Class Actions
2021

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the sixth edition of *Class Actions*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on India and the Netherlands.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Jonathan D Polkes and David J Lender of Weil Gotshal & Manges LLP, for their continued assistance with this volume.

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Getting The Deal Through

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France

Céline Lustin-Le Core
EBA Endrös-Baum Associés

OVERVIEW

Court system

1 Outline the organisation of your court system as it relates to collective or representative actions (class actions). In which courts may class actions be brought?

The introduction of the class action in French law through the Hamon Law is relatively recent, dating back to March 2014, and may be considered a 'small procedural revolution' in France.

The consideration of a possible introduction of this type of proceeding in French legislation began as early as 2005, when the first committee, formed in order to improve legislation so that class actions could be brought before French courts, began to work on the subject.

However, it took almost nine years for French lawmakers to issue the law consecrating class actions; known as the Hamon Law, it was passed on 17 March 2014 (Law No. 2014-344).

Later that year, in September 2014, a decree was introduced aimed at implementing the Hamon Law (Decree No. 2014-1081, 24 September 2014). On 31 December 2014, the remaining questions for the implementation of the Hamon Law were addressed in a circular (JUSC 1421594).

French lawmakers first chose to introduce class actions into French law 'through the back door' by adding only a small specific chapter to the French Consumer Code (Chapter III, Title II, Book IV, now Book VI since the French Government's Ordinance No. 2016-301 dated 14 March 2016 modified the Consumer Code and the numbering of its articles) and an article to the Judiciary Organisation Code (article L211-15) dedicated to this new kind of action, instead of choosing to create a new part of the French Code of Civil Procedure, consecrating this new type of procedure.

As a consequence of this choice, the scope of class actions was initially very limited, as the class actions provided for within this whole process were open to only 15 consumer associations approved on a national scale and to the damages resulting from the sales of goods, service supply or anticompetitive practice.

Things have moved on since the class action was introduced by article 184 of Law No. 2016-41 of 26 January 2016, in the French health system and in the French Health Code (articles L1143-1 to L1143-22, R1143-1 to R1143-14 and R1526-1) and was potentially extended to 486 health user-approved associations. Indeed, this law, which was validated by the constitutional council, allows the 486 existing health user-approved French associations to take legal action before French courts in health matters. On 26 September 2016, Decree No. 2016-1249 was introduced implementing Law No. 2016-41 of 26 January 2016. Since this decree entered into force, class actions in the health field may be brought before the administrative (articles R1143-1 of the Public Health Code and R 779-11 of the Code of Administrative Justice) and judiciary (civil) courts (article 862-2, 905 and 1575 of the French Code of Civil Procedure). In 2016, Title V of Law No. 2016-1547 passed on 18 November 2016 known as the Justice of the XXI Century Law, created a common legal framework for the class action proceedings introduced before the French civil or administrative court and extended class actions to three new fields: discrimination (particularly discrimination at work (introducing the articles L1134-6 to L1134-10 in the Labour Code)), data protection (based on article 43-ter of Law No. 78-17 of 6 January 1978, known as the Loi Informatique et Liberté) and environmental matters (introducing the article L 142-3-1 in the Environmental Code). On 6 May 2017, Decree No. 2017-888 was introduced specifying the common procedural base for all these different types of class actions. Lastly, articles 25 and 26 of Law No. 2018-493 dated 20 June 2018, concerning data protection, modified the article 43-ter of Law No. 78-17 of 6 January 1978 and adapted it to the EU regulation 2016/679 of 27 April 2016 by extending class actions to the compensation of material and moral damages caused by a controller or a processor after 25 May 2018.

Regarding the jurisdiction competent to state on this new type of action, French lawmakers decided not to create a new category of judges who would be in charge of class actions, but rather decided that the general jurisdiction competent for civil and administrative litigation would also be competent for class actions.

According to article L211-9-2 of the Judiciary Organisation Code, the Tribunal de Grande Instance (high court) is the rationae materiae competent judge for class actions in the consumer and competition field.

In the health field (article R1143-1 of the Public Health Code) and in the environmental, discrimination and data protection fields, class actions may be introduced before the French civil or administrative court (according to article L211-9-2 of the Judiciary Organisation Code to article 826-2 and following of the Civil Procedure Code and to articles L77-10-1 and following and articles R77-10-1 and following of the Code of Administrative Justice) depending on the competent jurisdiction. The rationae materiae competent judge is dependent on the person of the defendant. Whenever the defendant is a public entity, then the rationae competent judge will be the administrative court. Consequently, there is no material specialisation of judiciary courts and the user-approved associations could introduce their actions before the High Court or before the administrative court when the liability of a hospital or a public institution or body is concerned.

Regarding territorial competence, the effective competent jurisdiction is the high court of the place where the professional defendant in the procedure resides. If he or she does not reside in France or if he or she does not have a place of residence, the Paris High Court is designated as the effective tribunal. Consequently, without any court's specialisation, there are 206 courts that are potentially competent for health, environmental, discrimination and data protection in class actions in the French territory (42 administrative courts, 164 High Courts).

Nevertheless, class actions remain above all a specific means of action and a specific procedure established to facilitate the work of the judge and of the plaintiffs concerned, insofar as the judge has only one file to deal with instead of multiple files.

Frequency of class actions

2 How common are class actions in your jurisdiction? What has been the recent attitude of lawmakers and the judiciary to class actions?

For the consumer field the class action procedure was first introduced in French law on 17 March 2014 (Law 2014-344), whereas the decree pertaining to the application of the Hamon Law is two years old (24 September 2014) and the circular for the remaining questions regarding the law was published in December 2014 (JUSC 1421594).

In the health field, Law No. 2016-41 of 26 January 2016 was only recently implemented by Decree No. 2016-1249, which first entered into force on 26 September 2016. In the environmental, discrimination and data protection fields, Law No. 2016-1547, Justice of the XXI Century passed on 18 November 2016, was implemented by Decree No. 2017-888 dated 6 May 2017, which first entered into force on 10 May 2017.

As the laws authorising class actions are very recent, French jurisdictions have not been confronted with many class actions so far. The first one was filed on 1 October 2014. Since then, very few class actions have been filed, with around only 15 class actions having been filed since 2014. None of these 15 class actions have been successful at this stage, as no judgment retaining the liability of the defendant has been rendered so far and only a few proceedings introduced were finally settled.

In the consumer field, only 14 class actions have been introduced in France in since 2014. The different courts adopted a very restrictive interpretation of the scope of the consumer class action and considered that the landlord-tenant relationship, which is governed by the French Housing Relations Law dated 6 July 1989, cannot be considered as a service delivery entering into the scope of the Consumer Code, and is thus not applicable as a class action case and cannot, therefore, found a consumer class action. Within this framework the Paris Court of Appeal adopted this restrictive interpretation of the scope of the consumer class action with an important decision rendered on 9 November 2017. This restrictive interpretation was also confirmed by a judgment rendered on 14 May 2018 by which the High Court of Nanterre dismissed the very first class action introduced on 1 October 2014 by the French consumer association 'UFC Que choisir' and considered this action as inadmissible, as a landlord-tenant relationship cannot be considered as a service delivery entering into the scope of the Consumer Code.

