

‘Business and human rights: promoting environmental protection through enforcement of consumer rights’

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Contents

1.	Introduction	4
2.	Scope of consumer protection laws and environmental laws	5
2.1	<i>What kind of claims (ex. judicial or non-judicial, civil, administrative) can be submitted under existing consumer protection or environmental laws to enforce:</i>	5
2.1.1	<i>Introduction</i>	5
2.1.2	<i>Judicial proceedings, among other things as to environmentally unfriendly advertising/use of labels</i>	6
2.1.3	<i>Non-judicial proceedings, among other things as to environmentally unfriendly advertising/use of labels</i>	8
2.1.4	<i>Examples of judicial and non-judicial proceedings as to environmentally unfriendly advertising/use of labels</i>	12
2.1.5	<i>Experts' opinions</i>	14
2.1.6	<i>Conclusions</i>	16
2.2	<i>What are the material and procedural requirements for enforcing consumer/environmental rights? For example: what are the requirements for proving the existence of harm/damage? is it possible to submit claims "in the general interest" without reference to individual damage? Is it necessary to challenge a particular administrative decision, etc.</i>	19
2.2.1	<i>Introduction</i>	19
2.2.2	<i>The Shell case</i>	21
2.2.2.1	<i>Summary</i>	21
2.2.2.2	<i>Collective claim</i>	21
2.2.2.3	<i>Standard applied to the duty of care</i>	23
2.2.2.4	<i>Conclusion Shell case</i>	26
2.3	<i>Based on your findings, what main intersections or gaps can you identify regarding the links between consumer rights and protection of environment, that is to what extent current consumer law can serve as a tool to enforce environment protection, and which elements of the legal framework should be improved;</i>	26
2.3.1	<i>Intersections</i>	26

2.3.2	Gaps noticed by the experts	27
2.3.3	Conclusions	28
2.4	<i>What is the practical application of the Aarhus Convention as regards access to information in environmental matters?</i>	28
2.4.1	<i>Access to information in environmental matters</i>	28
2.4.2	<i>Examples</i>	29
2.4.3	<i>Conclusions</i>	31
3.	Possibilities for collective claims by consumers or representations of collective interests.	31
3.1	Does the legal framework and practice on collective/representative action allow claims beyond consumer matters, including related to the environment?	31
3.2	Who can represent consumers in such litigation (CSOs, institutions etc.)?	32
3.3.	What is the state of transposition of Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers?	33
3.3.1.	<i>Overview of the state of transposition of Directive 2020/1828</i>	33
3.3.2.	<i>Conclusions</i>	34
4.	Due diligence and reporting obligation:	35
4.1	<i>Due diligence laws</i>	35
4.2	<i>Can you identify examples of application of provisions regarding non-financial reporting to enforce consumer rights in your country in respect to Directive 2014/95/EU (Non-Financial Reporting Directive – NFRD) - for example similar to the case submitted by Client Earth against supermarket groups – Ahold Delhaize (Notification to the Dutch Authority for the Financial Markets (clientearth.org);)</i>	37
4.2.1	<i>Introduction</i>	37
4.2.2	<i>Notification to the Netherlands Authority for the Financial Markets</i>	38
4.2.3	<i>Notification to National Contact Point for OECD Guidelines</i>	42
5.	Conclusions and ways forward	43
5.1	Summary of findings and overarching observations and assessments	43
5.2	<i>Best promising practices</i>	47

1. Introduction

Please provide a brief outline of the desk research and expert consultations, and describe any difficulties or specific situations encountered during the research. This outline should include:

- Sources consulted
- Number of individual consultations
- Breakdown of consultations:
 - Professional group
 - Gender
 - Method of conducting the interview (e.g. face to face)

The following research shows that it is difficult for consumers to obtain good environmental information about products and services, but that they can rely in and out of court on legislation which prohibits especially misleading advertising. Out of court it is also possible for supervisory authorities, on the basis of complaints by consumers, to order businesses to change their behaviour (advertising, use of labels, for example) after an investigation, but penalties may be imposed then, too. Very common are non-judicial proceedings before a self-regulatory body for the industry and they are effective as to misleading advertising, because businesses which have lost the case no longer have access to the media as far as the advertisements concerned are involved. In theory, individual consumers can rely in court on consumer law with several remedies such as a reduction in price if products or services do not have the characteristics they are supposed to have, but there have been no cases as to environmental characteristics so far. Experts advise to restrict consumer rights for the sake of the environment, such as the right to return a defective product. Instead, repair should be the rule. Environmental laws do not address consumers as such.

As of 1 January 2020 it has been possible to file collective claims by any representative organisations, as long as there is a link with the Netherlands and the Articles of Association of the organisation make clear that it represents the interests involved, among other things. On the basis of Directive 2020/1828 some amendments have to be made in terms of cross-border claims and requirements as to funding.

There are no due diligence laws in the Netherlands, but in practice businesses are required to report about, for example, consumer risks and environmental risks. A bill to make this mandatory is being drafted. There is a unique example of the application of provisions regarding non-financial reporting regarding consumer rights: ClientEarth sent a notification of extensive use of single-use plastic packaging by the supermarket chain Ahold Delhaize to the Netherlands Authority for Financial Markets on 18 November 2021. This may set a precedent. Another example is a notification by BankTrack et al. to the National Contact Point for OECD Guidelines about ING for failure to commit appropriately to achieving targets under the 2015 Paris Agreement on 19 April 2019.

The sources consulted are in particular European legislation, Acts, parliamentary documents, case law, and academic literature. Various stakeholders were consulted, among whom equality bodies, national human rights institutions and Civil Society Organisations (CSOs).

There have been five individual consultations. Lawyers working for a state-based non-judicial supervisory body, among whom a senior officer in supervisory matters in the field of consumers, have been consulted.¹ An attorney experienced in consumer/environmental cases, representing businesses

¹ This body is one of the many supervisory bodies protecting the interests of consumers.

has been consulted.² A legal expert, a professor of private law, at a university has been consulted.³ Two lawyers from a CSO, among other things protecting consumer rights, have been consulted.⁴ A legal expert representing a bank was consulted, too.⁵

Three interviews were conducted by zoom. The attorney was consulted on the telephone, and so was the legal expert representing the bank.

2. Scope of consumer protection laws and environmental laws

This section should provide assessment of the scope and potential interlinks between consumer protection and environment protection laws, in particular as regards empowering consumers to influence the behaviour of business to become more environmentally sustainable). It should cover the following.

2.1 What kind of claims (ex. judicial or non-judicial, civil, administrative) can be submitted under existing consumer protection or environmental laws to enforce:

- a. access to reliable information regarding a product and its environmental impact;
- b. consumers' right to be provided with sustainable and affordable choices when purchasing a product or service (for example to have the possibility to buy products in environmentally friendly packaging, or to be able to choose a product that is affordable and sustainable, confirmed by verifiable labels, etc.).

2.1.1 Introduction

Although there are several judicial methods to enforce consumer law and/or environmental law in order to obtain reliable information regarding a product and its environmental impact, it is difficult to enforce these rights in practice, mainly due to an information gap between businesses and consumers. It is hard to find out whether a product or service truly has environmentally friendly packaging, for example, and to what extent labels can be relied upon. The problem is not only that there are so many labels, but they may also be abused. A consumer who feels that they have been misled can instigate judicial proceedings, but may also contribute to or instigate non-judicial proceedings by supervisory authorities as to environmentally unfriendly advertising (Chapters 2.1.2. and 2.1.3). Chapter 2.1.2. will distinguish between proceedings before the court based on the Unfair Trade Practices Act (*Wet oneerlijke handelspraktijken*)⁶, tort law, but also proceedings based on the duty of care, i.e. tort law in general (Article 6:162 of the Civil Code).⁷ Chapter 2.1.3. will go into non-judicial proceedings by supervisory authorities which may enforce consumer law, and proceedings before a self-regulatory body, the Advertising Code Committee (*Reclame Code Commissie*).⁸ Chapter 2.1.4 will give practical examples. Chapter 2.1.5. will give an overview of the opinion of experts. And Chapter 2.1.6. will contain concluding remarks.

² This legal practitioner works for a law firm that only represents businesses in consumer and environmental matters.

³ This legal expert has written a number of publications about consumer rights and environmental issues.

⁴ This CSO protects environmental interests and consumer interests worldwide, but also in the Netherlands. One of the lawyers is a plastic lead lawyer and the other one has led a number of legal actions in the intersection between consumer protection and the environmental impact of businesses.

⁵ This legal expert is a business and human rights advisor, employed by a major bank in the Netherlands.

⁶ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Section 3.3A Unfair Trade Practices, Articles 193a-193j](#).

⁷ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 162](#).

⁸ The Netherlands, Advertising Code Foundation (*Stichting Reclame Code*) (2022), [Code for Environmental Advertising \(Milieu Reclame Code\)](#).

2.1.2 Judicial proceedings, among other things as to environmentally unfriendly advertising/use of labels

First of all, the Unfair Trade Practices Act (*Wet oneerlijke handelspraktijken*)⁹, civil law, may be relied on before the court by consumers. This Act was adopted by Parliament as a separate Act, and is known as such, but it was implemented in an individual Chapter of the Civil Code. The Act consists of ten stipulations (Article 6:193a of the Civil Code up to and including Article 6:193j of the Civil Code)¹⁰. Misleading advertisements, for example, are covered by this Act.¹¹ This Act is based on the Unfair Commercial Practices Directive (2005).¹² On 14 October 2021 a bill was introduced in the Houses of Parliament to add additional rules about online information. Article 6:193a provides definitions which make clear that the rules apply to the relationship between a consumer and a business. Art. 6:193b¹³ defines in general what an unfair trade practice is. Exaggeration in an advertisement or words that should not be taken literally do not make a practice unfair (Article 6:193b, subsection 4¹⁴). More details can be found in Article 6:193c and following. A trade practice is misleading if information is supplied which is misleading in terms of facts, or if it misleads the average consumer or may mislead the average consumer. A trade practice is also misleading if there is a misleading omission (Article 6:193d, subsection 1¹⁵). Article 6:193g.¹⁶, contains a black list of practices which are always deemed to be unfair. One of the practices, under b, describes the situation in which a recognized label has been used without permission. Claims about the environment are not explicitly mentioned, but are implicitly covered as well.

The result of unfair trade practices is that the business acts unlawfully towards a consumer who suffers damage (Article 6:193b, subsection 1¹⁷). This includes the situation in which the consumer decides to enter into an agreement, which they would not have done if the misleading information had not been provided, but a consumer does not necessarily have to have entered into an agreement, as this Act is tort law. The burden of proof in these cases rests on the business, which has to prove that information is actually correct and complete if this seems appropriate in view of the circumstances of the case; whereby the lawful interests of the business and any other party taking part in the proceedings are taken into account (Article 193j, subsection 1¹⁸). The information advertised therefore only has to be alleged false by the consumer. The business is liable for damage if caused by its unlawful act. The consumer has to prove this is the case. There should be a direct link between the unlawful act (the misleading advertising or misleading label) and the damage (Article 6:193j, subsection 2¹⁹). An agreement which has been concluded on the basis of an unfair trade practice is voidable (Article 6:193j, subsection 3²⁰)).

Consumers may also turn to tort law before the court (another example of civil law). Businesses may have committed an unlawful act (i.e. tort law in general) if they have not obeyed the general duty of care (Article 6:162 of the Civil Code) towards the inhabitants of the Netherlands, including consumers.²¹ Contrary to the Unfair Trade Practices Act (Articles 6:193a-193j of the Civil Code)²², it is necessary to prove an infringement of the duty of care. Just like in the case of the Unfair Trade

⁹ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Section 3.3A Unfair Trade Practices, Articles 193a-193j](#).

¹⁰ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Section 3.3A, Unfair Trade Practices, Articles 193a-193j](#).

¹¹ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Section 3.3A, Unfair Trade Practices, Articles 193a-193j](#).

¹² European Union, [Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005](#) ('Unfair Commercial Practices Directive').

¹³ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193b, subsection 1](#).

¹⁴ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193b](#).

¹⁵ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193d, subsection 1](#).

¹⁶ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193g](#).

¹⁷ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193b, subsection 1](#).

¹⁸ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193j, subsection 1](#).

¹⁹ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193j, subsection 1](#).

²⁰ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193j, subsection 1](#).

²¹ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 162](#).

²² The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Section 3.3A, Articles 193a-193j](#).

Practices Act the business is liable for damage if caused by this unlawful act. The consumer has to prove this is the case. There should be a direct link between the unlawful act (the misleading advertising or misleading label) and the damage.²³ This article is therefore more stringent for the claimants than the Unfair Trade Practices Act²⁴, which shifts the burden of proof to the defendant as far as the unlawful act is concerned. The government feels that reliance on this general duty of care should be seen as a last resort. It prefers reliance on, as much as possible, administrative law, enforced by a European supervisory body instead. It is in favour of this construction over the option of Article 6:162 of the Civil Code.²⁵

There are several environmental laws, which may be relied upon before the Administrative Division of the Council of State (*Afdeling bestuursrechtspraak Raad van State*) in appellate, administrative, proceedings. The main one is the Environmental Management Act (*Wet milieubeheer*).²⁶ Other Acts are, for example, the Water Act (*Waterwet*),²⁷ the Soil Protection Act (*Wet bodembescherming*)²⁸ and the Fertilizer Act (*Meststoffenwet*).²⁹ The latter three Acts focus on permits issued by the competent authorities which stipulate to what extent a business, for example, may dump waste in the water or to what extent a business may use fertilizers for the soil. The Act General Stipulations on Environmental Laws (*Wet algemene bepalingen omgevingsrecht*)³⁰ contains stipulations on the enforcement of this legislation in so far as the specific Acts do not contain these stipulations themselves.

The Acts are enforced by administrative authorities, who may, for example, issue permits to businesses for their activities in these areas or give them exemptions. If an interested party, i.e. a party who is affected by, for example, these permits, feels that the permits are issued wrongfully it may challenge the administrative body's decision before this body and appeal to the Administrative Jurisdiction Division of the Council of State (for example: Article 20.1 of the Environmental Management Act).³¹

In addition to stipulations about permits, the Environmental Management Act encompasses stipulations about activities which may have an important adverse impact on the environment, or the case in which the competent authorities have to judge the question whether this is the case or not.³² An environmental impact assessment, the rules of which have been implemented on the basis of an EU Directive,³³ will have to be drafted. Anyone may give their view about this in the preliminary stage (Article 7.6, paragraph 4).³⁴ Once the environmental impact assessment has been drafted, the competent authorities may decide on the question whether the activities concerned may be carried out. It is not possible to instigate proceedings in the case of an environmental impact assessment. It is possible to challenge the decision of the competent authority based on the assessment and instigate administrative proceedings (see above) and challenge the assessment in that context.

²³ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 162](#).

²⁴ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Section 3.3A, Articles 193a-193j](#).

²⁵ The Netherlands, Minister of Foreign Trade and Foreign Development (2021), 'Bouwstenen voor IMVO-wetgeving', [Letter to House of Representatives](#), 5 November 2021.

²⁶ The Netherlands, Environmental Management Act (*Wet milieubeheer*), [13 June 1979](#).

²⁷ The Netherlands, Water Act (*Waterwet*), [29 January 2009](#).

²⁸ The Netherlands, Soil Protection Act (*Wet Bodembescherming*), [3 July 1986](#).

²⁹ The Netherlands, Fertiliser Act (*Meststoffenwet*), [27 November 1986](#).

³⁰ Act General Stipulations on Environmental Laws (*Wet algemene bepalingen omgevingsrecht*) <https://wetten.overheid.nl/BWBR0024779/2022-10-01/#Hoofdstuk5>

³¹ The Netherlands, Environmental Management Act (*Wet milieubeheer*), [13 June 1979](#).

³² The Netherlands, Environmental Management Act (*Wet milieubeheer*), [Chapter 7](#).

³³ European Union, European Parliament and Council of Europe (2014), [Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance](#).

³⁴ The Netherlands, Environmental Management Act (*Wet milieubeheer*), [Chapter 7](#). <https://wetten.overheid.nl/BWBR0003245/2022-05-01#Hoofdstuk7>

Consumer rights are not directly addressed. In a rare case a consumer may prove that they are directly affected, for example when alive instead of dead animals are offered for destruction and this may have an effect on the health and safety of man, in the context of the pollution of the supply chain of food.³⁵ (See for this case 2.4.2, Examples of the application of the Aarhus Convention).

In court proceedings, there are fees to be paid (see 2.2.1 on procedural and material requirements for details).

2.1.3 Non-judicial proceedings, among other things as to environmentally unfriendly advertising/use of labels

Consumers and consumer associations may also seize the opportunity to report unfair trade practices in general, but more in particular misleading advertising and a wrong use of labels, to supervisory authorities (i.e. administrative bodies) or the Advertising Code Committee, which is a self-regulatory body of the industry.³⁶ The Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) which enforces the Act on Unfair Trade Practices, among other things, may be involved. The Netherlands Authority for Consumers and Markets may investigate businesses which are involved in unfair trade practices.³⁷ Article 2.9 of the Consumer Protection Enforcement Act (*Wet handhaving consumentenbelangen*)³⁸, enables the Netherlands Authority for Consumers and Markets to order a party which has committed an unlawful act to change its behaviour (with a penalty if it does not, under letter a) of this Article) or give such a party an administrative fine (under b) of this Article). Decision regarding the fines are made public. One of the relevant cases in which the Netherlands Authority for Consumers and Markets may do so is an unfair trade practice (Article 8.8³⁹).

It should be noted that the Netherlands Authority for Consumers and Markets co-operates with the Dutch Authority for the Financial Markets (*Autoriteit Financiële Markten*), which is competent in the same way in the field of finance:⁴⁰ just like the Netherlands Authority for Consumers and Markets it can give a party involved, among other things, an order (Article 3.4, subsection 2 of the Consumer Protection Enforcement Act⁴¹) or it can impose fines.

Consumers may report to the authorities mentioned above about the behaviour of businesses. The Consumer Protection Enforcement Act⁴², states, however, that the collective interests of consumers should be involved (Article 1.1 under Definitions of an infringement). Consumers should instigate separate proceedings before the court if they want damages (see section 2.1.2 on judicial proceedings).

The Netherlands Authority for Consumers and Markets has drawn up guidelines, partly based on a Working Document by the European Commission on unfair marketing practices (2016).⁴³ They address claims by businesses as to sustainability and are directed towards businesses.⁴⁴ They require that

³⁵ The Netherlands, Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak Raad van State*) (2022), *Case No. 202101970/1/A3*, 18 May 2022, ECLI:NL:RVS:2022:1432.

³⁶ The Netherlands, Advertising Code Foundation (*Stichting Reclame Code*) (2022), *Code for Environmental Advertising (Milieu Reclame Code)*.

³⁷ The Netherlands, Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), 'Onze bevoegheden', [Web page](#).

³⁸ The Netherlands, Consumer Protection Enforcement Act (*Wet handhaving consumentenbescherming*), [20 November 2006](#).

³⁹ The Netherlands, Consumer Protection Enforcement Act (*Wet handhaving consumentenbescherming*), [Article 8.8](#).

⁴⁰ The Netherlands, Consumer Protection Enforcement Act (*Wet handhaving consumentenbescherming*), [Article 3.1](#).

⁴¹ The Netherlands, Consumer Protection Enforcement Act (*Wet handhaving consumentenbescherming*), [Article 3.4, subsection 4](#).

⁴² The Netherlands, Consumer Protection Enforcement Act (*Wet handhaving consumentenbescherming*), [20 November 2006](#).

⁴³ European Union, European Commission (2016), *Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices*, Commission staff working document.

⁴⁴ Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), *Guideline on the claims as to sustainability (Leidraad Duurzaamheidsclaims)*.

businesses take the following five steps: 1. Make clear which advantage in terms of sustainability a product has; 2. Prove these claims by means of facts and keep them up-to-date; 3. See to it that comparisons are fair; 4. Be honest and specific about the efforts made in terms of sustainability and 5. See to it that visual claims and marking are helpful for consumers instead of confusing.⁴⁵ These guidelines are binding and enforced by the Netherlands Authority for Consumers and Markets pursuant to its powers described above. Every year, it puts some sectors of industry on its agenda to investigate on the basis of consultations with businesses, consumer organisations and experts, sometimes in conjunction with complaints. But it may also investigate businesses on the basis of complaints only. Orders with penalties or administrative fines may follow.

