France

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In France, issues pertaining to collective redress have been particularly sensitive and subject of controversial discussions within political and economic circles for several decades. In particular, lobbying from businesses has been effective in delaying the action of the legislator. Existing judicial mechanisms appears today still ineffective for resolving mass claims.

1. Issues related to the scope and mechanism of the instrument(s)

1.1 What is its scope (consumer only, horizontal…)?

Several mechanisms exist in France to resolve mass claims:

- **Judicial mechanisms:**

➢ The ***action de groupe***[531] was introduced into French law in 2014 after several decades of lengthy and difficult discussions. According to a note from the Ministry of Justice dated September 2014, the objective of the *action de groupe* is first and foremost to facilitate compensation in case of mass harm situations. France initially followed a sectoral approach and the mechanism was first made available in consumer and competition law. It was then extended to other sectors, including health, discrimination, environment and privacy. A horizontal framework for *actions de groupe* before administrative and judicial courts has also been adopted.

Figure 1 presents an overview on successive legislative developments:

Figure 1

Sector	***Legislation***	***Relevant provisions***
Consumer law	Loi n° 2014-344 *relative à la consommation* (17 March 2014)	Art. L623-1 *et seq*. of French Consumer Code (*Code de la consommation)*
Competition	Loi n° 2014-344 *relative à la consummation*	Art. L623-1 *et seq.* of French Consumer Code + Article L. 623-24 / 26 for special rules related to competition litigation
Health	Loi n° 2016-41 *de modernisation de notre système de santé* (26 January 2016)	Art. L1143-1 *et seq.* of the French Public Health Code (*Code de la santé publique)*
Privacy & data protection	Loi n°2016-154 *de modernisation de la justice du 21e siècle* (18 November 2016) + *Loi relative à la protection*	Art. 43 ter of Loi n° 78-17 *relative à l'informatique, aux fichiers et aux libertés*

[531] For the sake of clarity, we will use the French terminology (*action de groupe*) throughout this report.

	des données personnelles (2018, under discussion)	
Environment	Loi n°2016-*154 de modernisation de la justice du 21e siècle* (18 November 2016)	Art. L142-3-1 of the Environment Code *(Code de l'environnement)*
Discriminations	Loi n°2016-154 *de modernisation de la justice du 21e* siècle (18 November 2016)	Art. L. 1134-6 *et seq.* of the French Labour Code *(Code du travail)* + *Loi n° 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*
General framework	Loi n° 2016-154 *de modernisation de la justice du 21e siècle* (18 November 2016)	Art. 66 *et seq.* of the Loi 2016-154 (main principles) Art. 826-2 *et seq.* of the French Code of Civil Procedure (*Code de procedure civile)* for procedural matters Art. L.77-10-1 *et seq.* of the Administrative Justice Code (*Code de justice administrative*)

The rest of this report will mainly focus on the *action de groupe*. However, it is worth noting other judicial mechanisms that have been used to resolve mass claims in the past.

- The ***action en representation conjointe***[532]. Prior to the implementation of the *action the groupe*, this action was the closest mechanism to a collective redress scheme. Initially limited to consumer law, its scope was afterwards extended to other sectors, including environmental matters and securities. Like the *action de groupe,* the *action en représentation conjointe* is initiated by accredited associations and aims to defend the individual interests of consumers who are in similar situations and have suffered from the same misconduct. The action follows an opt-in system and is used to aggregate individual claims into one single litigation. If the association prevails, damages are distributed to the individuals who, beforehand, should have duly authorised the association to act on their behalf. However, if the association fails, represented individuals do no longer have the right to file individual lawsuits for the same facts. The French Parliament adopted this restrictive approach to avoid the purported excesses associated with US class actions. Importantly, advertising is prohibited and associations cannot approach consumers directly. In particular, associations may not solicit individuals by means of public announcements on radio or television, tracts or personalized letters. In addition, each consumer must necessarily give his/her consent in written prior to the start of the proceedings. In practice, the *action en représentation conjointe* has been an inefficient tool for dealing with mass claims. In particular, four main obstacles have limited its overall effectiveness: (1) the prohibition of advertising; (2) heavy liability risks on associations; (3) heavy administrative and procedural costs for associations, and (4) limited numbers of associations entitled to bring the action. One of the reasons explaining the adoption of

[532] Art L. 622-1 *et seq* of Consumer Code; Art of L. 142-3 Environmental Code; Art. L. 452-2 *et seq* of Monetary and Financial Code (*Code monétaire et financier*).

the *action de groupe* was to overcome the inefficiency of the *action en representation conjointe.*

- The ***action of associations for the protection of the individual interests of their members*** (horizontal scope).
- The ***action en défense d'un intérêt collectif*** (horizontal scope).

