

Class Actions, Group Litigation & Other Forms of Collective Litigation

Protocol for National Reporters

FRANCE

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1. *As background for consideration of the context within which your country's group litigation operates, please briefly describe your civil litigation system (e.g. common law, civil law)?*

Belonging traditionally to civil law systems, French legislation is mostly codified, meaning that written law has a durable, general and binding effect on all citizens.

If Constitution recognises full and complete powers to the Legislative and Governmental institutions, the judiciary one is only vested in a limited “*authority*” that hinders judges’ discretionary power: jurisprudence principal duty is to interpret legislation, not to create new rules (Article 4 and 5 of the Civil Code), and Equity cannot be taken into account by judges, except when it is required by law (e.g. Article 1135 Civil code). Many rules of civil procedure, governing jurisdictions and standing to sue, historically inspired by Medieval Romanist times, highlight this situation.

But rules underwent important changes since the 70’s, when the new Code of civil procedure was passed, thus conveying some conceptual evolutions². Today, there is a great tendency in later legislators to produce rules in order that justice in general be more accessible to people, and that judges give more space to conciliation and rend their decisions faster. Accompanying these legal changes, judges also adapt their behaviour in trials’ every day life.

Moreover, French legislation and procedural practice became deeply influenced by international changes. In particular, some new procedural rules developed under the influence

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² See S. Guinchard *et alii*, *Droit processuel, Droit commun du procès et droit comparé du procès équitable*, Dalloz, 4th éd, General Introduction, 1. For a thorough comparison between the American and French judicial systems, see A. GARAPON, I. PAPAPOULOS, *Juger en Amérique et en France*, éd. O. Jacob, 2003.

of the European Convention for the protection of Human Right and fundamental freedom (ECHR), that the French government signed in 1975. As a matter of fact, the case law produced by the Court for the protection of Human Rights directly binds French judges, and, indirectly, legislators themselves.

Lastly, those to be tried have new expectations. Watching what exists, or changes that are happening in other countries, they appeal for a more efficient justice in their own country, and legislators are sensitive to these evolutions. Globalization is a sociological element that can not be neglected, especially in the European Union area³.

At the crossroad of these influences, the First Book of the Code of civil procedure, entitled “Leadings Principles for all litigations of Civil procedure”, states some universal principles, three of which will be exposed here for better comprehension of the following developments:

i. *The Accusatory principle*

Unlike the American procedure, French proceedings are not presided over by interrogating judges. The parties are the main actors of the procedure as they can commence (Article 1 of the Code of civil procedure), develop or stop any proceeding, and produce evidence, as they like. Judges are only there to make a ruling for a specific cause.

ii. *Right to “a fair trial”.*

Traditionally, parties in court would benefit from the protection of so called “Defence rights”. The EHCR influence has increased that protection, as shown by the Article 6 para. 1 (art. 6-1) of the Convention: "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....".

According to this rule, every party in any court must be granted a fair trial: Equality of arms, a right to fair and rapid hearing, and to an impartial and loyal judge... are inherent in the concept of a fair trial.

iii. *A "contestation" (dispute) over a right rule (“principe du contradictoire”)*

³ For the very first time, a French report presents a comparative assessment of the different European jurisdictions systems focusing on economic matters, and questions the need for more harmonisation in this field : « Quelles juridictions économiques en Europe?, Du règne de la diversité à un ordre européen », Pref. R. BADINTER, concl. G. CANIVET, Litec, 2007.

The rule allows each person in a suit to appear in court and be heard. Before giving their ruling, judges must verify that the principle was actually followed

French judges are bound by all these universal principles of justice.

Opponents to the introduction of a class action based on an Opt out system argue that this type of action would not comply with most of these principles.

