Class Actions

Contributing editors
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2018

GETTING THE DEAL THROUGH

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France

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

The introduction of the class action in French law through the Hamon Law is very 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 action into French law 'through the back door' by only adding 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 the class actions was initially very limited, as the class actions provided for within this whole process were only open to 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). Lastly Title V of the 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 L 1134-6 to L1134-10 in the Labour Code), data protection (based on article 43ter 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.

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 field, class action 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.

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

As already mentioned, 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, it must be underlined that 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 field, 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, the government's report to the parliament regarding the application of this new legislation has yet to be issued, and our 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.

In the consumer field, on 31 December 2016, only nine class actions had been introduced in France in two years, out of which eight class actions are still pending in France: three class actions before the High Court of Nanterre, two class actions before the High Court of Paris, one class action before the High Court of Vannes, one class action before the High Court of Versailles and one class action before the Paris Court of Appeal. Three of these proceedings concern landlord–tenant relationship matters, three concern financial matters (bank), one concerns automotive matters, one concerns property matters (ownership of land or a mobile home) and one concerns electronic communication networks. A class action introduced on 14 October 2014 before the High Court of Paris against the social housing landlord 'Paris-habitat' relative to rental charges was finally settled on 19 May 2015.

It must be underlined that the only class action now pending before the Paris Court of Appeal was declared inadmissible in first instance by the Paris High Court and was thus dismissed because the class action brought by the user association CNL was only concerning four individual cases that were thus considered by the Paris High Court as not representative for the 200,000 social housing units managed by the social-housing landlord group 3F.

As this regulation is very new and innovative, the French judiciary are 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 one first-instance decision was rendered after three years. It has also to be noted that only a few proceedings have been introduced until today, showing that the new French class action system is not as efficient as expected. Finally it must be underlined that the first decision rendered is a dismissal, and that the question of the admissibility of the claim was subject to a very strict and rigorous control of the Paris High Court.

In the health field where Decree No. 2016-1249, implementing Law No. 2016-41 of 26 January 2016, first entered into force on 26 September 2016, the health user-approved association APESAC, representing 2,000 children and their parents, sent a formal notice to the laboratory Sanofi in December 2016 and then introduced the first health class action on 17 May 2017 before the High Court of Paris. This first class action is relative to the Depakine medication which caused autistic disorders in many children whose mothers took this treatment during their pregnancy. 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 the financial Law No. 2016-1917 entered into force on 1 June 2017 and created a non-judicial compensation procedure for the victims that 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 the 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 will probably be a success because it emerged as a result of pharmaceutical scandals, for example the Mediator scandal.

In the other fields (environment, data protection and discrimination) no class action has yet been filed, but this new type of action will also probably be a success.

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

As mentioned before, 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 the 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.

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 that 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, economical 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, according to article 43ter of Law No. 78-17 of 6 January 1978 known as the Loi Informatique et Liberté the class action aims 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 the data protection. 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 the lawmakers progressively extended the list of crimes for which a collective action is possible.

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 money damages can be either given 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 money 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 L 1143-3, 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 a 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 a 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 the 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 43ter of Law No. 78-17 of 6 January 1978 known as the Loi Informatique et Liberté the class action aims 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.

6 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 the 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).

7 How is a class action initiated?

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, that 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 has to be represented by a lawyer, whose name must be mentioned in the summons served by the bailiff on the concerned professional (defendant).

8 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 standing 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 the 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 the Law No. 2016-1547. In the data protection field the entitlement to act or stand a class action may be brought by an association declared for five years and acting in the data protection, as well as by unions' and users' associations approved under articles L811-1 of the French Consumer Code according to article 91 of the Law No. 2016-1547, Justice of the XXI Century.

In the consumer field, only 15 associations are approved under this article 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). Concerning the number of associations potentially affected by the health, environmental, discrimination and data protection class action 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 the class action proceeding in France, whereas it has to 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, 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 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 only given after the professional has been established as liable.

9 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 this collective action are foreseen by the Hamon legislation: the ordinary procedure (opt-in system) and the simplified procedure (opt-out system).

Ordinary procedure

On the one hand the Hamon Law created an ordinary procedure (articles L623-4 to L623-13 of the French Consumer Code) which 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 for 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 and ask for money damages is two to six months starting at 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 the 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 only be taken 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

On the other hand, 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 of 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 the 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 field there is only an ordinary procedure (no simplified procedure).

Title V of the 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, the 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)).

10 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 analyses this requirement as a way to express the fact that only 12 consumers are needed and not several dozen. 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 the 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 article 64 and 85 of the 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 only be introduced 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 the 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 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.

11 How does a court determine whether the case qualifies for a collective or 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 has to 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 a 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 the compensation by the professional and of the time limit after which the consumers may refer to the judge any difficulties regarding the payment of the 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 discrimination, data protection and environment, 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 has to pay the compensation to the claimants according to the conditions set out by 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 relative to the payments of the compensation by the professional, states on the execution of the first judgment and proceeds to the liquidation of the damages that have not been compensated in a final judgment.

12 How does discovery work in class actions?

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

In the health field, during a class action proceeding, the French judge may order any measures of inquiry 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 inquiry 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 inquiry 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.

13 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 one time 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 the 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, the Law No. 2016-41, and the Law No. 2016-1547, Justice of the XXI Century only allow plaintiff associations to sign a mediation agreement aiming 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 the 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 only enter into force 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 of this damage after six months and no later than five years.

14 May class members object to a settlement? How?

The Hamon Law only contains two articles relative 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 the 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 proposed to the parties by the mediator, accepted by the claimant association and at least by 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.

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.

Contrary to the settlement agreement, the mediation agreement has not in itself 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, as long as the judge has not approved the 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 a compensation under the pending class action proceeding.

15 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.

16 What type of appellate review is available with respect to class action decisions?

According to the Hamon Law, the Law No. 2016-41, and to 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) the lawmakers decided that in the future only the normal appellate procedure would apply to class actions and suppressed paragraph 2 of the 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.

17 What role do regulators play in connection with class actions?

The Hamon Law, the Law No. 2016-41, and the 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, the Law No. 2016-41, and particularly the 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.

18 What role does arbitration play in class actions? Can arbitration clauses lawfully contain class-action waivers?

The Hamon Law, the Law No. 2016-41, and the 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, and 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.

Update and trends

There are no more legislative or regulatory developments related to class actions on the horizon, as class actions were already considerably extended to several different and various fields. It now seems necessary to observe and closely monitor the judicial reaction to these brand new regulatory and legislative developments in France, particularly in the heath field regarding the forthcoming health scandal relative to Depakine and to the Mediator medicines.

The small amount of class actions introduced before the different French courts tends to show that this new regulation did not meet expectations as of today.

Nevertheless it must be underlined that the last Decree relative to the application of the last important Law, named Justice of the XXI Century, has been applicable only since May 2017, so it is too recent to measure the impact of this new regulation on class actions in France.

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

The Hamon Law, the Law No. 2016-41, and the 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.

20 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, the Law No. 2016-41, and the 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 the 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 has to 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.

21 Is third-party funding of class actions permitted?

The Hamon Law, the Law No. 2016-41, and the 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 the responsibility of 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 profit. It has to be underlined that after two years only seven 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.

22 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, which 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.

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

According to article L623-18 of the Consumer Code and to article L1143-11 of the Public Health Code, articles 69 to 71 of the Justice of the XXI Century Law and to 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, the Law No. 2016-41, and the 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.

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