- **Other mechanisms:**

  - **Mass settlement agreements reviewed by a court** (see below under 'ADR' section).
  - **Mass claims resolved by an ombudsman** (see below under 'ADR' section)
  - **Compensation schemes**. Several compensation schemes have been created to deal with mass damage in specific fields, such as terrorism, asbestos, *etc.* In most cases, those funds were created as a response to emergency situations. Noteworthy, the ONIAM (*Office National d'Indemnisation des Accidents Médicaux, des Affections Iatrogènes et des Infections Nosocomiales*) was created in 2002 to compensate victims of medical accidents. Its scope was extended to cover people suffering from HIV contamination, hepathitis, *etc*.

1.2 Who has standing?

Only accredited associations are entitled to initiate the proceedings under the French *action de groupe* model. Legal requirements for associations depend on the sector at stake. For example, in consumer law, associations must be representative at national level, have at least one year of existence, show evidence of effective and public activity with a view to the protection of consumer interests, and have a threshold of individually paid-up members (this covers around 15 associations to date). In health law, the action is initiated by accredited associations of users of the healthcare system. Associations must be representative at national or local levels (*i.e.,* around 500 associations to date). In the field of discriminatory practices, accredited associations should have been exercising their activities in the fields of disability or fight against discriminations for at least five years or should have been active for at least five years and the purpose of which includes the protection of an interest violated by the discriminatory practice.
Lawyers (*avocats*) are not entitled to start *actions de groupe* from their own motion. This restriction was criticized by the Bar. In practice, lawyers still assist associations throughout the proceedings. This is because representation by lawyers remains mandatory before High Courts of First Instance (*Tribunal de Grande Instance*).

1.3 How does certification work in practice in your country? If there is no such mechanism, what is there instead?

The *action de groupe* follows a complex procedural model where **associations** and the **court** play central roles for filtering and certifying the group. The procedure follows a two-stage process and can be sketched as follows:[533]

- During the **liability phase (*Phase 1*)**, the court decides on the liability of the defendant on the basis of **individual model cases** presented by the association in the summons (*assignation*). The role played by these model cases is essential. Formally, there is no class of claimants at the beginning of the procedure and the

[533] Please that this is only the general framework. Some procedural peculiarities may apply depending on the sectors in which the action is initiated.

decision of the court is exclusively based on the review of those individual cases. The objective of the policymaker was to avoid a 'massification' of the dispute at early stages. The law does not specify how many model cases the association must bring (in theory, two individual cases could thus be sufficient). The cases should be representative enough of the entire group and the court needs to be confident that the underlying facts and legal issues can be extrapolated to other individuals. Based on the review of model cases, the court will then define the group of potential claimants and the parameters that individual claimants must meet to join the group. Challenging the representativeness and relevance of model cases has therefore become cornerstone in the litigation strategies of defendants. Several *actions de groupe* have failed because of the lack of probative value of the cases presented by the association. During this first phase, the court will also define the scope of the defendant's liability, the damage to be compensated and available remedies. It also specifies how the case will be publicized in the media and sets cut-off dates for plaintiffs to join the group.

- During the **compensation/award distribution phase (*Phase 2*)**, claimants meeting the criteria fixed by the court can join the group via an opt in system (see below). Once the award has been distributed, the court terminates the proceedings and addresses any unresolved issues or disagreements linked to the award distribution. To date (*i.e.,* May 2018), no *action de groupe* has reached Phase 2.

1.4 *What are your views on certification of the entity (eg. qualified association)? What are your views on certification of the group?*

As regards certification of associations, experience tends to show that the prerequisites and requirements imposed on associations are too restrictive. In practice, only a few have the actual resources (financial, human, *etc.*) to effectively initiate and handle *actions de groupe*. A report for the National Assembly dated October 2016 also suggested to allow for *actions de groupe* brought by *ad hoc* associations as well as actions brought by the French General Directorate for Competition, Consumer Affairs and Prevention of Fraud (DGCCRF)[534] .

As regards certification of the group, the French model is peculiar in the sense that the group does not formally exist at the start of the proceedings. It is only represented by model cases brought forward by the association. Potential plaintiffs can join the group later on once the court has handed down its decision on liability. However, to date, no *action de groupe* has reached Phase 2.

1.5 Is the system opt-in or opt-out? How does it work in practice? Does it give rise to abuses? Is your system, whether opt-in or opt-out, satisfactory in terms of access to justice and length of proceedings?

The French model follows a peculiar **late opt-in system**: potential claimants can join the group only when the decision on liability has been handed down and within a period of time that is fixed by the court (*e.g.,* for consumer matters, this period cannot be under 2 months and extend beyond 6 months. The starting date is the date of publicity in the media. In the healthcare sector, this period should be between 6 months and 5 years).

[534] see here: www.assemblee-nationale.fr/14/rap-info/i4139.asp.