In addition to these Guidelines the Netherlands Authority for Consumers and Markets has drafted Guidelines together with its Norwegian counterpart about the way in which the clothing industry may use the Higg Material Sustainability Index, which is used by major clothing brands to communicate sustainability claims, partly about the whole life cycle, about the materials they use to their customers.⁴⁶ Without additional information for consumers, this Index may be unclear, and misleading, according to the Authorities. Recommendations are being made by both Authorities. The information must be clear, specific, and must have a solid basis. 1. The business that uses the Higg Material Sustainability Index must clearly state that the information is of a general, average nature which does not directly apply to the production of the specific product; 2. The business must state that the full impact of the material has not been mapped completely, but only for four categories and that the point is an analysis from the cradle to the gate (the impact in terms of sustainability from the production up to and including the sale); 3. In addition, it must also be clear for the consumer that the Higg Material Sustainability Impact only compares the impact on the environment within the scope of one type of material, and not among types of materials. Therefore, the impact of biological cotton is compared with conventional cotton, and not with, for example, polyester and 4. Finally, the underlying data must be up-to-date and be validated by an independent third party

These Guidelines are not legally binding.⁴⁷

In order to make it possible for consumers to choose packaging or products on the basis of sustainability, the Netherlands Authority for Consumers and Markets stated that the government should draft appropriate legislation in this field.⁴⁸ The number of labels is, at the moment, confusing. They are mostly private or self-awarded. The government should take steps to establish labelling which is only accredited by the government or another independent body. Moreover, businesses give misleading information about sustainability in more general terms. An investigation into the fashion industry and an investigation into the energy sector have just been concluded and will be discussed below (see 2.1.4. Examples of judicial and non-judicial proceedings as to environmentally unfriendly advertising/use of labels). Research has shown that consumers cannot make an informed choice at the moment.⁴⁹ In the case of

⁴⁵ Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), [Guideline on the claims as to sustainability \(Leidraad Duurzaamheidsclaims\)](#).

⁴⁶ The Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), [Research into the effect of labels on sustainability on consumers \(Onderzoek naar de invloed van duurzaamheidskeurmerken op consumenten\)](#), News release, 16 June 2022.

⁴⁷ The Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), [Research into the effect of labels on sustainability on consumers \(Onderzoek naar de invloed van duurzaamheidskeurmerken op consumenten\)](#), News release, 16 June 2022.

⁴⁸ The Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), [Legislator to help consumers make sustainable choices with reliable information \(Wetgever aan zet consument met betrouwbare informatie te helpen duurzame keuzes te maken\)](#). News release, 16 June 2022.

⁴⁹ The Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), [Research into the effect of labels on sustainability on consumers \(Onderzoek naar de invloed van duurzaamheidskeurmerken op consumenten\)](#), News release, 16 June 2022.

the labelling of substances and mixtures, Regulation (EC) No 1272/2008 applies,⁵⁰ together with Title 9.3a of the Environmental Management Act (*Wet milieubeheer*).⁵¹

A few labels are mandatory and recognised by the government, for example, labels about the energy performance of buildings, among which houses and apartments (which have an indirect impact on the environment), and labels as to the fuel economy and CO2 emissions of new personal cars. They range from A to G (very good performance up to a very bad performance). The energy labels on buildings are based on an EU Directive,⁵² implemented in the Housing Act (*Woningwet*),⁵³ the Decision on the energy performance of buildings (*Besluit energieprestatie gebouwen*)⁵⁴ and the Ruling on the energy performance of buildings (*Regels energieprestatie gebouwen*).⁵⁵ The Inspectorate Surroundings and Transport (*Inspectie Leefomgeving en Transport*) enforces these rules, but it is hardly clear how, apart from the fact that it may impose fines if the labels are not provided or wrongfully provided.⁵⁶ The Inspectorate also enforces the use of labels giving information about the fuel economy and CO2 emissions of passenger cars, to be provided by car dealers, based on an EU Directive,⁵⁷ implemented in the Decision on the labelling of the energy consumption of personal cars (*Besluit etikettering energieverbruik van personenauto's*).⁵⁸ Consumers may notify the Inspectorate of a lack of the label or abuse of the label. Lack or abuse of these labels is an economic crime; the Inspectorate may use administrative powers (such as giving orders or imposing fines) or start criminal proceedings.⁵⁹ Electric appliances must also be given an energy label on the basis of an EU Regulation.⁶⁰ The Act on the implementation of EU acts on energy efficiency (*Wet uitvoering EU-handelingen energie-efficiëntie*),⁶¹ and the Decision on energy labels applying to energy-related products (*Besluit energie-etikettering energiegerelateerde producten*) apply on the basis of this Regulation.⁶² The Netherlands Authority for Food and Non-Food Products (*Nederlandse Voedsel- en Warenautoriteit*) enforces these rules, by means of inspections of traders and random checks.⁶³ Consumers can notify the Netherlands Authority for Food and Non-Food Products about the lack of energy labels.⁶⁴ The Minister of Economic Affairs and Climate has the power, among other things, to order businesses to comply with the law, and to impose an administrative fine. In practice, these powers are delegated to the Netherlands Authority for Food and

⁵⁰ European Union, European Parliament and European Council (2008), [Regulation \(EC\) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation \(EC\) No 1907/2006](#) ; European Union, European Parliament and European Council (2008), [Regulation \(EC\) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation \(EC\) No 1907/2006](#)

⁵¹ The Netherlands, Environmental Management Act (*Wet milieubeheer*), [Chapter 9](#).

⁵² European Union (2010), [Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings \(recast\)](#), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02010L0031-20210101&from=EN>

⁵³ The Netherlands, Housing Act (*Woningwet*), [29 August 1991](#).

⁵⁴ The Netherlands, Decree on Energy Performance Buildings (*Besluit energieprestatie gebouwen*), [24 November 2006](#).

⁵⁵ The Netherlands, Regulation on Energy Performance Buildings (*Regels energieprestatie gebouwen*), [21 December 2006](#).

⁵⁶ The Netherlands, Netherlands Enterprise Agency (*Rijksdienst voor Ondernemend Nederland*) (2022), ['Energy labels for houses' \(Energie-label woningen\)](#), Web page.

⁵⁷ European Union (1999), [Directive 1999/94/EC of the European Parliament and of the Council of 13 December 1999 relating to the availability of consumer information on fuel economy and CO2 emissions in respect of the marketing of new passenger cars](#).

⁵⁸ The Netherlands, Decree on energy labelling of passenger cars (*Besluit etikettering energieverbruik van personenauto's*), [3 November 2000](#).

⁵⁹ The Netherlands, Inspectorate Surroundings and Transport (*Inspectie Leefomgeving en Transport*) (2022), [Energie-label autos](#).

⁶⁰ European Union (2017), [Regulation \(EU\) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU](#) (Text with EEA relevance.).

⁶¹ The Netherlands, Act on the implementation of EU acts on energy efficiency (*Wet uitvoering EU-handelingen energie-efficiëntie*), [26 February 2011](#).

⁶² The Netherlands, Decree on energy labelling energy-related products (*Besluit etikettering energiegebruik personenauto's*), [30 January 2018](#).

⁶³ The Netherlands Food and Consumer Product Safety Authority (*Nederlandse Voedsel- en Warenautoriteit*) (2022), ['Energy labels home appliances' \('Etikettering energielabels huishoudelijke apparaten'\)](#).

⁶⁴ The Netherlands Food and Consumer Product Safety Authority (*Nederlandse Voedsel- en Warenautoriteit*) (2022), ['Energy labels home appliances' \('Etikettering energielabels huishoudelijke apparaten'\)](#), [Memorie van Toelichting Wijziging van de Wet implementatie EU-richtlijnen energie-efficiëntie](#). n

Non-Food Products.⁶⁵ These labels clearly enable a consumer to make sustainable choices in terms of the environmental impact of products or goods.

Moreover, there are quite a number of labels which give information about the impact on the environment during the whole life cycle of a product. The Higg Material Sustainability Index was already mentioned above.⁶⁶ The main label is the European organic label, prescribed for organic products pursuant to a Regulation on these products which came into force on 1 January 2022.⁶⁷ Most other labels are not prescribed by law. Because there are so many of them, the system is not transparent and consumers have to look for additional information on appropriate websites to get an insight in what products to choose in terms of environmental impact from the moment of production to sale. This also goes for packaging. Food Centre (*Voedingscentrum*) recommends twelve labels for information about food, most of which refer to the environment, too.⁶⁸ Focus on the Environment (*Milieucentraal*) explains labels, such as 27 labels for meat only, about half of which refer to the environment, too.⁶⁹ This shows how difficult it is to make choices for food, let alone all products and services. It is therefore questionable whether these labels are useful for the consumer to make a choice on the basis of tracking a product's impact on the environment in practice.

Non-judicial proceedings may also take place before the Advertising Code Committee (*Reclame Code Commissie*) on the basis of self-regulation, laid down in the Code for Environmental Advertising (*Milieu Reclame Code*)⁷⁰ which is currently being updated, and in the general part of the Dutch Advertising Code (*Nederlandse Reclame Code*),⁷¹ in particular the current Article 8, which states that claims as to sustainability may not be misleading. Consumers often rely on Articles 2 and 3 of the Code for Environmental Advertising⁷². Article 2, Code for Environmental Advertising stipulates that advertisements may not be misleading in terms of claims about the environmentally friendly characteristics of products or about the alleged contribution of the advertiser to environmental protection. In addition, Article 3 is often invoked, which stipulates that all claims as to the environment should be proven to be correct. The burden of proof therefore rests on the advertiser. The Advertising Code Committee makes recommendations. There are no sanctions if advertisers do not comply with these recommendations, but the media in which they advertise will no longer allow these advertisements, so that the advertisers no longer have access to the public, as the professor of private law who was consulted, remarked.

Consumers may turn to the Advertising Code Committee with a complaint about advertisements by businesses. Parties may appeal to the Board of Appeal of the Advertising Code Foundation. It is not possible to claim damages and there are no individual remedies.

⁶⁵ The Netherlands, Minister of Economic Affairs (2019), Explanatory Memorandum to the Amendment to the Act implementing EU energy efficiency directives ([Memorie van Toelichting Wijziging van de Wet implementatie EU-richtlijnen energie-efficiëntie](#)), pp. 3-5.

⁶⁶ Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), 'Regulators create guideline for apparel industry on use of materials index in marketing', ([Toezichhouders maken richtlijn voor kledingindustrie voor gebruik materialenindex bij marketing](#)), News release, 11 October 2022.

⁶⁷ European Union (2018), [Consolidated text: Regulation \(EU\) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation \(EC\) No 834/2007](#).

⁶⁸ The Netherlands, Food Centre (*Voedingscentrum*) (2022), 'Labels' ([Keurmerken](#)), Web page.

⁶⁹ Focus on the Environment (*Milieucentraal*) (2022), Labels meat ([Overzicht vlees](#)).

⁷⁰ The Netherlands, Advertising Code Foundation (*Stichting Reclame Code*) (2022), [Code for Environmental Advertising \(Milieu Reclame Code\)](#).

⁷¹ The Netherlands, Advertising Code Foundation (*Stichting Reclame Code*) (2022), [Dutch Advertising Code \(Nederlandse Reclame Code\)](#).

⁷² The Netherlands, Advertising Code Foundation (*Stichting Reclame Code*) (2022), [Code for Environmental Advertising \(Milieu Reclame Code\)](#).

2.1.4 Examples of judicial and non-judicial proceedings as to environmentally unfriendly advertising/use of labels

Examples of judicial proceedings as to environmentally unfriendly advertising

Relatively recent examples of reliance on Articles 6:193a-193j of the Unfair Trade Practices Act (*Wet oneerlijke handelspraktijken*)⁷³ before the court are the following. The Foundation Pigs in Need (*Stichting Varkens in Nood*) and the Foundation Rights of Animals (*Stichting Dierenrecht*) started proceedings against the Foundation Meat.nl (*Stichting Vlees.nl*) about the promotion of the consumption of pork.⁷⁴ The case was brought before the Hague District Court on 30 January 2019. The Court allowed a class action, based on the objectives of the claimants in their Articles of Association, in particular the Articles of Association of the Foundation Rights of Animals (*Stichting Dierenrecht*), which states that it has, among its objectives, the representation of consumers who are likely to be the victims of misleading information or unfair trade practices as to, among other things, the pollution of the environment. The Court goes into the role of the average consumer and states that this consumer should be aware of the interests of the parties who advertise their products, in other words, that these parties are not neutral and promote their own position. This consumer has a duty to investigate the information given and get information from alternative sources, too. The claimants allege that Foundation Meat.nl (*Stichting Vlees.nl*) claims that eating pork is sustainable by showing a particular video about the production of pork and a number of statements on its website. Foundation Meat.nl (*Stichting Vlees.nl*), however, states that it only claims that its farmers operate in a sustainable way. According to the claimants, this is too general a statement. The Court rejects the claim, because Foundation Meat.nl (*Stichting Vlees.nl*) does not claim that the production of pork or the eating pork is sustainable and the average consumer has a duty to inform himself in various ways. They should be aware of the interest represented by Foundation Meat.nl (*Stichting Vlees.nl*), and the fact that it wishes to improve the image of farmers, and may therefore exaggerate the benefits, also from an environmental point-of-view, of a product. This also goes for the discussion about the emission of ammonia by the pigs, which increases when the pigs go outside, and the effect this has on the environment. Both parties state that there is a tension between the welfare of the pigs and the environment. The Court holds that the average consumer, here, too, should make their own assessment and should not be naïve and should not merely rely on the information provided. The average consumer should not merely believe that farmers operate in a sustainable way when they say so, in view of their evident self-interest. The claims by the claimants are denied.

Another case was brought before the District Court of Amsterdam on 14 July 2021.⁷⁵ The claimant, in the context of a class action, is the Foundation Volkswagen Car Claim (*Stichting Volkswagen Car Claim*) which instigates proceedings against, among others, Volkswagen AG in Germany, which used deceptive software when testing the emissions of their cars with as a result provided unlawful information (among which the wrongfully obtained accredited label from the German authorities) which the buyers relied on when concluding their contracts. Volkswagen AG admitted that this was deceit. It alleges, however, that environmental friendliness and sustainability are not an important reason for buyers to buy a car. The court holds that, if buyers can choose between a car which is more environmentally friendly and sustainable than another car, they will choose the former. Moreover, Volkswagen AG says in its advertisements that the environment is important, whereas its behaviour contradicts this. As to the question whether this is an unfair trade practice, the claimants alleged that Volkswagen AG has acted contrary to Article 6:193b, subsection 2, of the Civil Code⁷⁶ (acting contrary

⁷³ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Section 3.3A Unfair Trade Practices, Articles 193a-193j](#).

⁷⁴ The Netherlands, District Court The Hague (*Rechtbank Den Haag*) (2019), [Case nr. : C/09/550422 / HA ZA 18-354](#), 30 January 2019, ECLI:NL:RBDHA:2019:616.

⁷⁵ The Netherlands, District Court Amsterdam (*Rechtbank Amsterdam*) (2021), [Case no. C/13/647072 / HA ZA 18-432](#), 14 July 2021, ECLI:NL:RBAMS:2021:3617.

⁷⁶ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193b, subsection 2](#).

to the requirements of professional commitment and limiting the ability of the average consumer to take an informed decision, Article 6:193c, subsection 1, beginning and under b of the Civil Code⁷⁷ (giving misleading information) and Article 6:193d, subsections 1 up to and including 3 of the Civil Code⁷⁸ (omitting to provide essential information). Moreover, Volkswagen AG also infringed Article 6:193g, beginning and under d, Civil Code⁷⁹ (alleging that a product has been approved of, as it received an official label, without the conditions for approval having been met). Volkswagen AG claims that there have been potential limitations and a failure in the production of the car. However, the court holds that the question is not whether there is a problem with the emissions, but whether there is a problem with the information that has been given. It therefore agrees with the claimants and declares that the defendant has acted unlawfully towards the claimants. On the basis of this decision, among other things, the court holds that the price of the cars that has been paid must be reduced (damages) and that Stichting Volkswagen Car Claim is entitled to negotiate about this with the defendant, as pursuant to the law in force at the time damages could not be awarded by the court (see question 3 on collective claims).

See a case on a breach of the general duty of care (Article 6:162 of the Civil Code) in more detail under question 2.2 about the material and procedural requirements for enforcing consumer/environmental rights as far as this duty is concerned.

Examples of non-judicial proceedings as to environmentally unfriendly advertising and unfair trade practices

A recent case in which the Netherlands Authority for Consumers and Markets was active concerns the clothing industry.⁸⁰ The Netherlands Authority for Consumers and Markets investigated this industry, as it had noticed that there were a lot of claims as to sustainability which might be misleading. In spring 2021 businesses selling clothing were addressed to have a good look at their claims. Afterwards, the Netherlands Authority for Consumers and Markets went deeper into the practices of among others Decathlon and H&M. It had turned out that they used labels such as “Ecodesign” and “Conscious” without specifying these claims. The companies promised to make adaptations. The promises will be assessed during the next two years. The companies donated 400,000 and 500,000 euros respectively to independent organisations which represent sustainability and clothing issues. Another recent case like this was an investigation into the energy market.⁸¹ Two energy providers, Vattenfall and Greenchoice, said they provided sustainable energy on the basis of comparisons, but it was not clear what these comparisons were based on. The companies donated 950,000 and 450,000 euros respectively to various organisations with sustainability aims and promised to mend their ways.

One of the other cases that the Netherlands Authority for Consumers and Markets dealt with is the Volkswagen case mentioned above. It fined Volkswagen AG on 18 October 2017.⁸² The Netherlands Authority for Consumers and Markets held, among other things, that Volkswagen AG misled consumers as to the sustainability of its cars, in spite of the fact that it claimed it was a sustainable company (under 8.5). It therefore fined Volkswagen AG 450,000 euros, the maximum fine (at the time possible).

⁷⁷ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193c subsection 1](#).

⁷⁸ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193d](#).

⁷⁹ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193g](#).

⁸⁰ The Netherlands Authority for Consumers and Markets (ACM) (2022), '[Going forward, Decathlon and H&M will provide better information about sustainability to consumers](#)', News release, 13 September 2022.

⁸¹ The Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), '[Going forward, Greenchoice and Vattenfall will provide better information about sustainability to consumers](#)', News Release, 11 October 2022.

<https://www.acm.nl/nl/publicaties/greenchoice-en-vattenfall-zullen-consumenten-voortaan-beter-informereren-over-duurzaamheid>

⁸² The Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2017), [Besluit van de Autoriteit Consument en Markt tot het opleggen van een boete aan Volkswagen AG](#), 18 October 2017.

In other, separate proceedings before the District Court of Amsterdam which were a follow-up to this case in 2021⁸³, the Court came to the same conclusions as the Netherlands Authority for Consumers and Markets. The proceedings were conducted pursuant to the then existing law about class actions (see question 3 about collective actions) for the organisation representing the individual consumers to negotiate with Volkswagen AG about the amount of damages which should be paid. This has nothing to do with the fine, but is related to the actual damage suffered. Results of this class action are binding for individual buyers. Without results of the negotiations, individual buyers can sue the business involved and ask, for example, for a price reduction of the product or service provided.

On 18 November 2021 ClientEarth notified the Netherlands Authority for the Financial Markets about the lack of disclosure, with, among other things, financial consequences for the value of the company (which should therefore be reported to especially shareholders whose shares may as a result go down), about single-use plastic packaging by the supermarket chain Ahold Delhaize. There has not been a reaction yet (see question 4.2 about due diligence).

Examples of proceedings before the Advertising Code Committee are the following.

Arla, a producer of biological dairy products, advertises for its products, stating they are climate neutral. The complainant alleges that this suggests that the products do not have an effect on the environment, and that this is contrary to Articles 2 and 3, Code for Environmental Advertising.⁸⁴ In the appellate case the College of Appeal holds on 6 July 2022 that the advertisements are misleading (Article 2, Code for Environmental Advertising), but that Article 3, Code for Environmental Advertising does not apply.⁸⁵

Another case (decided on 8 April 2022) concerned the claim by KLM that its emissions could be compensated by travellers (CO2-zero emissions).⁸⁶ The complainant alleged that this suggested that travelling by air with KLM could be climate neutral in absolute terms and that KLM would not be able to prove this claim (Article 3, Code for Environmental Advertising⁸⁷). The Advertising Code Committee held that KLM misled its customers and could not prove the absolute effect of the compensation. The Advertising Code Committee made a recommendation not to advertise like this anymore.

In a very similar case against Royal Dutch Shell, in which Royal Dutch Shell stated that drivers could compensate the effects of the use of fossil fuels, the Advertising Code Committee held the same.⁸⁸

2.1.5 Experts' opinions

A legal expert from a university that has been consulted states that a consumer can get more tailor-made remedies, such as a reduction in price, when they rely on the stipulations on consumer sales in Book 7 of the Dutch Civil Code, based on the Consumer Rights Directive.⁸⁹ One of the stipulations is that a product should be as sustainable as it was claimed to be (Article 7:18, subsection 2, under d of the Civil

⁸³ The Netherlands, District Court Amsterdam (Rechtbank Amsterdam) (2019) , [Case nr.C/13/647072 / HA ZA 18-432](#) , 20 November 2019, ECLI:NL:RBAMS:2019:8741.

⁸⁴ The Netherlands, Advertising Code Foundation (*Stichting Reclame Code*) (2022), [Code for Environmental Advertising](#) (*Milieu Reclame Code*).

⁸⁵ The Netherlands, Advertising Code Committee (*Reclame Code Commissie*) (2021), Case no. [2021/00472](#) (concerning claim of climate neutral biological products by Arla).

⁸⁶ The Netherlands, Advertising Code Committee (*Reclame Code Commissie*) (2021), Case no. [2021/00553](#) (claim CO2-zero by KLM) .

⁸⁷ The Netherlands, Advertising Code Foundation (*Stichting Reclame Code*) (2022), [Code for Environmental Advertising, Article 3](#) (*Milieu Reclame Code*).

