

Class/collective actions in France: overview

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OVERVIEW OF CLASS/COLLECTIVE ACTIONS AND CURRENT TRENDS

1. What is the definition of class/collective actions in your jurisdiction? Are they popular and what are the current trends?

Definition of class/collective actions

The general aim of class actions is to either:

- Compensate individual losses incurred by persons placed in a similar or identical situation, which are caused by a breach of legal or contractual duties by the same entity.
- Put an end to these breaches.

Only pecuniary damages can be compensated.

Under the Law No. 2016-1547 of 18 November 2016, when several persons placed in a similar situation incur a loss caused by the same person through a breach of legal or contractual duties, a class action can be initiated based on the individual cases presented by the claimant (*Article 62*). A class action can be initiated either to:

- Put an end to the breach.
- Establish the liability of the person who caused the damage, to obtain compensation for the damages suffered.

Class actions were introduced in France by Law No. 2014-344 of 17 March 2014, and have been actionable since October 2014. This Law only enabled class actions related to consumer and competition law breaches.

Class actions were then extended to health product liability by Law No. 2016-41 of 26 January 2016, which entered into force on 1 July 2016.

The Law No. 2016-1547 of 18 November 2016 (see *above*) defines class actions in broad terms (see *above*) and extends their scope to environmental liability, discrimination and personal data protection. This Law sets out the general procedural framework applicable to class actions, with variations depending on the area of law to which a claim relates. Class actions are generally subject to the ordinary rules of civil procedure, unless specific provisions apply. The Law is only applicable to breaches that occurred after its entry into force, but does not apply to class actions relating to consumer law. Therefore, there are currently two procedural regimes:

- A specific regime for class actions related to consumer law.
- A regime for all other class actions.

This article will be illustrated by several key comparisons between the French model and the US model, which may be of interest since class actions originated in the US.

Use of class/collective actions

Due to the limited availability of class actions and to their recent introduction, it is not yet possible to establish general trends. To date, the following 16 class actions have been brought in France:

- *UFC-Que choisir v Foncia*: Foncia allegedly illegally charged its lessees for sending them monthly rent payments receipts. This claim was dismissed by the Court of Nanterre on 14 May 2018.
- *CLCV v Axa-Agipi*: insurance companies (Axa and Agipi) allegedly breached their contractual obligations to guarantee a minimum return rate on life insurance investments. The decision on the admissibility of this claim is currently pending.
- *CNL v 3F*: the public housing group 3F inserted in its lease contracts a penalty clause applicable in the case of late payment, which is allegedly illegal in France. This claim was dismissed by the first judges and the dismissal confirmed by the Court of Appeal of Paris on 9 November 2017.
- *Familles rurales v SFR*: the network provider SFR allegedly misled consumers into buying 4G smartphones, without providing actual coverage of the territory. The decision on the admissibility of this claim is currently pending.
- *Familles rurales v Manoir de Ker an Poul*: the camping site Manoir de Ker an Poul allegedly included an illegal clause in its lease contracts, to expel all mobile homes after a certain time. The decision on admissibility of this claim is currently pending.
- *CLCV v BMW Motorrad France*: BMW Motorrad France, a motorbike manufacturer, allegedly unfairly compensated consumers for defects in the conception of a motorbike. The decision on the admissibility of this claim is currently pending.
- *UFC-Que Choisir v BNP Paribas*: BNP Paribas allegedly breached its contractual duties, promising a threefold increase of the capital contributed to an investment fund called Jet 3. Dismissed by the first judges (Court of Paris, on 20 December 2017), the matter is pending before the Court of Appeal.
- *SLC-CSF v Paris Habitat-OPH*: the public housing group Paris Habitat-OPH allegedly charged its clients for installing remote monitoring equipment in the housing complex. This action was settled for EUR2 million in 2015.
- *APESAC v Sanofi*: a drug developed by Sanofi allegedly caused malformations to the new-borns of drug users. The decision on the admissibility of this claim is currently pending.
- *Sud-rail v SNCF*: the French state rail company allegedly discriminated handicapped employees in terms of their career and remuneration development. The decision on the admissibility of this claim is currently pending.
- *Resist v Bayer HealthCare*: a contraceptive device developed by Bayer allegedly caused damaging side effects to the users. The decision on the admissibility of this claim is currently pending.
- *CGT v Safran Aircraft Engine*: Safran allegedly discriminated employees in terms of their union activities. The decision on the admissibility of this claim is currently pending.
- *Quadrature du net v GAFAM* (that is, Google, Apple, Facebook, Amazon and Microsoft): the association Quadrature du net (which defends the rights and freedom of citizens on the internet) is considering a class action against leading tech companies in September 2018. This depends on the outcome of prior complaints which are to be filed before the C.N.I.L (the

French data protection authority) on 25 May 2018. Due to the sanction imposed by the C.N.I.L. against Google on 21 January 2019, the association has not brought a class action before a Court of Justice.