To date, the late opt-in system has not given rise to abuses. However, as no *action de groupe* has reached Phase 2 yet, it may be too early to draw clear cut conclusions. In theory, late opt-in give claimants better views on the success of their claims. They are less exposed to the risks associated with the litigation and this should limit possible risks of rational apathy and incentivize them to participate. However, late opt-in also creates some uncertainty for the court and defendant(s) since they may have no clear views on the size of the actual class and the size of the loss (as explained below, the court will ground its decision on the review of individual model cases). Moreover, the French late opt-in system tends to extend the length of the proceedings (experience has shown that several years are already needed to go through Phase 1).

1.6 What are your views on both systems (opt-in / opt-out)? What are your views on mixed systems?

Opt-in was preferred because it was perceived as more in line with the French legal tradition and constitutional principles. However, a mixed-system allowing courts to use either an opt-in or an opt-out system depending on the circumstances of the case at stake (see for example in Belgium) would be worth investigating. This should however be accompanied with guidelines for assisting and guiding judges.

1.7 What shortcomings could you identify, if any? What satisfactory characteristics of your system could you identify?

Shortcomings

Several issues were identified in a report for the National Assembly dated October 2016.[535] They are also often enumerated by stakeholders themselves. Key problems can be summarized as follows:

- **Limited effects on access to justice and compensation***:* Since 2014, 3 actions have been rejected by courts, 2 have been settled (a third one is expected to be settled in the coming months) and 7 are still pending (see Appendix).
- **Costs and duration of the proceedings**: The action is usually costly, burdensome and time-consuming for associations. For example, the first *action de groupe* in France (*UFC v. Foncia*) was filed in October 2014 but the court issued its (negative) decision on Phase 1 only in May 2018. Only a small number of associations have the resources for launching actions. As explained above, to date, no *action de groupe* has reached Phase 2 (the award distribution phase) but it is expected that Phase 2 will also be lengthy and burdensome for all stakeholders (including associations, defendants and courts).
- **Difficulties in quantifying individual loss.** Quantifying individual loss may be difficult in practice. Several associations have called for the adoption of damages scheduling systems.
- **Problems with the type of damage that can be compensated.** In consumer *actions de groupe*, only material damage affecting consumers' assets can be compensated. The mechanism cannot be used for compensating non-material damage. In practice, this has limited its use by associations, in particular in the context of the Dieselgate/Volkswagen scandal.
- **Multiplication of online collective actions outside the realm of *actions de groupe*.** Several private initiatives have been launched to collect and aggregate

[535] see here: www.assemblee-nationale.fr/14/rap-info/i4139.asp.

individual claims via digital platforms[536]. These actions are not subject to the same rules as those applying to *actions de groupe*. They also tend to create confusion.

- **Reluctance / scepticism from courts when handling *actions de groupe*.** Some judges appear to be still unfamiliar with this procedure.

<u>*Benefits*</u>:

- **Media impact**: from the viewpoint of associations, *actions de groupe* can have media impacts on businesses, which are likely to trigger some behavioural changes. This is because *actions de groupe* are usually accompanied with intensive media coverage organised by associations from the very start of the proceedings (see below under 'publicity' for more information).
- **Incentive to settle** (?) In some cases, the action seems to have incentivized defendants and association(s) to settle their case. However, given the limited experience to date, it is still premature to draw clear conclusions on this aspect.

2. Issues related to compensation

2.1 Is the mechanism in place limited to injunctive relief or is compensatory relief also available?

The *action de groupe* allows for injunctive and/or compensatory relief. However, please note that in privacy and data protection, the action was initially only permissible to request the cessation of unlawful practices. The upcoming bill implementing the General Data Protection Regulation (GDPR) into French law is expected to broaden its scope to also allow for compensatory relief.

2.2 Is injunctive relief sufficient or compensatory relief also necessary? In the latter case, could you please specify the benefits of having compensatory mechanisms?

Both are necessary. The latter is required to compensate the loss suffered by the victims of the unlawful conduct.

2.3 When there is no individual compensation (either because the individual amounts are too small, or because the national regulation does not permit it) is there a specific national fund in place in which damages can or must be allocated? If not would you advise such a fund?

Such a fund does not exist and would indeed be necessary.

The fund would also facilitate compensation when the defendant is/becomes insolvent.

2.4 *What shortcomings could you identify in your legislation regarding these issues, if any? What are the strengths of your legislation regarding these issues, if any?*

N/A (as explained above, to date, no action de groupe has reached phase 2).

[536] see for example: www.actioncivile.com/action-collective.

3. Publicity issues

3.1 How are collective actions publicized in your country?

The court decides on how the case will be advertised in the media when it hands down its decision on liability. However, in practice, associations often launch extensive media coverage before starting/when starting the proceedings (see below).