⁸⁸ The Netherlands, Civil Code (*Burgerlijk Wetboek*) , [Book 6, Article 162](#) . ; The Netherlands, Advertising Code Committee (*Reclame Code Commissie*) (2021), Case no. [2021/00190](#) (claim "Drive CO2-neutral" by Shell).

⁸⁹ European Union, European Parliament and Council of Europe (2011), [Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance/](#)

Code).⁹⁰ There have been no cases in which consumers relied on this Article as far as the environment is concerned so far, however. Moreover, the remedies provided for breach of contract on lacking qualities or a product being defective are not always in the interest of the environment. Quote: “There should be a ranking of the remedies in consumer law on the European and national level, so that environmentally friendly options prevail over less environmentally friendly options. It is now possible, for example, to return a product which is defective and which is then substituted and thrown away. This is not environmentally friendly. It would be better if it were mandatory to try and repair the product first.” This view is confirmed in academic literature.⁹¹ Also, consumers’ rights to return products, enshrined in the same Directive, should be limited for the sake of the environment, as consumers are tempted to buy products online without hesitation as they are sure they can come back on their decision without cost. The transport of the products leaves a footprint on the environment, however. If consumers have to pay for the transport, they will have second thoughts about their purchase. Although some improvements may be introduced thanks to a recent proposal for a Directive by the Commission (the supply of information as to the environment),⁹² further steps should be taken to restrict the consumer rights above-mentioned. On the other hand, information about sustainability should be made mandatory on all products.⁹³ Finally, another point raised is that it is too easy for companies to slightly adapt the wording of their fossil fuel advertising in order to act in compliance with the law, for example changing the claim that it is CO2 neutral into a claim that it goes far into being CO2 neutral. This does not do justice to the fact that fossil fuels are as damaging to the environment as tobacco is to health. They are incompatible, have a misleading effect on consumers, and should therefore be banned completely.⁹⁴ This is confirmed by the legal experts from the CSO that was consulted. Moreover, “in order to put the green transition into effect, we must decide which products we need to phase out, for example petrol cars, home gas heating, red meat, and flying.”

There are many supervisory authorities in the Netherlands. Lawyers representing one of these authorities state that there are almost as many supervisory authorities as there are Directorates-General within the European Union and ministries in the Netherlands. Quote: “There are too many supervisory bodies involving consumer rights. Not only the Netherlands Authority for Consumers and Markets and the Dutch Authority for the Financial Markets are competent, but there are, for example, two supervisory authorities for fishery: one of them supervises the way fish are caught, the other one supervises the way fish are packed. There is a special supervisory authority for tires. For consumers, it is not clear where government departments are competent and where other supervisory bodies are competent. The experts believe it is important to harmonise this fragmented system on the European level and the national levels.” The government is also in favour of this.⁹⁵ Moreover, the standards as to the environment and sustainability are undefined. This is confusing for both consumers and businesses. It makes it possible for businesses to use a wide range of claims, such as “sustainable”, “join life”, and “conscious”, without these claims being clear.

This is confirmed by an attorney representing businesses in this area. She praises the efforts made by the Netherlands Authority for Consumers and Markets to draw up the above-mentioned guidelines,

⁹⁰ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 7, Article 18, subsection 2, under d.](#)

⁹¹ Pavillon, C.M.D.S. (2022), ‘Dwingend consumentenrecht en de overgang naar een circulaire economie: het mes snijdt aan twee kanten’, *Ars Aequi*, July/August 2022, pp. 576-585; Terryn, E. and Van Gool, E. (2021), ‘Kunnen we e-commerce vergroenen door het consumentencontractenrecht te herzien?’, *TvC* 2021, edn. 1, pp. 15-28.

⁹² European Union, European Parliament and Council of Europe (2011), [Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information.](#)

⁹³ Pavillon, C.M.D.S. (2022), ‘Dwingend consumentenrecht en de overgang naar een circulaire economie: het mes snijdt aan twee kanten’, *Ars Aequi*, July/August 2022, pp. 576-585; Terryn, E. and Van Gool, E. (2021), ‘Kunnen we e-commerce vergroenen door het consumentencontractenrecht te herzien?’, *TvC* 2021, edn. 1, pp. 15-28.

⁹⁴ Kaupa, C. (2021), ‘Smoke gets in your eyes: misleading fossil fuel advertisement in the climate crisis’, *Journal of European Consumer and Market Law*, 1/2021, pp. 1-25.

⁹⁵ The Netherlands, Minister of Foreign Trade and Foreign Development (2021), ‘Bouwstenen voor IMVO-wetgeving’, [Letter to House of Representatives](#), 5 November 2021.

because it gives clarity to both consumers and businesses. Moreover, she says that the great number of cases which have been decided in the course of time by the Advertising Code Committee (*Reclame Code Commissie*), which is gone into in more detail below, give a clearer indication than existing legislation as to what businesses are entitled to claim. Quote: “Proving that claims are truthful is hard for businesses, because the terminology used is broad. It is not clear where a life cycle assessment, for example, begins and ends. Also, it is not clear whether the term sustainability covers the three Ps: people, planet and profit.

The legal experts from the CSO that was consulted also state that there are no clear and explicit terms in the present international and national legislation and that, therefore, there is a lack of clarity. There is a major role for FRA and national human rights institutions here. They should take a more active part in the legislative process, for example, FRA should write notes to the Commission with their expert opinion, linking the lessons from the science of decarbonisation with consumer law, and also with the climate change-related human rights impacts and risks. FRA and NHRIs should take this task upon themselves, because consumer associations are quite willing to do so, but not empowered in this field, so that in practice it is left to environmental agencies to take action. The CSO concludes that the FRA/NHRIs should act more against greenwashing: <https://www.clientearth.org/what-we-do/priorities/greenwashing/>

- By advocating on the legislative level in the EU and nationally
 - for example, the EU reform project here: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733543/EPRS_BRI\(2022\)733543_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733543/EPRS_BRI(2022)733543_EN.pdf)
 - And supporting the calls for a fossil fuel advertising ban, see here for more info: <https://verbiedfossielereclame.nl/wie-zijn-reclame-fossielvrij/>;
- By filing interventions/amicus curiae in support of greenwashing cases and complaints;
- By hearing complaints against businesses and engaging with businesses;
- By joining with consumer associations and promoting the links between climate, human rights and greenwashing;
- By conducting research and publishing reports which can be used by courts and regulators.

All in all, the lawyers representing the supervisory authorities, the attorney representing businesses and the CSO that was represented expressly stated that the standards used at the moment are too vague and European legislation should remedy this. Moreover, the FRA and the NHRIs should be more active in this field.

2.1.6 Conclusions

The conclusions about judicial proceedings before the court are that individual consumers and consumer associations may rely on Articles 6:193a-193j of the Unfair Trade Practices Act before the court if they have been misled by certain advertising, among which a certain use of labels. Class actions may also take place (Article 6:193j, subsection 3⁹⁶, in conjunction with Article 3:305a of the Dutch Civil Code⁹⁷). There is a shift of the burden of proof. The burden of proof in these cases therefore rests on the business⁹⁸.

⁹⁶ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193j, subsection 1](#).

⁹⁷ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 3, Article 305a](#).

⁹⁸ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193j, subsection 1](#).

Damage must be proven to be directly caused by the misleading advertising/label. Damages may be claimed (Article 6:193j, subsection 2⁹⁹). An unlawful agreement is voidable (Article 6:193j, subsection 3¹⁰⁰). Anyone can rely on Article 6:162 of the Civil Code.¹⁰¹ The burden of proof rests on the consumer. If there has been a breach of the duty of care, and the consumer proves that the damage was caused by this directly, damages may be claimed, too.¹⁰²

Environmental laws may be relied on by parties whose interest is directly affected. The main Act is the Environmental Management Act.¹⁰³ The Acts are enforced by administrative authorities, who may, for example, issue permits to businesses for their activities in these areas or give them exemptions. Interested parties may challenge the administrative body's decision before this body and appeal to the Administrative Jurisdiction Division of the Council of State (for example: Article 20.1 of the Environmental Management Act).¹⁰⁴

The conclusions as to non-judicial proceedings are as follows. It may be concluded that consumers reporting to supervisory authorities (administrative bodies) such as the Netherlands Authority on Consumers and Markets on the basis of the Unfair Trade Practices Act¹⁰⁵ about environmentally unfriendly advertising, including an abuse of labels, may contribute to better behaviour by businesses, as investigations may be made and orders and fines may be given (administrative tools), and that this serves the general interest.¹⁰⁶ It is difficult for the consumer to obtain reliable or transparent information on the impact of products on the environment on the basis of the use of labels, as only a few of them are mandatory and regulated. Moreover, there are many confusing self-awarded labels. The Netherlands Authority for Consumers and Markets is active in drafting Guidelines which make these labels more transparent.^{107 108} It makes a recommendation, however, to introduce a more uniform national system.¹⁰⁹ Only then will the consumer be able to make an informed choice as to sustainable and affordable packaging and products.

Non-judicial proceedings on the basis of the Code for Environmental Advertising before the Advertising Code Committee may be effective for society as a whole,¹¹⁰ as, in case of environmentally misleading advertising, the media no longer co-operate with a business which has lost a case there. There is a low threshold as no lawyer is required and there are no fees. There is a shift of the burden of proof.¹¹¹ However, there are no individual remedies.

The conclusions about examples of judicial proceedings are as follows. In the case about advertisements for pork much attention is paid to the stipulation that a trade practice such as this one should be unfair

⁹⁹ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193j, subsection 1](#).

¹⁰⁰ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193j, subsection 1](#).

¹⁰¹ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 162](#).

¹⁰² The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 162](#).

¹⁰³ The Netherlands, Environmental Management Act (*Wet milieubeheer*), 13 June 1979.

¹⁰⁴ The Netherlands, Environmental Management Act (*Wet milieubeheer*), [13 June 1979](#).

¹⁰⁵ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Section 3.3A, Articles 193a-193j](#).

¹⁰⁶ The Netherlands, Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), 'Onze bevoegheden', [Web page](#); The Netherlands, Consumer Protection Enforcement Act (*Wet handhaving consumentenbescherming*), [Article 8.8](#). The Netherlands, Consumer Protection Enforcement Act (*Wet handhaving consumentenbescherming*), [20 November 2006](#), Article 1.1.

¹⁰⁷ European Union, European Commission (2016), [Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices](#), Commission staff working document.

¹⁰⁸ The Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), 'Regulators create guideline for apparel industry on use of materials index in marketing' ([Toezichhouders maken richtlijn voor kledingindustrie voor gebruik materialenindex bij marketing](#)), News release, 10 October 2022.

¹⁰⁹ The Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), [Legislator to help consumers make sustainable choices with reliable information](#) (*Wetgever aan zet consument met betrouwbare informatie te helpen duurzame keuzes te maken*). News release, 16 June 2022.

¹¹⁰ The Netherlands, Advertising Code Foundation (*Stichting Reclame Code*) (2022), [Code for Environmental Advertising](#) (*Milieu Reclame Code*).

¹¹¹ The Netherlands, Advertising Code Foundation (*Stichting Reclame Code*) (2022), [Code for Environmental Advertising](#) (*Milieu Reclame Code*), Article 3.

to an average consumer.¹¹² Although a business should give correct information (and in this case, it is held that the information is not wrong), a consumer has the duty to investigate the information given himself.¹¹³ The case about Volkswagen cheating with a label shows that claims about impact on the environment and a wrongfully obtained accredited label can play a role in civil proceedings before the courts based on the Unfair Trade Practices Act.¹¹⁴

The conclusions about examples of non-judicial proceedings are as follows. The investigations by the Netherlands Authority for Consumers and Markets into the clothing industry and the energy market shows that this may be quite an effective tool, as businesses selling clothes with unclear labels as to sustainability and energy providers promised to improve this and donated money to organisations which try to promote this.¹¹⁵ The Volkswagen cases show that a case before the court may lead to damages for consumers,¹¹⁶ but that a case reported to the Netherlands Authority for Consumers and Markets about the same situation may lead to a considerable fine.¹¹⁷ The cases before the Advertising Code Committee show that an environmental claim may not be misleading, and must in general be proven to be correct.¹¹⁸

Experts add the following. A consumer can get more tailor-made remedies, such as a reduction in price, when they rely on the stipulations on consumer sales in Book 7 of the Dutch Civil Code, based on the Consumer Rights Directive.¹¹⁹ One of the stipulations is that a product should be as sustainable as it was claimed to be (Article 7:18, subsection 2, under d of the Civil Code).¹²⁰ The remedies provided are not always in the interest of the environment. Consumer rights laid down in existing EU consumer law and national consumer law, should be restricted. For example, it should be made mandatory to repair a product instead of having it substituted.¹²¹

All in all, the lawyers representing the supervisory authorities, the attorney representing businesses and the CSO that was represented agree that the standards used at the moment are too vague and European and national legislation should remedy this. Moreover, the FRA and the NHRIs should be more active in this field. Also, the supervisory system should become less fragmented. This is also advocated by the government.¹²²

In brief: consumers can rely, in particular, on civil law (the Act on Unfair Trade Practices and as a last resort Article 6:162 of the Civil Code, judgements are binding) and self-regulation (in particular the Code for Environmental Advertising, recommendations are made). They may also rely on environmental laws

¹¹² The Netherlands, District Court The Hague (*Rechtbank Den Haag*) (2019), [Case nr. : C/09/550422 / HA ZA 18-354](#), 30 January 2019, ECLI:NL:RBDHA:2019:616.

¹¹³ The Netherlands, District Court The Hague (*Rechtbank Den Haag*) (2019), [Case nr. : C/09/550422 / HA ZA 18-354](#), 30 January 2019, ECLI:NL:RBDHA:2019:616.

¹¹⁴ The Netherlands, District Court Amsterdam (*Rechtbank Amsterdam*) (2021), [Case no. C/13/647072 / HA ZA 18-432](#), 14 July 2021, ECLI:NL:RBAMS:2021:3617.

¹¹⁵ The Netherlands, Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), '[Going forward, Decathlon and H&M will provide better information about sustainability to consumers](#)', News release, 13 September 2022

¹¹⁶ The Netherlands, District Court Amsterdam (*Rechtbank Amsterdam*) (2021), [Case no. C/13/647072 / HA ZA 18-432](#), 14 July 2021, ECLI:NL:RBAMS:2021:3617.

¹¹⁷ The Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2017), [Besluit van de Autoriteit Consument en Markt tot het opleggen van een boete aan Volkswagen AG](#), 18 October 2017.

¹¹⁸ The Netherlands, Advertising Code Foundation (*Stichting Reclame Code*) (2022), *Code for Environmental Advertising (Milieu Reclame Code)*.

¹¹⁹ European Union, European Parliament and Council of Europe (2011), *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance/*

¹²⁰ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 7, Article 18, subsection 2, under d.](#)

¹²¹ Pavillon, C.M.D.S. (2022), 'Dwingend consumentenrecht en de overgang naar een circulaire economie: het mes snijdt aan twee kanten', *Ars Aequi*, July/August 2022, pp. 576-585; Terry, E. and Van Gool, E. (2021), 'Kunnen we e-commerce vergroenen door het consumentencontractenrecht te herzien?', *TvC* 2021, edn. 1, pp. 15-28.

¹²² The Netherlands, Minister of Foreign Trade and Foreign Development (2021), 'Bouwstenen voor IMVO-wetgeving', [Letter to House of Representatives](#), 5 November 2021.

before, in particular, the Administrative Division of the Council of State. They may also notify, among many other supervisory authorities, the Netherlands Authority for Consumers and Markets, or the Netherlands Authority for the Financial Markets,, of bad behaviours, which may lead to administrative proceedings, with, possibly, penalties. The supervisory system, though, is far to fragmented and the standards used are, unfortunately, vague, although the Authority for Consumers and Markets has tried to remedy this somewhat with Guidelines and the great number of cases before the Advertising Code Committee are helpful. Experts suggests that some consumer rights should be restricted for the sake of the environment, such as cost-free return of products.

2.2 What are the material and procedural requirements for enforcing consumer/environmental rights? For example: what are the requirements for proving the existence of harm/damage? is it possible to submit claims “in the general interest” without reference to individual damage? Is it necessary to challenge a particular administrative decision, etc.

2.2.1 Introduction

Individual consumers and consumer associations may rely on Articles 6:193a-193j of the Unfair Trade Practices Act before the court if they have been misled by certain advertising, among which a certain use of labels. In terms of procedural law, both consumers and representative organisations may instigate proceedings before the court. (Article 6:193j, subsection 3 of the Unfair Trade Practices Act¹²³, in conjunction with Article 3:305a of the Dutch Civil Code¹²⁴). In these legal proceedings representative organisations usually represent the interests of a number of consumers and their damage suffered in general, as the Volkswagen case mentioned above shows. Before the courts these organisations or institutions have to meet a number of requirements to have legal standing, an important one of which is that the (consumer) interest served is laid down in their Articles of Association. (See question 3 on possibilities for collective claims for more details)¹²⁵ Anyone, so individual consumers, but also consumer associations, under the same conditions just mentioned,¹²⁶ can rely on Article 6:162 of the Civil Code: breach of a duty of care by the advertiser or producer towards the consumer.¹²⁷ The Shell case below shows that the general interest may be served with no reference to individual damage.¹²⁸

There is a shift of the burden of proof in the case of the Unfair Trade Practices Act before the court. In terms of material law, the burden of proof rests on the business, which has to prove that information is actually correct and complete if this seems appropriate in view of the circumstances of the case; whereby the lawful interests of the business and any other party taking part in the proceedings are taken into account (Article 193j, subsection 1¹²⁹). In the Volkswagen case¹³⁰ Volkswagen has to prove that there is no trade practice, if the consumer states there is. In this case, Volkswagen said that the deceitful way in which it obtained a label was not an interaction with a consumer, so that it was not engaged in a trade practice. However, the court held that this was contrary to the requirement to be professionally committed, laid down in the Act on Unfair Trade

¹²³ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193j, subsection 1](#).

¹²⁴ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 3, Article 305a](#).

¹²⁵ The Netherlands, District Court Amsterdam (*Rechtbank Amsterdam*) (2021), [Case no. C/13/647072 / HA ZA 18-432](#), 14 July 2021, ECLI:NL:RBAMS:2021:3617, under 16.12.

¹²⁶ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 3, Article 305a](#).

¹²⁷ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 162](#).

¹²⁸ The Netherlands, The Hague District Court (*Rechtbank Den Haag*) (2021), [Case no. C/09/571932 / HA ZA 19-379](#), 26 May 2021, ECLI:NL:RBDHA:2021:53391

¹²⁹ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193j, subsection 1](#).

¹³⁰ The Netherlands, District Court Amsterdam (*Rechtbank Amsterdam*) (2021), [Case no. C/13/647072 / HA ZA 18-432](#), 14 July 2021, ECLI:NL:RBAMS:2021:3617.

Practices, so that it was unlawful towards the consumer (under 8.23-8.28).¹³¹ Damage must be proven to be directly caused by the misleading advertising/label. Damages may be claimed. (Article 6:193j, subsection 2¹³²). An agreement based on an unfair trade practice is voidable (Article 6:193j, subsection 3¹³³). In the case of Article 6:162 of the Civil Code, the burden of proof rests on the consumer. As the Shell case described below shows,¹³⁴ proving a breach of the duty of care is complicated, because all circumstances of the case (in this case: fourteen) are weighed for and against. Damage has to be proved on the basis of Article 6:162 by the claimant. It should be proven that it is the direct result of the breach of the duty of care of the defendant.¹³⁵ If there has been a breach of the duty of care, damages may be claimed, too.¹³⁶

In the case of the application of environmental laws, interested parties, in terms of procedural and material law, have to prove they are directly affected by decisions by administrative bodies. These decisions have to be challenged before these bodies. Appeal is possible before the Administrative Jurisdiction Division of the Council of State.¹³⁷

Court fees vary from 2837 euros to 8519 euros for legal persons, not individuals, who instigate proceedings worth up to 100,000 euros to a value of more than 1,000,000 euros respectively. Individuals pay 1301 euros up to 2277 euros. If they cannot pay this, they may be entitled to aid. If the claim has no value, the fee is less.¹³⁸

In non-judicial proceedings, the following procedural aspect can be found. Consumers or consumer associations (without having to meet the requirements they have to meet before the court, but they have to prove that they serve a collective interest) may report to supervisory authorities (administrative bodies) such as the Authority on Consumers and Markets on the basis of the Unfair Trade Practices Act¹³⁹ about environmentally unfriendly advertising, including an abuse of labels. In terms of material law they do not have to prove anything. Investigations are made and orders and fines may be given (administrative tools). Damage does not have to be proven, partly because there is no place for damages to individuals.¹⁴⁰ No lawyer is required and there are no fees. If consumers want damages, they have to instigate separate proceedings before the court.

In terms of procedure, non-judicial proceedings on the basis of the Code for Environmental Advertising can be instigated by consumers and consumer organisations. It only has to be clear that they are consumers.¹⁴¹ There does not have to be a collective interest. On the basis of Article 3, there is a shift of the burden of proof. In terms of material law, the business has to prove that its claims are correct. Damage does not have to be proven, partly because there is no place for damages to individuals. No lawyer is required and there are no fees.

