

THE CLASS ACTIONS
LAW REVIEW

Editor
Richard Swallow

LAWREVIEWS

THE CLASS ACTIONS LAW REVIEW

The Class Actions Law Review

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LAW REVIEW

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PREFACE

Class actions and major group litigation can be a seismic event not only for large commercial entities but for whole industries. Their reach and impact mean they are one of the few types of claim that have become truly global in both importance and scope.

There are also a whole host of factors currently coalescing around the litigation space that increase the likelihood and magnitude of such actions, where very significant sums are now routinely at stake. These factors include the political change in Europe and North America, which has already begun to impact the regulatory sphere, as for the first time in decades, there is a shift towards protectionism and greater regulatory oversight. Advances in technology not only change our understanding of the world but also result in new and ever more stringent standards, offering the potential for significant liability for those who fail to adhere to such protections. Finally, ever-growing consumer markets of greater sophistication in Asia and Africa add to the expanding pool of potential claimants.

It should therefore come as no surprise that claimant law firms and third-party funders around the world are becoming ever more sophisticated and active in promoting and pursuing such claims, and local laws are being updated so as to facilitate such actions before the courts.

Despite this, or perhaps because this is an areas that, although much anticipated, has only relatively recently been recognised as a real and present threat, any comprehensive study has to date not existed. This first edition therefore aims to step into this void, by providing practitioners and clients with a single overview handbook to which they can turn for the key procedures, developments and factors in play in a number of the most important jurisdictions.

Richard Swallow
Slaughter and May
London
May 2017

FRANCE

*Erwan Poisson and Constance Ascione Le Dréau*¹

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

Before 2014, class actions, as understood in the United States and other common law jurisdictions, did not exist in France. However, several mechanisms already enabled claimants to act jointly, and still exist to date under French law:

- a* some procedural mechanisms enable an aggregation of parties into a single procedure (e.g., joinder, consolidation and voluntary intervention);²
- b* legal action can also be taken by associations representing their members for a claim as to a collective loss suffered by the group as a whole, and not by each individual;³
- c* some certified associations can initiate proceedings in order to obtain compensation for losses suffered by individuals, but only if they are expressly mandated by the latter, and without any real possibility to solicit victims, for them to join the action;⁴ and
- d* similarly, labour unions are entitled to collectively bring a claim before courts specialised in labour law-related matters, on behalf of employees who are subject to dismissal on economic grounds.⁵

1 Erwan Poisson is a partner and Constance Ascione Le Dréau is an associate at Allen & Overy.

2 Joinder: several plaintiffs can bring a single claim and be represented by one counsel, when their claims arise from the same cause, or when there is a common question of law or facts. However, their case is then examined by courts as a standard case, and the assessment of the loss suffered is examined, and remedies granted, on an individual basis; consolidation: when several claims have been brought separately, but are of a similar nature, courts can, if it is in the interest of justice to rule upon them jointly, consolidate these claims, but the claims, the loss suffered, and the damages to be granted are examined on an individual basis; voluntary intervention: a third party is able to intervene in pending proceedings, when his or her claims have a strong link with the ongoing proceedings, but, again, courts assess the claims on an individual basis.

3 Action taken in a collective interest: certain authorised associations are able to pursue lawsuits in the collective interest of the members they represent. As a result of initiating such an action, associations can claim damages for a collective loss, but not for all individual losses suffered. For instance, actions can be taken with respect to environmental issues, or public health issues.

4 Joint representative action: approved associations are able to sue on behalf of several individual who have suffered a personal loss with the same origin, and resulting from the actions of the same professional, in relation to consumer law (L. 422-1 of the French Consumer Code), investment law (L. 452-2, Section 1 of the French Monetary and Financial Code) and environmental law (L. 142-3 of the French Environmental Code).