Furthermore, the French Supreme Court rendered its first decision in a class action matter on 27 June 2018. It was seized on a strictly procedural question and rendered a first decision regarding the potential procedural inadmissibility of a class action owing to the fact that the different individual cases presented in the initial claim could be unrepresentative and that the claim filed to the different parties could thus be void. The French Supreme Court considered that the question of the representativeness of the individual cases presented in the initial claim is not only a procedural question on which the judge leading the proceeding can decide, but an argument on the merits of the case that must be examined by the judge deciding on the merits and on the question of the liability of the defendant.

Consequently, according to this approach, it is necessary to wait for the end of the first part of the proceeding and for the first judgment on liability to have a first assessment on the admissibility of the claim.

As this regulation is very new and innovative, the French judiciary is not yet used to this kind of proceeding and it will take time to acquire the necessary experience to assess the situation and to draw conclusions on the application of this new law. Nevertheless, it must be stated that these first proceedings have a long duration, as only a few first-instance decisions were rendered after four years and none of them considered the defendant as liable. It should be noted that only a few (15) proceedings have been introduced to date, showing that the new French class action system is not as efficient as expected. Finally, it must be noted that the first decisions rendered are dismissals, and that the question of the admissibility of the claims was subject to a very strict and rigorous control of the Paris High Court.

In the health field, the Association of Assistance to Parents of Children suffering from Anticonvulsant Syndrome, representing 2,000 children and their parents, introduced the first health class action concerning Depakine medication before the High Court of Paris on 17 May 2017. More than 14,000 women who took the medicine between 2007 and 2014 are potentially affected by this new class action. Considering the importance of the potential health scandal attached to the to-be-announced Depakine class action, the French National Assembly decided as early as 15 November 2016 to give its consent to the creation of a victim compensation fund. This compensation fund was introduced to the French law system by article 150 of the financial Law No. 2016-1917 of 29 December 2016, which modified Chapter II, Title IV, 1st Book, 1st Part of the Public Health Code, and added the articles L1142-24-9 to L1142-24-18 relative to the creation of this specific compensation fund for Depakine to the French Public Health Code. Decree No. 2017-810 implementing financial Law No. 2016-1917 entered into force on 1 June 2017 and created a non-judicial compensation procedure for the victims, which entered into force on 1 July 2017. The National Office for the Compensation of Medical Accidents (ONIAM), a French public office, created on 4 March 2002, will thus instruct the non-judicial compensation claims relative to Depakine filed by the victims in the framework of this non-judicial procedure. As a consequence of Depakine the victims will have the choice between a judicial class action before the High Court of Paris and a non-judicial compensation claim before ONIAM. In the health field this new form of class action emerged as a result of pharmaceutical scandals – for example, the Mediator scandal. The strong mediatisation of this type of class action will probably lead to more settlements or to the creation of non-judicial compensation procedures or compensation funds for the victims. This is an indirect but positive effect of the extension of class actions to the health field. In the health field, only three class actions have been introduced in France since 2016.

To our knowledge, only two class actions have yet been filed in the discrimination field, and two class actions in the personal data protection field. Globally, only 21 class actions have been introduced since 2014, out of which three class actions led to a mediation, and five class actions have been dismissed by the Tribunal.

Legal basis

3 What is the legal basis for class actions? Is it derived from statute or case law?

Class actions were introduced through the Hamon Law dated 17 March 2014 (Law 2014-344), and the Decree dated 24 September 2014 pertaining to the application of the Hamon Law. The second legal basis for class actions was introduced by article 184 of Law No. 2016-41 relative to the modernisation of the health system and Decree No. 2016-1249 dated 26 September 2016 implementing this new law and extending class actions to the health field. The third legal basis for class actions was introduced by Title V of Law No. 2016-1547 passed on 18 November 2016, known as the Justice of the XXI Century Law and Decree No. 2017-888 6 May 2017 implementing this new law and extending class actions to three new fields: discrimination (particularly discrimination at work), data protection and environment.

Hence, class actions are derived from statute law, which is considered in France as the primary and most notable basis for class actions.

Types of claims

4 What types of claims may be filed as class actions?

Consumption, health, environment, data protection and discrimination are several fields dealing with actual class actions.

In the consumption field, in France, as in other countries, collective actions aim to obtain compensation for individual and patrimonial damages resulting from material damage suffered by several consumers placed in an identical or similar situation, and damage incurred as a result of a contractual or legal breach by one or more of the same professionals (article L623-1 of the Consumer Code).

This new type of action is reserved for consumers, as only claims regarding consumer litigations may be filed as class actions. Consumer litigation concerns consumers and the disputes they have with professionals.

What matters here is the definition of a 'consumer'. In this respect, the Hamon Law added a new preliminary article to the French Consumer Code that defines the consumer as 'any natural person who is acting for purposes which are outside his trade, business, craft or profession'.

This definition corresponds to the transposition of Directive 2011/83 of the European Parliament and of the Council of 25 October 2011 (article 2 definitions).

According to article L623-1 of the French Consumer Code, this proceeding is limited to the damages resulting from: the sale of goods or services supplied; or anticompetitive practice in the meaning of Title II, Book IV of the French Commercial Code, or of articles 101 and 102 of the Treaty on the Functioning of the European Union.

The innovative aspect of article 184 of Law No. 2016-41 of 26 January 2016, which introduces class action in the Public Health Code, is that the application field is very broad. Article L1143-1 of the public Health Code provides that a health user-approved association may bring an action in order to obtain compensation for the individual damage suffered by health users being in an identical or similar situation caused by a breach of its legal obligations or a failure to fulfil its legal obligations by a producer, supplier or a service provider producing, supplying or providing services relative to the products mentioned under point II of article L5311-1 of the Public Health Code. Nevertheless, article L5311-1 of the Public Health Code provides a very large field of application. Indeed it includes 'human sanitary products and cosmetic products', which means that medicine, and essential oils, cosmetics and tattoo products are included in the application field of potential class actions.

In the environmental field, articles L142-2 and L142-3-1 of the Environmental Code also provide a very large field of application. The class action aims either to obtain an injunction to stop a nuisance or to obtain compensation for injury to persons or material losses suffered by several persons placed in an identical or similar situation, caused by the breach of legal obligations or a failure to fulfil its legal obligations relative to the protection of nature and of the environment, to the improvement of living conditions, to water protection, air protection, soil protection, sites or landscape protection, to the protection of urban planning, of sea fishing, or any damage relative to the fight against pollution and nuisance, nuclear safety, or radiation protection etc. The class action may be filed by any agreed environmental protection association according to article L141-1 of the Environmental Code existing for at least three years.

In the discrimination field, the class action aims either to obtain an injunction to stop a nuisance or to obtain compensation for damages suffered by several persons placed in an identical or similar situation, and caused by a discrimination linked to their origin, sex, family circumstances, pregnancy, physical appearance, economic situation, name, place of residence, state of health, loss of autonomy, handicap, genetic characteristics, customs, sexual orientations, gender, age, political opinions, union activities, ability to speak another language, real or presumed membership or non-membership of a particular ethnic group, people, race or religion. The class action may be filed by any union (for discrimination at work) or any association specialised in the fight against discrimination existing for at least five years.

