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Introduction of Class Actions in France: A Growing Threat to Professionals?

A long-awaited law

The question of the introduction of class actions has caused much turmoil in France's legislative and political sphere over the past decades. After many years of debate, the French Senate and National Assembly have finally reached an agreement on the introduction of class actions in France. After gaining approval of the constitutionality of the proposed class action mechanism by the Constitutional Court, the new legislation, the "Loi Hamon" n° 2014-344 of the 17th of March 2014 has finally been enacted, with the goal of reinforcing consumer protection in France and providing consumers fair compensation for their economic losses. Although the new law is now officially enacted, the provisions relating to the class action mechanism in France have yet to come into effect via implementing decrees which are expected in the following months.

The new law introduces a different system from the well entrenched US example. The new French law elects the "opt-in" model and limits the role of class representation to nationally representative and accredited consumer associations. In addition, the scope of class actions has been limited to consumer and competition law violations, with specific conditions applicable to competition law claims.

A law with a limited scope and clearly identified actors

Only nationally representative and accredited consumer associations (associations) are entitled to represent consumers and bring a class action before the courts. There are 15 clearly identified consumer associations authorized to bring such claims. The new law's scope thus excludes individuals or attorneys acting on behalf of a group of consumers and excludes any associations beyond those listed.

The new law specifically applies to consumer and competition law violations. The law provides that class actions are available for the sale of goods or provision of services and for competition law violations, thereby *a priori* excluding health and environmental law violations.

A civil liability lawsuit based on the "opt-in" system

Unlike class actions in the US which provide for an "opt-out" procedure, class actions in France are based only on an "opt-in" system. In the "regular" proceedings, consumers must explicitly consent to their inclusion in the group on whose behalf the proceedings have been brought and claim their individual compensation after the courts have ruled on the professional's liability. In the "simplified" proceedings, consumers must explicitly consent to the compensation of their losses.

“Regular” proceedings

Associations can seek recovery for individual economic losses sustained by similarly situated consumers. Article 3 of the law, which adds a preliminary article to the first book of the French Consumer Code, defines a “consumer” as any natural person acting for purposes which fall outside of his trade, business, craft or profession.

An action can only be brought for material damages sustained by consumers as a result of one or more professional’s breach of its/their legal or contractual obligations. Compensation through the class action process thus excludes non-pecuniary damages such as for moral and bodily injuries (which claimants can still recover individually). Civil courts (*tribunaux de grande instance*) have jurisdiction over class action claims.

The new law establishes a four-stage procedure.

1st stage: the first ruling on liability

In a first ruling, the court will assess whether the conditions required to bring a class action are met. In doing so, the judge will verify that the association is one of the 15 competent associations and determine whether a class action is appropriate for the claim at hand (*i.e.* whether the association seeks to obtain recovery of material damages sustained by consumers placed in similar or identical situations and resulting from consumer or competition law violations).

The court will also determine the liability of the professional on the basis of individual cases brought by the association. At any point during the procedure, the court can order measures it deems necessary for preserving evidence, including evidence held by the professional.

If the professional is held liable, the court will determine the group of consumers entitled to compensation or set forth the criteria for group inclusion and the damages that can be awarded to each consumer or each category of consumers forming the group and the amount of those damages. In-kind reparation is possible when appropriate, subject to the conditions set out by the court.

Finally, the court will determine the appropriate measures to inform the consumers likely to be part of the group. The court’s decision will be publicized only after the ruling has become final. The professional bears the cost of publishing the judgment.

The court will also set out the conditions under which and the time period during which consumers can apply (opt in) to become a member of the group (no less than two months and no more than six months after the publication of the ruling) as well as the time period during which the liquidation of the assessed losses should occur and the deadline to bring before the court any difficulties arising out of the liquidation phase.

2nd stage: the opt-in phase

Depending on the conditions determined by the court, the concerned consumers can either directly contact the professional, the association or the court-appointed legal professional assisting the association to opt in to the group. At this stage, the professional will be able to verify or object to a consumer opting-in to the group and the consumer’s claim for compensation.