- *UFC-Que Choisir v Free*: subscribers had complained about the quality of the 3G network between 2012 and 2015. This action was settled by an agreement concluded on 31 May 2017. Free mobile will compensate subscribers of Free subscribing to a subscription between 2012 and 2015. For each month of inconvenience that the subscriber will have reported, compensation will amount to EUR1 up to a maximum of EUR12.
- *AALGA Bretagne v Linky*: Linky installed electricity meters that were allegedly harmful to the users. This claim was dismissed by the Court of Rennes on 31 May 2018.
- *UFC- Que choisir v Natixis Asset Management*: Natixis Asset Management allegedly committed various breaches concerning management fees charged to structured funds. This action was brought before the Civil Court of Paris in March 2018 and the decision on the admissibility of this claim is currently pending.
- *CNL v XL Habitat*: XL Habitat allegedly illegally charged its lessees for renovation of cable television network for 15 years. This action was brought before the Court of Mont de Marsan in February 2018 and the decision on the admissibility of this claim is currently pending.
- *Internet Society France v Facebook*: the association Internet Society France (which campaigns for a neutral Internet) has given notice to Facebook on 9 November 2018 for violation of the GDPR. Facebook must respond to seven causes of action within four months. If this deadline is not respected, the association will consider bringing a class action before the Civil Court of Paris.

Current trends

The scope of class actions has been gradually extending since their introduction in 2014. Class actions were recently extended to the following areas of law:

- Health product liability.
- Environmental liability.
- Personal data protection.
- Discrimination.

In comparison, class actions in the US have been litigated for decades in an ever-expanding number of fields, including employment law, securities actions, consumer protection actions, environmental matters, mass tort and product liability actions and so on.

REGULATORY FRAMEWORK

2. What are the principal sources of law and regulations relating to class/collective actions? What are the different mechanisms for bringing a class/collective action?

Principal sources of law

Class actions were introduced by Law No. 2014-344 of 17 March 2014, which came into force on 1 October 2014 and incorporated provisions relating to class actions into the French Consumer Code.

The Ordinance of 14 March 2016 modified the numbering of Articles L. 423-1 *et seq* and R. 423-1 *et seq* to Articles L. 623-1 *et seq* and R. 623-1 *et seq*. of the French Consumer Code. The content of these Articles remains unchanged.

Law No. 2016-41 of 26 January 2016 introduced Articles L. 1143-1 *et seq* in the French Public Health Code, which allows class actions in

the field of health products. These Articles came into force on 27 September 2016.

Law No. 2016-1547 of 18 November 2016 sets out a more general procedural framework for class actions and extends the legal basis of class actions to environmental liability, discrimination and personal data protection.

Apart from the specific provisions set out in the relevant laws and decrees mentioned above, class actions are governed by the general rules on tort liability and civil procedure (*Article R. 623-4, French Consumer Code; Article R. 1143-1, French Public Health Code; Article 826-2 French Civil Procedure Code*).

Principal institutions

The courts that have jurisdiction to hear class actions vary depending on the legal grounds of the class action and the legal status of the defendant. If the defendant is a private entity, the competent court will be the civil court (*Tribunal de Grande Instance*) (TGI). If the defendant is a public entity, or a private entity that has a public service duty (such as a public hospital or a public administration), the competent court is the administrative court (*Tribunal Administratif*) (TA).

The territorial jurisdiction of the courts is determined by the general civil procedure rules, except for class actions claims relating to consumer law, for which the competent tribunal is the TGI of the place where the defendant is located (*Article R. 623-2, French Consumer Code*). If the defendant is not located in France, the competent court is the TGI of Paris.

Different mechanisms

Class actions are tort liability claims brought on the basis of Article 1240 (formerly Article 1382) of the French Civil Code, which provides that any person who commits an act that causes damage to another must provide compensation for that damage.

A class action is a specific legal means to exercise this right to compensation. However, class actions can only be brought to obtain compensation of pecuniary losses. For example, no remedy for mental distress can be awarded.