In the data protection field, the class action was recently extended according to article 43-ter of Law No. 78-17 of 6 January 1978, known as the Loi Informatique et Liberté. It used to aim only to obtain an injunction to stop a nuisance regarding the treatment of personal data, suffered by several persons placed in an identical or similar situation, and caused by the breach of legal obligations contained in the Loi Informatique et Liberté or a failure to fulfil its legal obligations relative to data protection. Lastly, Law No. 2018-493 dated 20 June 2018, concerning data protection, modified article 43-ter of Law No. 78-17 of 6 January 1978, and adapted it to the EU regulation 2016/679 of 27 April 2016 by extending class actions to the compensation of material and moral damages caused by a controller or a processor. The class action may be filed by any union or any agreed users' or consumers' association or data protection association existing for at least five years.

In the field of crime, some collective actions may be filed before the criminal court by a registered association. This type of action before the criminal court already existed before the Hamon Law entered into force, but remains very rare and limited. Only a group of victims can form actions and only for certain crimes listed in articles 2-1 to 2-21 of the French Code of Criminal Proceedings. According to these articles, a registered association may launch a collective civil action within a criminal proceeding. The collective action must be launched by a duly registered non-profit association (according to the French Law of 1901) whose articles of association aim at combating certain types of crime and helping certain kinds of victims. As mentioned, this type of collective action is strictly limited to the crimes listed in the French Procedural Code, whereas over the years lawmakers have progressively extended the list of crimes for which a collective action is possible.

Relief

5 | What relief may be sought in class proceedings?

In the consumer field, according to article L623-2 of the French Consumer Code: 'The class action can only deal with the compensation of pecuniary damages resulting from material damages suffered by consumers'.

Throughout the steps of the French class action proceeding, the professional involved is first held responsible for the damage and then asked to repair his or her wrong in a pecuniary way. The financial damages can be given either to the association representing the class or to the consumers themselves. The judge decides whether the money is directly (by the professional) or indirectly (using the association) handed to the victims.

Furthermore, the judge may also order a reparation in kind (article L623-6 of the Consumer Code) if he or she thinks it is better adapted to the situation, if it is possible and also accepted by the consumer. He or she will then further define the conditions of this reparation in kind by the professional. However, this reparation in kind may be excluded if it generates disproportionate costs for the professional.

Victims can seek financial damages by just joining the group (Consumer Code, articles L623-8 and L623-9), while no punitive damages may be sought. Only the material damages suffered by the victims can be reimbursed.

In the health field, according to article L1143-3, paragraph 2 of the Public Health Code: 'The judge determines the personal injuries to be remedied suffered by health users constituting the group defined by him'.

Unlike the consumers' class action, which only repairs the financial damages suffered by the consumers being in an identical or similar situation caused by a breach of its legal obligation by a professional, the 'class action in the health field' provides compensation for the personal physical injury suffered by health users being in an identical or similar situation caused by a breach of its legal obligations or a failure to fulfil its legal obligations by a producer, supplier or a service provider producing, supplying or providing services relative to the products mentioned under point II of article L5311-1 of the Public Health Code.

In the environmental field, according to article L142-3-1 of the Environmental Code, the class action provides either an injunction to stop a nuisance or compensation for injury to persons or material losses suffered by several persons placed in an identical or similar situation.

In the discrimination field, according to article 86 (discrimination) or 87 and 88 (discrimination at work) of Law No. 2016-1547, Justice of the XXI Century dated 18 November 2016, the class action aims either to obtain an injunction to stop a nuisance or to obtain compensation for damages suffered by several persons placed in an identical or similar situation.

In the data protection field, according to article 43-ter of Law No. 78-17 of 6 January 1978, known as the Loi Informatique et Liberté, the class action aims to obtain an injunction to stop a nuisance regarding the treatment of personal data, suffered by several persons placed in an identical or similar situation and since 20 June 2018 to the compensation of material and moral damages caused by a controller or a processor.

Initiating a class action and timing

6 | How is a class action initiated? What is the limitation period for bringing a class action? Can the time limit for bringing a class action be paused? How long do class actions typically take from filing to a final decision?

A class action is initiated by a duly registered consumer or health-user association that issues a summons before the competent jurisdiction (high court or administrative court) of the place of residence of the defendant, and is served by a bailiff or by the secretary of the administrative court on the professional concerned. If there are several defendants, the association has the choice between the different places of residence of the defendants and is thus able to choose a jurisdiction.

As usual under French law, the parties are not required to provide a notice with opportunity to cure prior to filing the complaint.

Furthermore, as usual, before the high court and before the administrative court the registered consumer association and the registered health users association must be represented by a lawyer, whose name must be mentioned in the summons served by the bailiff on the concerned professional (defendant).

The limitation period for bringing a class action is the same as for general cases: five years. Furthermore, the filing of a class action immediately suspends the statute of limitation period for all the individual actions depending on the class action. The statute of limitation period shall then begin to run again for a minimum period of six months for the individual actions when the judgment on the class action becomes definitive or when the settlement agreement signed after a mediation is approved by the judge. Furthermore, it is possible for the parties to sign a special agreement to suspend, pause or interrupt the statute of limitation period.

Generally, class actions take more than two years from filing to a final decision on the damage, whereas the proceeding is split into two parts and made of two decisions: one decision on liability and the second on the damage.

CLASS FORMATION

Standing

7 | What are the standing requirements for a class action?

A class action in France is ruled by restrictive subjective conditions, in particular regarding the entitlement to act or standing: a class action may only be brought by a duly registered association. In order to initiate a class action, an association must be representative at a national level and approved under articles L811-1 and 811-2 of the French Consumer Code for consumer class actions or approved under article L1114-1 of the Public Health Code according to article L1143-1 of the Public Health Code for health class actions, or approved under article L141-1 of the Environmental Code according to L142-3-1 of the Environmental Code for environmental class actions. In the discrimination field the entitlement to act or stand in a class action may be brought by an association declared for five years and acting in the discrimination field according to articles 86 (discrimination) or 87 and 88 (discrimination at work) of Law No. 2016-1547, Justice of the XXI Century dated 18 November 2016, or by a union acting for the employees according to articles 87 and 88 of Law No. 2016-1547. In the data protection field the entitlement to act or stand in a class action may be brought by an association declared for five years and acting in the data protection field, as well as by unions and users' associations approved under articles L811-1 of the French Consumer Code according to article 91 of Law No. 2016-1547, Justice of the XXI Century.

In the consumer field, only 15 associations are approved under article 91 of Law No. 2016-1547 as having the authority to file a collective action, whereas in the health field, and in the environmental, discrimination and data protection fields, class action is open to all user-approved associations (with no requirement of representativeness at a national level). The number of associations potentially affected by health, environmental, discrimination and data protection class actions is much more significant than the number of associations able to file the consumers' class action. Indeed, there are plenty of user-approved associations at a national level and at a regional level. The public authorities will obviously extensively increase the number of people who have the ability to introduce a class action in several fields.

Consequently, only the consumer association and user-approved association or union (as claimant) and the professional (as defendant) may be party to a class action proceeding in France, whereas it must be noted that the consumer or user-approved association is not a legal person. In fact, there is a real substitution between the association that is a party to the class action proceeding and the individual person who will later enjoy the benefit of the class action once they make themselves known to obtain a compensation.