5 Article L. 1235-8, Labour Code.

However, despite these various mechanisms, the implementation of class action proceedings has long been debated among French scholars and practitioners, as well as before the French parliament. As a result, starting from 2014, various class action mechanisms were introduced in the French legal system:

- a on 17 March 2014, Act No. 2014-344 was adopted by the French parliament,⁶ and implemented the first class action mechanism in France, referred to as ‘group action’.⁷ This mechanism was then applicable only to disputes arising in consumer law⁸ and competition law;
- b on 26 January 2016, Act No. 2016-41 extended the domain for group actions to health issues;⁹ and
- c on 18 November 2016, Act No. 2016-1547 further extended group actions to discrimination law, environmental law and data protection law.¹⁰

Pursuant to these various provisions, several specific types of group action proceedings now co-exist under French law. However, they are essentially similar, and in particular, the French group action type can best be described as an improved opt-in mechanism: after a judicial decision is rendered on the defendant’s liability, claimants may join proceedings to seek compensation. However, with respect to consumer law, there is a ‘simplified group action’, which is closer to an opt-out type (see Section III.i, *infra*).

Under French law, group actions cannot be initiated by individuals or a group of individuals, as such, but only by certified associations, the aim of which is related to the legal action, or given groups such as labour unions (for further detail, see Section III.ii, *infra*).

In principle, group actions are of the competence of the Civil High Court.¹¹ However, when public entities or private entities in charge of a public mission are involved in the dispute, the administrative judge will be competent, and administrative procedural rules will apply.¹²

To the best of our knowledge, as of February 2017, nine group action proceedings have been initiated in France in relation to consumer law. Three of these nine proceedings are related to housing issues, and three others to the banking sector.¹³

6 Act No. 2014-344, 17 March 2014 (together with its implementing decree No. 2014-1081 dated 24 September 2014 and its circular NOR: JUSC1421594C of 26 September 2014).

7 The authors have chosen to keep this phrase to describe French ‘class actions’ in this article, as French group actions are quite different from common law ‘class actions’.

8 Under French consumer law, a professional is a person, a natural or a legal, public or private, acting on its own behalf or through an agent, who enters into commercial, industrial, artisanal, or liberal activities. In this regard, it should be noted that the consumer act introduced a preliminary article in the French Consumer Code, which defines a consumer as ‘Any individual who acts without connection with his or her commercial, industrial, artisanal or professional activities’.

9 Act No. 2016-41, 26 January 2016.

10 Act No. 2016-1547, 18 November 2016.

11 Article L 211-9-2 of the Judicial Organization Code.

12 In the French justice system, there exists a key distinction between the ‘judicial order’ and the ‘administrative order’, the former having jurisdiction over disputes involving a public entity and the latter being in charge of disputes involving natural and legal persons.

13 Institut National de la Consommation, ‘L’action de groupe “consommation”: 9 actions introduites en deux ans’, www.conso.net/content/laction-de-groupe-consommation-9-actions-introduites-en-deux-ans.

II THE YEAR IN REVIEW

i New legal provisions

As previously mentioned, in 2016, two legal acts pertaining to group actions have been adopted in France: Act No. 2016-41 on the modernisation of the French health system,¹⁴ and Act No. 2016-1547 on the modernisation of the 21st century justice system.¹⁵

Act No. 2016-41 dated 26 January 2016 enables certain associations to claim damages on behalf of the users of the French public health system who suffered physical injuries due to a defective health product.¹⁶

Act No. 2016-1547 dated 18 November 2016 enables claimants to initiate group action proceedings in relation to discrimination, environmental law and data protection. It also establishes a general procedural framework for group actions, although these can only be initiated when specific provisions refer to it in given domains.¹⁷

In addition, Act No. 2017-86, which was adopted by the French parliament in January 2017, had created, in its Article 217, a financing fund for group actions, which would have been funded by an increase in criminal fines imposed by criminal courts in the context of group actions. However, on 26 January 2017, the French Constitutional Court ruled that such a provision, which established a difference between claimants before civil and criminal courts, was contrary to the principle of equality before the law. The Court thus invalidated these provisions.¹⁸

ii Case law and ongoing proceedings

Nine group actions have been initiated in France since 2014. Of these, eight are still pending.

