogenbosch 15 December 2015, ECLI:NL:GHSHE:2015:5229;
2016	75. Court of Appeal Amsterdam 19 January 2016, ECLI:NL:GHAMS:2016:113; 76. District Court Haarlem 18 May 2016, ECLI:NL:RBNHO:2016:6762; 77. Court of Appeal 's-Hertogenbosch 24 May 2016, ECLI:NL:GHSHE:2016:2011; 78. District Court Amsterdam 24 June 2016, ECLI:NL:RBAMS:2016:6742; 79. District Court Nijmegen 29 July 2016, ECLI:NL:RBGEL:2016:4141
2017	80. District Court Gelderland 20 January 2017, ECLI:NL: RBGEL:2017:342; 81. District Court Gelderland 30 January 2017, ECLI:NL:RBGEL:2017:559; 82. District Court Oost-Brabant 2 February 2017, ECLI:NL:RBOBR:2017:342 83. Court of Appeal 's-Hertogenbosch 2 February 2017, ECLI:NL:GHSHE:2017:1874; 84. District Court Noord-Nederland 19 December 2017, ECLI:NL:RBNNE:2017:4888.
2018	85. District Court Rotterdam 30 January 2018, ECLI:NL:RBROT:2018:850; 86. District Court Zaanstad 12 April 2018, ECLI:NL:RBNHO:2018:3068; 87. Supreme Court 22 June 2018, ECLI:NL:HR:2018:976; 88. District Court Rotterdam 13 July 2018, ECLI:NL:RBROT:2018:5543; 89. District Court Noord-Holland 25 July 2018, ECLI:NL:RBNHO:2018:6229; 90. Court of Appeal Den Haag 25 September 2018, ELCI:NL:GHDHA:2018:2419; 91. District Court Limburg 26 September 2018, ECLI:NL:RBLIM:2018:9137; 92. District Court Roermond 5 December 2018, ECLI:NL:RBLIM:2018:11451;
2019	93. District Court Amsterdam 15 January 2019, ECLI:NL:RBAMS:2019:198; 94. Court of Appeal 's-Hertogenbosch 22 January 2019, ECLI:NL:GHSHE:2019:178; 95. Court of Appeal Arnhem-Leeuwarden 26 March 2019, ECLI:NL:GHARL:2019:2624 96. Court of Appeal Arnhem-Leeuwarden 23 April 2019, ECLI:NL:GHARL:2019:3554; 97. District Court Groningen 1 May 2019, ECLI:NL:RBNNE:2019:1922; 98. District Court Enschede 7 May 2019, ECLI:NL:RBOVE:2019:1538; 99. District Court Amsterdam 1 July 2019, ECLI:NL:RBAMS:2019:4546; 100. Court of Appeal 's-Hertogenbosch 20 augustus 2019 ECLI:NL:GHSHE:2019:3098; 101. District Court. Oost-Brabant 19 september 2019, ECLI:NL:RBOBR:2019:5295.