Furthermore, to initiate a class action, the registered association must provide evidence for identical cases of victims (two cases minimum) and for its recognition as a consumer or health user-approved association. Before any judgment, the association must show, using factual proof, that the professional can be held liable. At the same time, the association must substantiate its damage and define the adherence criteria of the group. As the action is initiated, it is relevant to mention that no mandate is given to the association by the victims. Such mandates are given only after the professional has been established as liable.

Participation

8 | Do members of a class have to opt in or opt out of the action? Are class members notified that an action has been commenced on their behalf and, if so, how?

In the consumer field, two types of proceedings for collective action are foreseen by the Hamon legislation: the ordinary procedure (opt-in system) and the simplified procedure (opt-out system).

Ordinary procedure

The Hamon Law created an ordinary procedure (articles L623-4 to L623-13 of the French Consumer Code) that is close to the opt-in procedure. This procedure requires an active approach on the part of the consumer, who has to take the initiative to join a consumer group identified by the judge as the group against which the professional is liable.

During this first step of the proceeding, the judge pronounces on the liability of the professional. The judge first establishes the prerequisites to join the group and the time limit to do so. Members of a class

have to opt in to the action. If the consumer does not join the group, then the decision will not apply to him or her.

The time limit to join the class action and ask for financial damages is two to six months starting from the date on which the publicity measures ordered by the judge are completed and effective (article L623-8 Consumer Code). The judge decides which publicity measures should be taken to inform consumers of the decision. The information or publicity measures are carried out by the professional at his or her own cost (article L623-7 of the Consumer Code). The information measures can be taken only once the judgment is no longer subject to a further appeal. The judge also specifies whether the consumers have to opt in with the professional or through the association. During this time, the professionals presumed to be liable will not know how many people they will have to indemnify.

Opting in to the group is the only requirement for a consumer to be compensated. Also, opting in to the group does not imply that the consumer has become a member of the plaintiff association.

As a second step, after the consumers have joined the consumer group in order to obtain a compensation from the professional, the judge who decided on the liability will have to rule in a second judgment on the difficulties that may arise in connection with the execution of the first judgment (articles L623-18 to L623-21 of the Consumer Code). He or she will state in a second judgment on each and every claim for compensation to which the professionals did not accede.

Simplified procedure

The Hamon Law created a simplified procedure (articles L623-14 to L623-17 of the Consumer Code) that is close to the opt-out system. The judge makes a statement on the professional's liability and may order them to indemnify, directly and individually, the consumers whose identity and number are known without any active approach to those consumers (article L623-14 of the Consumer Code). In this procedure, there is no time limit for the consumer to accept the compensation. This procedure is relevant for cases where the company liable has a client file, such as matters concerning insurance or mobile phone contracts. Taking into account the fact that many companies have client files, the simplified procedure is likely to be widely implemented.

In the health field there is only one type of procedure.

Law No. 2016-41 introduces a procedure that differs from the ordinary proceeding provided in the Hamon Law.

Indeed, Phase 1 is similar to Phase 1 provided in the Hamon Law: once informed about the judgment, the users can join the class action by addressing an individual compensation assignment either directly to the guilty defendant or to the claimant association.

Nevertheless, Law No. 2016-41 provides a delayed opt-in system: the judge will fix the deadline for a consumer to join the class action, which cannot be less than six months and not more than five years (article L1143-4 of the Public Health Code); the delay to opt in is thus much longer than in the Consumer Code (two to six months). Furthermore, a user whose claim was not compensated may introduce an individual action before the judge, who rendered the first decision on the liability of the professional, and ask him or her to rule on the compensation of his or her own damage (article L1143-11 of the Public Health Code), whereas articles L623-19 and L623-20 of the Consumer Code only provide that the judge may rule on every difficulty or on the enforcement of the judgment that was not executed by the professional. This procedural divergence takes the specificities of the physical damages and in particular the occurrence delay of some physical injury into account.

In the environmental, discrimination and data protection fields there is only an ordinary procedure (no simplified procedure).

Title V of Law No. 2016-1547, passed on 18 November 2016, known as the Justice of the XXI Century Law, and Decree No. 2017-888 dated 6 May 2017, introduced new articles in the Code of Civil Procedure (articles 826-2 to 826-24) and in the Code of Administrative Justice (articles L77-10-1 and following and articles R77-10-1 and following) and created a common legal framework for the class action proceedings relative to compensation claims introduced before the French civil or administrative court. In a first step, the judge renders a decision on the liability and establishes the prerequisites to join the group and the time limit to do so; there is no maximum delay to opt in fixed by the Law (articles 66 and 85 of the Justice of the XXI Century Law (L77-10-7 Code of Administrative Justice)). The judge decides which publicity measures should be taken to inform the concerned persons of the decision (article 67 and 85 of the Justice of the XXI Century Law (L77-10-8 Code of Administrative Justice)). Furthermore, a user whose claim was not compensated may introduce an individual action before the judge who rendered the first decision on the liability of the professional and ask him or her to rule on the compensation of his or her own damage (articles 71 and 85 of the Justice of the XXI Century Law (L77-10-12 Code of Administrative Justice)). As a second step, after the users have joined the group in order to obtain a compensation, the judge who decided on the liability will have to rule in a second judgment on the agreement found between the parties or on the execution of the first judgment (article 73 and 85 of the Justice of the XXI Century Law (L77-10-14 Code of Administrative Justice)).

Certification requirements

9 What are the requirements for a case to be filed as a class action?

According to article L623-1 of the Consumer Code and article L1143-2 of the Public Health Code, in order to initiate a class action, the registered association must provide evidence for identical cases of victims (two cases minimum) and for its recognition as a consumer association.

Two consumers or users are theoretically considered as a sufficient number of persons to form a group of consumers or health users. The legal doctrine considers that only 12 consumers are needed to form a group of consumers or health users. The criteria of adherence to the group are defined by the association when the liability of the professional is in question. Once the professional is held responsible, the judge becomes the one determining these criteria.

According to article L623-1 of the Consumer Code and L1143-2 of the Public Health Code, to articles L141-1 and L142-3-1 of the Environmental Code, and to articles 86, 87, 88 and 91 of Law No. 2016-1547, Justice of the XXI Century dated 18 November 2016, only an agreed consumer or health-user association, an association declared for five years and acting in the discrimination field, a union or an association declared for five years and acting in the data protection are authorised to take legal action in order to obtain a compensation.

Furthermore, in the discrimination, data protection and environmental fields according to articles 64 and 85 of Law No. 2016-1547, Justice of the XXI Century dated 18 November 2016, a prerequisite for the introduction of the class action is the sending of a formal notice to the respondent. The class action may thus be introduced only four months after the reception by the respondent of this formal notice requesting him or her to remedy the failure or to compensate the damage.

A class action must be filed on the basis of the group's common interest.

Regarding the pleading requirements, the class action is introduced by the registered consumer, the union or user-approved association according to the rules laid down by decree of the Council of State (article L623-3 of the Consumer Code and article L1144-1 of the Public Health Code, articles L141-1 and L142-3-1 of the Environmental Code and articles 86, 87, 88 and 91 of Law No. 2016-1547, Justice of the XXI Century dated 18 November 2016) and to the general and special procedural rules applicable in France (articles 56 and 752, 862-2 and following, 905 and 1575 of the French Code of Civil Procedure, article R1143-1 of the Public

Health Code and articles L77-10-1 and following and articles R77-10-1 and following of the Code of Administrative Justice and article L211-9-2 of the Judiciary Organisation Code).