Ordinary procedure. There is a general procedure applicable to all class actions, which may vary depending on the ground on which the claim is brought.

Before filing a class action claim, except in consumer law proceedings, the association representing the claimants must send a formal notice requesting the adverse party to either stop the breach or compensate the losses incurred by the claimants.

Class action proceedings then consist of the three following stages:

- The competent judge assesses the liability of the defendant, based on the facts and on the testimonies of the persons presented by the association.
- After ruling that the action is admissible, the judge defines the group of persons affected and the publication methods to advertise the action. At this stage, the individuals have the opportunity to opt in into the class, which leads to the formation of the class.
- The judge sets the quantum and nature of damages owed by the defendant to each member of the class.

Simplified procedure (consumer law and competition law). A simplified procedure is available for consumer law and competition law class actions when both:

- The number and identity of affected consumers is known from the outset.
- All the affected consumers suffered the same loss caused by the same actions.

Once the class concerned and the loss suffered have been determined, the judge can order the defendant to compensate the victims.

3. Are class/collective actions permitted/used in all areas of law, or only in specific areas?

Class actions can only be brought in the areas defined by law, which have been extended gradually.

Product liability

The French Consumer Code covers sales of goods to consumers. Therefore, class actions are available in the field of product liability, provided that the products are sold to consumers.

Environmental law

Class actions have been extended to environmental liability by the Law No. 2016-1547 of 18 November 2016. Whether environmental law class actions will be subject to a specific procedure remains unknown.

Competition law

Losses resulting from a breach of competition law by a professional entity can be compensated through a class action.

Pensions disputes

Class actions cannot be used in pension disputes.

Financial services: consumer redress

The French Consumer Code covers financial services provided to consumers. Therefore, class actions are available in this area.

Other areas of law/policy

Since September 2016, class actions can be filed on the basis of health product liability.

The Law No. 2016-1547 of 18 November 2016 also introduced class actions in the areas of discrimination and personal data protection.

LIMITATION

4. What are the key limitation periods for class/collective actions?

There are no specific limitation periods applicable to class actions. Class actions are therefore subject to the general limitation periods under French civil procedure law. Class actions must be brought within five years following the damage, that is, the date on which the holder of the right to bring the claim becomes aware, or should have become aware, of the facts enabling them to exercise this right (*Article 2224, French Civil Code*).

For competition law class actions, the five-year period starts running from the day a definitive ruling finding an infringement of competition law duties is disclosed to the public (*Article L. 623-25, French Consumer Code*). The ruling can either be issued by European or national authorities. If there is an appeal pending on other grounds than the infringement of competition law (for example, the quantum of the damages and/or the fine), the decision can be considered final and consumer associations are entitled to file a class action.

A class action suspends the limitation periods of individual actions that can be filed on the same grounds. The limitation periods start running again once a final judgment has been rendered.

STANDING AND PROCEDURAL FRAMEWORK FOR BRINGING AN ACTION

Standing

5. What are the rules on standing for bringing a claim in a class/collective action?

Definition of class

Under the French system, the entity filing the claim is not the class but a licensed association. The class is defined by the judge once the liability of the defendant has been determined. The judge sets out the criteria to meet to take part in the class.

Potential claimant

The claimant must be a licensed association. The number of possible claimants is limited so that only significant actions are brought. The claimant may need to meet certain conditions, depending on the field of law to which the claim relates.

Consumer law. National representative consumer associations accredited by the government have sole standing to bring consumer law class actions, as they are considered to be the only legal entities that represent the general interests of consumers.

The following 15 associations are currently entitled to bring class actions:

- Association for the defence, education and information of the consumer (*Association de défense, d'éducation et d'information du consommateur*) (ADEIC).
- Labour Force Consumers' Association (*Association Force Ouvrière Consommateurs*) (AFOC).
- Leo Lagrange Association for the Defence of Consumers (*Association Léo Lagrange pour la Défense des Consommateurs*) (ALLDC).
- General Housing Confederation (*Confédération Générale du Logement*) (CGL).
- Consumption, Housing and Living Environment Confederation (*Confédération de la Consommation, du Logement et du Cadre de Vie*) (CLCV).
- National Council of Secular Families (*Conseil National des Associations Familiales Laiques*) (CNAFAL).
- National Confederation of Catholic Families' Associations (*Confédération Nationale des Associations Familiales Catholiques*) (CNAFC).
- National Housing Confederation (*Confédération Nationale du Logement*) (CNL).
- Families Union Confederation (*Confédération Syndicale des Familles*) (CSF).
- Families of France (*Familles de France*) (FF).
- Rural Families (*Familles Rurales*) (FR).
- National Federation of Transport Users' Associations (*Fédération Nationale des Associations d'Usagers des Transports*) (FNAUT).
- Association for the Information and Defence of Employed Consumers (*Association pour l'Information et la Défense des Consommateurs Salariés*) (INDECOSA-CGT).
- Federal Union of Consumers (*Union Fédérale des Consommateurs*) (UFC-Que Choisir).
- National Union of Family Associations (*Union Nationale des Associations Familiales*) (UNAF).