3.2 Who is responsible for the publicity of collection actions? Who bears the costs of such publicity?

The court orders publicity measures. Advertising can only be done only when the court decision is no longer subject to appeal or cassation. The defendant remains responsible for the publicity and bears the costs.

3.3 Overall, is publicity regarding collective actions an issue in your country?

Three elements should be noted here:

- Initially, *actions de groupe* were supposed to be advertised in the media only after the court had handed down its decision on liability (*i.e.,* after the end of Phase 1). The objective was to minimize reputation costs for companies. However, this is not how things have materialized in practice. Often, associations have accompanied the launch of their actions with extensive media coverage, sometimes several months before the actual filing of their claims. For example, in the case *Confédération Nationale du Logement (CNL) v. Immobilière 3F*, the launch of the action was extensively relayed in off-line and online national newspapers in November 2014 even though the claim was formally registered in January 2015. Similarly, the association APESAC announced the launch its action against Sanofi in December 2016 but the action officially started in May 2017. This has forced businesses to adapt their communication strategies. Importantly, these early communication strategies from associations can be regarded as a consequence of the *action de groupe*'s multi-stage procedural design. Indeed, potential group members will need to keep proofs and receipts for joining the group and being compensated. However, given the length of the proceedings (up to several years), potential group members need to be informed at early stages so as to facilitate the preservation of evidence.
- As highlighted above, the main added value of *action de groupe* has been its media impact on defendants.
- There is no official horizontal register listing all ongoing and past *actions de groupe*.[537] It remains thus difficult to collect and retrieve information. In addition, experience has shown that subsequent judicial decisions on on-going *actions de groupe* remains often unnoticed and media coverage is overall fairly limited once the proceedings have started.

[537] Please note that the State Council (*Conseil d'Etat*) keeps a registry of *actions de groupe* filed before administrative courts only. For more information, see here: www.conseil-etat.fr/Conseil-d-Etat/Actions-collectives.

4. Financial issues

4.1 Are legal costs regulated? If so, how (courts' costs, calculation of lawyers' remuneration, regulation of contingency fees etc.) and does it give satisfaction?

The French rules on *actions de groupe* do not provide for public funding. The court may order the defendant to provide the association with an advance on payment in respect of the costs and expenses arising out of Phase 2. The exact amount is left to the court's discretion but should reflect the nature and the complexity of the diligences borne by the association. In November 2017, the association APESAC requested from the pharmaceutical company Sanofi an advance on payment of more than €660,000 as legal fees. The request was rejected by the court.

In parallel, several private initiatives allowing for third-party financing have progressively emerged in France (see below).

4.2 What are your views on "the loser pays" principle?

The rule may act as a disincentive for non-profit qualified entities, such as consumer organisations.

4.3 Is the "loser pays" principle applied? If so, does it work as a deterrent in practice?

Yes, it does. See question 4.2.

4.4 Is third party funding regulated in your country? If so, how? If third party funding is prohibited, does it have an impact on access to justice?

Third-party funding is still a new phenomenon in France. Some private initiatives are supporting third-party funding for collective litigation.[538] Discussions on third-party funding have also been particularly significant in the realm of arbitration. The French International Chamber of Commerce has published guidelines on third-party funding in arbitration in 2014.[539] On 21 February 2017, the Paris Bar Council (*Conseil de l'Ordre du Barreau de Paris*) adopted a resolution supporting third-party funding in the context of international arbitration.[540] In parallel, several other French stakeholders have published interesting recommendations to accompany the development of third-party funding (see in particular the 2014 report by *Club des Juristes*[541] and the 2015 Report by the French Bars National Council (*Conseil National des Barreaux*)).[542]

Under French law, third-party funding is not directly regulated by a dedicated set of rules and no legal provision prohibits it (but none expressly allows it neither). The French

[538] see for example *Alter Litigation*, more information at www.alterlitigation.com/wp-content/uploads/2015/02/Interview-ODA-.pdf.
[539] see here: www.icc-france.fr/docmail/Guide_pratique_financement_arbitrage_tiers.pdf
[540] see here: www.avocatparis.org/system/files/publications/resolution_financement_de_larbitrage_par_les_tiers.pdf.
[541] www.leclubdesjuristes.com/les-commissions/commission-ad-hoc-financement-de-proces-par-un-tiers/.
[542] CNB-RE2015-11-20_TXT_Financement-proces-par-les-tiers[P]%20(1).pdf.

Supreme Court appears to consider third party funding as permissible. For example, in a case related to inheritance rights and in the context of third-party funding of an individual's action, the Court of Cassation quashed the Court of appeal that had *"not sought, as it was invited, if the funder's remuneration was not excessive in relation to the service provided"*[543]. This seems to implicitly suggest that the third-party funding's agreement was valid in this case.