The registered association has a summons before the competent high court or administrative court served on the concerned professional by a bailiff or by the secretary of the administrative jurisdiction seized by the claimant. For this proceeding before the competent high court or the administrative court, the association must be represented by a lawyer of the competent jurisdiction.

10 How does a court determine whether the case qualifies for a class action?

After the introduction of the class action by the registered consumer or user-approved association through summons served on the professional, the proceeding before the high court or the administrative court is governed by the general procedural rules applicable before the high court or the administrative court, respectively.

In general, the proceeding before the high court or the administrative court is a written procedure – the judge sets up a calendar for the exchange of submissions and evidence of claimant and respondent.

There are three different steps in the ordinary class action proceeding, as detailed below.

During the first phase of the proceeding (the liability phase) leading to a first judgment on the liability of the professional, the association has to provide proof that the professional is responsible for a prejudice endured by a group of consumers. Hence, the burden of proof is on the plaintiff, namely, the association.

After a certain amount of time the judge closes the exchange of submissions and evidence and sets up a hearing, at which both parties' lawyers plead the case.

After the pleading hearing, the judge renders a first judgment on the liability of the professional.

In the consumer field, to render this first judgment, the judge must verify the requirements set by article L623-1 of the Consumer Code regarding the association and the action itself. The judge determines whether the case qualifies for a collective action by analysing the proof provided by the association. For such qualification, the association has to provide evidence that the professional has damaged the group and that a common interest induced by the prejudice may be sought.

The judge first strives for acknowledgment of the veracity of the common interest presented. He or she then decides whether the professional implicated is the one that may be held responsible for the prejudice alleged as having caused the common interest.

This first judgment thus has to address the following points (articles L623-4 to L623-13 of the Consumer Code):

- admissibility of the class action brought by the registered association according to article L623-1 of the Consumer Code;
- liability of the professional;
- definition of the consumer group against which the professional is held liable and definition of the criteria for being considered as belonging to this group;
- definition of the damages that may be compensated for each consumer or each consumer category constituting the group it defines, and definition of the amount of each damage or of any elements allowing the evaluation of the said damages;
- definition of the appropriate publicity measures to be taken in order to inform the consumers potentially belonging to the defined consumer group;
- definition of the time limit within which the consumers may join the collective action to obtain compensation for their damage (two to six months maximum);
- determination of the modalities for joining the collective action; and
- determination of the time limit for the payment of compensation by the professional and of the time limit after which the consumers may refer to the judge any difficulties regarding the payment of compensation by the professional.

Similarly, regarding healthcare, article L1143-2 of the Public Health Code provides that the judge has to determine in the same decision which physical damages could be compensated for the users of the class action, as well as the class action attachment criteria and the publicity measures to be taken by the professional.

Regarding the discrimination, data protection and environmental fields, the judge also renders a first decision on the liability and establishes the prerequisites to join the group and the time limit to do so. There is no maximum delay to opt in fixed by the law (articles 66 and 85 of the Justice of the XXI Century Law (L77-10-7 Code of Administrative Justice)). Then the judge decides which publicity measures should be taken to inform the concerned persons of the decision (articles 67 and 85 of the Justice of the XXI Century Law (L77-10-8 Code of Administrative Justice)).

An appeal may be lodged against this first judgment regarding liability conforming to the general procedural rules if the total amount claimed is not yet known or is higher than €4,000 (see articles 35 and 40 of the Civil Procedure Code and R211-3 of the Judiciary Organisation Code).

After this judgment, the proceeding enters into the second phase, the 'compensation phase', which is conducted by the association between the claimants and the professional, outside the court. The professional must pay compensation to the claimants according to the conditions set out in the above-mentioned judgment.

However, the judge still remains in charge of the case during this second phase of the proceeding.

During the third phase of the proceeding (the 'implementation phase'), the judge assesses any difficulties relating to the payments of compensation by the professional, states on the execution of the first judgment and proceeds to liquidation of the damages that have not been compensated in a final judgment.

Consolidation

11 Is there a process for consolidating multiple class action filings?

No process for consolidating multiple class action filings is provided for in the Hamon Law in Law No. 2016-41 of 26 January 2016, or by Law No. 2016-1547, Justice of the XXI Century passed on 18 November 2016. However, an association may voluntarily join another pending proceeding, whereas the judge has no obligation to join the different proceedings.

Furthermore, when a judgment is rendered on a claim brought up using a class action, the decision applies to every association, even the ones that did not file the complaint. Also, associations are considered interchangeable in a proceeding; an association may ask the judge to be allowed to 'step in the right' of another association in a proceeding if the latter encounters a lack of funding (see article L623-31 of the French Consumer Code and article L1143-19 of the Public Health Code).

In France there are no mechanisms or resources such as databases that allow plaintiffs and courts to find out about competing actions in other fora and to decide which should progress.

PROCEDURE

Discovery

12 How does discovery work in class actions?

French law and French procedure do not provide for the discovery procedure that is typical in the common law process and common law countries but which does not exist in France.

In the health field, during a class action proceeding, the French judge may order any measures of enquiry that he or she considers appropriate including a medical expertise (article L1143-3, paragraph 3 of the Public Health Code), whereas under French law these enquiry measures are limited to what is 'legally admissible' in order to conserve proof or evidence before any litigation (nomination of a court-appointed expert, or request to obtain certain defined documents). However, according to the French Supreme Court, the requested measures of enquiry are strictly limited to what is considered to be legally admissible and should not affect any fundamental rights or liberty or constitute a breach of the general principles of audi alteram partem or the defence rights.

Privilege and confidentiality

13 | What rules and standards govern non-disclosure of documents on the grounds of professional privilege, litigation privilege or other confidentiality considerations?

In France the rules and standards governing the non-disclosure of documents on the grounds of professional privilege are very clear and established: all communication between lawyers (letters, emails and all the documents communicated in this framework) is strictly confidential and cannot be disclosed to third persons.

The same applies to the communications between lawyers and their clients. According to article 66-5 of the law of 31 December 1971, all communication between lawyers and their clients (letters, emails and all the documents communicated in this framework) is strictly confidential and cannot be disclosed to third persons. The lawyer is the only person authorised to disclose the documents sent by his or her client to a judge or a third person with the client's agreement.

Testimony

14 | What rules apply to submission of factual and expert witness testimony? In what circumstances will the court order witness-examination?

There are no special rules applying in France to the submission by a party of factual and expert testimony. Before the civil or administrative courts, who deal with class actions, this kind of testimony is communicated by a party in written form to the court and to the opposing party with the written submissions, as an exhibit annexed to the written submissions. A party can ask the court to hear one witness or expert at the hearing, but the court is not obliged to do so, as the procedure before these courts is a written procedure.

The court shall appoint an expert who will lead expertise measures in a neutral and independent way and who will draft a report for the court, which will be able to use this report to render its judgement. The court can ask the court-appointed expert to testify at the hearing but is not obliged to ask him or her to testify. In general, in France it is unusual for experts (even the court-appointed expert) and witnesses to testify before the civil and administrative courts. The situation is different before the criminal court.