¹³¹ Article 6:193b, subsection 2, of the Civil Code

¹³² The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193j, subsection 1](#).

¹³³ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193j, subsection 1](#).

¹³⁴ The Netherlands, The Hague District Court (*Rechtbank Den Haag*) (2021), [Case no. C/09/571932 / HA ZA 19-379](#), 26 May 2021, ECLI:NL:RBDHA:2021:5339I

¹³⁵ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 162](#).

¹³⁶ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 162](#).

¹³⁷ The Netherlands, Environmental Management Act (*Wet milieubeheer*), [13 June 1979](#).

¹³⁸ The Netherlands Judiciary (*Raad voor de Rechtspraak*)(2022), Court fees civil law ([Griffierecht Civiel](#)).

¹³⁹ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Section 3.3A, Articles 193a-193j](#).

¹⁴⁰ The Netherlands, Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), 'Onze bevoegheden', [Web page](#); The Netherlands, Consumer Protection Enforcement Act (*Wet handhaving consumentenbescherming*), [Article 8.8](#). The Netherlands, Consumer Protection Enforcement Act (*Wet handhaving consumentenbescherming*), [20 November 2006](#), Article 1.1.

¹⁴¹ The Netherlands, Advertising Code Foundation (*Stichting Reclame Code*) (2022), [Code for Environmental Advertising \(Milieu Reclame Code\)](#).

2.2.2 The Shell case

2.2.2.1 Summary

The Shell case, based on a breach of the duty of care laid down in Article 6:162 of the Civil Code,¹⁴² was brought by the CSOs Milieudefensie together with a number of other actors (hereinafter: Milieudefensie) against Royal Dutch Shell before the Hague District Court.¹⁴³ It illustrates a few of the above-mentioned issues: in terms of procedural law the extensive opportunity to submit collective claims in the general interest (Article 3:305a of the Civil Code), and the application of Dutch law if an international business has its headquarters in the Netherlands. The court interprets the duty of care against the background of human rights in treaties (even if they may not have direct effect). In terms of material law it shows the difficulty of proving that the duty of care was breached (Article 6:162 of the Civil Code). It is clear that the increasing need to provide energy to the world population is not regarded as an excuse to harm the environment.

In this case, the Hague District Court ordered Royal Dutch Shell to reduce the CO2 emissions of the Royal Dutch Shell group by net 45% in 2030, compared to 2019 levels, through the Shell group's corporate policy. The court holds that the compelling common interest that is served by complying with the reduction obligation outweighs the negative consequences Royal Dutch Shell might face due to the reduction obligation and also the commercial interests of the Royal Dutch Shell group, which are served by an uncurtailed preservation or even increase of CO2-generating activities (under 4.4.54.). The reduction obligation relates to the Shell group's entire energy portfolio and to the aggregate volume of all emissions and therefore includes the emissions by end-users, i.e. the consumers, of its products. The reduction obligation is an obligation of result for the activities of the Shell group, with respect to which Royal Dutch Shell may be expected to ensure that the CO2 emissions of the Shell group are reduced to this level. This is a significant best-efforts obligation, which means Shell only has to try its best here, instead of having to reach a result, with respect to the business relations of the Shell group, including the end-users, i.e. it is also responsible for the emissions of consumers. In this context Royal Dutch Shell may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO2 emissions generated by the business relations, and to use its influence to limit any lasting consequences as much as possible (under 4.1.4., 4.4.39. and 5.3.)

2.2.2.2 Collective claim

In terms of procedural law, and the interests that were represented, it is interesting that the case was brought by a number of CSOs such as Milieudefensie, but also by 17,379 individual claimants who have issued to Milieudefensie a document appointing it as their representative in these proceedings. The various CSOs all have as their objective, among other things, the protection of the environment, according to their Articles of Association, apart from one CSO (Action Aid, founded in 1997), whose objective is *Contributing to the fight against poverty and injustice all over the world. Africa is an area of special focus.* (under 2.1.7.)

The court holds that the common interest of preventing dangerous climate change by reducing CO2 emissions can be protected in a class action. The dispute on the admissibility of class actions revolves around the question whether or not they comply with the requirement 'similar interest' in the sense

¹⁴² The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 162](#).

¹⁴³ The Netherlands, The Hague District Court (*Rechtbank Den Haag*) (2021), [Case no. C/09/571932 / HA ZA 19-379](#), 26 May 2021, ECLI:NL:RBDHA:2021:5339

of Book 3 Section 305a Dutch Civil Code.¹⁴⁴ This requirement entails that the interests in question must be suitable for bundling so as to safeguard an efficient and effective legal protection of the stakeholders. ActionAid does not meet this requirement, as it does not promote the interests of Dutch residents sufficiently for its collective claim to be allowable. ActionAid's object is broadly formulated in its articles of association, which pertains to the world with a special focus on Africa. ActionAid mainly operates in developing countries. Its operations in the Netherlands are geared towards developing countries, not Dutch residents. Its collective claim must therefore be declared not allowable. Moreover, besides a class action there is only room for the claims of individual claimants if they have a sufficiently concrete individual interest. The courts holds that this is not the case here: the interest of the claims of individual claimants is the same as the common interest which the class actions seek to protect. Their interests are already served by the class actions, so that they are part of the class action, and they do not have an interest in a separate claim in addition to the class actions. The claims of the individual claimants must therefore be declared not allowable. (under 4.2.). The conclusion is that the claims of ActionAid and the individual claimants are denied for procedural reasons and that the other collective claims are not allowable insofar as they serve the interest of the entire world population in curbing dangerous climate change caused by CO2 emissions (under 4.6.1.).

These considerations show that it is possible to file a claim in the general interest by means of a class action, but if this overlaps with individual interests it is no longer possible to file individual claims. There is an "opt-out" system (see question 3 on the possibilities for collective claims and the damages that will be negotiated, also for individuals, by the representative organisation). Moreover, the general interest should not be too broad: the interests of Dutch citizens, among whom consumers, should be represented, and not the interest of the entire world population.

Another procedural issue is the applicable law. The parties in this case disagree about the applicable law. Milieudefensie argues that the policies made by Royal Dutch Shell's headquarters in the Netherlands are of influence on the group's CO2 emissions and therefore are an 'event giving rise to the damage' in the sense of Article 7 Rome II.¹⁴⁵ This leads to the applicability of Dutch law. Royal Dutch Shell alleges that the CO2 emissions take place all over the world and that there are therefore many events giving rise to the damage, resulting in the applicability of many laws. The court holds that Shell's approach is too narrow, not in line with the characteristics of responsibility for environmental damage and imminent environmental damage nor with the concept of protection underlying the choice of law in Article 7 Rome II¹⁴⁶. Although Article 7 Rome II refers to an 'event giving rise to the damage', i.e. singular, it leaves room for situations in which multiple events giving rise to the damage in multiple countries can be identified, as is characteristic of environmental damage and imminent environmental damage. When applying Article 7 Rome II, Royal Dutch Shell's adoption of the corporate policy of the Shell group therefore constitutes an independent cause of the damage, which may contribute to environmental damage and imminent environmental damage with respect to Dutch residents and the inhabitants of the Wadden region. Superfluously, the court considers that the conditional choice of law of Milieudefensie et al. (Dutch law pursuant to Article 4 paragraph 1 Rome II¹⁴⁷) is in line with the concept of protection underlying Article 7 Rome II¹⁴⁸, and that the general rule of Article 4 paragraph 1 Rome II, upheld in Article 7 Rome II, insofar as the class actions seek to protect the interests of the Dutch residents, also leads to the applicability of Dutch law (under 4.3).

¹⁴⁴ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 3, Article 305a](#).

¹⁴⁵ European Union, European Parliament and Council of Europe (2017), [Regulation \(EC\) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations \(Rome II\), Article 7](#).

¹⁴⁶ European Union, European Parliament and Council of Europe (2017), [Regulation \(EC\) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations \(Rome II\), Article 7](#).

¹⁴⁷ European Union, European Parliament and Council of Europe (2017), [Regulation \(EC\) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations \(Rome II\), Article 4, paragraph 4](#).

¹⁴⁸ European Union, European Parliament and Council of Europe (2017), [Regulation \(EC\) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations \(Rome II\), Article 7](#).

The court's judgement entails that the policies of an individual company, with its headquarters in the Netherlands although operating worldwide, can constitute an independent cause of damage, so that Dutch law is applicable.

2.2.2.3 Standard applied to the duty of care

In terms of material law, the scope of the responsibility of Royal Dutch Shell is an interesting point. The court applies Article 162, Book 2, of the Dutch Civil Code ¹⁴⁹. It applies in particular the unwritten duty of care that it imposes on Royal Dutch Shell and explicitly states that there has not been an unlawful act by the company emitting CO₂ gas (under 4.5.8.). Royal Dutch Shell's policies to limit its emissions, however, are insufficient, so it has infringed its duty of care.

After having extensively gone into the subject of environmental damage caused by CO₂ emissions and the soft law governing this subject, the court concludes that the climate change caused by CO₂ emissions will have serious and irreversible consequences for the Netherlands. Although the consequences of climate change and the associated risks for the inhabitants of the Wadden region may turn out differently from the risks for Dutch and other residents because the effect of accelerated sea level rise will be limited and hardly noticeable in the Wadden region up to 2030 (see 2.3.8), climate change will equally have serious and irreversible consequences for the inhabitants of the Wadden region; in the more extreme scenarios this area will drown completely in the long term (under 2 and 4.4.6).

The court holds that the Shell group is responsible for significant CO₂ emissions all over the world. The total CO₂ emissions of the Shell group exceeds the CO₂ emissions of many states, including the Netherlands. It is not in dispute that these global CO₂ emissions of the Shell group contribute to global warming and climate change in the Netherlands and the Wadden region (under 4.4.5 and 4.4.6). The court therefore holds that a far-reaching duty of care rests on Royal Dutch Shell, because its (lack of) policies affect the CO₂ emissions caused by the Shell group it governs, and also the emissions caused by the end-users of its products, causing the damage described above. The standard of care is based by the court by weighing fourteen elements, ¹⁵⁰ as all the circumstances of this particular case have to be taken into account (under 4. and 4.4.2).

In the following paragraphs, the section of the judgement on the right to life and the right to respect for private and family life of Dutch residents and the inhabitants of the Wadden region (one of the fourteen elements) will be discussed in more detail, as these are the human rights referred to by Milieudefensie and these are the human rights applied by the court in order to determine the standard of care applying to Royal Dutch Shell. In this case, it was already held that harm was being done; in this section the question is answered to what extent Shell has breached its duty of care. The section of the judgement on the UN Guiding Principles (another of the fourteen elements) will be gone into as well, because human rights in general play a more important role there, so that specific consumer rights may be assumed to be covered as well.

Although the right to life and the right to respect for private and family life, enshrined in Articles 2 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

¹⁴⁹ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 162](#).

¹⁵⁰ These elements are the following: 1.) the policy-setting position of RDS in the Shell group, (2.) the Shell group's CO₂ emissions, (3.) the consequences of the CO₂ emissions for the Netherlands and the Wadden region, (4.) the right to life and the right to respect for private and family life of Dutch residents and the inhabitants of the Wadden region, (5.) the UN Guiding Principles, (6.) RDS' check and influence of the CO₂ emissions of the Shell group and its business relations, (7.) what is needed to prevent dangerous climate change, (8.) possible reduction pathways, (9.) the twin challenge of curbing dangerous climate change and meeting the growing global population energy demand, (10.) the ETS system and other 'cap and trade' emission systems that apply elsewhere in the world, permits and current obligations of the Shell group, (11.) the effectiveness of the reduction obligation, (12.) the responsibility of states and society, (13.) the onerousness for RDS and the Shell group to meet the reduction obligation, and (14.) the proportionality of RDS' reduction obligation. Numbers 4 and 5 will be gone into more deeply.

and Articles 6 and 17 of the International Covenant on Civil and Political Rights (ICCPR) apply in relationships between states and citizens, the court applies these rights to the present case between private entities; due to the fundamental interest of human rights and the value for society as a whole they embody, they may play a role in the relationship between Milieudefensie and Royal Dutch Shell (under 4.4.9).

The court recognises here that Milieudefensie cannot invoke these rights directly (which is based on Article 93 of the Constitution, saying that only stipulations in treaties that are binding each and anyone may have direct effect; moreover, the horizontal effect of human rights is not always accepted either).¹⁵¹ On the basis of the fundamental interest of these rights, the court does state, however, in the following paragraphs that Royal Dutch Shell has its own responsibility towards Milieudefensie. This is in line with the tendency in case law to interpret the duty of care laid down in Article 6:162 of the Civil Code against the background of stipulations in treaties, so that there is an indirect effect.¹⁵²

Royal Dutch Shell argues that the human rights offer no protection against dangerous climate change. However, the courts holds that there is global agreement that human rights norms apply to the full spectrum of environmental issues, including climate change, based, among other things, on a case before the UN Human Rights Committee and a report by the UN Special Rapporteur on Human Rights. (under 4.4.10.)

In its interpretation of the unwritten standard of care, the court also follows the UN Guiding Principles (UNGP), which leads to the conclusion that businesses have an individual responsibility as to climate change in comparison with the responsibility of states. It can be deduced from the UNGP and other soft law instruments that it is universally endorsed that companies must respect human rights. This includes the human rights enshrined in the ICCPR as well as other 'internationally recognized human rights', including the ECHR. This is confirmed by the OECD Guidelines for Multinational Enterprises. (under 4.4.11 - 4.4.15)

The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts. The means through which a business enterprise meets its responsibility to respect human rights should (according to the court) be proportional to, among other factors, its size. Severity of impacts will be judged by their scale, scope and irremediable character. The means through which a business enterprise meets its responsibility to respect human rights may also vary depending on whether, and the extent to which, it conducts business through a corporate group or individually. The court is of the opinion that much may be expected of Royal Dutch Shell (under 4.4.16).

The court then goes into the adverse human rights impacts not only through a business's own activities, but also through their business relationships with other parties, based on the principles in the UNPG. The responsibility to respect human rights encompasses the company's entire value chain, including its end-users. This is in line with the analysis of the various protocols and guidelines for climate change for non-state actors, drawn up by the University of Oxford in 2020, although there are some nuances. In its interpretation of the unwritten standard of care, the court has also included the internationally propagated and endorsed need for companies to genuinely take responsibility for Scope 3 emissions (end-users). This need is more keenly felt where these emissions form the majority of a company's CO2 emissions, as is the case for companies that produce and sell fossil fuels, according

¹⁵¹ The Netherlands, Constitution (*Grondwet*), [Article 93](#).

¹⁵² Pulles, G.J.W. (2017), 'Een verdrag met potentieel vérstrekkende gevolgen, De toepassing van het VN-verdrag Handicap door de Nederlandse rechter', *Handicap & Recht*, June 2017, no. 1, under 2.
https://www.woudegraaf.nl/local/userfiles/sweet_uploads/GJW_Pulles_Doorwerking_gehandicaptverdrag_H_R_2017_nr_1.pdf;
<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2015:3932>, consideration 3.5.

to the court. In case of the Shell group, approximately 85% of its emissions are Scope 3 emissions (see 2.5.5). (under 4.4.17, 4.4.18 and 4.4.19)

Royal Dutch Shell has identified and assessed the adverse effects of all its emissions (2.5.4.) A company which has done so should subsequently take ‘appropriate action’ on the basis of their findings and assessments. (under 4.4.20 and 4.4.21).

Royal Dutch Shell’s responsibility is defined by the influence and control it can exercise over all emissions, direct or indirect, of the Shell group (4.4.6), and what is needed to prevent dangerous climate change (4.4.7). On Royal Dutch Shell rests an obligation of results as regards the Scope 1 emissions of the Shell group as well as a significant best-efforts obligation as regards the business relations of the Shell group, including the end-users, whereby Royal Dutch Shell may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO₂ emissions generated by them, and to use its (significant) influence to limit any lasting consequences as much as possible. (under 4.4.22-4.4.37).

The court holds that a reduction target with 2019 as the base year sufficiently corresponds with the widely endorsed consensus that limiting global warming to 1.5°C requires a net reduction of 45% in global CO₂ emissions in 2030 relative to 2010, and a net reduction of 100% in 2050. (under 4.4.38).

The following is clear from the above-mentioned considerations. In the context of procedural law: although human rights may not usually have a direct effect or a horizontal effect, the court applies these indirectly by interpreting Royal Dutch Shell’s duty of care (Article 6:162 of the Civil Code) against the background of human rights laid down in non-binding principles and stipulations in Treaties, because of the fundamental interest involved. In terms of material law: proving a breach of the duty of care is hard, because all elements of the case are weighed, but it is feasible. Human rights, among other things, require that the duty of care that rests on Royal Dutch Shell has a very high standard. Although Royal Dutch Shell alleges repeatedly that, for example, states have a greater responsibility than individual businesses, this is rejected by the court, which states that Royal Dutch Shell has such an impact on its complete value chain (including its end-users) by means of its policies, that it must take rigorous measures to limit CO₂ emissions. The court goes quite far in stating that Royal Dutch Shell is not only responsible for its own emissions, but also for the emissions of consumers who use its products. The court, in this case, puts great emphasis on the damage caused by CO₂ emissions to society as a whole. Royal Dutch Shell can play a major role in reducing this damage, according to the court. .

Twin challenge: environment vs need to supply energy

Another point of material law that is raised in this case is the so-called twin challenge. Royal Dutch Shell alleges that it cannot meet its reduction obligation, because there is an increasing global energy demand. However, the importance of access to reliable and affordable energy, as pointed out by Royal Dutch Shell, and the Shell group’s role in it, have no bearing on Royal Dutch Shell’s reduction obligation, according to the court. That interest must always be served within the context of climate targets. The court explains that there is a connection between the UN Sustainable Development Goals and the climate goals of the Paris Agreement and other agreements made for the implementation of the UN Climate Convention. It is not the intention for SDG 7 (“*Ensure access to affordable, reliable, sustainable and modern energy for all*”), as cited by Royal Dutch Shell to detract from the Paris Agreement or to interfere with these goals. This also follows from SDG 13 (“*Take urgent action to combat climate change and its impacts*”) and the preamble under 8 of the Paris Agreement, which emphasizes the intrinsic connection between the tackling of dangerous climate and fair access to sustainable development and the eradication of poverty. The UNSDG sustainability goals can therefore not be a reason for Royal Dutch Shell to not meet its reduction obligation. Finally, the obligations of states to provide energy supply, as laid down in the Agreement on an International

Energy Program and the European Energy Charter Treaty and the associated protocol, are separate from the obligation of states and companies, such as the Shell group, to align the composition of their energy supply with the CO2 reduction required for countering global warming. (under 4.4.40. -4.4.43.). Although Royal Dutch Shell claims that states have a pioneering role in this, the court holds that here, too, businesses have their own, individual responsibility. (under 4.4.51. and 4.4.52.)

The court holds that Royal Dutch Shell 's policies and intentions are not sufficiently concrete and specific and are of too general a nature. They are non-binding. Moreover, Royal Dutch Shell disregards its independent responsibility, but lets states and other parties play a pioneering role. This is incompatible with its legal obligation of reduction. Now that the court has established that Royal Dutch Shell may violate its reduction obligation, the court holds that the claimed order to comply with that obligation must be allowed and it will be provisionally enforceable (under 4.5.)

2.2.2.4 Conclusion Shell case

The parts of this judgement that have been discussed show that human rights, which, after all, include consumer rights, play an important role in tort law in the Netherlands.

As to procedural law: collective claims (Article 3:305a of the Civil Code) are well served, but the case shows that there has to be a link to the Netherlands, and if the Articles of Association of a representative association mainly refer to Africa, it is not allowed as a plaintiff. Dutch law applies when there is a clear link to the Netherlands, such as a business having its headquarters here. Human rights laid down in treaties and non-binding principles are indirectly applied by the court when it interprets the standard of the duty of care against this background.

As to material law: proving that a business has breached the duty of care towards the claimant on the basis of tort law in general (Article 6:162 of the Civil Code), is difficult, because all circumstances of the case (fourteen) are being weighed.

The case shows that a business has an individual responsibility, and the more influence it has, the higher the standard of the duty of care is. Environmental interests, in this leading case, prevail over the need to supply energy to consumers.

2.3 Based on your findings, what main intersections or gaps can you identify regarding the links between consumer rights and protection of environment, that is to what extent current consumer law can serve as a tool to enforce environment protection, and which elements of the legal framework should be improved;

2.3.1 Intersections

Consumer law, especially the Unfair Trade Practices Act, makes it possible to act against misleading advertisements or a wrong use of labels. There is a shift of the burden of proof, which is a good thing. A business will then have to give correct information and/or improve its product or service in terms of sustainability. Improvement will be stimulated, which is good for the protection of the environment, because businesses which perform better will attract more customers. This also goes for notifications to supervisory authorities, which apply the Unfair Trade Practices Act, but use administrative tools, such as fines. Allowing businesses to mend their ways and donate to organisations which serve the

environmental interest instead of pay fines benefits the environment in two ways and is quite effective.

The Unfair Trade Practices Act also enables consumers to receive damages in court proceedings. They may mention the fines imposed by supervisory bodies to prove their case, but it will not have an effect on the damages awarded. Class actions are particularly successful. This serves, in particular, the consumer interest.