One case, opposing two authorised associations to a social landlord, has been settled, with tenants being reimbursed fees they had been charged in relation to the CCTV in the elevators.¹⁹

In another case, opposing a housing confederation and a real estate company,²⁰ the Paris High Court has rendered its decision on 27 January 2016. In this case, the consumers' association argued that the penalty clause inserted in the lease contracts, which could be triggered by the company in the event of a delayed payment, was unfair. It thus sought compensation for the damage allegedly suffered by consumers. In its decision, the Court held that the action was admissible but dismissed the claim.²¹ In dismissing the claim, the Court considered that there was no evidence that the company had failed to fulfil its contractual or statutory obligations. Claimants have filed an appeal against this judgment, and appeal proceedings are currently ongoing.

¹⁴ Act No. 2016-41, 26 Jan. 2016.

¹⁵ Act No. 2016-1547, 18 Nov. 2016.

¹⁶ French Public Health Code, Article L. 1143 and following.

¹⁷ H. Croze, 'Un droit commun de l'action de groupe', *Revue procédures*, No. 2, Feb. 2017, étude No. 4.

¹⁸ Cons. Const., 26 Jan. 2017, decision No. 2016-745; see also 'Loi "égalité et citoyenneté": focus sur les principales mesures sociales', *JCP E*, No. 6-07, 9 Feb. 2017, act. 120.

¹⁹ *Syndicat du logement et de la consommation/Confédération syndicale des familles (slc-csf) v. Paris habitat – OPH*.

²⁰ *Confédération Nationale du Logement v. Immobilière 3F*.

²¹ Tribunal de Grande Instance de Paris, 27 Jan. 2016, No. 15/00835.

In late 2016, two new group actions were initiated, both in the banking sector, by two different consumers' associations, before the Paris High Court.²² The Court is currently assessing the admissibility of the claims.²³

III PROCEDURE

By way of an introduction, it is worth noting that procedural rules governing group actions are disseminated in various texts, but can mainly be found (1) in the Consumer Code; (2) in Act No. 2016-1547 dated 18 November 2016; and (3) in the Administrative Justice Code (the contents of which are almost identical to that of Act No. 2016-1547).²⁴

i Types of action available

Under French law, group actions can be initiated when various persons, placed in a similar or identical situation, suffer harm, as a result of one person's breach of contractual or statutory obligations (although with respect to consumer law, the harm can be caused by various professionals²⁵).²⁶ When these criteria are met, group action can be initiated in order to get compensation for individual losses suffered.

Interestingly, under French law, group actions can also aim at getting a decision ordering a breach to be put to an end, most often simultaneously with the legal action to get compensation. For data protection issues, it is, in fact, the only type of decision that can be obtained.²⁷ However, with respect to public health issues as well as consumer law, only damages can be claimed.²⁸

ii Commencing proceedings

Only specific groups and associations can initiate proceedings, namely:

- a* for consumer law and competition law, only approved associations may initiate group actions, namely 15 associations for the time being;²⁹
- b* for discrimination law, only given groups may commence group actions, when their stated purpose is either (1) to protect employees (e.g., labour unions), (2) to fight against discrimination, or (3) is related to disabilities, provided they have existed for at least five years;³⁰

22 Report drafted by the Commission for economic affairs on the implementation of Act No. 2014-344 (Rapport d'information 2016 déposé par la Commission des affaires économiques sur la mise en application de la loi No. 2014-344 du 17 mars 2014 relative à la consommation et présenté par M. Damien Abad et M. Philippe Kemel, députés).

23 Institut National de la Consommation, 'L'action de groupe "consommation": 9 actions introduites en deux ans', www.conso.net.

24 Chapter X, Title VII, Book VII, Administrative Justice Code.

25 Article L. 623-1, Consumer Code.

26 Article 62, Act No. 2016-1547 dated 18 Nov. 2016.

27 Article 43 *ter*, Act No. 78-17, 6 January 1978.

28 Article L. 1143-2 of the French Public Health Code; Article L.623-1, Consumer Code.

29 Article L. 623-1, Consumer Code; list of certified associations available at: www.economie.gouv.fr/dgccrf/Liste-et-coordonnees-des-associations-nationales.