Public health. Accredited associations of users of the health system can file class actions relating to health products (*Article L. 1143-1, French Public Health Code*). There are over 400 accredited associations.

Environmental liability. Accredited associations whose corporate purpose includes the defence of victims of physical injuries or the defence of economic interests of their members, and legally accredited associations for the protection of the environment, have sole standing to file class action claims (*Article L. 142-3-1, French Environmental Code*).

Discrimination. To have standing to file a claim, an association must both:

- Have been publicly declared for a minimum of five years.
- Act in the field of disability or have as its corporate purpose the defence of one of the interests at stake in the discrimination case.

Labour unions are also allowed to file a class action claim when the discrimination is prohibited by labour law and occurs in the context of a contractual labour relationship.

Personal data protection. To have standing to file a claim, an association must have been legally declared for five years and have as its corporate purpose the protection of private life and personal data. Consumer associations (*see above, Potential claimant*) also have standing when the breach affects consumers. Labour unions have standing if the breach affects the employees they represent.

Claimants outside the jurisdiction

Only entities that meet certain criteria can file class actions (*see above, Potential claimant*).

However, there is no legal provision preventing individuals outside the jurisdiction from opting in actions, provided that they meet the definition set by the competent judge.

Professional claimants

There are no professional claimants in France for the following two reasons:

- A right of action cannot be sold, as it is considered to be strictly personal and does not have any patrimonial value.
- Only a limited number of legally defined entities can file class action claims (*see above, Potential claimant*).

Qualification, joinder and test cases

6. What are the key procedural elements for maintaining a case as a class action?

Certification/qualification

During the first stage of a class action, the competent judge will determine the admissibility of the class action and verify that the claim qualifies as a class action. A claim must fulfil four criteria:

- Except for consumer law claims, a formal notice must have been sent to the defendant to request it to stop the breach or compensate the individuals affected.
- The claim must have been filed by an admitted entity (*see Question 5, Potential claimant*).
- The claim must be based on concrete cases of persons who have suffered a loss or who are currently subject to a breach. The claim cannot be based on possible, but not yet established, outcomes of the defendant's behaviour.
- The aim of the claim is to either:

- seek compensation for pecuniary losses suffered by the individuals due to the same breach of contractual or legal duties by the same professional; or
- stop that breach.

If a claim fulfils those criteria, the judge will certify it as a class action, but this does not mean that the defendant will be held liable.

If the class action is not certified, the individuals retain the right to act in their own name to obtain compensation for their losses.

In comparison, the US model is far more complex, with certification tests that vary depending on the nature of the relief sought.

Minimum/maximum number of claimants

A class is constituted by at least two persons. There is no maximum number of persons admitted to opt in the class.

The procedural requirements in the US are more complicated. There is no minimum number and the determination of the class involves a number of factors (such as how geographically dispersed the class is and judicial economy). To be satisfied, this test usually requires at least dozens of members, but the number can be lower or higher depending on the circumstances of each case.

Joining other claimants

In the ruling issued at the conclusion of the first stage of the proceedings, the judge determines whether the defendant is liable for the losses incurred by the individuals affected and/or the measures to be taken to stop the breach.

If the defendant is found liable, the judgment sets the:

- Definition of the class and which criteria an individual must fulfil to opt in.
- Damages that can potentially be compensated for each category of person.
- Publication measures that the defendant must implement to inform individuals of their right to compensation. The measures can be either personal, by way of a letter to each of the individuals concerned or global, by way of advertisements in the press, on television or on the internet. The defendant bears the cost of those measures.