Environmental law as such does not address consumer rights, but it serves the interest of the protection of the environment as a whole, for example because of conditions that have to be met to get a permit to dump waste. It will be difficult for a consumer to prove that they are directly affected and rely on these laws.

Finally, regulation by the Advertising Code Commission is effective in practice where misleading advertisements are concerned. The media will no longer publish the advertisements, so that it becomes more difficult for the business to sell its products or provide its services, which is in the interest of the protection of the environment. However, this does not have a direct impact on individual consumers either, who have to instigate separate legal proceedings to enforce their rights.

The intersections mentioned show that it depends on the interest which one wants to serve which of the above options should be considered best: the individual interest of the consumer or the interest of the environment as a whole. There is no clear-cut answer.

2.3.2 Gaps noticed by the experts

All the experts agree that one of the major problems in this area is that it is not clear what environmental claims are. The vague standard applied is a problem for consumers and businesses. A Guideline drawn up by the Netherlands Authority for Consumers and Markets is helpful, just as the great number of cases before the Advertising Code Committee. Definitions should be drawn up on a European and national level. This will be beneficial for consumers, businesses and the environment.

Some experts say that there should be a black list for claims by businesses, such as claims about the compensation for fossil fuel.¹⁵³ This should be remedied on a European and national level. Still, efforts should be made on the European and the national levels to improve the present situation.

As to the use of labels, a gap here is that there are only a few mandatory labels and that most of them are confusing, not transparent and self-awarded. An improvement would be if there were a few uniform labels, enforced by an independent authority, as proposed by the Authority for Consumers and Markets.¹⁵⁴ Rules should be laid down on the EU level and the national level. This will be beneficial for consumers, whose position as to choosing products on the basis of, among other things, sustainability will improve and it will be beneficial for the protection of the environment, because products or services of businesses which perform better in this respect will become more popular than businesses which perform worse.

Experts say that environmental information on products should be made mandatory.¹⁵⁵

¹⁵³ Kaupa, C. (2021), 'Smoke gets in your eyes: misleading fossil fuel advertisement in the climate crisis', *Journal of European Consumer and Market Law*, 1/2021, pp. 1-25.

¹⁵⁴ The Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), [Legislator to help consumers make sustainable choices with reliable information](#) (*Wetgever aan zet consument met betrouwbare informatie te helpen duurzame keuzes te maken*). News release, 16 June 2022.

¹⁵⁵ Pavillon, C.M.D.S. (2022), 'Dwingend consumentenrecht en de overgang naar een circulaire economie: het mes snijdt aan twee kanten', *Ars Aequi*, July/August 2022, pp. 576-585; Terryn, E. and Van Gool, E. (2021), 'Kunnen we e-commerce vergroenen door het consumentencontractenrecht te herzien?', *TvC* 2021, edn. 1, pp. 15-28.

Consumer law giving rights to consumers to have defective products replaced rather than repaired, for example, are bad for the protection of the environment, as defective products are often thrown away. This is a gap and rights should be restricted.¹⁵⁶ This may not so much benefit consumers, but it will benefit the protection of the environment.

Finally, remarks were made by the experts about procedural law: the supervisory system is much too fragmented and this should be remedied. The government is in favour of EU administrative legislation, with an EU supervisory body, too.¹⁵⁷ This would make it easier for consumers to report businesses' bad behaviour and will particularly benefit the environment.

2.3.3 Conclusions

This research shows that there are many intersections between civil law among which tort law, administrative law and self-regulation of the industry. It is especially collective interests that are served. This usually means that the requirements which consumers or consumer associations have to fulfil are low, unless they want damages. There are also quite a number of gaps.

2.4 What is the practical application of the Aarhus Convention as regards access to information in environmental matters?

2.4.1 Access to information in environmental matters

The stipulations of the Aarhus Convention as regards access to information in environmental matters were implemented in a number of Acts, the main one of which are the Environmental Management Act (*Wet milieubeheer*),¹⁵⁸ and the Government Information (Public Access) Act (*Wet openbaarheid bestuur*)¹⁵⁹, and entered into force on 10 February 2005. It was dealt with together with Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, the implementation of which entered into force on 7 July 2005, and extended the scope of the environmental information that has to be provided by administrative bodies, meaning they had to provide more environmental information than used to be necessary.¹⁶⁰ Chapter 19 of the Environmental Management Act currently covers the public availability of environmental information, giving details about the nature of this information and the obligation of administrative bodies to supply information of their own accord, or after having been asked,¹⁶¹ in conjunction with the Government Information (Public Access) Act, providing procedural rules, which was replaced by the Open Government Act Act (*Wet open overheid*) on 1 May 2022.¹⁶²

An important difference between the Government Information (Public Access) Act¹⁶³ and the Open Government Act, is that the Open Government Act requires that administrative bodies supply

¹⁵⁶ Pavillon, C.M.D.S. (2022), 'Dwingend consumentenrecht en de overgang naar een circulaire economie: het mes snijdt aan twee kanten', *Ars Aequi*, July/August 2022, pp. 576-585; Terryn, E. and Van Gool, E. (2021), 'Kunnen we e-commerce vergroenen door het consumentencontractenrecht te herzien?', *TvC* 2021, edn. 1, pp. 15-28.

¹⁵⁷ The Netherlands, Minister of Foreign Trade and Foreign Development (2021), 'Bouwstenen voor IMVO-wetgeving', [Letter to House of Representatives](#), 5 November 2021.

¹⁵⁸ The Netherlands, Environmental Management Act (*Wet milieubeheer*), 13 June 1979.

¹⁵⁹ The Netherlands, Government Information (Public Access) Act (*Wet openbaarheid bestuur*), 31 October 1991.

¹⁶⁰ The Netherlands, National Government (2004), [Act implementing Treaty of Aarhus](#) (*Wet uitvoering Verdrag Aarhus*).

¹⁶¹ The Netherlands, Environmental Management Act (*Wet milieubeheer*), Chapter 19.

¹⁶² The Netherlands, Open Government Act (*Wet Open Overheid*), 1 May 2022.

¹⁶³ The Netherlands, Government Information (Public Access) Act (*Wet openbaarheid bestuur*), 31 October 1991.

information of their own accord more often than they do now.¹⁶⁴ As to environmental information, the stipulations about the protection of the civil servants and the concept of environmental information, covered by the Environmental Management Act, remain the same. This also goes for information about emissions.

In practice, parties relied on the Government Information (Public Access) Act¹⁶⁵ if they were not satisfied with the provision of information by administrative bodies. There have been no cases on the Open Government Act Act (*Wet open overheid*) and environmental information yet.

As to who has access to justice, the General Administrative Law Act (*Algemene wet bestuursrecht*)¹⁶⁶ is, at present, in conflict with the Aarhus Convention. The European Court of Justice¹⁶⁷ held that stipulations in that Act were in conflict with the Aarhus Convention.¹⁶⁸ On the one hand, Dutch legislation stipulates that “interested parties” can vent their views, in the case of decisions that will be taken by administrative bodies about environmental issues, such as permits, and that non-interested parties may be, but are not always, entitled to do so, too. (Article 3.15, subsections 1 and 2). The Aarhus Convention mentions “the public concerned” (Article 6, subsection 1). Interested parties may, after giving their views, then file a complaint to the administrative body and if they are not successful appeal to the administrative court (Articles 7:1 and 8:1 of the General Administrative Law Act). They must have participated in the administrative procedure which preceded the decision, in other words, they must have given their opinion about the possible decision at that stage (Article 6:13 of the General Administrative Law Act). In the case of non-interested parties, they do not have this right pursuant to the General Administrative Law Act. The fact that it is not possible to appeal afterwards is in conflict with the Aarhus Convention (Article 9, subsections 2 and 3) and will be remedied. On 6 April 2022, a bill which remedied the issue was submitted to the public for internet consultation.¹⁶⁹ Interested parties may always appeal. Non-interested parties may appeal if they have given their opinion in the administrative procedure, or, if they have not, they may appeal if this cannot reasonably be held against them. In the bill, the government also adds an Annex to the General Administrative Law Act which describes the decisions at stake in more detail. They include, among other things, activities which may have considerable environmental effects. This was considered too broad by, among others, the Council of State, which is also against the role of non-interested parties and wants to exclude them altogether.¹⁷⁰ The internet consultation was closed on 15 May 2022. Debate about this bill is going on. In practice, the court applies the criticism of the European Court of Justice.¹⁷¹

2.4.2 Examples

One of the Government Information (Public Access) Act cases shows that an appeal, relying on Article 11, subsection 4 of the Government Information (Public Access) Act¹⁷² can be successful. The appellant

¹⁶⁴ The Netherlands, Ministry of Interior and Kingdom Relations (2022), ‘Woo regelt recht op overheidsinformatie’, [News release.](#), 1 May 2022.

¹⁶⁵ The Netherlands, Government Information (Public Access) Act (*Wet openbaarheid bestuur*), 31 October 1991.

¹⁶⁶ The Netherlands, General Administrative Law Act (*Algemene wet bestuursrecht*), 4 June 1992.

¹⁶⁷ European Union, Court of Justice of the European Union (2021), [Case no. C–826/18](#), 14 January 2021, ECLI:EU:C:2021:7.

¹⁶⁸ United Nations Economic Commission for Europe, [Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters](#) (Aarhus Convention), 25 June 1998

¹⁶⁹ The Netherlands, Minister for Legal Protection (2022), [Draft Bill for the Act amending the General Administrative Law Act and other Act in connection with CJEU Arrest](#) (Wijziging Algemene wet bestuursrecht en enkele andere wetten naar aanleiding van het ‘Varkens in Nood’); The Netherlands, Minister for Legal Protection (2022), [Explanatory Memorandum to Draft Bill for the Act amending the General Administrative Law Act and other Act in connection with CJEU Arrest](#). (Memorie van Toelichting bij Wijziging Algemene wet bestuursrecht en enkele andere wetten naar aanleiding van het ‘Varkens in Nood’).

¹⁷⁰ The Netherlands, Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak Raad van State*) (2022), [‘Wijziging Algemene wet bestuursrecht en enkele andere wetten naar aanleiding van het ‘Varkens in Nood’ arrest’](#), Letter to Minister for Legal Protection, 2 June 2022.

¹⁷¹ The Netherlands, Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak Raad van State*) (2021), [Case No. 201908374/1/R3](#), 14 April 2021, ECLI:NL:RVS:2021:786; The Netherlands, Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak Raad van State*) (2021), [Case No 202003081/1/R3](#), 4 May 2021, ECLI:NL:RVS:2021:953.

¹⁷² The Netherlands, Government Information (Public Access) Act (*Wet openbaarheid bestuur*), [Article 11, Subsection 4](#).

appealed against the decision of the Minister of Finance not to make public environmental information in some manuals about the application of the VAT, because this information was based on personal views of civil servants about the policies involved, in which case the Government Information (Public Access) Act says there is an exception to the duty to give information (Article 11, subsection 1¹⁷³). However, subsection 4¹⁷⁴ states that in the case of environmental information the interest of the protection of the opinion of civil servants should be balanced against the protection of the publication of information. In this case the court holds that the information is twenty years old and that the publication of the information prevails (under 5.1, 8.1).¹⁷⁵

In another case, about the building of dykes against the Minister of Infrastructure and Water Management (15 July 2022), the Council of State decided about an appeal to a judgement by the District Court about a similar issue. The Council of State held that the Minister had not balanced the interests mentioned above.¹⁷⁶ The same thing was decided by the Council of State in an appellate case against the municipality of Hulst about the development of a nearby polder (1 June 2022). Even though the opinions of the civil servants were only an exchange of ideas, and did not constitute final plans, there should have been a balance of interests, which had not taken place (10).¹⁷⁷

There are also cases about the scope of the concept of environmental information. In another case Article 10, subsection 4 is relied on by the plaintiff, who proceeds against the Minister of Economic Affairs about providing subsidies for building a park of windmills by a private party. The plaintiff states that in the context of granting the subsidy (which implies coverage by the Environmental Management Act (*Wet milieubeheer*),¹⁷⁸ and the Government Information (Public Access) Act (*Wet openbaarheid bestuur*)¹⁷⁹, the Minister should have included information about the emissions of the windmills, which he did not. This subsection states that environmental information about emissions has to be supplied, in principle, in spite of exceptions to this duty laid down in the remainder of this article. The court, among other things, interprets the concept of environmental information and states that theoretical ideas about emissions (such as the effect of the speed of the wind on noise) do not constitute environmental information. The information should be specific, predictable and non-hypothetical (the court refers to a judgement by the ECJ, ECLI:EU:C:2016:889), which it is not. The plaintiff's claim is dismissed (under 9.1-9.6).¹⁸⁰ In the case about the building of dykes, on 15 July 2022 against the Minister of Infrastructure and Water Management, the Council of State decides about a section in the judgement by the District Court which held that the personal opinions of civil servants and the description of possible effects on the soil in the building of dykes at the seaside do not constitute environmental information. The Council of State held that the concept of environmental information, covered by Article 19.1a, subsection 1 of Environmental Management Act¹⁸¹ does not deal with final information only (under 6).¹⁸² In another case the Council of State also interprets the concept of environmental information on 18 May 2022. The Minister of Agriculture, Nature and the Quality of Food appeals against a court decision which says that information about offering living animals instead of dead animals for destruction is environmental information, as it may have an effect on the health and safety of man, in the context of the pollution of the supply chain of food. The Minister alleges that public health is not the issue here, as described in Article 19.1a, subsection 1, beginning and under f of the Environmental Management Act¹⁸³. However,

¹⁷³ The Netherlands, Government Information (Public Access) Act (*Wet openbaarheid bestuur*), Article 11, Subsection 1.

¹⁷⁴ The Netherlands, Government Information (Public Access) Act (*Wet openbaarheid bestuur*), Article 11, Subsection 4.

¹⁷⁵ The Netherlands, District Court Rotterdam (*Rechtbank Rotterdam*) (2022), Case no. ROT 21/18, 2022. ECLI:NL:RBROT:2022:6695

¹⁷⁶ The Netherlands, Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak Raad van State*) (2022), Case no. 202006761/1/A3, 13 July 2022. ECLI:NL:RVS:2022:1995 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2022:1995>

¹⁷⁷ The Netherlands, Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak Raad van State*) (2022), Case no. 202004537/1/A3, 1 June 2022, ECLI:NL:RVS:2022:1542..

¹⁷⁸ The Netherlands, Environmental Management Act (*Wet milieubeheer*), 13 June 1979.

¹⁷⁹ The Netherlands, Government Information (Public Access) Act (*Wet openbaarheid bestuur*), 31 October 1991.

¹⁸⁰ The Netherlands, District Court Netherlands (*Rechtbank Noord-Nederland*) (2019), Case no. LEE 17-3979, 28 June 2019, ECLI:NL:RBNNE:2019:2999.

¹⁸¹ The Netherlands, Environmental Management Act (*Wet milieubeheer*), Article 19.1a. subsection 1.

¹⁸² The Netherlands, Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak Raad van State*) (2022), Case no. 202006761/1/A3, 13 July 2022, ECLI:NL:RVS:2022:1995.

¹⁸³ The Netherlands, Environmental Management Act (*Wet milieubeheer*), Article 19.1a. subsection 1.

the Council of State holds that there is a possible effect on the health and safety of man (even though the animals are alive and not dead) and that this suffices (under 5.1), so that the appeal by the Minister is not allowed.¹⁸⁴

2.4.3 Conclusions

The stipulations of the Aarhus Convention as regards access information in environmental matters were implemented in the Environmental Management Act (*Wet milieubeheer*),¹⁸⁵ and the Government Information (Public Access) Act (*Wet openbaarheid bestuur*)¹⁸⁶, and entered into force on 10 February 2005. It was dealt with together with Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, the implementation of which entered into force on 7 July 2005, and extended the scope of the environmental information that has to be provided by administrative bodies. Cases show that, although exceptions to the duty to provide environmental information have been laid down, among which the right of civil servants to be protected where they vent their opinions, the duty to balance this against the interest of the publication of environmental information, is taken seriously in practice.¹⁸⁷ These and other cases show that in practice there is a broad, and not restricted, interpretation of the concept of providing environmental information.¹⁸⁸ As to who has access to this information, Dutch law is in conflict with the Aarhus Convention. However, in practice this was remedied in case law and a bill was drafted to lay this down in legislation, too.

3. Possibilities for collective claims by consumers or representations of collective interests.

This section should address the following:

3.1 Does the legal framework and practice on collective/representative action allow claims beyond consumer matters, including related to the environment?

The Dutch Civil Code used to allow representative action both on behalf of a group of people with similar interests and in the general public interest (for instance, in the interest of the environment or gender equality), where there was no need to identify a particular victim. In this case, associations and foundations could act in a representative capacity, asking for a 'declaration in law', which establishes the facts and the liability in a case without further consequences, but they could not claim damages for themselves, and it was necessary to establish individual damages afterwards.¹⁸⁹

This changed as of 1 January 2020. As of this date, it was possible for a representative entity to bring a "collective action" on an "opt-out basis", which means that individuals who do not want to be represented have to declare that they do not want to be involved in the proceedings.¹⁹⁰ It became

¹⁸⁴ The Netherlands, Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak Raad van State*) (2022), *Case No. 202101970/1/A3*, 18 May 2022, ECLI:NL:RVS:2022:1432.

¹⁸⁵ The Netherlands, Environmental Management Act (*Wet milieubeheer*), 13 June 1979.

¹⁸⁶ The Netherlands, Government Information (Public Access) Act (*Wet openbaarheid bestuur*), 31 October 1991.

¹⁸⁷ The Netherlands, Government Information (Public Access) Act (*Wet openbaarheid bestuur*), *Article 11, Subsection 4*; The Netherlands, District Court Rotterdam (*Rechtbank Rotterdam*) (2022), *Case no. ROT 21/18*, 2022. ECLI:NL:RBROT:2022:6695; The Netherlands, Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak Raad van State*) (2022), *Case no. 202006761/1/A3*, 13 July 2022. ECLI:NL:RVS:2022:1995; The Netherlands, Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak Raad van State*) (2022), *Case no. 202004537/1/A3*, 1 June 2022, ECLI:NL:RVS:2022:1542.

¹⁸⁸ The Netherlands, Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak Raad van State*) (2022), *Case No. 202101970/1/A3*, 18 May 2022, ECLI:NL:RVS:2022:1432.

¹⁸⁹ European Union, FRA (2020), *Business and human rights – access to remedy*, October 2020, p. 65.

¹⁹⁰ The Netherlands, Civil Code (*Burgerlijk Wetboek*), *Article 3:305 a.*: The Netherlands, Code on Civil Procedure (*Wetboek van Strafvordering*) *Article 1018f*.

possible to claim damages.¹⁹¹ The new legislation is known as the Resolution of Mass Damage in Collective Actions Act (*Wet Afwikkeling Massaschade in Collectieve Actie*).¹⁹² The Resolution of Mass Damage in Collective Actions Act, applies to collective actions for damages initiated on or after the date of its entry into force that relate to “events” that occurred on or after 15 November 2016.¹⁹³ The Resolution of Mass Damage in Collective Actions Act¹⁹⁴, does not distinguish between types of actions. A collective action can be brought on behalf of anyone and can be based on any type of legal infringement that affects a class.¹⁹⁵ However, in the event of (very) small claims and claims with an idealistic purpose, it is not possible to claim damages.¹⁹⁶ Moreover, mass damages claims should be closely connected to the Dutch jurisdiction, even though cross-border cases are still covered, as long as, for example, the defendant has its seat in the Netherlands or most of the consumers are Dutch.¹⁹⁷ The representative organisation must also have tried to settle before it can bring the case before court.¹⁹⁸ Persons who live abroad can join the collective action on an “opt-in” basis. By way of exception, in cases in which foreign class members are relatively easily identifiable the court may order that the “opt-out class” does extend to those class members.¹⁹⁹ As the new legislation came into force on 1 January 2020 it did not implement Directive 2020/1828 of 25 November 2020.

3.2 Who can represent consumers in such litigation (CSOs, institutions etc.)?

Class action representatives have to meet certain criteria before they can bring a collective action. In the case of CSOs, their founders and successors may not have profit as an objective, so they must be non-profit.²⁰⁰ The representative organisation must be a foundation or an association with full legal powers and they must protect similar interests of other persons, insofar as they represent these interests pursuant to their Articles of Association and provided that these interests are sufficiently safeguarded.²⁰¹ This is the case if the legal person is sufficiently representative, which means that the following criteria have to be met:

- It has a big enough platform and the size of the claims it represents is sufficient;
- It has, in principle, a supervisory board;
- It avails itself of suitable and effective mechanisms for the participation in or representation in the decision-making process of the persons involved in the claim;
- It has sufficient means to instigate proceedings and it has sufficient say over the claim;
- It has a generally accessible internet page.

On this internet page the following information should be available:

- Articles of Association;
- the organization of the board;
- the most recent annual accounts of the supervisory board about its supervision;
- the latest report by the board;
- the fees of the directors and the members of the supervisory board;

¹⁹¹ The Netherlands, Minister of Security and Justice (*Minister van Veiligheid en Justitie*) (2017), [Explanatory Memorandum to the Resolution of Mass Damage in Collective Actions Act](#), pp. 1-2.