All in all, the legal nature of third-party funding agreements remains still unclear to date.

Two options seem possible:

1) Third party funding may be a composite contract that combines *sui generis* contract aspects[544] and different kinds of contractual mechanisms laid down by the French Civil Code, especially rules dealing with special contracts (*droit des contrats spéciaux)*, service contract (*contrat d'entreprise*), mandate (*mandat*), aleatory agreement (*contrat aléatoire*), receivables assignment agreement (*contrat de cession de créances*).
2) Third-party funding may also be a bank loan contract in the meaning of the Monetary and Financial Code that falls under the banking monopoly.

Other rules may apply directly or indirectly to third-party funding (*e.g.,* lawyers' rules on professional ethics.

4.5 What are your views on third party-funding (need for regulation, risks of abuse etc.)?

To date, no clear abuses have been reported in France.

4.6 Overall, what risks related to economic and financial issues do you identify both in theory and in practice? What safeguards (protecting the defendant as well as the claimants /absent parties) should be put in place?

Until now, such risks (*e.g.,* blackmail actions, excessive remuneration of funders, agency costs, *etc*…) have not materialized in France. It may also be assumed that third party funders will only finance trials with high chance of success. Frivolous or abusive actions appear unlikely in the current state of play. For this reason, it seems premature at this stage to impose statutory regulation that could hinder the development of collective redress mechanisms. Soft law instruments (*e.g.,* Best Practices, Recommendations, *etc.*) may be valuable in this field though.

5. Issues of private international law

5.1 Is the international dimension of collective redress (claimants residing in different states, claimants and defendant residing in different states, damage occurred in another state etc.) taken into account in your national legislation? If so, how? Is it satisfactory in practice ?

French rules on *actions de groupe* provide limited elements for the resolution of international mass claims. The only dedicated statutory provision is set out in the general framework for *actions de groupe* that is laid down in the French Code of Civil Procedure

[543] Cass. 1re civ., 23 nov. 2011, n° 10-16770.
[544] CA Versailles, 12e ch., sect. 2, 1er juin 2006, n° 05/010038.

(*Code de procedure civile*). In particular, Article 826-3 *alinea* 2 states that the Paris High Court of First Instance *(Tribunal de Grande Instance de Paris*) has exclusive jurisdiction when the defendant is located outside France.

Please note that, to date (*i.e.,* May 2018), no cross-border mass claims have been filed in France.

In theory, international collective redress proceedings will be governed by common principles of private international law (*droit international privé commun)* and EU private international law for intra-EU litigation (*droit international privé européen)*.

In the specific context of mass competition litigation, the Court of Justice of the European Union adopted a 'claimants friendly' interpretation of Brussels I Regulation in its landmark ***CDC* case**.[545] It was notably decided that under Article 5(3) (now Article 7(2), victims may choose to bring actions before the courts of:

- 'The place in which the cartel was definitively concluded or, as the case may be, the place in which one agreement in particular was concluded which is identifiable as the sole causal event giving rise to the loss allegedly suffered,'
- 'The courts of the place where its own registered office is located;'

In practice, it resulted from this interpretation a wide extension of jurisdiction to Member States courts (especially British and Dutch courts) to claimants and defendants from all over the EU. Some litigation brought to these MS courts had remote links with these MS markets (and sometimes no links at all). In cases related to EU-wide cartels, French victims have thus brought their actions abroad. For some scholars, this flexible interpretation of Brussels I Regulation created a new *forum actoris* jurisdiction regime in competition litigation. This new regime is seen as being at odd with the domicile of the defendant principle laid down by former Article 2 (now Article 4). It has also been stated that the CDC case is a strong incentive to law and forum shopping strategies for claimants-side stakeholders. (see question 5.2 below)

However, please note that the recent decision of the Court of Justice of the European Union (***Schrems II*** case)[546] adopted a less 'claimant-friendly' approach (the case did not relate to proceedings in France).

5.2 Are there abuses related to the extension of jurisdiction / to parallel proceedings?

No abuses have been identified to date.

In France, most of mass claims have not led to clear abuses from claimants (see however above on the use of advertising by associations). This is mainly due to the inefficiency of available collective redress mechanisms. That said, mass competition litigation should be set apart (as highlighted in question 5.1, law and forum shopping have been eased by the *CDC* decision of the Court of Justice of the European Union).

5.3 What are the appropriate ways of dealing with abuses (forum shopping, choice of law of more liberal countries …) by litigants?

[545] Case C-352/13, 21 May 2015, ECLI:EU:C:2015:335.
[546] Case C-498/16, 25 January 2018, ECLI:EU:C:2018:37.