30 Act No. 2008-496, 27 May 2008, Article 10; Labour Code, Article L. 1134-7; Administrative Justice Code, Article L. 77-11-2.

- c for environmental law, only certified environment protection associations may initiate group actions, as well as associations the aim of which is to defend victims of physical injuries or the economic interests of its members;³¹
- d for health issues, only certified associations for users of the health system can initiate proceedings, provided that they do not commercialise health products or cosmetics;³² and
- e for data protection issues, only (1) associations the purpose of which is to protect personal data and privacy, and with at least five years' existence; (2) certified consumers associations; or (3) labour unions can initiate group actions proceedings.³³

Before initiating a group action, these entities may participate in a mediation process (see Section III.v, *infra*).

Furthermore, these authorised associations have to serve a formal notice to put an end to the breach at stake, including with respect to consumer law. Claimants will then have to wait for four months after they serve the notice, before being able to refer the case to the courts.³⁴ This is not, however, the case with respect to public health issues, where no prior notice need be served.³⁵ With respect to discrimination issues, starting from the initial demand to put an end to the situation, a specific process will be initiated, and the claimants will only be able to initiate proceedings after a six-month period.³⁶

Concerning competition law, group actions can only be commenced after a final decision has been rendered on the defendant's breaches of competition law.³⁷

With respect to limitation periods, there are no specific rules for group actions, and limitation periods thus depend on the nature of the claim, as well as their domain. However, the initiation of a group action will suspend the limitation period with respect to individual claims. This limitation period will resume for at least six months after a judicial decision is rendered, and is final and enforceable (not appealable either before the Court of Appeal or the Court of Cassation), or after the settlement is authorised by the judge (see Section III.v, *infra*).³⁸

French group action type can best be described as an improved opt-in mechanism. When proceedings are initiated, there is no need for the authorised entity to define a given class. The judge examines the case submitted by the authorised entity, and renders a decision, mostly on the admissibility of the claim and the principle of the defendant's liability. In this decision, the judge also defines the very group, in giving criterion for litigants to join the group, as well as the types of losses that can be compensated, and the deadline for possible claimants to join the group.³⁹ However, with respect to consumer law, French law also provides for a simplified group action mechanism, which is of an opt-out type (see Section III.iii, *infra*).

31 Article L. 142-3-1, Environmental Code.

32 Article L. 1143-2, Public Health Code.

33 Article 43 *ter*, Act No. 78-17, 6 January 1978.

34 Article 64 and 85, Act No. 2016-1547, 18 Nov.2016.

35 Article L. 1143-2, Public Health Code.

36 Article L. 1134-9, Labour Code.

37 L623-24, Consumer Code.

38 Article 77, Act No. 2016-1547, 18 Nov. 2016; Article 623-27, Consumer Code.

39 Article 66, Act No. 2016-1547, 18 Nov. 2016; Article L623-4 of the Consumer Code.

iii Procedural rules

As set out above, under French law, group actions can aim to claim damages, or get an injunction to put an end to a breach of contractual or legal obligations, or both (see Section III.i, *supra*). Although these types of actions are most often simultaneous, for the sake of clarity, we will distinguish between these two types of proceedings.

Claiming damages

When the group action aims to claim damages, the judge examines the case, and decides whether or not the summoned company should be held liable. If so, the judge sets out the compensation scheme, which includes a definition of the ‘group’ of victims entitled to compensation, the amount of damages that can be claimed, the types of losses that can be repaired, as well as the time period within which victims have to come forward if they want to join proceedings. The judge also determines how the judgment should be published, so as to enable victims to come forward. Costs incurred in relation to such publications are born by the defendant.⁴⁰

After this initial decision on the very principle of liability, a second phase starts, which aims to compensate individual losses. Then, as set out below (see Section III.v, *infra*), when the claimants request it, the judge may order that a negotiation be opened between the authorised entity, on behalf of all individual claimants, and the defendants. This is, however, not possible with respect to public health issues, consumer law and labour law.

