

Published on 1 May 2013



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Towards class actions à la Française?

On May 2, 2013, the Minister of Economy and Finance and his Deputy Minister for Social and Solidarity Economy and Consumption, presented to the Council of Ministers a Bill on consumption issues (the “Bill”), the flagship measure of which concerns the introduction in France of a so-called *action de groupe*, i.e. a type of collective redress action.

The Bill will be discussed in Parliament in the coming weeks.

The objective pursued by the French Government is to strike the balance between the consumers’ high expectations and the legal and economic certainty legitimately advocated by businesses.

Inspired by American class action lawsuits, but significantly redesigned *à la française*, the *action de groupe* contemplated in the Bill raises numerous questions as to what really lies behind it.

If we stick to the language of the Bill, the following provisions would be included in the French Consumer Code:

“A consumer association, recognized as representative at the national level and approved in accordance with Article L. 411-1 [of the French Consumer Code] can initiate proceedings before civil courts to seek reparation for individual harms suffered by consumers who find themselves in a similar or identical situation that result from the breach by the same professional of its legal or contractual obligations:

a) in relation to the sale of goods or the supply of services;

b) or when such harms are caused by anti-competitive practices within the meaning of title II of Book IV of the French Commercial Code or Articles 101 and 102 of the Treaty on the Functioning of the European Union.

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Only reparation for material losses that result from a damage to the property of the consumers and that is due to one of the aforementioned causes can be sought through this action."

The first observation that can be made is that, contrary to the USA where the class action is open to all natural persons or legal entities who/that have suffered the same damage, the French *action de groupe* could only be initiated by one of the 16 consumer associations approved at the national level.

Lawyers are excluded from the *action de groupe*, which has caused quite a stir and fueled debates on the monopoly reserved for consumer associations.

The French government has justified this choice by the fact that the *"the status and purpose of these associations, i.e. the defense of the consumers' collective interest, enable them to meet the legitimacy requirements in connection with standing to act and authority to represent the group of consumers, without the need to previously identify the victims. The license granted to such consumer associations is a guarantee that they are independent from business interests and allow to avoid the risk of delaying procedural tactics by a competitor."*

Truth is that this sign of distrust is driven by the financial drifts experienced in the USA where lawyers manage to recover a significant percentage of the sums granted by the judge. In France, there are some safeguards in that solicitation and remuneration on a purely proportional basis are prohibited for lawyers.

Second observation: whereas class actions generally covers reparation for physical injuries, moral damages and environmental damages, the contemplated *action de groupe* would be limited to *"material losses that result from a damage to the property of the consumers"* arising *"in connection with the sale of goods or the provision of services"*, or resulting from *"anti-competitive practices"*.

Physical injuries and moral damages are therefore excluded, because of their *"idiosyncratic nature"*.

Beyond consumer law disputes strictly speaking, the *action de groupe* would also covers the losses/damages resulting from competition law infringements, in particular price cartels (e.g. in the mobile phone industry), following a final and definitive sanction decision issued by the French Competition Authority.

On the other hand, public health and environmental issues are excluded from the scope of the *action de groupe*. In this respect, the government explained that the losses/damages suffered in these areas vary from one person to another and the compensation for such losses/damages generally requires individual assessments.

As such, for these areas, people will have to continue using existing procedures. With respect to environmental matters, it should be noted that there exists in France a specific action called *action en représentation conjointe* (joint lawsuit) available to certified associations for the protection of the environment. However, this action remains little known and rarely implemented.

Article L. 142-2 of the French Environmental Code grants to certified associations for the protection of the

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environment the right to initiate before any court of law an *action en représentation conjointe* in the name and on behalf of at least two natural persons.

The prerequisite for bringing such an action is that the relevant natural person must have suffered individual damages caused by the act of a single person and with a common origin.

The difference between this type of action and the *action de groupe* contemplated in the Bill is that the association must first be mandated by natural persons before bringing the action.

In procedural terms, the contemplated *action de groupe* is structured around two phases:

- First, the examination of the merits of the case by the trial judge who will rule on the liability of the involved professional, lay down the criteria according to which the consumers will be able to seek reparation, determine the amount of indemnification or, at the very least, the method of calculation of such amount, and detail the procedure to be followed by consumers to obtain such indemnification; and
- Second, the indemnification phase during which the consumers will be able to obtain the indemnification determined by the judge, either out-of-court or, if it is difficult to obtain such out-of-court payment, pursuant to a decision of the judge.

In the end, we are quite far from North American class actions, a remedy whose introduction in the French legal system – a completely different system – is in fact hardly conceivable.

Class actions have been designed for another legal system, i.e. the common law system, and operate according to a set of specific procedural rules that shape the very foundations of this system (discovery procedure, punitive damages, remuneration of lawyers, etc.).

Interestingly, while collective actions exist in some European countries, notably in Portugal, Italy, Sweden, the Netherlands, or England, it should be noted that all such countries have been careful to distance themselves from North American class actions and their related abuses.

To date, there is no such thing as a European class action. Discussions on a coherence European approach to collective redress have been launched by the European Parliament and the European Commission but no consensus has yet been reached on what should be the European model for collective legal actions.

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