DEFENCE

Defence strategy

15 | What mechanisms and strategies are available to class-action defendants?

There are no mechanisms and strategies available to class action defendants in France. The introduction of class actions in France is too recent and not sufficiently successful to encourage the creation and development of new defence strategies and mechanisms.

Joint defence agreements

16 | What rules and standards govern joint defence agreements? Are they discoverable? What are the advantages and disadvantages of these agreements?

There are no rules and standards governing joint defence agreements because the joint defence agreement is unusual in France.

As discovery does not exist under French law and as there is a general confidentiality principle covering all the communications between lawyers as well as between lawyers and their clients (letters, emails and all the documents communicated in this framework), the lawyer is the only person authorised to disclose the documents sent by his or her client to a judge or a third person with the client's agreement.

For all these reasons there is no absolute necessity to draft joint defence agreements to communicate documents to other defendants or to draft common defence agreements to keep documents confidential.

SETTLEMENT

Approval of settlements

17 | Describe the process and requirements for approval of a class-action settlement.

The Hamon Law and the circular pertaining to its application contain provisions relative to the class-action settlement.

Indeed, settlement is tackled by the Hamon Law under the form of mediation, laid down in articles L623-22 and L623-23 of the Consumer Code.

Similarly, in the health field, Law No. 2016-41 introduced five articles in the Public Health Code that are dedicated to mediation in health class actions: articles L1143-6 to L1143-10 of the Public Health Code. According to article L1143-6 of the Public Health Code, the requested judge may ask a mediator to propose an amicable settlement to the parties for the damages concerned by the legal action. The judge will also set up the assignment of the mediator and the duration of his or her mission, the limit being three months, which can be extended once for three months upon request of the mediator.

This mediation can take place before any judicial intervention or during the judicial procedure.

In the discrimination, data protection and environmental fields, Law No. 2016-1547, Justice of the XXI Century dated 18 November 2016, also contains three articles dedicated to mediation before the judicial judge (articles 75 and 76) and the administrative judge (article 85 (L77-10-16 and L77-10-17 Code of Administrative Justice)).

In the framework of this judicial or extrajudicial mediation, the Hamon Law, Law No. 2016-41 and Law No. 2016-1547, Justice of the XXI Century, only allow plaintiff associations to sign a mediation agreement aimed at obtaining the compensation of individual damages as mentioned in article L623-1 and article L1143-2 of the Public Health Code (L623-22 of the Consumer Code and article L1143-9 of the Public Health Code and articles 75 and 76 and 85 (77-10-16 and 77-10-17 of the Code of Administrative Justice) of Law No. 2016-1547, Justice of the XXI Century).

Furthermore, in both cases (judicial or extrajudicial mediation), once a settlement is signed by the association, it can enter into force only when the judge approves it, after making sure that the interests of the party signing the settlement are protected.

Here as well, publicity measures must be foreseen in the mediation agreement to make it possible for consumers concerned to adhere to the group after the judgment approving the class-action settlement has been rendered (L623-23 of the Consumer Code and L1143-8 7 of the Public Health Code).

Once a settlement agreement is signed, according to article 1143-11 of the Public Health Code, the person who meets the attachment criteria of the class action group may ask for compensation for this damage after six months and no later than five years.

Objections to settlement

18 | May class members object to a settlement? How?

Under French law there is a difference between a settlement agreement concluded between the parties according to article 2044 of the French Civil Code and a mediation agreement.

The settlement agreement has, in itself, the authority of a final decision towards the signatories of the settlement agreement.

Contrary to the settlement agreement, the mediation agreement does not in itself have the authority of a final decision, as long as it has not been accepted and approved by the judge in a judgment according to article L131-1 of the Civil Procedure Code. Furthermore, it does not in itself close the proceeding as long as the parties have not agreed to put an end to the pending proceeding and renounce any action in the future.

Consequently, it seems impossible for a party who signed a settlement agreement to object to the settlement agreement that he or she signed, whereas as long as the judge has not approved a mediation agreement in a formal decision, and as long as the parties have not expressly confirmed, in writing, their will to put an end to the pending litigation and to renounce any possible claim, there is still a possibility to object to a settlement or to claim for compensation under the pending class action proceeding.

Separate settlements

19 | How are separate class action settlements handled?

A separate settlement agreement signed between a single claimant and the defendant has, in itself, the authority of a final decision towards the signatories of the settlement agreement and does not need to be accepted and approved by the judge in a judgment according to article L131-1 of the Civil Procedure Code.

Thus, it can be concluded separately and must only then be mentioned to the court.

In contrast, the mediation agreement cannot be concluded separately and will apply to all the members of the class action, and for this reason requires the judge's approval.

JUDGMENT AND APPEAL

Preclusive effect

20 | What is the preclusive effect of a final judgment in a class action?

The final judgment in a class action strictly deals with the prejudice repaired within the procedure. It liquidates the damage between the consumers concerned and the professional and puts an end to the class action proceeding before the high court.

The final judgment in a class action has in itself the authority of a final decision between the professional and all the consumers or health users of the group concerned who obtained compensation within the class action procedure (L623-28 of the Consumer Code and L1143-17 of the Public Health Code).

However, an appeal may still be lodged against this final judgment conforming to the general procedural rules.

Appeals

21 | What type of appellate review is available with respect to class-action decisions?

According to the Hamon Law, Law No. 2016-41 and Law No. 2016-1547 dated 18 November 2016, appellate review is possible for the first judgment stating the liability of the professional, as well as for the final judgment stating the compensation conforming to the general rules of the Civil Procedure Code within one month after the notification of the decision to the parties.

Nevertheless, regarding the first judgment concerning the liability of the professional, an appeal may only be lodged if the total amount claimed is not yet known, or if the claimed amount is higher than €4,000 (see articles 35 and 40 of the Civil Procedure Code and R211-3 of the Judiciary Organisation Code).

Initially, the lawmakers chose to subject the appellate review for class actions in the consumer and in the health field, in both cases (first judgment and final judgment) to a specific appellate procedure, namely the procedure that is normally applicable to urgent matters.

In May 2017 (according to Decree No. 2017-888 dated 6 May 2017), lawmakers decided that in the future only the normal appellate procedure would apply to class actions and suppressed paragraph 2 of article 905 of the Civil Procedure Code that was dedicated to class actions. Consequently, according to the general procedural rules, an appeal may still be lodged against the first and the final judgment following the normal procedural rules.

REGULATORY ACTION

Regulators

22 | What role do regulators play in connection with class actions?

The Hamon Law, Law No. 2016-41 and Law No. 2016-1547 dated 18 November 2016, do not provide for any role of the regulators in class actions. Neither are regulators taken into account in the decree or the circular.

Furthermore, the Hamon Law, Law No. 2016-41 and, particularly, Law No. 2016-1547 dated 18 November 2016, are too recent to evaluate their application in practice and the role that could be played by the regulators in such class actions. In the same way, it is currently impossible to predict the impact of future class action settlements or future case law on potential regulatory actions.

Private enforcement

23 | Describe any incentives the civil or criminal systems provide to facilitate follow-on actions.

As class actions are very recent in France there are no incentives provided by the civil or criminal systems to facilitate follow-on actions.