Alternatively, individual claims for damages are sent to the defendant, either directly or through the authorised entity. The defendant then compensates losses incurred, within the framework defined by the judge in the initial decision.⁴¹ Should the defendant not compensate claimants, the latter can then refer the matter to the judge, to get a decision ordering compensation.⁴²

The final decision by the judge is binding with respect to victims who have received compensation, with respect to the particular losses compensated. A new group action cannot be initiated on the very same losses. However, individuals can still initiate proceedings if (1) they did not participate in the group action; or if (2) they suffered other losses that have not been compensated in the context of the group action.

Furthermore, it is worth noting that with respect to consumer law, a ‘simplified’ group action can be used, when consumers are easily identifiable and when they have suffered an equal or very similar loss, while they were in the same situation. When an authorised association initiates proceedings, the judge assesses the defendant’s liability, and can order the latter to directly indemnify consumers. These proceedings can, in a way, be considered as closer to an opt-out type system, given that consumers do not have to consent to proceedings being brought against a professional. However, after the judge renders a decision on compensation, and when the professional is ordered to directly compensate consumers, the former have to formally accept compensation within the time limit set by the judge, to effectively receive damages.⁴³

40 Article 67, Act No. 2016-1547, 18 Nov. 2016; Article L. 623-4 of the Consumer Code.

41 Article 70, Act No. 2016-1547, 18 Nov. 2016; Article L. 623-18 of the Consumer Code.

42 Article 71, Act No. 2016-1547, 18 Nov. 2016; Article L. 623-20 of the Consumer Code.

43 L. 623-14 to L. 623-17, Consumer Code.

Getting an order to put an end to a breach

When the group action aims at getting an order that a breach be put to an end, the authorised entity can request that the judge orders the defendant to put an end to a breach of contractual or statutory obligations. The judge will then set a deadline for a given behaviour to stop, and will also be able to order daily penalties to be paid by the defendant, should it not obey the injunction.⁴⁴

iv Damages and costs

Firstly, it is worth noting that under French law, there is no possibility to claim punitive damages, such that companies will only have to compensate losses suffered, but will not be exposed to punitive damages.

Furthermore, it is worth noting that only certain types of damages can be claimed, depending on the domain at stake:

- a* with respect to consumer law and competition law, only economic losses can be compensated, not moral harm or personal injuries.⁴⁵ When appropriate, the judge can order reparation in kind;⁴⁶
- b* with respect to public health issues, a group action can be initiated in order to seek compensation for personal injuries (economic and non-economic losses resulting from these injuries);⁴⁷
- c* with respect to environmental law, a group action can be initiated in order to seek compensation for personal and economic losses;⁴⁸
- d* with respect to data protection issues, damages cannot be claimed;⁴⁹ and
- e* with respect to discrimination, damages for personal and economic losses can be claimed.

In any event, as set out above, the judge, in the initial decision on the admissibility of the claim, and the defendant's liability, will define the framework within which claimants may receive damages and the types of losses to be compensated (see Section III.iii, *supra*).

v Settlement

Settlements are encouraged under French law, before the initiation of a judicial group action, as well as during the compensation phase of group action proceedings.

Before any judicial action, it is possible for the association to participate in a mediation process with the other party.⁵⁰ If an agreement is reached, it will then have to be authorised by the judge, who verifies that the agreement preserves the interests of all parties and future claimants, before rendering an enforcement decision.⁵¹ The agreement is then published such

44 Article 65, Act No. 2016-1547, 18 Nov. 2016.

45 L. 423-1, Consumer Code.

46 Article L. 623-6, Consumer Code.

47 Article L. 1143-2 of the French Public Health Code.

48 Article L. 142-3-1, Environmental Code.

49 Article 43 *ter*, Act No. 78-17, 6 January 1978.

50 Article 75, Act No. 2016-1547, 18 Nov. 2016.

51 Article 76, Act No. 2016-1547, 18 Nov. 2016.

that all individuals who could be entitled to compensation on its basis can seek it.⁵² As a consequence, a new group action on the same breach, to claim the same damages, will automatically be dismissed.⁵³