2. *What formal rules for representative or non-representative group litigation have been adopted in your country? Please include both statutory rules and rules adopted by the judiciary, and include both private law and public law mechanisms (e.g. partie civile). Describe briefly the policy debate and political context for the consideration and adoption of different forms of group litigation, including if relevant the decision to adopt a non-representative form of group litigation and/or a limited form of representative litigation, as alternative(s) to a broadly available representative litigation procedures, along the US model. For each litigation mechanism, please describe what types of claims the mechanism pertains to (for example, all multi-party claims or only some specific type of claims, such as antitrust, consumer protection, investor/shareholder protection, environmental, etc.) and when the rules were adopted. If there have been important amendments to the governing statutes or rules since their adoption, please identify these, describe them briefly and if possible describe why amendments were adopted. Please attach copies of the statutory provisions and/or rules, and an English translation, if possible.*

2.1. The policy debate and political context for the consideration and adoption of a form of group litigation

In France, there is no group litigation procedure, whether it be along the US or the English model. Nevertheless, the class action debate is not a new one. The French background regarding class actions show how important this issue is.

i. It is French judges themselves, who, first of all, appealed to a kind of class action. According to the so-called “Jurisprudence des ligues de défense”, a group of people are allowed to organize themselves to defend their own but shared interests in justice. Therefore, a case law on «*ad hoc* non-profit organisations » developed, as shown by a

famous case judged in 1913 by the French Supreme Court, the *Cour de cassation*⁴. In this case, a group of wine growers were admitted to bring a joint action to defend their interests in court. Narrowing the jurisprudence on consumption matters, the ***Royer Act*** was passed on 27 December 1973, creating the ***action in the collective interest of consumers***.

ii. Later on, two task forces, both under the supervision of the best known Academic in the field of Consumer Law, Prof. Calais Auloy, made proposals in two reports, one respectively published in 1984 and 1990 to create a group litigation for consumers.

These reports were quite innovative. As they were inspired by the American Class action model, but in a more restrictive form, the reports suggested that only approved consumer associations be allowed to initiate such action. Moreover, it proposed two different procedures depending on the victims and the possibility to identify all of them previously. If all the victims were not identified, a two-step procedure was recommended whereby judges were first to rule on whether liability could be attributed to the professional concerned and, if so, were to make their decision public and wait for potential injured third parties to manifest themselves before enforcing the sentence, each claim for damages and interest then being examined separately. The proposal was very similar to an opt out class action system. However, these reports were never acted upon.

iii. In the mid-90s', consumers and investors protection was reinforced by the creation of a ***Joint representative action***, but these legal provisions did not follow the Calais Auloy's proposals.

iv. In a speech delivered on 4 January 2005, former President Jacques Chirac came out in favor of introducing class actions into French law for the consumers only, in the following terms:

“Consumers must at long last be given the means to defend their rights: means that were unavailable to them up to now since, when taken separately, each individual injury suffered is not big enough to cover the cost of legal action. This is why I am asking the Government to draft changes to current legislation so that consumer groups and their associations can bring class actions against the unfair practices going on in certain markets.”

⁴ Chambres réunies, 5 avril 1913, Syndicat National de la Viticulture Française.

A task force was set up in April 2005 chaired by Dir. Guillaume Cerutti and Dir. Marc Guillaume. It was composed of representatives from consumer associations (CLCV, UFC-QUE CHOISIR, UFCS...), from professional bodies (MEDEF⁵, CCIP⁶, FBF, AFEP) and legal practitioners (Academics, magistrates, lawyers). Their task was to make proposals with a view to improving the system for bringing actions on behalf of several individuals and to setting up new mechanisms *“to give consumer associations the possibility of taking legal action, in certain types of dispute, on behalf of a group of consumers in order to ensure compliance with legislation and to obtain compensation for individual injuries.”*

The working group submitted its report to the Ministry of Finance and the Minister of Justice on 16 December 2005⁷. As a result a proposal was made in November 2006. Its main recommendation was to allow any claimant to sue for damages, only in cases of “material harm” or “disturbance of possession” “caused individually or severally to many consumers, due to the non fulfillment or a faulty performance of contractual obligations by a single professional in the selling of merchandises or services”. Despite some particularities, the new action looked very similar to the abovementioned Joint representative Action. The proposal was never discussed in the Senate or the Deputy Assembly and the new French government decided that a new reform in this field was not a priority.