The reporters' view is that, behind the circumvention strategies allowed by the instruments of private international law, the real problem emerges, that is the delay of certain internal laws in offering effective collective redress. In other words, forum and law shopping is just the symptom of disparities between Member States not the real problem. Rather than dealing with the symptom by reforming the rules of private international law to prevent litigants from moving to more hospitable jurisdictional systems, it might better to deal with the real problem. The most appropriate way seems to implement a harmonised set of procedural and substantive rules that will discourage law and forum shopping. Directive 2014/104 is a first step in that direction but it is too early to assess its outcome.

That said, it is clear that Brussels I bis regulation has not been tailored for resolving mass claims. It does not set out any clear solution for multijurisdictional litigation. For this reason, Brussels I bis Regulation should be revised (see below answer to question II - 6.2).

6. Issues related to alternative dispute mechanisms

6.1 Are there other mechanisms which are used for mass harm events in your country and which can either complement or be a good alternative to collective redress (consumer ADR partly regulated by 2013 ADR directive etc.)?

Several elements should be noted here:

- Rules on collective settlements have emerged from practice in France. As early as 2009, CMAP (Paris Mediation and Arbitration Centre) participated in a mediation process to resolve a dispute between a bank and several associations. The dispute dealt with misleading information on variable rate housing loans. Parties managed to reach an agreement in only six months, which was perceived as a success. Based on this first experience, CMAP developed a set of rules aimed at facilitating collective settlement of mass claims.
- Rules on collective settlements were enshrined into French law in 2014 (Art. L623-22 and L.623-23 of French Consumer Code). In October 2016, the Act on the modernisation of Justice also introduced a general framework for settlements of mass claims. Association(s) and defendant(s) may agree to settle their case. If so, the settlement must be submitted to the court for review. The court must conduct an in-depth evaluation of the terms of the proposed settlement agreement. In particular, judges must ensure that the interests of all potential class members are adequately protected. The settlement agreement must then be advertised in the media to allow individuals to opt in.
- In 2015 and 2017, two *actions de groupe* were settled:
    - The case CSF v. Paris Habitat OPH was settled for an amount of €2M for 100,000 individuals;
    - The case UFC v. Free Mobile was settled for an amount of €1,7M. Group members received between €1 and €12 individually.
    - A third one (*Familles Rurales v. Manoir de Ker an Poul*) is also in the process of being settled.
- In parallel, there are example of mass claims handled by an Ombudsman. In particular, the Financial Markets Ombudsman (*Médiateur de* l'*Autorité des Marchés Financiers* – AMF) resolved mass cases in 2012 and 2016:

- in 2012 the Ombudsman was contacted by a lawyer representing 143 investors complaining that they had not been properly informed by around 20 financial institutions when acquiring shares in a listed company that had since been placed into court-ordered insolvency proceedings. After reviewing each investor's profile, the Ombudsman in some cases recommended no compensation while in other cases proposing a gesture of goodwill in line with the degree to which the investor
- In 2016, a case was brought before the Ombudsman's Office comprising 102 individual cases, of which 97 were closed by the end of the year. It related to the financial disclosure by French account keepers to their clients, shareholders of a large foreign company, and to the tax consequences under French law of a spin-off voted for by said foreign company.

6.2 What opportunities do you identify with alternative dispute mechanisms?

Benefits of ADR for the resolution of mass claims can be the following:

- Faster resolution of mass claims
- Flexible outcomes, less costly and burdensome for associations and traders. In particular, the intervention of the Ombudsman turned out to be effective. As the AMF Ombudsman for instance highlighted in its 2012 annual report: 'mediation allows equity to be restored – something that no court can do. In this particular case, this was an argument to which the financial institutions involved were sensitive. From the claimants' perspective, the involvement of the Ombudsman enabled imbalances between them and the institutions in question to be corrected'.[547]

6.3 What shortcomings do you identify with alternative dispute mechanisms?

- Confidentiality of settlement agreements can be an issue, depending on the nature of the case at stake;
- Parties need to have an incentive to settle their cases;
- Reviewing settlement agreements can be difficult for judges as their task will be to ensure that the rights and interests of all parties are protected. It may be useful to develop guidelines that courts could refer to when reviewing mass settlements. These guidelines would list some key points requiring specific scrutiny. This is the path followed by the US Federal Judicial Centre with the publication of a 'pocket guide' assisting judges when reviewing mass settlements.[548] This guidance has been designed in the US context and should be adapted to the EU/French framework. However, the underlying problems remain the same as courts must in all cases protect the interests of all represented and absent parties.
- Enforcing settlement agreements can be burdensome for associations, in particular in cases where the situations of claimants are heterogeneous.

[547] see AMF Ombudsman 2012 Annual report, p.5, available at: www.amf-france.org/en_US/Publications/Rapports-annuels/Rapports-annuels-du-mediateur/Archives?docId=workspace%3A%2F%2FSpacesStore%2Fe45ad67a-835c-4cd9-bb27-68bd1ed9c369.