The information provided to the affected persons must contain elements pertaining to both their:

- Substantial rights (for example, the legal grounds of the ruling, contact details of the defendant, criteria they must fulfil to opt in and so on).
- Procedural rights (that is, the deadline to opt in, form and content of the option, consequences of acceptance or refusal to opt in).

The publication measures are not applicable until the decision has become final.

The judgment issued by the competent court also sets the time frame of the class action and the deadline to opt in.

In consumer law cases, the time limit for opting in must be between two and six months after the implementation of the publication measures (*Article L. 623-8, French Consumer Code*). For actions relating to health products, the time limit for opting in is extended to five years (*Article L. 1143-4, French Public Health Code*). The law does not impose any time frame for actions relating to other areas of law.

The French procedure is based on an opt-in model, that is, consumers must express their willingness to be part of the class. A consumer's option can be notified to the association bringing the claim, to the defendant directly, or to any person specified by the judge in the ruling. The law does not require the use of any particular form of communication.

Under the simplified procedure available in consumer law cases (see *Question 2, Different mechanisms*), where the class is already identified, the consumer must receive the same information as under the standard procedure, except that the decision is communicated to each consumer separately, without having to be made public. A consumer who opts in must accept the compensation defined by the judge.

A consumer who chooses not to opt in the class action loses the right to seek compensation for any loss suffered that could have been compensated by the class action (*Article L. 623-29, French Consumer Code* and *Article L. 1143-18, French Public Health Code*).

A contractual clause under which a consumer waives their right to opt in a class action is considered abusive and is therefore null and void (*Article L. 1143-21, French Public Health Code* and *Article L. 623-32, French Consumer Code*).

In comparison, in US courts, the issue of class certification is typically determined after a period of litigation and discovery (not from the outset). Unlike under French law, persons and entities that fit the definition of the class as certified by the court will, with limited exceptions, automatically become part of the class. In other words, they do not need to opt in. There is an exception to the opt-out model in the case of certification under the Fair Labor Standards Act, which requires class members to affirmatively opt into the class within a deadline set by the court.

Before the US courts, whether members of a certified class receive notice of the action and the right to opt out will depend on the nature of the class. Members of the class will be bound by any final judgment, without the right to seek individual or additional remedies. Persons who opt out when permitted (or who do not opt in) retain the right to seek their own relief. Proceedings will typically allow for additional discovery on the merits after certification, and before any trial on the matter.

Test cases

Not applicable. To date, no class actions have been completed in France (see *Question 1, Use of class/collective actions*).

TIMETABLING

7. What is the usual procedural timetable for a case?

Where a formal notice must be sent to the defendant, four months must elapse between the receipt of the formal notice and the filing of the claim.

In discrimination class actions based on labour law that are brought before labour courts and administrative courts, the employer has one month to inform the employee representatives of the notice and to start a discussion on how to stop the discrimination. The claim can be filed six months after the receipt of the formal notice.

Once the relevant association has filed a class action claim against a defendant with the competent tribunal, the judge must determine the liability of the defendant. The law does not set a time limit for a judge to issue a decision, although they must comply with the European principle of prompt justice.

If they find the defendant liable, the judge will set the timetable regarding the publication measures and the deadline for opting in (see *Question 6, Joining other claimants*).

It is not possible to indicate the average time required to obtain a final judgment, as no class action has been completed to date.

In comparison, class actions in the US will typically take far longer. The length and nature of discovery will vary depending on the complexities of the claims, but usually several months or more will elapse before the court is presented with the claimant's motion to certify a class. If a class is certified, additional discovery on the merits may proceed for months, ultimately culminating in a trial.

Interlocutory appeals against an order on class certification will extend the timetable. In the ordinary course, and absent an expedited schedule, a class action can potentially take over a year to litigate (and sometimes much longer).

EFFECT OF THE AREA OF LAW ON THE PROCEDURAL SYSTEM

8. Does the applicable procedural system vary depending on the relevant area of law in which the class/collective action is brought?

There is a separate legal regime applicable to consumer law breaches, although it is similar to the main regime on most points. The most relevant differences are the requirement for a formal notice and the methods of calculation of damages (see *Question 19, Damages*).

In competition law cases, class actions can be brought from the date of a final judgment finding an infringement of competition law (see *Question 4*). The limitation period also starts running from that date.

For actions relating to health products, the time limit for opting in is extended to five years from the implementation of the publication measures, instead of six months (*Article L. 1143-4, French Public Health Code*) (see *Question 6, Joining other claimants*).