In a nutshell, there exists, so far, two litigation mechanisms.

2.2. Litigation mechanisms

Under French law, actions can be taken in the defence of a collective interest before criminal or civil jurisdictions (i). As from the mid-90’s, Joint representative actions, aiming at defending multiple personal interests, can be brought on behalf of several individuals (ii).

i. Action taken in a collective interest

a. Actions taken by authorized consumer associations in the collective interest of consumers

⁵ MEDEF is the name for the French Movement of Entreprises.

⁶ CCIP is the name for the Chamber of Commerce in Paris.

⁷ Rapport sur l’action de groupe- Groupe de travail présidé par Guillaume Cerutti, Directeur Général de la Concurrence, de la Consommation et de la Répression des Fraudes (DGCCRF) et Marc Guillaume, Directeur des Affaires Civiles et du Sceau, <http://lesrapports.ladocumentationfrancaise.fr/BRP/054004458/0000.pdf>).

According to the **Royer Act**, which was passed on 27 December 1973, amended in 1988, 2001 and codified in 1993 in the Consumer Code, properly declared associations whose expressed aim is the protection of consumer interests, may take an action in the collective interest of consumers.

When consumer associations bring an action in the collective interest of consumers, they must ascertain whether or not the injurious event was a criminal offence.

Article L. 421-1⁸ of the Consumer Code provides that, ***when a criminal offence has been committed***, consumer associations may, if they are approved for this purpose, “*exercise the rights of a party to the prosecution in respect of events directly or indirectly harming the collective interest of consumers*”.

Under the abovementioned 1988 Act, the consumer associations referred in Article L. 421-1 may also bring an action to stop illegal behavior. According to this act, codified in Article L. 421-2 of the Consumer Code⁹, when an association initiates a civil action, it may ask the civil court, ruling on civil actions, or the criminal court, ruling on civil actions, if need be under threat of a penalty, to order the defendant or the accused to take any action to “*stop illegal behavior or to remove illegal clauses from a particular contract or a standard contract offered to consumers*”.

In order to have such measures implemented, an action can therefore be brought together with the approved association’s civil action. Whereas the former type of action gives rise to compensation for the injury, the latter tends to prevent that injury from continuing to occur. These actions are thus complementary.

Where no criminal offence has been committed, it is acknowledged since 2001 that actions brought by approved associations in the collective interest of consumers are not conditional upon a criminal offence having been committed:

Article L. 421-7 of the Consumer code¹⁰ allows consumer associations referred in Article L. 421-1 to “*join proceedings in civil court*” and, in a liability suit brought by a consumer who has been the victim of acts not punishable under criminal law, request to stop illegal behavior or to remove illegal clauses as provided for in Article L. 421-2 already mentioned.

⁸ See Appendix I, Article L. 421-1 of the Consumer Code.

⁹ See Appendix I, Article L. 421-2 of the Consumer Code.

¹⁰ See Appendix I, Article L. 421-7 of the Consumer Code.

Pursuant to Article L. 421-6 of the Consumer Code¹¹, the same associations may also, but only at their initiative, initiate a suit in the civil courts without any criminal offence having been committed, in order to remove *illegal or abusive clause from any contract or standard contracts offered to or intended for consumers*” by professionals. The right of approved consumer protection associations to take autonomous action in a specific case has therefore been acknowledged. The courts have also ruled that a request to remove a term may be filed spontaneously to assist a consumer in a case brought against him/her by a professional.

b. Action taken by authorized associations for the protection of Health (Art. 1114-2 of the Public Health Code)

Among other objectives, the 4th March 2002 Act pertaining to “patients’ rights and the quality of the health system”, was to achieve a kind of democratic health system in France. One concrete result of that objective has been to allow approved associations for the protection of health to take actions against health institutions and also to bring actions in the criminal courts. According to Article L.1114-2 of the Public Health Code¹², these associations may exercise the rights of a party to the prosecution in respect of acts which directly or indirectly harm the collective interests of the users of the health system. These criminal acts involve acts of manslaughter and intentional invasions of a person’s bodily integrity, as well as offences provided for in the Code of Public Health.

c. Actions taken by authorized associations for the protection of the Environment (Art. L. 142-2 of the Environment Code)

Identically, in the area of the Environment protection, approved associations may exercise the rights of a party to the prosecution in respect of acts which directly or indirectly harm the collective interest that they defend and which constitute an infringement of laws governing the protection of nature and environment (article L. 142-2 of the Environment Code¹³).