ALTERNATIVE DISPUTE RESOLUTION

Arbitration and ADR

24 | What role do arbitration and other forms of alternative dispute resolution play in class actions? Can arbitration clauses lawfully contain class-action waivers?

The Hamon Law, Law No. 2016-41 and Law No. 2016-1547 dated 18 November 2016, do not contain any provisions relative to arbitration.

Furthermore, article L211-9-2 of the Judiciary Organisation Code, article R1143-1 of the Public Health Code, articles L77-10-1 and following and articles R77-10 of the Administrative Code of Justice and

article 862-2 and following of the Civil Procedure Code provide that the high court and the administrative court are the competent jurisdiction for class action cases, which tends to exclude the competence of an arbitral tribunal in class action cases.

In addition, according to the general provisions of the French Civil Code and of the Consumer Code relative to the arbitration clauses and the abusive clauses (article 2060 of the French Civil Code and article L132-1 of the French Consumer Code), there is reason to consider the arbitration clause in the consumer contracts as prohibited, even though this interpretation of the above-mentioned legal provisions of the Civil and Consumer Codes is still debated.

Generally, it can be assumed that arbitration proceedings are to be excluded in cases of French consumer and user-approved class actions.

Lastly, the Hamon Law formally prohibits class action waivers. Indeed, article L623-32 of the Consumer Code considers as non-existent the clauses intending to prohibit a consumer from participating in a class action.

Court-ordered mediation

25 | Do courts order pretrial mediation in class actions? Does the appointment of a mediator make it more likely that the court will approve a settlement?

The Hamon Law contains only two articles relating to mediation: articles L623-22 and L623-23 of the Consumer Code. In the discrimination, data protection and environmental fields there are only three articles dedicated to mediation before the judicial judge (articles 75 and 76) and the administrative judge (article 85 (L77-10-16 and L77-10-17 of the Code of Administrative Justice) in Law No. 2016-1547 dated 18 November 2016, whereas in the health field there are five articles in the Public Health Code that are dedicated to mediation: articles L1143-6 to L1143-10 of the Public Health Code. According to article L1143-9 of the Public Health Code the mediation agreement must be suggested to the parties by the mediator, accepted by the claimant association and by at least one of the defendants, and finally approved by the requested judge. Once approved by the judge the mediation agreement puts an end to the pending proceeding.

The mediation agreement does not in itself have the authority of a final decision, as long as it has not been accepted and approved by the judge in a judgment according to article L131-1 of the Civil Procedure Code. Furthermore, it does not in itself close the proceeding if the parties have not agreed to put an end to the pending proceeding and renounce any action in the future.

FEES, COSTS AND FUNDING

Contingency fees

26 | What are the rules regarding contingency fee agreements for plaintiffs' lawyers in a class action?

The Hamon Law, Law No. 2016-41 and Law No. 2016-1547 dated 18 November 2016, do not contain any specific provisions regarding fee agreements for plaintiffs' lawyers in a class action.

However, in France, legally binding general rules governing professional ethics and applicable to lawyers strictly prohibit French lawyers from adopting a fee agreement with their client linking the fees to the result of the proceeding and the amount in dispute (a prohibition of the *quota litis* pact).

As a general ethical rule, French lawyers' fees must necessarily be based, for their essential part, on a pre-established rate and cannot be proportional to the amount claimed or obtained before the court.

In the absence of any other particular rule, this necessarily applies to French lawyers involved in class action cases.

Cost burden

27 | What are the rules regarding a losing party's obligation to pay the prevailing party's attorneys' fees and litigation costs in a class action?

The Hamon Law, Law No. 2016-41 and Law No. 2016-1547 dated 18 November 2016, do not specify anything in the class action procedures regarding an obligation to pay the prevailing party's attorneys' fees and the litigation costs.

Hence, article R632-1 of the Consumer Code and article R1143-1 of the Public Health Code and Law No. 2016-1547 dated 18 November 2016, apply, which in turn expressly refer to the Civil Procedure Code and the Code of Administrative Justice as the general rule in the absence of any particular rule.

Consequently, articles 696 and 700 of the Civil Procedure Code and article L761-1 of the Code of Administrative Justice are applicable regarding attorneys' fees and litigation costs.

According to article 696 of the Civil Procedure Code:

> *The losing party is condemned to the litigation costs, unless the judge by a motivated decision decides that the total amount or part of this amount has to be borne by another party.*

According to article 700 of the Civil Procedure Code:

> *The judge orders the party bearing the litigation costs to pay to the other party an amount he determines for the costs exposed that are not contained in the litigation costs [including the attorneys' fees].*

According to article L761-1 of the Code of Administrative Justice:

> *The judge orders the party bearing the litigation costs, or failing that, the losing party to pay to the other party an amount he determines for the costs exposed that are not contained in the litigation costs [including the attorneys' fees].*

Consequently, according to these legal provisions, the judge traditionally decides that the losing party must bear the litigation costs as well as a lump sum determined by the court, corresponding to a part of the attorneys' fees. The same rules should apply for class actions.

Calculation

28 | How are costs calculated? What costs are typically recovered? Does cost calculation differ in the litigation and settlement contexts?

Legal costs can only be recovered at the end of the proceeding. They are made of:

- the dépens (judicial expenses), which are not very high, as the justice is a public service for which claimant and defendant do not have to pay and which are composed of the judicial costs and the bailiff's costs for the service of the summons or the judgments and possibly the costs for the court-appointed experts, who are judicial officials; and
- the legal expenses, composed of the lawyers' (who are also judicial officials) fees, and translation and other costs.

At the end of the proceeding the unsuccessful party is usually condemned in the judgement to bear the cost of the proceedings, meaning the dépens in their entirety and a small part of the legal expenses, in the form of a provisional indemnity estimated and determined by the judge on a global basis.

The dépens are usually calculated by the successful party and by the court-appointed expert regarding his or her own expenses and partly approved by the court. Regarding the legal expenses and particularly the lawyers' fees there is no cost calculation and approbation by the court.

There are no specific rules applying to cost recovery for class actions in France, and there is no difference regarding cost calculation in the litigation and settlement context.

Third-party funding

29 | Is third-party funding of class actions permitted?

The Hamon Law, Law No. 2016-41 and Law No. 2016-1547 dated 18 November 2016, do not contain any provision regarding the possibility of third-party funding of class actions.

In this respect, the idea of a third party financing a class action and thus being entitled to receive, in proportion to its contributions, a share of the compensation obtained before the court, cannot be envisaged in France and would be considered as financial speculation on the judicial risk, which is contrary to the French philosophy regarding justice.

For the same reason, the *quota litis* pacts for the attorneys' fees are prohibited under French law.

In general, French lawmakers consider that it is not necessary to provide for any specific stipulations regarding the financing of class actions, considering that the litigation costs and the attorneys' fees could be at least partly reimbursed to the consumer associations at the end of the proceeding according to articles 696 and 700 of the French Civil Procedure Code article L761-1 of the Code of Administrative Justice.

Time will tell whether their assessment was correct and how the consumer associations will go about financing these litigations and taking responsibility for the class action cases, considering that, according to French laws on association, the consumer associations may receive any donation and are not supposed to make a profit. It must be underlined that after four years only 15 class actions have been filed in France. This tends to prove that lack of money may be an obstacle to the filing of class actions before the French courts and may limit the development of this new type of litigation as consumer associations cannot afford to bear, on their own, the costs of such long proceedings.