[548] See in particular: B. Rothstein & T. Willging, *Managing class action litigation : a pocket guide for judges*, 2010, 3rd ed., available at: www.fjc.gov/sites/default/files/2012/ClassGd3.pdf

7. Issues for practitioners

7.1 What impact have legal practitioners experienced on their practices?

As said above, French law did not entitle lawyers to start *actions de groupe* on their own motion. As a reaction, the Paris Bar decided to launch a website ('*avocat actions conjointes*') to collect and aggregate individual claims, which are assigned to one or several lawyers. This initiative was perceived as unfair competition by some associations[549].

7.2 What impact have actors with legal standing (for example, qualified entities) experienced?

Please see above. *Actions de groupe* are usually burdensome, time-consuming and costly for associations. Only a few have the actual resources to initiate and conduct such proceedings.

7.3 Overall, what are the difficulties and opportunities experienced by all actors involved?

For past research on similar issues, the two reporters carried out interviews with associations' representatives involved in collective redress proceedings. Some of them seemed to praise the "name and shame" effect of the action and recognise the lack of efficiency of the mechanism. Other representatives found the *action de groupe* particularly time-consuming, lengthy, expensive and inefficient for obtaining compensation.

8. Trends

8.1 Do you witness a trend towards a growing use of collective redress mechanisms in your country? If so, in which fields in particular and why? If not, is there any specific reason?

The following conclusions can be made (to date):

- The number of *actions de groupe* remains low and their impact is still fairly limited.
- Some associations tend to select cases in which criminal or administrative sanctions have been issued beforehand (follow-on *action de groupe*) so as to reduce uncertainty. However, this strategy is not always conclusive and tends to delay the conduct of proceeding.s[550]
- In December 2017, the *Cour des comptes* recommended to the Minister of Economy and Minister of Justice to proceed to a revision of the rules of *action de groupe* so as to maximize their potential.[551]

[549] The website's first report is available here: www.avocatparis.org/mon-metier-davocat/publications-du-conseil/rapport-sur-le-site-avocats-actions-conjointes.
[550] see for instance case *UFC v. BNP Garantie Jet 3.*
[551] see here: www.ccomptes.fr/sites/default/files/2018-02/20180305-refere-S2017-3908-DGCCRF-protection-eco-consommateur.pdf.

II. TOWARDS A EUROPEAN INSTRUMENT

Please keep in mind that your answers must be rooted in the reality of your own country. Your recommendations/positions must correspond to what citizens and politics in your country are willing to accept and implement.

17. Impact of EU instruments on your legislation

1.1 In your opinion, is there a need for a binding instrument at the EU level or not?

The multiplication of cross-border mass harm situations (Ryan Air, Dieselgate, *etc*.) combined with the limited effect of the 2013 Recommendation of the European Commission on collective redress have made the adoption of a binding instrument necessary at the EU Level.

1.2 Did the EU Recommendations on- the common principles for collective redress of 2013 have an impact in your country / field of expertise? If so, of which nature (satisfactory or not)? And if not, why is that?

The *action de groupe* was implemented in France in 2014. However, its procedural design had been under discussions for several decades before. Therefore, it remains difficult to assess the practical impact of the 2013 Recommendation in France.

It should be noted that the General Data Protection Regulation has contributed to extend the scope of *actions de groupe* in privacy/data protection (they should be soon available to request injunctive and/or compensatory relief. Before, compensatory relief was excluded).

1.3 In you view, would your country benefit from such an instrument, or be negatively impacted?

As shown above, *actions de groupe* have failed to provide an efficient tool for the resolution of mass claims. Arguably, France could potentially benefit from such an instrument.

1.4 Would the implementation of a collective redress mechanism at a EU level introduce a risk of abusive litigation? If so, what minimum safeguards should be put in place ?

In theory, the introduction of collective redress mechanisms could introduce a risk of abusive litigation. However, in France, these risks have not materialized so far.

The accurate question is rather how to find the right balance between sufficient safeguards preventing abusive litigation without preventing actions from qualified entities.

In particular, reporters consider that the following issues are worth investigating:
- Giving standing to public authorities (DGCCRF) and/or public ombudsmen (as independent entities, risks of abuses seem low).
- An early certification phase by the courts might be enough to minimize the risks of abusive litigation. This safeguard would allow to give legal standing to representative individuals and not only to associations or public bodies.

2 Building an EU instrument

2.1 If you are in favour of a European instrument, what level of harmonization would you recommend?

A non-binding instrument is not sufficient, as evidenced by the 2013 Recommendation, which have failed to secure a coherent and consistent framework for collective redress in the EU.