¹¹ See Appendix I, Article L. 421-6 of the Consumer Code.

¹² See Appendix III, Article L. 1114-2 of the Public Health Code.

¹³ See Appendix IV, Article L. 142-2 of the Environment Code.

d. Action taken by authorized associations for the defense of investors (Article L. 452-1 of the Monetary and Financial Code)

Since a 1994 Act (August 8th, 1994) codified in the Monetary and Financial Code, approved associations of shareholders or investors have been allowed to take actions in respect of events directly or indirectly harming the collective interest of investors or some of them (Article L. 452-1 of the Monetary and Financial Code).

ii. Joint representative action

a. Joint representative action for consumers

Under Article L. 422-1 of the Consumer Code¹⁴, where several individuals, identified, consumers have suffered personal prejudice having a common origin through the actions of the same person, any approved association recognized as being a nationwide representative may, if instructed to do so by at least two of the consumer concerned, sue for damages any court on behalf of those consumers.

Contrary to the actions previously exposed, the Joint representative action is taken in the *individual interest* of several consumers who have been injured due to the actions of the same professional. It brings together, in the same set of proceedings, the individual liability suits that could have been initiated by each of the consumers who are, for example, victims of the same defect in a mass-produced product or of a failure to perform a service offered to the same group of people.

Such a tool allows victims to bring civil actions in order to get damages due to breaches of antitrust rules or in other matters.

b. Joint representative action for investors

Under Article L. 452-2, al. 1 of the Monetary and Financial Code¹⁵, if several identified investors have suffered personal prejudice having a common origin through the actions of the same person, any approved associations of investors may, if instructed to do so by at least two

¹⁴ See Appendix II, Article L. 422-1 of the Consumer Code.

¹⁵ See Appendix V, Article L. 452-2, al. 1er, of the Monetary and Financial Code..

of the investors concerned, sue for damages before any court on behalf of those investors. Under some conditions¹⁶, the mentioned associations are allowed to take action in the defense of the *individual interest* of several investors who have been injured due to the actions of the same professional.

3. *For each litigation mechanism identified above, please provide a general description of the process contemplated by the formal rules. In most legal systems, there are significant differences between “the law on the books” and “the law in practice.” For this item, we are interested in “the law on the books”; later we will ask about actual practice, and about specific issues, such as standing, appointment of legal counsel, and who is bound by outcomes of the litigation.*

3.1. Actions taken in the defence of a collective interest

This type of actions is only opened to authorized and representative associations.

Moreover, it will only be admitted to the extent that the injury being claimed by the association differs not only from the one suffered by the general public, but also from the one personally suffered by the direct victims.

To the extent that the purpose of this type of actions is to defend the collective interest, the injury to be repaired continues to be collective and the repair of an individual injury is not possible, unlike a true class action.

According to the French *Cour de cassation*, the collective interest is necessarily different from the individual interest of the victims who suffered personally and who can only ask for compensation (Crim., May 20th, 1985, Crim. Bull. 485).

3.2. Joint representative action

This type of action is close to a class action model as it aims at compensating individual injuries. However the two actions still differ in many ways.

¹⁶ See *infra*.

Only approved associations representing consumers or investors at a national level are permitted to bring a Joint representative action.

To be approved, the associations must meet various criteria. They must obtain a government approval and have, at least, six months of existence and a certain amount of members. The associations for the defense of investors must also draw up a balance sheet, a profit and loss account and an appendix each year, the scope and presentation of which are determined by decree, which are approved by the meeting members¹⁷.