Public funding

30 | Is legal aid or other public funding available for class actions?

Unfortunately, there is no legal aid or other public funding available for class actions in France. This is probably the reason why class actions are not very popular or successful in France.

Insurance

31 | Are adverse costs, adverse litigation judgment or after-the-event insurance available?

No adverse costs, adverse litigation judgment or after-the-event insurance are available in France.

Transfer of claims

32 | Can plaintiffs sell their claim to another party?

There is no mention in the law of the possibility for a plaintiff to sell their class action claim.

While French law provides for the possibility to proceed to a voluntary assignment and to transfer a receivable or a debt and the ancillary claims and rights that are attached hereto, there is no possibility for a plaintiff to sell its claims before court.

Furthermore, according to the case law rendered on the application of article 31 of the French Civil Procedure Code relative to 'the interest in acting before court', each and every claimant going to court has to justify a 'direct and personal interest in acting', as the right to act before court is considered as a fundamental right.

This means that the claimant must be directly concerned by the damage suffered and must thus have a personal interest in the court recognising his or her rights and compensating his or her damage.

Consequently, third parties that do not have a personal and direct interest to claim, cannot 'step in the right' of a victim and obtain compensation from the court, unless they are recognised consumers' associations.

Furthermore, the only plaintiffs admitted in French class action proceedings prior to the first judgment on the liability are the registered associations who are able to introduce the action in their own name. Should they eventually give up the claim, they are not entitled to sell it, given that, technically speaking, they are not the actual claim holder.

Consequently, it is not possible under French law for a plaintiff to sell his or her claims to another party under a class action proceeding.

Distributing compensation

33 | If distribution of compensation to class members is problematic, what happens to the award?

According to article L623-18 of the Consumer Code, article L1143-11 of the Public Health Code, articles 69 to 71 of the Justice of the XXI Century Law and articles L77-10-10 to L77-10-12 of the Code of Administrative Justice, the professional proceeds to the individual compensation of the damage of each victim according to the terms, time limits and conditions determined in the judgment on liability. The judge will thus decide whether the compensation is paid directly to the victim or through the consumer association.

Consequently, the professional can either transfer the total compensation sum to the association or transfer each individual compensation to each class member who had opted in within the time limit set by the judge.

The compensation is then distributed by the association according to the number of class members. The association can also be authorised by the judge to ask a member of a judicial regulated profession (lawyer, bailiff) to assist by receiving the compensation requests from the members of the consumer group or health users group, representing the consumers or health users against the professional to obtain the payment of the compensation, or to proceed to the distribution of the compensation (articles L623-13 and R623-5 of the Consumer Code and L1143-12 of the Public Health Code).

Under these circumstances, it is very unlikely for any amount to remain undistributed or left in the hands of the association by the end of the process, considering that after the payment of the different compensation amounts, the final judgment deals with the remaining enforcement, distribution and compensation problems before putting an end to the proceeding.

The Hamon Law, Law No. 2016-41 and Law No. 2016-1547 dated 18 November 2016, do not currently contain any provisions relating to remaining undistributed amounts. However, this question will probably be part of the necessary adjustments to the law that will be evaluated by the government in the future in order to improve the system.

UPDATE AND TRENDS

Legal and regulatory developments

34 What legislative, regulatory or judicial developments related to class actions are on the horizon?

There are no more legislative or regulatory developments related to class actions on the horizon in France.

From a judicial point of view, the French Supreme Court (Cour de cassation) rendered a decision on 19 June 2019 which clearly limited the scope of the law relative to class actions by excluding the application of class actions to lease contracts, which are governed by a specific law, considering that this type of contract cannot be considered as a supply or service contract in the meaning of the article L623-1 of the French Consumer Code.

For the moment, the introduction of class actions in France as set out in the French regulation does not seem to be adapted to the French judiciary system and is thus a failure. This failure is due to the length and complexity of the proceedings in two stages (first stage: judgement on admissibility and liability; second stage: judgment on compensation), the restrictive interpretation made by the court of the class actions application field and the financial aspects, as consumer associations cannot afford to bear the costs of such a long proceeding.

This mixed picture of the introduction of class actions into the national regulation is shared by different countries in Europe, as may be seen from the conclusions of a report of the European Commission dated 25 January 2018 regarding the implementation of the EU Recommendation 2013/396:

> *Without a clear, fair, transparent and accessible system of collective redress, there is a significant likelihood that other ways of claiming compensation will be explored, which are often prone to potential abuse negatively affecting both parties to the dispute.*

Consequently, there may be some additional and judicial developments in France in the future related to class actions that are not on the horizon for the moment but may be instigated by Europe.

In its report dated 25 January 2018, the European Commission Collective recommends, for example, the introduction of 'out-of-court dispute resolution schemes' that 'should take into account the requirements of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters but should also be specifically tailored for collective actions'.

According to the European Commission:

> *Introducing such schemes in collective redress mechanisms is an efficient way of dealing with mass harm situations, with potential positive effects on the length of the proceedings and on the costs for parties and judicial systems.*

The European Commission also recommends increasing the power of the national regulatory bodies, which could give official recommendations for compensation in specific cases.

In France, from a judicial point of view, in March 2018, the President of the High Court of Paris submitted a report to the French Ministry of Justice recommending the introduction of a new proceeding into the French regulation: 'the pilot judgement procedure', which is already used by the European Court of Human Rights to deal with a lot of similar cases that all have the same context and deal with the same legal issues. Within this framework, the concerned court could choose one of the pending cases and try to give this case priority, while at the same time pronouncing a stay in the other pending proceedings.

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Once the decision is taken in the pilot case it may then be applied to all the other identical cases, and this could thus favour mediation or settlement in the other pending cases.

If this new proceeding is introduced into the French Regulation it could lead to a new development of simplified class actions that may encourage quick settlements to the benefit of French consumers, health users and discriminated persons.

Furthermore, on 15 September 2020, a new law was proposed by some deputies at the French National Assembly, which aims at extending the scope of application of the law relative to class actions and the possible compensation, simplifying the rules applicable to the action and the proceeding, to facilitate the funding of such proceeding.

It would also introduce new sanctions against the liable companies.

If this new law is introduced in the French Regulation, it could lead to a new development of class actions by facilitating and extending the access to class actions.

Coronavirus

35 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

To address the covid-19 pandemic, the French government proclaimed the national 'health emergency' between 12 March 2020 and 23 June 2020 that led to the lockdown of the French state during this period and, thus, to the closing of the Tribunals and administrations.

For this reason, by Ordinance No. 2020-560 dated 13 May 2020, the French government postponed all legal deadlines for all legal actions, lawsuits, inscriptions, administrative formalities, declarations, notifications, publications that were supposed to be carried out in the period between 12 March and 23 June 2020 to 23 August 2020, which was the last deadline to undertake all the above-mentioned legal actions, declarations, notifications and formalities.

This Ordinance also applies to the introduction of class actions and any corresponding deadline relative to already-introduced class actions.

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Aviation Liability
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Cartel Regulation
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Domains & Domain Names
Dominance
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Pharmaceutical Antitrust
Ports & Terminals
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Private Banking & Wealth Management
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Private Equity
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Public Procurement
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