Furthermore, after a judgment on the defendant's liability is rendered, and if the request is made by the claimant, the judge may decide that parties shall enter a negotiation process in order to settle damages (note that this is not possible with respect to discrimination disputes governed by the Labour Code,⁵⁴ or to public health issues and consumer law). The judge will then determine the framework for the negotiation and in particular, its conditions and timing. If all the individual parties agree, the judge will then authorise the settlement agreement; if not, the judge will send parties back to negotiation for an additional two months. After two months, if an agreement has still not been reached, the judge will be responsible for the liquidation of remaining damages. If a party has resisted the conclusion of an agreement in an improper or dilatory manner, the judge may order the payment of a civil fine of €50,000.⁵⁵

IV CROSS-BORDER ISSUES

It should be noted that some difficulties may arise in relation to a request before French courts for recognition and enforcement of a decision rendered abroad in the context of a class action.⁵⁶ Indeed, to be enforced in France, a foreign judgment has to be recognised by way of specific enforcement proceedings before French courts. For the foreign decision to be enforced in France, three conditions must be met:

- a* the foreign court must have had jurisdiction over the claim; that is, there must be a 'characterised link' between the case and the state where the judgment was rendered;
- b* the judgment rendered must be consistent with principles of French international public policy; and
- c* there must have been no fraud, that is, no attempt to select a forum in order to escape the application of the law that would have been applied by a French court.⁵⁷

For some, it is doubtful that a foreign class action judgment would in fact be recognised and enforced in France, given that some of the above-mentioned criteria might not be met. Indeed, in the case of a foreign class action judgment based on an opt-out mechanism, it might be considered contrary to French law that some of the parties to the judgment may have been denied the right to opt-out after a specific deadline.⁵⁸ To the best of our knowledge, there is no published case law on this matter yet.

Then, the recognition and enforcement of a foreign class action decision could depend on whether or not there are enough elements to constitute a 'characterised link' between the foreign jurisdiction and the dispute at stake. However, this question could be viewed as

52 Idem.

53 Article 78, Act No. 2016-1547, 18 Nov. 2016.

54 Article 1134-10, Labour Code;

55 Article 73, Act No. 2016-1547, 18 November 2016.

56 See Niboyet, *Action de groupe et droit international privé*, *Revue Lamy Droit Civil* 2006, No. 32.

57 French Supreme Court, Civil Chamber 1, *Cornelissen c. Avianca Inc. e. a.*, February 20, 2007, commented by L. d'Avout et S. Bollée in *Dalloz* 2007, p. 1115.

58 See M.-L. Niboyet, G. Geouffre de la Pradelle, *Droit international privé*, L.G.D.J., 2015, 5e éd., spéc. No. 628.

merely theoretical, since companies that are sued in class action proceedings tend to have assets in a number of countries, thus enabling claimants to choose a country other than France to enforce the final judgment.

V OUTLOOK AND CONCLUSIONS

As of yet, and due to the recent nature of group action proceedings, one finds it difficult to take a step back and reflect on them. From a purely legal perspective, one can note that the existing French legal architecture with respect to group actions is quite fragmented, and thus does not stand out as a particularly coherent and consistent piece of legislation. Furthermore, group actions are only limited to given domains, and cannot be seen as a general procedural mechanism.

However, while the very notion of group action was long opposed by many French scholars and practitioners, it has now fully entered the French legal system, and authorised associations have decided to seize this powerful legal tool, as evidenced by the nine cases already brought before French courts. The coming years will thus be particularly meaningful as to the efficiency of this French group action mechanism.

Lastly, another key issue for the future will undoubtedly be that of ‘forum shopping’. Indeed, it can be considered that French group actions are less favourable to victims than other class action mechanisms, such as the US class action. Effectively, French proceedings do not include elements such as a jury, a discovery phase, punitive damages, or contingency fee agreements, which can all be very favourable to the victims. One can thus wonder if consumers will not tend to initiate their group action proceedings in countries other than France.

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