The association, whether representing consumers or investors, cannot initiate the action alone. It has to be instructed to do so by, at least, two individuals (consumers, investors), who must give their prior authorization to sue in their name and on their behalf. The instruction must be given in writing by each investor (Article R. 422-1 of the Consumer code; Article L. 452-2, al.2 of the Monetary and Financial Code¹⁸) and mandatory mentions must appear on it. Any individual (consumer or investor) having given this instruction can dismiss it without explanation.

With a view to getting more victims to join in the action, consumers association can solicit their authorizations in newspapers and magazines, but not via TV or radio, nor by distributing tracts or personalized letters. The rules say nothing regarding solicitation through the Internet.

These formalities are identical to investors' action litigation requirements: investors associations may not solicit instructions from individuals via TV or radio, nor by distributing tracts or personalized letters. However, if an approved association brings an action for damages before civil or commercial courts, the presiding judge of the court, as applicable, may issue a summary order authorizing it to solicit a power of attorney from the investors empowering it, at its own expense, to act in their behalf and have recourse to the advertising channels abovementioned (article L. 452-2, al. 3 of the Monetary and Financial Code).

Whereas any individual (consumer or investor) having given his agreement for the bringing of an action before a criminal court is deemed in those circumstances to be exercising the rights of a party to the prosecution, all notifications concerning the investor shall be sent to the

¹⁷ See Appendix V, Article L. 452-2, al.4 of the Monetary and Financial Code.

¹⁸ See Appendix V, Article L. 452-2, al.2 of the Monetary and Financial Code.

association (Article L. 422-2 of the Consumer Code¹⁹; Article L. 452-3 of the Monetary and Financial Code²⁰)

Once these conditions have been satisfied, the action may be brought “*in any court*”, meaning either in a civil or a criminal court or, as the case may be, in an administrative court. However, without making any distinction between jurisdictions, the rules provide that if a consumer withdraws his/her authorization, the party having given that authorization may pursue the case as if he/she had initiated it directly, it being that party’s duty to inform the judge and the other party.

Finally, if the action fails, the consumers or investors who were represented lose their individual right of recourse. On the other hand, if the professional is found liable, the damages and interest which that professional is sentenced to pay must be attributed to the injured consumers or investors since the only purpose of this action is to get compensation for their individual injuries.

Nevertheless, when bringing an action on behalf of several individuals, there is nothing to stop an approved association from initiating legal action, if need be, to defend the collective interest of consumers as well.

4. In representative litigation, who may come forward to represent groups of claimants, in what circumstances? Must class members all come forward individually (“opt in”) to join the litigation, in some or all circumstances? *What interests and organizations have availed themselves of the procedure? What roles have public justice officials and private lawyers played in prosecuting cases? What are the barriers to individuals and groups using the representative mechanism (e.g. funding problems, difficulty communicating with potential class/group members, lack of independence of officially-appointed representatives, judicial attitudes)? Are there features of your country’s civil litigation system that either facilitate or deter representative litigation?*

In a Joint representative action, a legal requirement is that the members of the group be legally represented by a specific entity, and some restricting conditions apply:

¹⁹ See Appendix I, Article L. 422-2 of the Consumer Code.

²⁰ See Appendix V, Article L. 452-3 of the Monetary and Financial Code.

4.1. The right to commence the action is only opened to national non-profit organisations which are authorized to do so by the French administration through an agreement (e.g. approved consumer associations representing consumers at national level);

i. In general, the association needs to be representative and has to fulfil some strict conditions (more than six months of existence, large number of members...)

ii. To bring any action, the organisation needs a special instruction. At least two individuals (consumers or investors) must give their prior written authorization to sue in their name and on their behalf. The instructions need to be in writing. Each defendant's name and identity have to appear on every writ. Agreements are easily dismissible.

iii. Moreover, the representative is only allowed to appeal for proxies through the press (newspapers and magazines), but not via TV or the radio (except, under judiciary conditions, for securities joint representative actions²¹).

iv. Most of the time, the organisation will have to pay the cost in advance (depending on the terms in the instruction)

v. Each claim for damages and interest will then be examined separately

vi. The association bears the full and entire responsibility of the costs of the procedure (and this with no insurance).