FUNDING AND COSTS

Funding

9. What are the rules governing lawyers' fees in class/collective actions?

There are no specific provisions related to lawyers' fees in class actions in France. The payment of lawyers cannot solely be based on a success fee, contrary to US practice. Success fees can only be supplemental to standard fees.

10. Is third party funding of class/collective actions permitted?

There are no specific provisions relating to third party funding of class actions. Class actions are funded by the association bringing the claim. Associations must comply with the legislation relating to the funding of associations in France.

In comparison, class counsel will usually bear the cost of the litigation in the US. Multiple firms can join to spread the risk, with any ultimate amount recovered allocated in a way that takes into account the proportionality of the risk borne. There is also a growing trend in the financing of class actions by investors that will fund some or all of the costs in exchange for a stake in the amount recovered, although this is subject to controversy.

11. Is financial support available from any government or other public body for class/collective action litigation?

No support is available from the state or any other governmental agency from the start of the proceedings.

However, if the competent judge finds the defendant liable, the ruling can require the defendant to pay a provision to the association to cover the expenses engaged during the second phase of the procedure.

12. Are other funding options available to claimants in class/collective actions?

See *Question 9 to 11*.

COSTS

13. What are the key rules for costs/fees in class/collective action litigation?

There are no specific regulations relating to costs and fees in class actions, except that the judge can order the defendant to pay a sum to cover the costs of the action (see *Question 11*).

If found liable, the defendant must bear the costs of the litigation (including fees for documents, witnesses and experts) (*Article 696, French Civil Procedure Code*).

The winning party can also request the losing party to bear its attorneys' fees (*Article 700, French Civil Procedure Code*). There are no provisions limiting lawyers' fees in France. The fees are governed by the agreement between the parties and their lawyers.

Key effects of the costs/funding regime

14. What are the key effects of the current costs/funding regime?

Associations have been complaining that the funding regime prevents them from bringing class actions. The need to advance all the litigation costs can be a heavy burden, especially if the litigation process requires extensive documentation. This lack of funding therefore hinders associations from bringing class actions.

DISCLOSURE AND PRIVILEGE

15. What is the procedure for disclosure of documents in a class/collective action?

The disclosure and discovery process as understood in common law systems has no equivalent in France.

There are no specific provisions relating to disclosure in class actions. The disclosure process must therefore comply with the French Civil Procedure Code, which applies to all types of litigation.

Before litigation

The claimant (that is, the entity that has standing) bears the burden of proof of the misconduct and of the damage caused to the affected persons. It must provide concrete and documented evidence that the individuals were harmed by the defendant's behaviour.

However, both parties can request the judge to order the production of a specific document. The document must be precisely named and the request must be grounded. The judge will balance the interests of both parties in disclosing the document. This request can be filed before and during the trial.

During litigation

The defendant does not have any obligation to co-operate in the litigation and need not disclose any document, unless ordered by the court. The judge can take all necessary measures for the safeguard and production of evidence, including evidence in the possession of the professional (*Article 133, French Civil Procedure Code* and *Article R. 623-9, French Consumer Code*).

In comparison, in the US, the parties to litigation are bound by the discovery rules of the competent court, which usually permit

document discovery, written discovery in the form of interrogatories and requests for admission, and depositions. This can be very expensive for defendants, and claimants' counsel will often attempt to use discovery tactics to create litigation and settlement leverage. Recent amendments to the federal procedural rules are intended to promote proportionality, to lessen the burden on defendants. Some defendants have secured limited discovery in certain circumstances under these rules.

16. Are there special considerations for privilege in relation to class/collective actions?

There are no special considerations for privilege in relation to class actions. Under French law, a party can refuse to disclose certain documents if they are covered by attorney privilege. Other professional privileges can be invoked (such as medical and banking secrecy).

Business secrets can also be protected. The judge must weigh the necessity to preserve business secrets against the need to use the relevant document in the procedure.

EVIDENCE

17. What is the procedure for filing factual and expert witness evidence in class/collective actions?

There are no specific rules relating to the appointment of experts and the admission of factual and expert witness evidence in class actions.

Expert nominations must comply with the standard procedure under the French Civil Procedure Code. Both parties can appoint an expert who will produce written technical statements, which can be admitted as evidence.

The judge can appoint a judicial expert, chosen from a list of experts admitted in the jurisdiction (*Article 232, French Civil Procedure Code*). At the end of their mission, the expert issues a technical report to the judge. The judge is not bound by the opinion of the judicial expert.