The two reporters slightly disagree on the type of needed European instrument. One takes the view that a regulation is politically unlikely at the European level as the issue of collective redress continues to be sensitive across the EU and still strongly divides Member States and stakeholders. It would also be perceived as disproportionate and going against the legal traditions of Member States. A directive fixing a common framework with clear rules but giving some flexibility to Member States would thus be preferable. The other considers that a regulation will be necessary given the critical need to: 1) grant the same level of protection on the internal market and an equal access to collective redress to all EU citizens and businesses; 2) deal with the sudden surge of EU wide mass litigation (e. g. in data protection, competition or consumer law fields); 3) avoid the lack of efficiency of Member States. These objectives could be better achieved at EU level and this why a regulation could comply with the principles of proportionality and subsidiarity.

All in all, we consider that two EU instruments would be valuable:

- 1°) a regulation for cross-borders mass claims and
- 2°) a directive for (internal) mass claims.

2.2 What should be the minimum requirements / rules contained in such an instrument (eg. admissibility of such actions, standing, joining the group, forms of redress) ?

The directive / regulation should clearly address the following issues:

- **Scope** should be horizontal. The mechanism should be available to request injunctive and compensatory relief.
- **Standing** of qualified entities: non-profit bodies, including ombudsmen and independent public authorities (for example, DGCCRF in France)
- **Funding**: the issue of funding is essential and the mechanisms should provide tools for supporting the action of qualified entities
- **Private International Rules**: clear jurisdictional rules for the resolution of cross-border mass claims are necessary given the multiplication of cross border mass disputes (see below)
- Mix of **opt-**in and opt-out system depending on the nature of the case at stake.

2.3 What should be scope of the instrument (horizontal, standing, certification, opt-in etc.)?

See above.

3 A New Deal for Consumers

3.1 The European Commission published its proposal for a "Directive of the European parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive

2009/22/EC" on April 11th. Is this proposal sufficient (scope, introduction of compensatory redress rules, continued use of the trader / consumer dichotomy, determination of qualified entities) ?

The draft directive is certainly a step forward after the failure of the 2013 Recommendation. However, several preliminary remarks can be made:

- **Standing** should be given to independent public bodies, in particular ombudsmen and public authorities. These authorities are not profit-driven entities and independent. As such, risks of abuses are likely to remain limited.
- Issues relating to **funding** of representative actions will be essential (in particular measures taken at national levels to financially support the actions of qualified entities).
- The draft directive should build up and **consolidate the principles laid down in the Recommendation**. Clear connections with the principles laid down in the 2013 Recommendation appear lacking;
- The success of the proposed mechanism will be **highly dependent on the good articulation between the injunction order and the redress mechanism**.
- The draft directive includes some measures supporting the action of qualified entities. The type of measures that will be introduced by Member States later on in this respect **will need to be carefully scrutinised and assessed**.
- Member States should be required to keep **up-to-date registers** listing all ongoing and past actions.
- The draft directive should be accompanied by **trainings for courts and guidelines / best practices for judges**.
- The draft directive should include **rules for the resolution of cross border mass claims**.

4 Alternative dispute resolution

4.1 How should a European instrument on collective redress be articulated with alternative dispute resolution mechanisms / amicable settlements?

A way to facilitate the articulation between (judicial) collective redress proceedings and ADR would be to give to (public) ombudsmen the possibilities to initiate the action. Also, as judges will be performing key roles when reviewing settlement agreements, guidance documents listing issues requesting specific scrutiny by the court could be beneficial. This is the path followed in the US with the publication of a 'pocket guide' assisting judges when reviewing mass settlements.

5 Cross-border cases – please note this question is optional, only answer if you wish to give suggestions on this topic.

5.1 How should cross border cases (claimants residing in different states, claimants and defendant residing in different states, damage occurred in a different state) be dealt with?

6 Issues related to Brussels I bis – please note this question is optional, only answer if you wish to give suggestions on this topic.

6.1 Is there a need for new rules on jurisdiction for cross border collective redress cases ? If so, do you reckon collective redress entails the revision of Regulation

Brussels I bis ? Or, instead, should jurisdiction issues be dealt with in a specific instrument dedicated to collective redress?

Brussels 1 Regulation has not been tailored for mass claims. Yet the multiplication of cross border cases affecting individuals located in several Member States combined with recent case law from the Court of the Justice of the European Union have made the issue pressing.[552] The issue of jurisdiction rules for cross border cases may either be addressed as part of a revision of Brussels 1 bis Regulation or through a new instrument, as long as clear rules are ultimately provided.

III. DATA AND STATISTICS

There is no official register listing all actions de groupe in France. Information available in the table below has been retrieved from online sources and contacts with associations.

See Appendix.

[552]see CJEU, Case C-498/16 *Schrems v Facebook Ireland Ltd*, EU:C:2018:37.