¹⁹² The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Article 3:305 a.](#): The Netherlands, Code on Civil Procedure (*Wetboek van Strafvordering*) [Article 1018f](#).

¹⁹³ The Netherlands, Code on Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*), [Article. 1018f](#).

¹⁹⁴ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Article 3:305 a.](#): The Netherlands, Code on Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) [Article 1018f](#).

¹⁹⁵ The Netherlands, Minister of Security and Justice (*Minister van Veiligheid en Justitie*) (2017), [Explanatory Memorandum to the Resolution of Mass Damage in Collective Actions Act](#), P. 7.

¹⁹⁶ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Article 3:305a, paragraph 6](#).

¹⁹⁷ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Article 3:305a, paragraph 3](#).

¹⁹⁸ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Article 3:305a, paragraph 3c](#).

¹⁹⁹ The Netherlands, Code on Civil Procedure (*Wetboek van Strafvordering*) [Article 1018f, paragraph 5](#).

²⁰⁰ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Article 3:305a, paragraph 3a](#).

²⁰¹ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Article 3:305a, paragraph 1](#).

- the aims and the operational methods of the legal person;
- a survey of the state of affairs of current procedures;
- if a contribution is asked from the persons whose claims are represented:

-an insight into the calculation of this contribution;

-a survey of the way in which persons whose interests are protected by the claim can join the legal person and the way in which they could end this participation.

Moreover, the representative body must have sufficient experience and expertise to instigate and continue the legal proceedings.²⁰² The board must account for its activities and there must be annual accounts in accordance with the stipulations for associations and foundations.²⁰³ Foreign organizations or public bodies may represent the interests of persons who regularly reside in the country where these organisations or public bodies are established.²⁰⁴ All in all, there are therefore criteria such as the representative CSO or institutions being non-profit, and criteria for governance and funding. CSOs and institutions which meet these criteria may be class action representatives, such as, in practice, the consumer-protection organization Consumer Association (*Consumentenbond*).

3.3. What is the state of transposition of Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers?

3.3.1. Overview of the state of transposition of Directive 2020/1828

The bill to transpose Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers the Act on the implementation of the Directive representative claims for consumers (*Implementatiewet richtlijn representatieve vorderingen voor consumenten*) was introduced in the House of Representatives on 17 February 2022.²⁰⁵ It was adopted as a formality without voting by the House of Representatives on 25 May 2022.²⁰⁶ It will now be discussed by the Senate.

Although the government claims that relatively little has to be amended in the Resolution of Mass Damage in Collective Actions Act (*Wet Afwikkeling Massaschade in Collectieve Actie*) some subjects stand out, in particular stipulations for cross-border claims and funding. Article 3:305c of the Civil Code will be amended, so that the organisations that can bring cross-border collective claims must, in addition to what the Resolution of Mass Damage in Collective Actions Act says (see above) also have been active in the field of the representation of consumers for at least twelve months, they may not be insolvent and they must report their general sources of funding (extra requirements of the Directive in article 4, paragraph 3 and consideration 25 of the Directive). They must be designated in advance and be recorded in a registry.²⁰⁷ The additional requirements, especially the requirement that organisations must have been active for twelve months, will not apply to Dutch organisations or institutions proceeding in the

²⁰² The Netherlands, Civil Code (*Burgerlijk Wetboek*), Article 3:305a, paragraph 2.

²⁰³ The Netherlands, Civil Code (*Burgerlijk Wetboek*), Article 3:305a, paragraph 5.

²⁰⁴ The Netherlands, Civil Code (*Burgerlijk Wetboek*), Article 3:305c, paragraph 1.

²⁰⁵ The Netherlands, Minister for Legal Protection (*Minister voor Rechtsbescherming*) (2022), [Bill for the Act on the implementation of the Directive representative claims for consumers \(*Implementatiewet richtlijn representatieve vorderingen voor consumenten*\)](#).

²⁰⁶ The Netherlands, House of Representatives (*Tweede Kamer Staten-Generaal*) (2022), [Bill for the Act on the implementation of the Directive representative claims for consumers \(*Implementatiewet richtlijn representatieve vorderingen voor consumenten*\)](#).

²⁰⁷ European Union, European Parliament and Council of Europe (2020), [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 \(Text with EEA relevance\)](#), article 5 ; <https://zoek.officielebekendmakingen.nl/dossier/kst-36034-3.html> ; The Netherlands, Minister for Legal Protection (*Minister voor Rechtsbescherming*) (2022), [Explanatory Memorandum. Bill for the Act on the implementation of the Directive representative claims for consumers \(*Memorie van Toelichting. Implementatiewet richtlijn representatieve vorderingen voor consumenten*\)](#) p. 7; The Netherlands, Minister for Legal Protection (*Minister voor Rechtsbescherming*) (2022), [Bill for the Act on the implementation of the Directive representative claims for consumers \(*Implementatiewet richtlijn representatieve vorderingen voor consumenten*\)](#), Article 1 C.

Netherlands, as the government values the possibility of *ad hoc* organisations or institutions.²⁰⁸ The court no longer has the power to (fully) assess foreign organisations or institutions once they have been registered, although it may check whether the objective in the Articles of Association is in line with the claim.²⁰⁹ Foreign organisations or institutions no longer have to represent only persons residing in the country in which they are established.²¹⁰ The “opt-in” option for persons residing abroad in the bill also requires that their interests are not in a similar way represented by foreign organisations or institutions. The stipulation that, in cases in which foreign class members are relatively easily identifiable the court may order that the “opt-out class” extends to those class members, is removed.²¹¹

As to funding, Dutch law will now adhere to Article 10 of the Directive, which is stricter than the Resolution of Mass Damage in Collective Actions Act (*Wet Afwikkeling Massaschade in Collectieve Actie*). Dutch law must ensure that, where a representative action for redress measures is funded by a third party, insofar as allowed in accordance with national law, conflicts of interests are prevented and that funding by third parties that have an economic interest in the bringing or the outcome of the representative action for redress measures does not divert the representative action away from the protection of the collective interests of consumers. 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 and the representative action is not brought against a defendant that is a competitor of the funding provider or against a defendant on which the funding provider is dependent. Courts or administrative authorities are empowered 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.²¹²

3.3.2. Conclusions

As the Resolution of Mass Damage in Collective Actions Act is a forerunner in view of the Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers, most stipulations are already in force in the Netherlands, but a few amendments in Dutch legislation have to be made, for example for cross-border claims, and there have to be additional requirements as to the funding of representative organisations.

²⁰⁸ The Netherlands, Minister for Legal Protection (*Minister voor Rechtsbescherming*) (2022), [Explanatory Memorandum. Bill for the Act on the implementation of the Directive representative claims for consumers \(Memorie van Toelichting Implementatiewet richtlijn representatieve vorderingen voor consumenten\)](#).

²⁰⁹ European Union, European Parliament and Council of Europe (2020), [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 \(Text with EEA relevance\)](#), article 6, paragraph 3; The Netherlands, Minister for Legal Protection (*Minister voor Rechtsbescherming*) (2022), [Explanatory Memorandum. Bill for the Act on the implementation of the Directive representative claims for consumers \(Memorie van Toelichting Implementatiewet richtlijn representatieve vorderingen voor consumenten\)](#). p. 7.

²¹⁰ The Netherlands, Minister for Legal Protection (*Minister voor Rechtsbescherming*) (2022), [Bill for the Act on the implementation of the Directive representative claims for consumers \(Implementatiewet richtlijn representatieve vorderingen voor consumenten\)](#), Article 1 B.

²¹¹ The Netherlands, Minister for Legal Protection (*Minister voor Rechtsbescherming*) (2022), [Explanatory Memorandum. Bill for the Act on the implementation of the Directive representative claims for consumers \(Memorie van Toelichting Implementatiewet richtlijn representatieve vorderingen voor consumenten\)](#). p. 11; The Netherlands, Minister for Legal Protection (*Minister voor Rechtsbescherming*) (2022), [Bill for the Act on the implementation of the Directive representative claims for consumers \(Implementatiewet richtlijn representatieve vorderingen voor consumenten\)](#), Article 1 C.

²¹² European Union, European Parliament and Council of Europe (2020), [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 \(Text with EEA relevance\)](#), article 6, paragraph 3; The Netherlands, Minister for Legal Protection (*Minister voor Rechtsbescherming*) (2022), [Explanatory Memorandum. Bill for the Act on the implementation of the Directive representative claims for consumers \(Memorie van Toelichting Implementatiewet richtlijn representatieve vorderingen voor consumenten\)](#) p. 7; The Netherlands, Minister for Legal Protection (*Minister voor Rechtsbescherming*) (2022), [Bill for the Act on the implementation of the Directive representative claims for consumers \(Implementatiewet richtlijn representatieve vorderingen voor consumenten\)](#), article 1A.

4. Due diligence and reporting obligation:

This section should address the following:

- 1) Are there national due diligence laws in your country? If YES: can it be applied in the area of consumer protection as relevant for the protection of the environment

4.1 Due diligence laws

At the moment, only the international UNGPs and the OECD Guidelines for MNEs, and, in addition, the ILO MNE Declaration apply in the Netherlands as regards due diligence.²¹³ On the basis of these documents, but without there being Dutch legislation, an appropriate duty of care investigation into human right risks in the chain of supply of businesses is the nucleus of businesses' responsibility (human rights due diligence, HRDD). Businesses in general are being addressed. In practice, the main attention goes to labour rights, but it is recognised that in theory all human rights are covered. This is based on the UNGPs, principles 2 and 12 in particular, which state that there is a corporate duty for businesses to respect human rights.²¹⁴ This means that consumer rights are covered, too. The investigation carried out by companies consists of six steps, based on the OECD Due Diligence Guidance for Responsible Business Conduct.²¹⁵ 1. The incorporation of due diligence in the policy of the company; 2. The identification of the risks; 3. Tackling the risks; 4. Implementing and checking the results; 5. Communication about the approach and 6. Facilitation of compensation and repairs.²¹⁶

Several covenants with the aim to tackle environmental and human rights issues by means of due diligence human rights investigations into risks in these fields have been concluded by non-governmental stakeholders, such as industry, unions and civil society and have been in effect since 2016.²¹⁷ The basis was an advice by the Social Economic Council (*Sociaal- Economische Raad*) in 2014.²¹⁸ The government facilitates the covenants. However, the government has noticed that they do not work properly because they are too much based on voluntary efforts. Only 1.6 per cent of the businesses in the high risk sectors are reached, as the Minister for Legal Protection states in a Memorandum sent to the House of Representatives in 2020-2021.²¹⁹

The government therefore wants to draft broader legislation containing binding obligations instead of voluntary commitments.²²⁰ Both the Social Economic Council and the government feel that all large enterprises with 250 or more employees should be covered by the legislation. If it is possible to determine risk sectors in an objective way medium-sized enterprises could be covered, too. The government wants to promote a level playing field by also imposing the human rights due diligence investigation on businesses which are not established in the European Union, but which do export

²¹³United Nations(2011), [UN Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework](#), HR/PUB/11/04, 2011; OECD (2011), [OECD Guidelines for Multinational Enterprises](#), Edition 2011, OECD Publishing ; United Nations, ILO (2017), [ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy](#), 2017 version. ...

²¹⁴ Rombouts, S.J. (2022), 'De vrijwilligheid voorbij? Vier vragen over Due Diligence wetgeving', *Tijdschrift voor Arbeidsrecht in Context*, 28 April 2022, no. 1, par. 2.

²¹⁵ OECD Due Diligence Guidance for Responsible Business Conduct, <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>,

²¹⁶ Rombouts, S.J., (2022), 'De vrijwilligheid voorbij? Vier vragen over Due Diligence wetgeving', *Tijdschrift voor Arbeidsrecht in Context*, 28 April 2022, no. 1, par. 3 and par. 5.

²¹⁷ Rombouts, S.J., "De vrijwilligheid voorbij? Vier vragen over Due Diligence wetgeving", *Tijdschrift voor Arbeidsrecht in Context*, 28 April 2022, no. 1, par. 4.2..

²¹⁸ The Netherlands, Social Economic Council (*Sociaal- Economische Raad*) (2014), [IMVO-Convenanten. Advies 14/04](#).

²¹⁹ The Netherlands, Minister for Legal Protection (*Minister voor Rechtsbescherming*) (2021), [Explanatory Memorandum. Bill diligent and sustainable international entrepreneurship \(Memorie van Toelichting. Wet verantwoord en duurzaam internationaal ondernemen\)](#); United Nations, UN Working Group on Business and Human Right (2021), [Guiding Principles on Business and Human Rights at 10: taking stock of the first decade](#), Report of the Working Group on the issue of human rights and transnational; The Netherlands, Minister of Foreign Affairs (2020), 'Van voorlichten tot verplichten: een nieuwe impuls voor internationaal maatschappelijk verantwoord ondernemerschap', [Letter to House of Representatives](#), 16 October 2020.

²²⁰ The Netherlands, Minister of Foreign Trade and Foreign Development (2021), 'Bouwstenen voor IMVO-wetgeving', [Letter to House of Representatives](#), 5 November 2021

products or services to the internal market.²²¹ Although this is what is recommended by the Dutch to the European Union, it is expected to be the basis for national legislation, too.²²² The legislation should therefore cover a large number of companies, it should be based on the UNGPs and the OECD Guidelines and firmly incorporate the six steps of the human rights due diligence investigation. Administrative measures should apply and there should be a positive and stimulating supervisory regime. Moreover, a general duty of care should be introduced for all businesses. The envisaged legislation should be drafted as soon as possible, especially if European legislation lags behind.²²³ However, European legislation is preferred, especially by those who fear that progressive Dutch legislation leads to unfair competition within the EU. Moreover, it is a challenge to keep intact the goodwill of companies that are already active on a voluntary basis, and which will be forced to take certain steps when legislation comes into effect.²²⁴ During the formation of a new government in 2021 the cabinet stated that it stimulated international due diligence within the European Union and that it wished to give shape to national IMVO legislation which takes into account a level playing field with neighbouring countries (Belgium, Germany, Luxembourg and France) and the implementation of possible EU legislation.²²⁵ A bill would first be submitted to stakeholders and advisory bodies, industry, society and scientific bodies, so that a feasible and effective bill could be introduced in Parliament. The bill for the Act diligent and sustainable entrepreneurship would be taken into account, too. It was expected to submit the bill to the relevant parties after the summer of 2022. The bill will then be revised. In the first half of 2023 the cabinet will submit the bill for advice to the Council of State. The bill will then be introduced in Parliament. Attempts will be made to have the bill run parallel to the proposal by the European Commission (corporate sustainability due diligence directive [CSDDD]),²²⁶ which will be the basis for the bill, which is a forerunner. By the summer of 2023 the bill is supposed to be introduced in Parliament.²²⁷

The expert representing a major Dutch bank refers to a number of documents laying down the bank's policy as to human rights and environmental sustainability.²²⁸ The bank has been in the process of implementing the UNGPs as of 2011,²²⁹ and welcomes the future EU legislation, such as the CSDDD, because it will introduce a level playing field, which is lacking now. As to the bank's own activities and its loan book, it uses requirements for the sectors and companies it provides loans to and there are annual meetings with individual businesses in order to improve their performance. Quote: 'The bank has a complaints mechanism in place, thanks to which clients can file grievances in case of any adverse impacts. However, the bank has noticed that there may be a problem in clients' value chains when these clients do not have such a mechanism themselves, so that it is difficult for the stakeholders of these clients to report shortcomings. The bank is therefore currently developing a mechanism itself

²²¹ The Netherlands, Minister of Foreign Trade and Foreign Development (2021), 'Bouwstenen voor IMVO-wetgeving', [Letter to House of Representatives](#), 5 November 2021, p.5.

²²² The Netherlands, Minister of Foreign Trade and Foreign Development (2021), 'Bouwstenen voor IMVO-wetgeving', [Letter to House of Representatives](#), 5 November 2021, p.5.

²²³ The Netherlands, Social and Economic Council (*Sociaal-Economische Raad*) (2020), [Together towards a sustainable impact on chains, sustainable policy for IMVO](#) (*Samen naar duurzame ketenimpact, Toekomstbestendig beleid voor internationaal MVO*), SER Advice 20/08.; The Netherlands, Social and Economic Council (*Sociaal-Economische Raad*) (2021), [Effective European appropriate due diligence legislation for sustainable chains](#), (*Effectieve Europese gepaste zorgvuldigheidswetgeving voor duurzame ketens*), October 2021; The Netherlands, Minister of Foreign Trade and Foreign Development (2021), 'Bouwstenen voor IMVO-wetgeving', [Letter to House of Representatives](#), 5 November 2021.

²²⁴ The Netherlands, Minister of Foreign Affairs (2020), 'Van voorlichten tot verplichten: een nieuwe impuls voor internationaal maatschappelijk verantwoord ondernemerschap', [Letter to House of Representatives](#), 16 October 2020, p.3; The Netherlands, Social en Economic Council (SER) (2020), [Together towards a sustainable impact on chains, sustainable policy for IMVO](#) (*Samen naar duurzame ketenimpact, Toekomstbestendig beleid voor internationaal MVO*), SER Advice 20/08.

²²⁵ The Netherlands, People's Party for Freedom and Democracy (VVD), Christian Democratic Alliance (CDA), Democrats '66 (D66) & Christian Union (CU) (2021), [Paying attention to each other, looking towards the future](#), (*Omzien naar elkaar, vooruitkijken naar de toekomst*), 15 December 2021.

²²⁶ The Netherlands, Minister of Foreign Affairs (2022), '[Fiche 1: Richtlijn gepaste zorgvuldigheidsverplichting voor ondernemingen](#)', Annex to Letter to House of Representatives, 7 April 2022.

²²⁷ The Netherlands, Minister of Foreign Trade and Foreign Development (2022), 'Betreft stand van zaken nationale IMVO-wetgeving', [Letter to House of Representatives](#), 27 May 2022.

²²⁸ ABN AMRO (2022), '[Sustainability policy](#)'.

²²⁹ ABN AMRO (2022), '[Human Rights Statement](#)'.

which is useful for these stakeholders. The aim is to then to resolve disputes between clients and affected stakeholders, using the bank's leverage, to improve the situation about which a complaint has been filed. This is an innovative approach of which there is planned to be a pilot in 2023. Only one other bank in the world (ANZ in Australia) has implemented this procedure."²³⁰

4.2 *Can you identify examples of application of provisions regarding non-financial reporting to enforce consumer rights in your country in respect to [Directive 2014/95/EU](#) (Non-Financial Reporting Directive – NFRD) - for example similar to the case submitted by Client Earth against supermarket groups – Ahold Delhaize ([Notification to the Dutch Authority for the Financial Markets](#) ([clientearth.org](#));)*

4.2.1 *Introduction*

In the field of non-financial reporting the Notification ClientEarth and the Plastic Soup Foundation submitted to the Netherlands Authority for the Financial Markets in respect of Ahold Delhaize, a supermarket chain, as to the financial year ending 3 January 2021, published on 2 March 2021 (the Management Report) on November 2021 should be mentioned.²³¹

ClientEarth, a non-profit organization which has an object to protect the environment, stated on its website on 18 November 2021 that it would instigate proceedings against Ahold Delhaize, a main supermarket chain, and submit a notification to the Dutch Authority for the Financial Markets (*Autoriteit Financiële Markten*) that Ahold Delhaize had, among other things, breached the duty of due diligence. The Dutch Authority for the Financial Markets was, according to ClientEarth, a competent body, because its object is, among other things, pursuant to Article 25 of the Financial Supervision Act, to focus on “orderly and transparency in financial markets” and “integrity between market parties”.²³² ClientEarth alleges that there is a huge information gap, however, between Ahold Delhaize and, among others, customers of the supermarket chain, who have a right to be properly informed about the products they buy and the impact these products have on the environment.

ClientEarth stated that the environment suffers from a great proportion of plastic waste and that Ahold Delhaize, one of the world's largest supermarket groups, is not disclosing key information on its use of plastics and fails to report plastic-related risk to its investors, in breach of its legal requirements. According to research by ClientEarth's Dutch partner [Plastic Soup Foundation](#), a non-profit organisation based in the Netherlands, focussing on combatting plastic pollution at source through public campaigning, advocacy with governments and companies, dissemination of scientific research and education, found that Albert Heijn – one of Ahold Delhaize's supermarkets – still heavily relies on wasteful plastic as 82% of its products are packaged in single-use plastic, but is not reporting the risks associated with this reliance on single-use plastic to its investors.

On its website, ClientEarth states that key findings from ClientEarth's review of Ahold Delhaize's reporting include that: It does not disclose the amount of plastic it uses, it does not describe the impact the plastic it uses has on the environment, the climate and people's health, it provides notably less information on its use of plastic packaging than many of its peers, and it does not acknowledge that its use of plastic packaging generates financial risks to its business.

In the following, attention will be paid to the details in the Notification ClientEarth and the Plastic Soup Foundation submitted to the Netherlands Authority for the Financial Markets in respect of Ahold

²³⁰ Also see: ABN AMRO (2021), [Human Rights Report 2020](#), pp 98-102...

²³¹ ClientEarth (2021), [Notification to the Dutch Authority for the Financial Markets in respect of Ahold Delhaize N.V.](#), November 2021.