4.2. The French Opt-in system

A long-running debate asks whether the French judiciary system may allow an action with opting out. A position has been made official by the Conseil constitutionnel²², in a decision regarding labor unions. According to this decision, the *Conseil constitutionnel* held that if, by law, group litigations might be commenced by labor unions on behalf of their members, it

²¹ See supra.

²² The French Conseil constitutionnel has power to verify that a the proposition of law (before it is passed) complies with the French Constitution.

could be so only provided that any employee be “*afforded the opportunity to give his assent with full knowledge of the facts and that he remained free to conduct personally the defence of his interests*”²³, thus having the possibility to disunite the group in order to bring his own action, on an individual basis.

The *Conseil constitutionnel* insists on the fact that “*the employee concerned must be informed by register letter with a form of acknowledgement of receipt in order that he may, if he desires so, object to the trade union’s initiative*”²⁴.

The freedom of bringing, or not bringing, one’s own action lies at the heart of this decision. Most Academics have interpreted this decision as condemning any opt out system.

In addition, some of the abovementioned universal principles of French justice, inspired by the ECHR, deter representative litigation:

- i. The “Due process” rule requires that an individual cannot be made a plaintiff without his knowledge
- ii. The doctrine of “*nul ne plaide par procureur*” requires all those involved in a lawsuit to have their identity known. Hence, members of the class have to be preliminarily identified (ie before the beginning of the action)

Contrary to the situation in the United States and other countries, membership to the group requires that a member should personally agree to join the action.

Therefore, the members of the group shall be parties to the action

- iii. Consequently, those who do not opt in won’t be bound by a future decision in the case. This is the so called “*autorité relative de la chose jugée*” (limited-to-parties authority of a judgement), under Article 5 of the Civil code.

4.3. Judges’ power

According to the representation requirements, the prerequisites to the proceedings are light for judges.

In compliance with the accusatory principle²⁵, judges have limited power during the proceedings. That is to say, in France, there is no special rule of Certification.

²³ Dec. Cons. Const. N°89-257 DC, July 25th 1989. See Appendix VII, spec. pt 24.

²⁴ Dec. Cons. Const. N°89-257 DC, July 25th 1989. See Appendix VII, spec. pt 25.

Like for any other action, judges will apply the general rules concerning applications to initiate proceedings.

The absence of a discovery procedure in French Law will further simplify these prerequisites.

5. In non-representative group litigation, who may initiate group litigation, and in what circumstances? *In what types of cases have parties/lawyers attempted to use the group litigation process? What role have judges played in conferring group litigation status on cases? What are the barriers to parties/lawyers using the group litigation mechanism (e.g. funding problems, difficulty determining whether group litigation would be efficient & effective, judicial attitudes)? Are there features of your country's civil litigation system that either facilitate or deter group litigation (presence or absence of contingency/speculative fee system, limits on lawyer advertising, etc.)?*
6. *How many lawsuits have proceeded in each litigation form over the past 5 years? If representative or group litigation requires judicial approval, please indicate the number of representative or group actions that have been attempted and the number in which approval was granted. Please indicate the source of any numbers you provide. If no "hard" numbers are available, please provide estimates.*

France faces a situation where remedies for anti-competitive practice, or personal injury are underutilized by consumers.

The Joint representative Action, the only one which allows consumer associations to ask for multiple but personal compensations, has only been initiated only 5 times since its creation in 1992.

Consumer associations complain that the proxy constraints are too strong and too costly.

In securities Joint representative actions, plaintiffs meet an additional obstacle, linked to judicial attitudes. In addition to all the constraints imposed on the association, the representative must prove a direct and personal damage has been suffered. In practice, this proof is difficult, as the decrease of the stock is not enough to constitute evidence of such an injury. Most of the time, judges decide that the company itself has been personally injured, the investors being so only indirectly. By exception, some injuries due, for example, to false

²⁵ See supra Q.1.

statements in connection with a managers' decision can sometime be taken into account and legitimate compensation for investors, but, generally, high courts are more reluctant to do so than lower courts²⁶.