In health product claims, the judge can also order a medical expertise (*Article L. 1143-2, French Public Health Code*).

DEFENCE

18. Can one defendant apply to join other possible defendants in a class/collective action?

Joining other defendants

There are no specific rules pertaining to joining other defendants in a class action. Under civil procedure rules, which govern class actions, a defendant can ask the judge to consolidate two pending lawsuits if they are closely related (*Article 367, French Civil Procedure Code*).

Rights of multiple defendants

There are no specific provisions relating to the rights of multiple defendants in class action procedures. French civil procedure law does not make a difference between procedures with one or several defendants. All the defendants hold the same rights.

Multiple defendants can be represented by the same attorneys if this does not give rise to a conflict of interest. In the case of conflict, a waiver must be obtained from the parties.

DAMAGES AND RELIEF

19. What is the measure of damages under national law in the field of class/collective actions?

Damages

The sole purpose of damages in a class action is to compensate the pecuniary loss of the victims. Moral damages, such as mental distress or loss of reputation, cannot be compensated in a class action (*Article L. 623-2, French Consumer Code* and *Article L. 1143-1, French Public Health Code*).

Damages are limited to the compensation of the loss suffered. Punitive damages are not available under the French system. By comparison, in the US, the scope of recoverable damages is not limited to compensatory damages. Statutory and punitive damages are potentially available, as well as non-monetary injunctive and declaratory relief.

Ordinary regime. Under the ordinary regime, there are two means to indemnify the class: the individual payment procedure and the collective payment procedure.

Under the individual procedure, the judge will:

- Define the class of persons with regard to whom the defendant's liability is engaged, by fixing the applicable criteria to be part of the class.
- Determine the damages likely to be compensated for each category of persons forming the class.
- Set the time limit by which persons fulfilling the criteria can join the group to obtain compensation of their losses.

(*Article 66, Law No. 2016-1547 of 18 November 2016*.)

The individual members of the class must contact the defendant or the association to be indemnified individually. If there is a disagreement on the damages received, the individual or the claimant (if mandated) can contest the quantum before the judge who issued the first judgment.

The collective payment procedure is a mixed procedure, half way between a settlement and a judgment. Under Article 68 of the Law 2016-1547 of 18 November 2016, on the claimant's request, the judge can decide on the implementation of a collective procedure of payment of damages, provided that the elements produced and the nature of the damage allow it. For this purpose, the judge will:

- Authorise the claimant to negotiate with the defendant the compensation of the damages suffered by each person forming the group.
- Determine, in the same judgment, the amount or all the elements enabling the assessment of the damages likely to be compensated for each category of persons forming the group.
- Set the time limits and terms and conditions of the negotiation and compensation.

This procedure leads to a settlement between the association (claimant) and the defendant. The settlement must comply with the terms and conditions set by the judge. If a settlement cannot be reached, the claimant has one year to refer the matter to the judge again to request the application of the individual payment procedure. A defendant or claimant that willingly, in an abusive or dilatory manner, stalls the negotiations, can be fined EUR50,000.

Regime applicable to consumer and competition class actions. For consumer law breaches, the assessment of damages varies between the standard and the simplified procedure.

Under the standard procedure, the amount of damages is individualised for each consumer who joined the class. The judge either sets the amount of the damages or the means to establish the

prejudice that will be compensated in that class action (*Article L. 623-5, French Consumer Code*). The consumers must provide evidence that they suffered the prejudice defined by the judge. The judge then individually sets the amount to be recovered by each consumer.

Under the simplified procedure, the loss is the same for all consumers. They will therefore recover the same amount of damages. This amount is set by the judge during the first phase of the procedure.

The form of damages is not fixed. Compensation can be monetary or in kind, depending on the judge's appreciation (*Article L. 623-6, French Consumer Code*).

Recovering damages

There are no specific provisions relating to the recovery from a third party of damages paid by the defendant. Damages can be covered by the defendant's insurance.

Interest on damages

When setting the amount of damages, the judge also sets the date before which they must be paid and the applicable default interest rate.

20. What rules apply to declaratory relief and interim awards in class/collective actions?

Declaratory relief

There are no specific provisions relating to declaratory relief in class actions under French law.

Interim awards

There are no specific provisions relating to interim awards in class actions under French law.