²³² Client Earth (2021), [We are taking action against a global supermarket giant on plastics](#), News release, 14 October 2021.

Delhaize as to the financial year ending 3 January 2021, published on 2 March 2021 (the Management Report) in November 2021.²³³ This Notification, which relies on the premise that environmental risks also constitute financial risks that should be reported to stakeholders, is quite unique and could be a precedent for other cases.

Another Notification was filed by BankTrack et al. in the case of the major Dutch ING Bank.²³⁴ Bank Track notified the National Point of Contact for OECD Guidelines about the ING Bank not adhering to its reporting obligations in terms of environmental interests and consumer rights. This will be gone into, too.

4.2.2 Notification to the Netherlands Authority for the Financial Markets

The main premise of the Notification is that Ahold Delhaize (i) causes material adverse impacts to the environment through its use of plastic packaging; and (ii) faces material financial risks linked to its use of plastic packaging, and has breached the applicable requirements by failing to provide material information relating to these two aspects of the topic of plastic packaging (under 2.2).

ClientEarth alleges that Ahold Delhaize is a major source of plastic packaging because there is a prevalence of plastic packaging in food retail in general, although Ahold Delhaize itself does not report about this (under 4). Albert Heijn alone, one of the many brands of Ahold Delhaize, could be the source of 10 – 14% of domestic plastic packaging in the Netherlands (4.4.1.), according to ClientEarth. It could be that Albert Heijn makes available approximately 68,000 tonnes of plastic packaging on the market in the Netherlands alone (under 4.4.2). ClientEarth bases its conclusions on reports by other, similar companies.

ClientEarth then argues that there is a significant environmental cost of plastic packaging and that it has a major adverse impact on public health worldwide (under 5 and 6).

It then alleges that Ahold Delhaize falls under the scope of Article 391(1) of Book 2 of the Dutch Civil Code as further elaborated in the Decree on disclosure of non-financial information (the Decree),²³⁵ which transposes the provisions of Directive 2014/95 (the Non-Financial Reporting Directive).²³⁶ In overview, according to ClientEarth, these instruments require Ahold Delhaize to include a non-financial statement in its annually published management reports in which it discloses information on the impacts it has on the environment, and the risks it faces related to these impacts (under 7.1). The European Commission has produced two sets of non-binding guidance on the interpretation of the Non-Financial Reporting Directive. The first – the Guidelines on non-financial reporting (methodology for reporting non-financial information) (the Guidelines) – was published in 2017 and the second – the Supplement on reporting climate-related information (the Supplement) – was published in 2019.²³⁷ Although the Supplement addresses the disclosure of climate-related information, its guidance is relevant and applicable to the interpretation to the for Reporting Directive generally, and in particular, to the reporting of environmental non-financial information, according to ClientEarth (under 7.2 and 7.3). The Recitals, the Guidelines and the Supplement are collectively referred to as the Sources of Interpretation in the remainder of the Notification by ClientEarth. (under 7.4).

²³³ ClientEarth (2021), [Notification to the Dutch Authority for the Financial Markets in respect of Ahold Delhaize N.V.](#), November 2021.

²³⁴ The Netherlands, National Contact Point for the OECD Guidelines for Multinational Enterprises (2019), [Final Statement. Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands \(Milieudefensie\) versus ING](#). 19 April 2019.

²³⁵ The Netherlands, Decree publication non-financial information (*Besluit bekendmaking niet-financiële informatie*), 14 March 2017. .

²³⁶ European Union, European Parliament and Council of Europe (2014). [Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups](#).

²³⁷ European Union. European Commission (2017), [Communication from the Commission – Guidelines on non-financial reporting \(methodology for reporting non-financial information\)](#), C/2017/4234; European Union. European Commission (2019), [Communication from the Commission – Guidelines on non-financial reporting: Supplement on reporting climate related information](#), C/2019/4490.

Based on this legislation, ClientEarth states that relevant reporting requirements are the following. Article 1(3) of the Non-Financial Reporting Directive provides that groups that fall under its scope must: “include in the management report a non-financial statement containing to the extent necessary for an understanding of the group’s development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including: (a) a brief description of the group’s business model; (b) a description of the policies pursued by the group in relation to those matters, including due diligence processes implemented; (c) the outcome of those policies; (d) the principal risks related to those matters linked to the group’s operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the group manages those risks; (e) non-financial key performance indicators relevant to the particular business. Where the group does not pursue policies in relation to one of more of those matters, the non-financial statement shall provide a clear and reasoned explanation for not doing so.” (For ease of reference, ClientEarth refers to the requirements set out in Article 1(3) collectively as the Reporting Requirements in the remainder of the Notification) .(under 8)

ClientEarth then goes into the double materiality perspective. This covers elements which have a financial perspective, “in the broad sense of affecting the value of the company” and elements which have “an environmental or social perspective”, in each of the core categories involved in the operation of the company, which have to be accounted for and will be discussed below (under 9). This is referred to as “the Overarching Obligation” by ClientEarth.

According to the Reporting Requirements, certain core categories of material information must be covered. These categories of information are set out in sub-Articles 1(3)(a) to 1(3)(e). Sub-Article 1(3)(a) requires issuers to provide a brief description of the business model. Sub-Articles 1(3)(b) – (d) contain the core categories of information that issuers must cover in their disclosures in respect of each of the Subject Areas. In summary, they provide that issuers must disclose: (i) a description of the policies pursued by the issuer in relation to each Subject Area and due diligence processes implemented in relation to those policies; (ii) the outcome of those policies; and (iii) the principal financial and other risks related to that Subject Area linked to the group’s operations (i.e. risks of an adverse impact on the environment, and risks to the issuer’s business) and how the group manages those risks. Sub-Article 1(3) requires issuers to provide non-financial key performance indicators (KPIs) relevant to the business. The Guidelines and the Supplement make clear that KPIs should be used throughout the non-financial statement to support and explain the disclosures that correspond with the other categories of information, in particular the Core Categories (under 10.1).

The first breach is, according to Client Earth, that Ahold Delhaize does not disclose that it takes a financial risk. ClientEarth alleges that Ahold Delhaize infringes the law by its failure to acknowledge financial materiality of plastic packaging and to disclose related risks to the business. In the Management Report, Ahold Delhaize provides three lists of material topics: (i) “Principal risks”, which it describes as “[t]opics that have a material impact on our current strategic, operations, financial and compliance objectives”; (ii) “Intersecting topics” (i.e. “[t]opics that have a material impact... both from an ESG and financial points of view”); and (iii) “Material ESG impacts”, which it describes as “[t]opics that have a material impact on our current business objectives from an ESG point of view, but not yet from a material financial impact point of view” (under 11.1) Ahold Delhaize includes the topic of “sustainable packaging” (by which, as ClientEarth explains below, ClientEarth considers it is referring principally to plastic packaging), on the third list (“Material ESG impacts”). By including the topic on the third list and not the second (“Intersecting topics”) or first list, Ahold Delhaize is, according to ClientEarth, in effect stating that the topic of plastic packaging is not material to the group from a financial perspective. Moreover, Ahold Delhaize does not disclose any information in the Management Report regarding financial risks to its business linked to the topic of plastic packaging (under 11.2 and 11.3), although it faces a number of risks that could have financial consequences for its business.

These include, according to ClientEarth: (i) rapidly changing regulatory frameworks on single-use plastics in its main markets; (ii) reputational damage arising from consumer concerns on the environmental and health impacts of plastic packaging; (iii) uncertain market dynamics affecting actors upstream in the plastics supply chain, which could increase the cost of plastic packaging; and (iv) increasing frequency of lawsuits and other type of legal action for heavy users of single-use packaging (under 14.1 and 15). By stating the topic is not financially material and not disclosing information regarding the financial risks to the group relating to the topic, Ahold Delhaize is failing to disclose material information on a material topic. Ahold Delhaize has therefore not met the threshold of providing sufficient information for a reader to understand the “development, performance [and] position” of the group, and this is a breach of the Reporting Requirements (under 11.5).

ClientEarth tries to demonstrate that the financial risks that Ahold Delhaize faces relating to the topic of plastic packaging are financially material to the group for the purposes of the Reporting Requirements with reference to key factors identified in the Sources of Interpretation as relevant to determining materiality and, in particular, financial materiality. One of the risks that Ahold Delhaize takes is that it lags back in comparison to their peers, who are more active in combatting plastic waste than they are. (under 16).

The second breach is that Ahold Delhaize fails to disclose material information regarding the environmental impacts of plastic packaging, despite acknowledging that the topic is environmentally material. This can be demonstrated by reference to comparing the Group’s disclosures on plastic packaging against the disclosure requirements relating to each of the Core Categories: in each case, Ahold Delhaize’s disclosures do not correspond with the level of information issuers are required to disclose in relation to the Core Categories. Moreover, the information that it does provide on the topic of plastic packaging is not supported by relevant KPIs (12.2). Ahold Delhaize has therefore also breached the overarching obligation in the Reporting Requirements to provide sufficient information for a reader to understand the “impact” of the group on the environment (12.3). For the purpose of showing the lack of adequate information, the Core Categories have been divided into two interlinked areas: (i) policies, due diligence carried out in respect of policies and outcomes of policies; and (ii) risks and risk management. (under 17.3-17.6).

In line with the intention of the Non-Financial Reporting Directive to enable external stakeholders to measure and monitor the performance of companies with regard to sustainability matters, the Reporting Requirements oblige issuers to provide information regarding the policies they have in place in relation to the Subject Areas, the due diligence measures associated with these policies and their outcomes. The Sources of Interpretation clarify what is understood by policies, due diligence and outcomes as follows: (i) Policies are described in the Guidelines as “approaches to key non-financial aspects”, including the “main objectives” of such approaches “and how they are planning to deliver on those objectives and implementing those plans”. The Supplement adds that the purpose of requiring disclosure of this information is to enable stakeholders to understand the “robustness” of the issuer’s approach to such matters. (ii) The Guidelines clarify that due diligence refers to how issuers are intending to “[deliver] against a concrete objective”. An example given in the Supplement of relevant disclosures relating to policies and due diligence indicates that “the rationale” behind policies is relevant, as well as disclosures regarding the level of oversight over material topics and related policies. Due diligence can therefore be summarised as the research conducted by an issuer to determine which policy to put in place regarding a particular material topic and to ensure its efficacy, as well as the internal processes in place to implement it and ensure the objective of the policy is achieved. (iii) Companies are required to report on the outcomes of their policies to provide stakeholders with the means to “monitor and assess” the company’s management of non-financial matters, including by reporting against the targets it has set. The Guidelines state that this analysis “should include relevant non-financial KPIs”, including “the KPIs that they consider most useful in monitoring and assessing progress and supporting comparability across companies and sectors”.

The due diligence disclosed by the Group is, according to ClientEarth, high-level and general, and due to inconsistencies in terminology used in the Management Report, it is not clear whether the information provided relates to the topic of plastic packaging. It follows from the lack of coherent disclosure relating to policies that disclosures on outcomes are similarly limited, particularly by the Group's failure to provide relevant KPIs indicating its performance against its objectives (under 18). ClientEarth demonstrates this by showing that in the Management Report Ahold Delhaize only discloses some general objectives, in relation to its own brand packaging only, which accounts for less than half of the packaging of Ahold Delhaize's goods, according to ClientEarth (under 19.1-19.6).

Moreover, Ahold Delhaize does not provide any information specifically related to the topic of plastic packaging that could be described as due diligence for the purposes of the Reporting Requirements. Instead, the Group limits itself to general comments regarding the setting and implementation of the Group's "Healthy and Sustainable" strategy, such as how the strategy is set, the integration of targets pertaining to the strategy into its remuneration structure, and the frequency with which the committee responsible for the strategy meets. These general disclosures on due diligence are distributed in various locations throughout the Management Report, and, due to inconsistency in the terminology used in the Management Report, Ahold Delhaize provides an example of shopping carts being manufactured out of recycled plastic. However, this is not related to the topic of "sustainable packaging". ClientEarth notes that the obligation to disclose policies relating to the Subject Areas is a "comply or explain" requirement, meaning that in the event an issuer does not have a policy relating to a Subject Area, it is required to explain why. However, there is nothing akin to an explanation of the lack of policies relating to the topic of plastic packaging in the Management Report, according to ClientEarth. In line with the general principle stated in the Guidelines that disclosure should be "comprehensive but concise", it is logical that issuers link certain topics together to describe the common due diligence processes shared between them in order to avoid repetition. However, the Guidelines also describe due diligence as how the issuer intends to "deliver on concrete objectives" indicating that specificity is envisaged for a proper understanding of relevant due diligence processes (under 19.7-19.11).

As to outcomes, ClientEarth alleges that despite several of its objectives containing quantitative targets, Ahold Delhaize does not disclose any KPIs revealing its progress against its objectives or the impacts of the actions taken by the Group in respect of plastic packaging. In fact, it only provides a single KPI on the topic of plastic packaging – the number of non-reusable plastic carrier bags distributed to shoppers during the financial year, which is not a matter for which the Group has a quantitative target in place. The absence of KPIs indicating progress against objectives means that stakeholders have no way to "monitor and assess" the actions that Ahold Delhaize has carried out on the topic of plastic packaging. Moreover, the Group acknowledges that it only has an insight into approximately 60% of our total business in terms of plastic packaging (its own brand). This, according to ClientEarth, throws into question whether the objectives stated on the topic of plastic packaging are credible and attainable, or simply aspirational. Moreover, despite having stated that it has calculated data in respect of own-brand packaging for 60% of its total business, it does not actually disclose this data. This means that Ahold Delhaize has effectively not disclosed any information whatsoever that can be described as "outcomes" for the purposes of the Reporting Requirements .

As to risks and risk management issuers should disclose both: (i) risks of negative impacts on the issuer (financial materiality) and the management of these risks; (ii) risks that the issuer will have a negative impact on the environment through its business relationships, products and services (environmental materiality); and (iii) how these risks are managed, according to ClientEarth (under 20).

Ahold Delhaize makes only the following reference to the adverse impacts of plastic packaging on the environment: "[a]cross the globe, millions of tonnes of plastic ends up in landfills, is burned, or leaks into the environment – and that amount is rising every year. At the current pace, there will be more

plastic than fish in the ocean by 2050. That is why... we're working hard to eliminate plastic waste." This statement is limited in both breadth and depth, according to ClientEarth. ClientEarth notes that Ahold Delhaize limits itself to discussing risk management as it relates to risks to the company, but not risks of the company causing adverse impacts on the environment or society. Since Ahold Delhaize also excludes topics it identifies as environmentally material from topic-specific disclosures on risk management, the result is that Ahold Delhaize does not disclose any information in the Management Report on how it manages the risk of the Group adversely affecting the environment, whether in relation to plastic packaging or any other environmentally material topic (under 21).

ClientEarth concludes that (i) the targets, generalised statements and specific actions disclosed by Ahold Delhaize on the topic of plastic packaging fall short of a policy in the sense of the Reporting Requirements, and relate only to packaging of own-brand goods, which comprises less than half of Group's net sales; (ii) the Group has failed to disclose specific due diligence information on the topic of plastic packaging, as well as provide any data (quantitative or qualitative) on the outcomes of actions taken; (iii) the description of the risk of adverse impacts on the environment associated with plastic packaging makes only brief reference to issues associated with "plastic waste", without providing detail or contextualising Ahold Delhaize's role in contributing to these issues; and (iv) Ahold Delhaize does not provide any risk management information in the Management Report relating to either risks of adverse impacts on the environment broadly, nor those associated with plastic packaging in particular. In each case, Ahold Delhaize falls short of providing information corresponding with the Core Categories to the standard mandated by the Reporting Requirements, which leads to the conclusion that, overall, Ahold Delhaize cannot be said to have provided environmentally material information on the topic of plastic packaging, i.e. sufficient information for a reader to understand the impact of the Group. Taken together with Ahold Delhaize's failure to disclose financially material information the Group has not complied with the Overriding Obligation, which is to provide sufficient information for an understanding of the group's "development, performance, position and impact." (under 22).

As to enforcement, ClientEarth relies on Article 25 of the Financial Supervision Act, which provides that the supervisory conduct of the AFM is to focus on (inter alia) "orderly and transparency in financial markets" ("orderly and transparent transactions in the financial markets", FRA) and "integrity between market parties". Many stakeholders are involved here, among whom consumers seeking to make more sustainable purchasing choices. ClientEarth notes that this group is an especially important group of stakeholders to Ahold Delhaize, as a consumer-facing company. Ahold Delhaize's failure to disclose material information on the topic of plastic packaging is systematic and severe, and goes right to the heart of the AFM's remit as set out in the Financial Supervision Act. ClientEarth therefore requests that the AFM take action in the way that will go furthest towards rectifying the knowledge gap arising from Ahold Delhaize's failure to comply with the law, and in a manner that is consistent with its remit, by issuing a recommendation to Ahold Delhaize that it publish a press release outlining and correcting the deficiencies in the Management Report that ClientEarth has identified in its Notification (under 23 and 24).

4.2.3 Notification to National Contact Point for OECD Guidelines

BankTrack, Greenpeace Nederland, Milieudefensie, Friends of the Earth collectively filed a complaint against ING for failure to commit appropriately to achieving targets under the 2015 Paris Agreement on 19 April 2019.²³⁸ The complaint alleged that ING had violated environment and consumer interest provisions of the OECD Guidelines by failing to set targets to reduce the emission of

²³⁸ The Netherlands, National Contact Point for the OECD Guidelines for Multinational Enterprises (2019), [Final Statement. Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands \(Milieudefensie\) versus ING](#). 19 April 2019.

greenhouse gases from its financial products. Further, ING had not reported the indirect product emissions of companies and processes that it financed, amounting to a disclosure breach under the guidelines, according to the complaint.

In its initial assessment, the Dutch National Contact Point accepted the case for further examination, noting the complexity with respect to calculation of CO₂ emissions. It felt that this deliberation could purposely enhance the effectiveness of the guidelines. The final statement by the National Contact Point held that ING is obliged under the OECD Guidelines for Multinational Enterprises to set climate goals that are aligned with the Paris Agreement.

Pursuant to the willingness of both parties to participate in mediation, agreement was reached with respect to ING's adoption of the so-called Terra approach, and the PACTA and PCAF methodologies to measure and set targets with respect to the bank's climate impact.²³⁹

As the ING's Annual Report of 2021 shows, the bank has made progress in this field and set targets, including intermediate steps, until 2050.²⁴⁰ The bank is aiming to steer its lending portfolio towards net-zero greenhouse gas emissions by 2050 or sooner. In its integrated climate report on ing.com the bank reported on its progress until end-2020 in the nine most carbon-intensive sectors, which are its main focus for steering. The bank was working on pathways for those sectors to align its targets for them with its own net-zero ambitions. In addition, in 2022, the integrated climate report, including the progress report, stated the following. The ING Bank starts with managing its own environmental footprint, for example by travelling by train rather than plane for short-haul business trips. In this regard, it has set a mid-term target to reduce scope 1, scope 2, and scope 3 business travel CO₂e emissions by 75% by 2025 compared to ING's 2014 baseline. Moreover, ING steers its loan book to reach net zero by 2050 or sooner for the nine sectors of industry through its Terra approach. It was important for the organisations filing a complaint that ING set intermediate targets, which it did for 2030. Eight sectors are aligned with the net zero scenario, one (shipping) is not (yet). A target for shipping will be set as soon as one is adopted under the Poseidon Principles, a financial industry framework for assessing climate alignment for the shipping sector.²⁴¹

5. Conclusions and ways forward

This section should include brief summary of findings and proposals how to improve environmental protection through consumers' rights, and how to improve enforcement of consumers' rights in this context.

What can be done on national level? What could be done at EU level?

Please include:

- *Short summary of findings*
- *Overarching observations and assessments*
- *Best promising practices*
- *Suggestions for improvements stemming from the research or opinions of experts*

5.1 Summary of findings and overarching observations and assessments

The conclusions about judicial proceedings before the court are that individual consumers and consumer associations may rely on Articles 6:193a-193j of the Unfair Trade Practices Act before the court if they have been misled by certain advertising, among which a certain use of labels. Class actions may also take

²³⁹ The Netherlands, National Contact Point for the OECD Guidelines for Multinational Enterprises (2019), [Final Statement. Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands \(Milieudefensie\) versus ING](#). 19 April 2019.

²⁴⁰ ING BANK (2022), [ING Bank Annual report 2021](#). pp. 11, 26-28, 67, 129 and 133.