3rd stage: the liquidation of the assessed losses

Opting in to the group results in an implicit mandate granted by the consumer to the association charged with claiming and reallocating the compensation to the consumer. The association thus receives the

financial compensation awarded by the judge on behalf of the members of the group, puts the amount into escrow with the *Caisse des dépôts et consignations* (the French sovereign fund) and then allocates the sums to each individual group member.

4th stage: the (potential) second ruling on liquidation

Any difficulties that may arise during the liquidation phase — related to the person of the consumer and/or its individual claim — will be the object of a second judgment, before the same court, in a time period provided in the first judgment. The association will enforce this second judgment which will rule on the difficulties and order the professional to pay.

“Simplified” proceedings

The new law also provides for an alternative “simplified” process based on a “closed” opt-in model. When consumers are identified and their number is known, the judge can rule on the professional(s) liability and order the professional(s) to compensate directly and individually the consumers within a time period and under conditions set by the court. The opt-in process is “closed” in the sense that the group of consumers is known and determined before the class action is brought and before any ruling on the liability of the professional. The decision is not made public; when final, the decision is communicated to each consumer individually, who must then accept compensation as provided in the judgment.

Mediation

The new law recommends associations pursue mediation as an alternative to seeking compensation through the courts for losses sustained. Only associations can participate in the mediation process. Any agreement resulting from mediation must be approved by the court, which will examine whether the agreement meets the consumers’ best interests. If the court approves the agreement, the court will enter a binding judgment on the mediating parties.

Specific conditions for class actions based on competition law violations

The new law provides specific conditions for class actions for competition law violations, based on a “follow-on” model. This follow-on model provides that associations can only bring class action suits after a ruling from the competent authorities (whether national or European) finding a competition law violation, after all appeals on the finding of the violation have been exhausted.

The adoption of a follow-on model may significantly impact competition law proceedings in France, particularly with respect to leniency programs. The applicant submitting a leniency application will face the risk that, by benefiting from the leniency, the applicant will be exposed earlier on to a class action as there is no incentive for a leniency applicant to appeal the Authority’s decision finding the violation, as opposed to say, the other members of the cartel of horizontal agreement. The threat of a class action may thus diminish the appeal of the “first come first served” leniency application model in France.

In addition, the new law also extends the time period during which consumers can seek compensation. The new law provides that this time period is five years from the date on which the decision finding the violation is no longer appealable as regards the finding of the violation, as opposed to the prior prescription period of five years from the date on which the holder of the right is aware or should have been aware of the facts allowing him to assert this right.

What are the practical consequences for professionals?

How this new law will translate in France's judicial system remains uncertain given the difficulty of predicting how some aspects of the law — which are totally new in the French legal system — will be applied by the courts.

Ruling on a professional's liability on the basis of individual cases — which are meant to represent the whole group but which cannot encompass all individual cases of all the potential members of the group — as well as quantifying and proving losses sustained by an unknown number of victims, are procedural innovations in French law, for which the law gives the courts total leeway.

Whether “simplified” or “regular,” class action proceedings are long and complex. The responsibility for the opt-in and the liquidation of the assessed losses stages solely rests on the associations (although they can be assisted by legal professionals) and are not in the hands of the courts. These stages require both human and financial means that the associations do not necessarily possess. In addition, these stages are key for the professional, who will then be able to identify the number of victims and assess the amount of reparation claimed and challenge opt-ins or claims of any member of the group (in the context of simplified proceedings, the ability to challenge opt-ins and claims will necessarily arise after the court's ruling ordering the professional to compensate the losses of the identified consumers.)

Furthermore, as noted above, jurisdiction over class action proceedings has been granted to all civil courts in France. Proposals to limit the number of competent courts to increase their level of specialization — although raised during the discussions on the bill — were not retained in the final version of the law. Professionals will thus have to prepare their defence adequately in the context of a higher degree of legal uncertainty due to the absence of specialized courts. Finally, as noted above, for competition law violations, professionals might need to reconsider their strategies regarding leniency programs and other negotiated proceedings.

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