Interim measures are only available in any of the following circumstances:

- There is an emergency situation and the measure cannot be seriously contested or the measure is justified by the existence of the dispute (*Article 808, French Civil Procedure Code*).
- Even in the event of a serious contestation, a measure can be ordered to prevent an imminent damage or to stop a manifestly illegal act (*Article 809, French Civil Procedure Code*).

SETTLEMENT

21. What rules apply to settlement of class/collective actions?

Settlement rules

Mediation is available in all class action proceedings. The aim of mediation is to reach a settlement.

For consumer law claims, the association filing the claim can resort to mediation under the rules of civil procedure (*Article L. 623-22, French Consumer Code*). Any agreement negotiated in the name of the class must be certified by the judge, who reviews that the agreement is in the interests of the persons to whom it will apply and declares it enforceable (*Article 75, Law 2016-1547 of 18 November 2016; Article L. 623-23, French Consumer Code*). Settlement agreements must also define the publicity measures and the means to opt in or out of the agreement. A settlement agreement will be enforceable after being approved by the judge.

In the field of health products, during the first stage of the proceedings, the judge can, with the agreement of both the association that filed the claim and the defendant, appoint a

mediation commission to encourage the parties to seek an amicable settlement. This commission is composed of:

- A mediator, appointed by the judge.
- Two health expert professionals chosen by the president of the commission from an existing list of experts.
- A person qualified in the field of compensation of personal injuries, appointed by the president of the commission.
- A health professional qualified in the pathologies likely to be caused by the health product challenged, appointed by the claimant association.
- A health professional qualified in the pathologies likely to be caused by the health product challenged, appointed by the defendant.
- A representative of the firms providing medical liability insurance within the meaning of Article L. 1142-2 of the French Public Health Code, appointed by the president of the commission.
- A representative of the National Office of compensation of medical accidents, iatrogenic infections and nosocomial infections, appointed by the president of that Office.
- A representative of the social security organisations, appointed by the director of the National Union of Social Security Funds.

(Article R. 1143-6, French Public Health Code.)

The settlement agreement is subject to the approval of the judge. Once the agreement has been approved, the consumers can choose to opt in or out.

Separate settlements

There are no specific provisions relating to separate settlements in class actions under French law. Private settlements are governed by the rules of civil procedure, and are therefore only enforceable against the parties to the settlement. They do not affect other claims.

A consumer who settles separately can no longer be part of the class action that aims to compensate the same damage. However, the consumer can be part of the class if the action aims to compensate another aspect of the damage caused by the professional, provided that it is not already covered by the settlement agreement.

APPEALS

22. Do parties have a right to appeal decisions relating to class actions, such as a decision granting or denying certification of a class action?

It is possible to appeal the decision before the competent appeal judge under the general rules of French civil procedure. Both the

claimant and the defendant can lodge an appeal within one month after the decision has been notified to the parties. The appellate court can only rule on the issues brought before the previous court. The appellate court will review both the facts and the legal reasoning of the lower court. As a last resort, both parties can appeal before the French High Court (*Cour de Cassation*), which will render a final judgment.

In consumer law proceedings, an appeal against a class action judgment must be brought as fast-track proceedings, as described in Article 905 of the French Civil Procedure Code (*Article R. 623-4, French Consumer Code*).

ALTERNATIVE DISPUTE RESOLUTION

23. Is alternative dispute resolution (ADR) available in class/collective actions?

See *Question 21*.

PROPOSALS FOR REFORM

24. Are there any proposals for reform concerning class/collective actions?

The Law No. 2016-1547 of 18 November 2016 implemented significant reforms to the class action regime. There are also current proposals for reform at both French and EU levels.

One bill, related to which entities can file a class action before a court, was introduced by 43 members of Parliament on 17 October 2018. These 43 members of Parliament propose to allow large consumer groups the possibility to file a class action without being obliged to ask a licensed association to do it on their behalf.

An update of the data protection law is currently ongoing before the French Parliament to allow a class action to compensate the victims of personal data infringements. To date, class actions relative to data protection only allow the judge to stop the infringements.

The European Commission proposed, in April 2018, a new directive on representative actions for the protection of the collective interests of consumers. In essence, it was proposed that a licensed association would be able to bring a class action before a member state court or administrative authority on behalf of classes of consumers who have been affected by a trader's breach of consumer protection laws. On 26 March 2019, an amended version of this directive was approved by the European Parliament Committee on Legal Affairs. The next stage will be for the Council of the European Union to discuss this draft directive. The final version of the directive is expected to be issued by the European Commission in late 2019 or early 2020.

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