7. In representative litigation, must possible class members be informed of the initiation of the litigation and, if so, how? *Do courts have oversight authority for the notification process? Please provide any information you have about the types of notification used, their scale, and costs. If parties are required to opt-in, what has been the experience with regard to that? What are the barriers to participation in representative suits? How are class members kept informed of developments, and to what extent can they exercise control over decisions, or take part in the process if they wish?*

In all Joint representative actions, every piece of information is given by judges to the representative association. In turn, the association must keep every individual from whom it received a proxy informed.

8. In non-representative group litigation, must the named parties be informed that the litigation is proceeding in group form? Can parties/lawyers whose cases are similar to others that are proceeding in group litigation form exclude themselves from the group litigation and proceed independently, and if so how? *Are group members kept informed of developments, and to what extent can they exercise control over decisions?*
9. In group litigation, are there special case management procedures (e.g. case pleadings, scheduling, development of evidence, motion practice, test cases, preliminary issues)? *Are there features of your country's civil litigation system that either facilitate or hinder the development of cases that proceed in representative or non-representative group form?*

In the traditionally accusatory French system, principles of universal justice hinder the development of group litigation legislation. It is so for the rule of Access to evidence (9.1), the principle of Equality of arms (9.2) and the "Dispute over a right" rule (9.3). However, these principles are not immutable and they allow more and more exceptions.

²⁶ For example Paris TGI, September 12th, 2006, *Sidel*.

9.1. Obstacles in access to evidence

Unlike the American *discovery* system, French judges are not empowered to issue an injunction forcing parties to communicate all information available to prove a fact or an agreement. Only specialized judges are allowed to search for proofs (*juge d'instruction*), helped by “*Le Parquet*”, and only where a criminal offence exists. Civil court judges have no such powers.

It is, however, to be noticed that French civil procedure sometimes allows, under certain conditions, that disclosure become compulsory. According to articles 10 and 11 of the Code of civil procedure, there is an obligation on parties to provide evidence. Under Article 138 of the same code, if, during a proceeding, a party wishes to rely on an authentic instrument or an instrument under private signature to which he was not a party, or a document held by a third party, he may request the judge hearing the case to order that a certified copy be sent to the court or the instrument or document itself be produced²⁷.

Under Article 145, preparatory inquiries are also admitted when there is a legitimate reason to preserve, or establish any legal process, the evidence of the facts upon which the resolution of the dispute depends²⁸.

Some professional of law, like the Chamber of commerce in Paris, have pleaded for a better use of these provisions, arguing that if it were so, the introduction of a discovery system would not be necessary.

9.2. The principle of Equality of arms.

Under Article 6§1 of the CEHR²⁹, every party in court must benefit a fair trial. The principal of Equality of arms is inherent in the concept of a fair trial. Hence, the EU Commission has held that the “right to a fair hearing, both in civil and criminal proceedings, contemplates that everyone who is a party to such proceedings shall have a reasonable opportunity of presenting

²⁷ See Appendix, VI, article 138 of the new Code of civil procedure.

²⁸ See Appendix, VI, article 145 of the new Code of civil procedure.

²⁹ Article 6 para. 1 (art. 6-1) of the Convention reads as follows: "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...."

his case to the Court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent”³⁰.

Therefore, any party in court must be able to present oral or written arguments (if he/she is not given the opportunity to appear in person, he/she has to be represented by a lawyer who will argue his/her case) or to challenge the validity of an unfavourable opinion.

In addition, no party may enjoy a procedural position which is more advantageous than that of other parties. As a conclusion, there should be no lack of fair balance between the parties.

On the opposite, the opt-out system seems, from a French point of view, consubstantial with asymmetry between parties in court. Unknown members of the class are not able to present their own arguments in court. And, while the representative of the class knows his opponent, the defendant doesn't know all his opponents. Protection of some Human rights could be at stake.