²⁴¹ ING BANK (2022), [2022 ING Climate Report](#), pp. 6-10, pp. 45-85.

place (Article 6:193j, subsection 3²⁴², in conjunction with Article 3:305a of the Dutch Civil Code²⁴³). There is a shift of the burden of proof. The burden of proof in these cases therefore rests on the business²⁴⁴. Damage must be proven to be directly caused by the misleading advertising/label. Damages may be claimed (Article 6:193j, subsection 2²⁴⁵). An unlawful agreement is voidable (Article 6:193j, subsection 3²⁴⁶). Anyone can rely on Article 6:162 of the Civil Code.²⁴⁷ The burden of proof rests on the consumer. If there has been a breach of the duty of care, and the consumer proves that the damage was caused by this directly, damages may be claimed, too.²⁴⁸

Environmental laws may be relied on by parties whose interest is directly affected. The main Act is the Environmental Management Act (*Wet milieubeheer*).²⁴⁹ The Acts are enforced by administrative authorities, who may, for example, issue permits to businesses for their activities in these areas or give them exemptions. If an interested party, i.e. a party who is affected by, for example, these permits, feels that the permits are issued wrongfully it may complain to the administrative body who took the decision and appeal to the Administrative Jurisdiction Division of the Council of State (for example: Article 20.1 of the Environmental Management Act).²⁵⁰

The conclusions as to non-judicial proceedings are as follows. It may be concluded that consumers reporting to supervisory authorities (administrative bodies) such as the Authority on Consumers and Markets on the basis of the Unfair Trade Practices Act²⁵¹ about environmentally unfriendly advertising, including an abuse of labels, may contribute to better behaviour by businesses, as investigations may be made and orders and fines may be given (administrative tools), and that this serves the general interest.²⁵² It is difficult for consumers to obtain reliable information on the impact of packaging or products on the environment on the basis of the use of labels, as only a few of them are mandatory and regulated. Moreover, there are many confusing self-awarded labels that are not transparent.^{253 254 255} Non-judicial proceedings on the basis of the Code for Environmental Advertising before the Advertising Code Committee may be effective for society as a whole,²⁵⁶ as, in case of environmentally misleading advertising, the media no longer publish these advertisements. There is a shift of the burden of proof.²⁵⁷ However, there are no individual remedies.

The conclusions about examples of judicial proceedings are as follows. In the case about advertisements for pork much attention is paid to the stipulation that a trade practice such as this one should be unfair to an average consumer.²⁵⁸ Although a business should give correct information (and in this case, it is

²⁴² The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193j, subsection 1](#).

²⁴³ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 3, Article 305a](#).

²⁴⁴ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193j, subsection 1](#).

²⁴⁵ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193j, subsection 1](#).

²⁴⁶ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193j, subsection 1](#).

²⁴⁷ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 162](#).

²⁴⁸ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 162](#).

²⁴⁹ The Netherlands, Environmental Management Act (*Wet milieubeheer*), [13 June 1979](#).

²⁵⁰ The Netherlands, Environmental Management Act (*Wet milieubeheer*), [13 June 1979](#).

²⁵¹ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Section 3.3A, Articles 193a-193j](#).

²⁵² The Netherlands, Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), 'Onze bevoegdheden', [Web page](#); The Netherlands, Consumer Protection Enforcement Act (*Wet handhaving consumentenbescherming*), [Article 8.8](#). The Netherlands, Consumer Protection Enforcement Act (*Wet handhaving consumentenbescherming*), [20 November 2006](#), Article 1.1.

²⁵³ European Union, European Commission (2016), [Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices](#), Commission staff working document.

²⁵⁴ The Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), 'Regulators create guideline for apparel industry on use of materials index in marketing' ([Toezichhouders maken richtlijn voor kledingindustrie voor gebruik materialenindex bij marketing](#)), News release, 10 October 2022.

²⁵⁵ The Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), [Legislator to help consumers make sustainable choices with reliable information](#) (*Wetgever aan zet consument met betrouwbare informatie te helpen duurzame keuzes te maken*). News release, 16 June 2022.

²⁵⁶ The Netherlands, Advertising Code Foundation (*Stichting Reclame Code*) (2022), [Code for Environmental Advertising](#) (*Milieu Reclame Code*).

²⁵⁷ The Netherlands, Advertising Code Foundation (*Stichting Reclame Code*) (2022), [Code for Environmental Advertising](#) (*Milieu Reclame Code*), Article 3.

²⁵⁸ The Netherlands, District Court The Hague (*Rechtbank Den Haag*) (2019), [Case nr. : C/09/550422 / HA ZA 18-354](#), 30 January 2019, ECLI:NL:RBDHA:2019:616.

held that the information is not wrong), a consumer has the duty to investigate the information given himself.²⁵⁹ The case about Volkswagen cheating with a label shows that claims about impact on the environment and a wrongfully obtained accredited label can play a role in civil proceedings before the courts based on the Unfair Trade Practices Act.²⁶⁰

The conclusions about examples of non-judicial proceedings are as follows. The investigations by the Netherlands Authority for Consumers and Markets into the clothing industry and the energy market shows that this may be quite an effective tool, as businesses selling clothes with unclear labels as to sustainability and energy providers promised to improve this and donated money to organisations which try to promote this.²⁶¹ This is good for the reputation of the companies, but it is also beneficial for further activities in this field. The Volkswagen cases show that a case before the court may lead to damages for consumers,²⁶² but that a case reported to the Netherlands Authority for Consumers and Markets about the same situation may lead to a considerable fine, which is good in the public interest.²⁶³ The cases before the Advertising Code Committee show that an environmental claim may not be misleading, and must in general be proven to be correct by the business.²⁶⁴

The conclusions about material and procedural requirements for enforcing consumer/environmental rights are the following. In terms of procedural law, it is easy for consumers and consumer associations to instigate claims pursuant to consumer law against advertisers or producers in the general interest without reference to individual damage before the courts or they can notify supervisory authorities of misleading claims or labels, if a collective interest can be proven and if (before the courts) there is a link with the Netherlands.²⁶⁵ When environmental laws are applied, of which the Environmental Management Act²⁶⁶ is the most important one, an interested party may challenge the decision of the administrative body who took the decision and appeal to the Administrative Division of the Council of State.²⁶⁷ Consumers may also instigate proceedings before the Advertising Code Committee, without a collective interest. Dutch law applies when there is a link with the Netherlands.

In terms of material law, there usually is a shift of the burden of proof, unless consumers or consumer associations rely specifically on a breach of the duty of care, laid down in Article 6:162 of the Civil Code.²⁶⁸ As all circumstances in cases like these have to be weighed, this is complicated, as the Shell case shows.²⁶⁹ In this case it is shown, however, that a business with a great impact has its own responsibility and has to adhere to a very high standard of care. If consumers want damages, damage has to be proven by the plaintiff on the basis of the Unfair Trade Practices Act²⁷⁰ or of Article 6:162 of the Civil Code, or in

²⁵⁹ The Netherlands, District Court The Hague (*Rechtbank Den Haag*) (2019), [Case nr. : C/09/550422 / HA ZA 18-354](#), 30 January 2019, ECLI:NL:RBDHA:2019:616.

²⁶⁰ The Netherlands, District Court Amsterdam (*Rechtbank Amsterdam*) (2021), [Case no. C/13/647072 / HA ZA 18-432](#), 14 July 2021, ECLI:NL:RBAMS:2021:3617.

²⁶¹ The Netherlands, Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), '[Going forward, Decathlon and H&M will provide better information about sustainability to consumers](#)', News release, 13 September 2022

²⁶² The Netherlands, District Court Amsterdam (*Rechtbank Amsterdam*) (2021), [Case no. C/13/647072 / HA ZA 18-432](#), 14 July 2021, ECLI:NL:RBAMS:2021:3617.

²⁶³ Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2017), [Besluit van de Autoriteit Consument en Markt tot het opleggen van een boete aan Volkswagen AG](#), 18 October 2017.

²⁶⁴ The Netherlands, Advertising Code Foundation (*Stichting Reclame Code*) (2022), [Code for Environmental Advertising \(Milieu Reclame Code\)](#).

²⁶⁵ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193j, subsection 1](#). The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 3, Article 305a](#). The Netherlands, District Court Amsterdam (*Rechtbank Amsterdam*) (2021), [Case no. C/13/647072 / HA ZA 18-432](#), 14 July 2021, ECLI:NL:RBAMS:2021:3617. The Netherlands, The Hague District Court (*Rechtbank Den Haag*) (2021), [Case no. C/09/571932 / HA ZA 19-379](#), 26 May 2021, ECLI:NL:RBDHA:2021:5339.

²⁶⁶ The Netherlands, Environmental Management Act (*Wet milieubeheer*), [13 June 1979](#).

²⁶⁷ The Netherlands, Environmental Management Act (*Wet milieubeheer*), [13 June 1979](#).

²⁶⁸ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 162](#).

²⁶⁹ The Netherlands, The Hague District Court (*Rechtbank Den Haag*) (2021), [Case no. C/09/571932 / HA ZA 19-379](#), 26 May 2021, ECLI:NL:RBDHA:2021:5339.

²⁷⁰ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 193j, subsection 1](#).

court proceedings following decisions by supervisory authorities. It should be proven that the damage is the direct result of the act of the business involved.²⁷¹ In the context of environmental law as such, it will be hard to prove that, for example permits, have a direct impact on consumer rights.

The conclusions about the intersections and gaps regarding the links between consumer rights and the environment are the following. There are a number of intersections. Consumer law, especially the Unfair Trade Practices Act, makes it possible to act against misleading advertisements with a shift of the burden of proof, which is beneficial for the protection of the environment. The Unfair Trade Practices Act, in addition, enables consumers to receive damages in court proceedings. Class actions in particular may succeed in major cases where a breach of the duty of care (Article 6:162 of the Civil Code) is concerned. Environmental law as such does not address consumer rights, but it serves the interest of the protection of the environment as a whole, for example because of conditions that have to be met to get a permit, for example to dump waste. Consumer rights, enforced by supervisory authorities, may lead to a change in the behaviour of businesses and therefore the protection of the environment on a larger scale, as there are penalties and fines. This benefits the environment, but not so much the consumer. Regulation by the Advertising Code Commission may be effective in practice where misleading advertisements are concerned. The media will no longer publish the advertisements with false claims, which is in the interest of the protection of the environment, but it does not directly benefit the consumer. There are several gaps in the law. Labels, for example, are confusing, not transparent and mostly self-awarded. This makes it difficult for consumers to make sustainable choices as to packaging and products. This is a gap in the law.

The requirements of the Aarhus Convention are met, although the question who has access to information is only implemented in practice, but not in legislation yet. Cases show that in practice there is a broad, and not restricted, interpretation of the concept of providing environmental information, which is in line with EU law.²⁷²

The Resolution of Mass Damage in Collective Actions Act (*Wet Afwikkeling Massaschade in Collectieve Actie*), effective as of 1 January 2020,²⁷³ allows consumers (and others) to be represented by interest groups in the general interest and is quite effective, as the Volkswagen case, among other things, shows.

Only a few amendments in the fields of, for example, cross-border claims and funding have to and will be made to transpose the Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers.²⁷⁴

There are no due diligence laws. However, there are businesses giving an insight into the human rights and environmental risks of their activities. This is voluntary, though. Legislation in order to impose duties on businesses is being drafted.²⁷⁵

²⁷¹ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Book 6, Article 162](#).

²⁷² The Netherlands, Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak Raad van State*) (2022), [Case No. 202101970/1/A3](#), 18 May 2022, ECLI:NL:RVS:2022:1432.

²⁷³ The Netherlands, Civil Code (*Burgerlijk Wetboek*), [Article 3:305 a](#): The Netherlands, Code on Civil Procedure (*Wetboek van Strafvordering*) [Article 1018f](#).

²⁷⁴ European Union, European Parliament and Council of Europe (2020), [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 \(Text with EEA relevance\)](#), article 6, paragraph 3; The Netherlands, Minister for Legal Protection (*Minister voor Rechtsbescherming*) (2022), [Explanatory Memorandum. Bill for the Act on the implementation of the Directive representative claims for consumers \(Memorie van Toelichting Implementatiewet richtlijn representatieve vorderingen voor consumenten\)](#) p. 7; The Netherlands, Minister for Legal Protection (*Minister voor Rechtsbescherming*) (2022), [Bill for the Act on the implementation of the Directive representative claims for consumers \(Implementatiewet richtlijn representatieve vorderingen voor consumenten\)](#), article 1A.

²⁷⁵ The Netherlands, Minister of Foreign Trade and Foreign Development (2021), 'Bouwstenen voor IMVO-wetgeving', [Letter to House of Representatives](#), 5 November 2021

Overarching observations and assessments are the following. Collective interests are well-served. It is easy for consumer organisations, just as individual consumers, to proceed before the courts and if a collective interest is served consumers and consumer organisations can also turn to supervisory authorities. In the case of misleading advertisements and a wrongful use of labels, there is a shift of the burden of proof, which benefits consumers and the environment. Before the courts, damages may be awarded, which is beneficial for consumers, but it will also force businesses to mend their ways, which is beneficial for the protection of the environment. There is no direct benefit for individual consumers when they turn to the supervisory authorities, but their investigations lead to better behaviour, and donations to organisations which have as their object the protection of the environment (instead of paying fines) are also helpful for environmental issues. Moreover, a better use of labels, for example, will benefit the consumer in choosing sustainable products. There are improvements in this field, especially instigated by Guidelines of the Authority for Consumers and Markets. It is preferable that there are much fewer, mandatory labels, supervised by an independent body. The terminology used in the fields of consumer law and environmental law is vague and concepts should be much more clearly defined. The supervisory system is much too fragmented to be completely effective. This should be remedied. Proceedings before the Advertising Code Committee are easy to instigate for consumers, no collective interest has to be demonstrated and there is a shift of the burden of proof, but there are no individual remedies. These proceedings benefit the environment rather than the individual consumer. Environmental laws protect the environment, but they do not really address consumer interests as such. This also goes for the application of the Aarhus Convention. Due diligence is work in progress.

All in all, consumer law serves environmental interests in a number of ways, but environmental law has few links with consumers as such. Depending on the question which specific interest one wants to focus on (the consumer's immediate interest, the consumer's interest in the long run, the collective consumer interest or the protection of the environment as a whole) different stipulations of civil law or administrative law may be relied upon. There is no way to say which are better or worse.

5.2 Best promising practices

Best promising practices are the following:

- The Guidelines drafted by the Netherlands Authority for Consumers and Markets, specifying the requirements which environmental claims by business have to meet when they make an environmental claim.²⁷⁶
- The Guidelines drafted by the Netherlands Authority for Consumers and Markets to improve the use of the Higg Material Sustainability Index in the case of clothing.²⁷⁷
- An investigation by the Netherlands Authority for Consumers and Markets into the clothing industry on the basis of consumer complaints shows that this may be quite an effective tool if used as a means to settle the wrong use of labels. Businesses selling clothes with unclear labels as to sustainability promised to improve this and donated money to organisations which try to promote this.²⁷⁸ This also happened in the energy sector.²⁷⁹
- The Resolution of Mass Damage in Collective Actions Act (*Wet Afwikkeling Massaschade in Collectieve Actie*), effective as of 1 January 2020, allows consumers (and others) to be

²⁷⁶ Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), [Guideline on the claims as to sustainability \(Leidraad Duurzaamheidsclaims\)](#).

²⁷⁷ The Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), 'Regulators create guideline for apparel industry on use of materials index in marketing' ([Toezichhouders maken richtlijn voor kledingindustrie voor gebruik materialenindex bij marketing](#)), News release, 10 October 2022.

²⁷⁸ The Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), '[Going forward, Greenchoice and Vattenfall will provide better information about sustainability to consumers](#)', News release, 13 September 2022.

²⁷⁹ The Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), '[Going forward, Greenchoice and Vattenfall will provide better information about sustainability to consumers](#)', News release, 10 October 2022.

represented by interest groups in the general interest. Interest groups which have been active for less than twelve months can represent consumers.

- The Notification by ClientEarth to the Netherlands Authority for the Financial Markets about a lack of disclosure of, among other things, financial risks, if a company does not report about the environmental risks it takes, on the basis of the Non-Financial Reporting Directive on 18 November 2018.²⁸⁰
- The Notification filed by BankTrack et al. in the case of the major Dutch ING Bank.²⁸¹ Bank Track notified the National Point of Contact for OECD Guidelines about the ING Bank not adhering to its reporting obligations as to greenhouse gases in terms of environmental interests and consumer rights. This was recognised by all the parties involved and resulted in the ING Bank setting intermediate targets for nine major sectors industry in 2030 voluntarily.

In progress:

- To introduce a less fragmented system of supervisory authorities and unify the laws they apply in the field of consumer interests, as experts state. To establish one European supervisory authority and unified administrative consumer law, advocated by the government.²⁸²
- To transpose the Directive 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers, some changes for cross-border cases and changes in terms of funding have to be made in the Resolution of Mass Damage in Collective Actions Act. Necessary. If a third party is involved in funding a representative organisation there may not be a conflict of interests. Courts or administrative authorities may make the representative organisation refuse or make changes in respect of the relevant funding and, if necessary, possibly reject the legal standing of the organisation.²⁸³
- As to human rights due diligence, to draft new legislation and introduce it in Parliament as soon as possible, imposing the duty on businesses to give an insight into human rights and environmental risks. Attempts are made to pass it in accordance with new EU legislation in this field. The government makes an effort to promote EU legislation in this field. The government recommends to promote a level playing field by also imposing the human rights due diligence investigation on businesses which are not established in the European Union, but which do export products or services to the internal market.²⁸⁴

As to complaints mechanisms, a major Dutch bank has noticed that there may be a problem in clients' value chains when these clients do not have such a mechanism themselves. The bank is therefore currently developing a mechanism itself which is useful for stakeholders. The aim is to then to resolve disputes between clients and affected stakeholders, using the bank's leverage, to improve the situation about which a complaint has been filed.

²⁸⁰ The Notification ClientEarth and the Plastic Soup Foundation submitted to the Dutch Authority for the Financial Markets in respect of Ahold Delhaize as to the financial year ending 3 January 2021, published on 2 March 2021 (the Management Report) on 18 November 2021.

²⁸¹ The Netherlands, National Contact Point for the OECD Guidelines for Multinational Enterprises (2022), *Final Statement Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) versus ING*, 19 April 2019

²⁸² The Netherlands, Minister of Foreign Trade and Foreign Development (2021), 'Bouwstenen voor IMVO-wetgeving', [Letter to House of Representatives](#), 5 November 2021.

²⁸³ European Union, European Parliament and Council of Europe (2020), *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 (Text with EEA relevance)*, article 6, paragraph 3; The Netherlands, Minister for Legal Protection (*Minister voor Rechtsbescherming*) (2022), *Explanatory Memorandum. Bill for the Act on the implementation of the Directive representative claims for consumers (Memorie van Toelichting Implementatiewet richtlijn representatieve vorderingen voor consumenten)* p. 7; The Netherlands, Minister for Legal Protection (*Minister voor Rechtsbescherming*) (2022), *Bill for the Act on the implementation of the Directive representative claims for consumers (Implementatiewet richtlijn representatieve vorderingen voor consumenten)*, article 1A.

²⁸⁴ The Netherlands, Minister of Foreign Trade and Foreign Development (2021), 'Bouwstenen voor IMVO-wetgeving', [Letter to House of Representatives](#), 5 November 2021

Recommendations

Recommendations are the following:

- Representatives of the supervisory authorities, the attorney representing businesses and the CSO that was represented all expressly state that the terminology, for example environmental information, used at the moment is too vague and European and national legislation should remedy this.
- The Authority for Consumers and Markets states that the government should draft legislation in the field of labels, so that they are only provided by an independent (possibly governmental) institution.²⁸⁵
- Experts say that environmental information on products should be made mandatory on a European and national level.²⁸⁶
- Experts say that some advertising, such as advertising for fossil fuel, should be banned completely.²⁸⁷ In this context the use of petrol cars, but also home gas heating, eating red meat and flying, for example, should be phased out. The FRA and the NHRIs should be more active in this field, according to the CSO consulted.
- Experts state that some consumer rights to remedies, for example the replacement of a defective product, instead of repair, and free return of a product purchased online, based on the Consumer Rights Directive and on the stipulations on consumer sales in Book 7 of the Dutch Civil Code²⁸⁸ should be restricted for the sake of the environment. This also goes for the free transport of products bought online. There should be a mandatory ranking of these remedies, whereby the environmentally friendly ones (for example repair) should prevail over the other ones (for example replacement).²⁸⁹

²⁸⁵ The Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt*) (2022), [Research into the effect of labels on sustainability on consumers](#) (*Onderzoek naar de invloed van duurzaamheidskeurmerken op consumenten*), News release, 16 June 2022.

²⁸⁶ Pavillon, C.M.D.S. (2022), 'Dwingend consumentenrecht en de overgang naar een circulaire economie: het mes snijdt aan twee kanten', *Ars Aequi*, July/August 2022, pp. 576-585; Terryn, E. and Van Gool, E. (2021), 'Kunnen we e-commerce vergroenen door het consumentencontractenrecht te herzien?', *TvC* 2021, edn. 1, pp. 15-28.

²⁸⁷ Kaupa, C. (2021), 'Smoke gets in your eyes: misleading fossil fuel advertisement in the climate crisis', *Journal of European Consumer and Market Law*, 1/2021, pp. 1-25.

²⁸⁸ European Union, European Parliament and Council of Europe (2011), [Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance/](#)

²⁸⁹ Pavillon, C.M.D.S. (2022), 'Dwingend consumentenrecht en de overgang naar een circulaire economie: het mes snijdt aan twee kanten', *Ars Aequi*, July/August 2022, pp. 576-585; Terryn, E. and Van Gool, E. (2021), 'Kunnen we e-commerce vergroenen door het consumentencontractenrecht te herzien?', *TvC* 2021, edn. 1, pp. 15-28.