9.3. *A "contestation" (dispute) over a right ("principe du contradictoire")* allows each person in a suit to appear in court and be heard.

This doctrine, based on the ECHR, has multiple consequences. According to the European Court, there is no dispute over a right when “ the President of the Court did not hear the plaintiff and did not invite him/her to present his/her own arguments in defence”³¹.

Therefore, a defendant could legitimately argue that any unidentified plaintiff has not appeared in court, has not been heard or was not allowed to hear his own arguments against the plaintiff. The defendants have the right to properly develop their strategy. This is especially important where the plaintiff's behaviour is partly responsible for the damage.

Principles of universal justice were underlined in the case filed in the US against VIVENDI Universal, SA³². In this case, Vivendi Universal SA, their former President (J.-M. MESSIER) and Chief Financial Officer (HANNEZO), had allegedly, in 2000, in connection with the merger of Vivendi, Seagram and Canal Plus, violated US securities laws through false

³⁰ Decision July 16th 1968, the Commission refers to its decisions on the admissibility of Applications n°. 434/58 and 1092/61, Yearbook of the European Convention on Human Rights, Vol. 2, pages 354 (370, 372), and Vol. 5, pages 210 (212), and, further, to its reports, and the decisions of the Committee of Ministers, in the cases of Ofner, Hopfinger, Pataki and Dunshirn; *Adde* ECHR, 27 October 1993, *Dombo Beheer c/ Netherlands*, Application n°. 14448/88; ECHR, 23 October, 1996, *Ankerl v/ Switzerland*.

³¹ ECHR, 29 May 1986, *Feldbrugge c/ Netherlands*, Application n°. 8562/79.

³² In *Re Vivendi Universal, SA Securities Litigation*, Case 02 Civ. 5571, March 23rd 2007.

statements. The US Federal District Court in New York had to analyse the effect that France would give to a US class action judgment. The Court recognized that the fact that the decision must not contravene French concepts of international public policy was the most problematic, since France allows no opt-out class action. On this issue, the defendants argued that the doctrine *nul ne plaide par procureur* required all those involved in a lawsuit to have their identity known. Therefore, the opt-out class actions would offend the doctrine. The US Court considered that the justification for the doctrine was to allow the defendants to properly develop their strategy and that this *should not apply in a securities fraud case*. The Court found that the opt-out provision of the class action would not offend the doctrine *nul ne plaide par procureur*, and would provide the opportunity to individual French members to appear or not.

From a French point of view, it is not quite sure that the doctrine “nul ne plaide par procureur” was the only relevant argument to the case, because the rule “a dispute over a right”, along with the abovementioned decision of the *Conseil constitutionnel*³³ could have been developed. As a matter of fact, the US judges allowed an American securities class action against VIVENDI to include in the plaintiff class French and other non-American victims, even though they had no connection with the United States and even though they may never benefit from being included in the class. The plaintiffs requested that a class be certified consisting of “all persons, foreign and domestic, who purchased or otherwise acquired ordinary Vivendi Universal, S.A. between October 20, 2000 and August 14, 2002”. This meant that all purchasers of Vivendi stock anywhere in the world during the period would become a part of the class in the American class action and **would be bound by the court’s decision** relating to the class, unless they affirmatively notified the Court that they wished to “opt out” of the class.

Under French Law, this procedure contravenes the rule “a dispute over a right” in both ways: any unidentified French plaintiff has not appeared in court and has not been heard by judges. Nevertheless, she/he was bound by the decision; the defendants could not properly develop their strategy in front of the unknown French victims, as they did not appear in court.

10. In group litigation, what proportion of cases is resolved through party/attorney negotiation and settlement, and what proportion is resolved through judicial or jury decision? *If cases*

³³ See *supra*, Q.4.

are settled, who participates in negotiating settlements? Does the court or do other public officials have responsibility for assuring fairness of any negotiated outcomes, and if so what procedures exist to address the fairness issue? What has the experience of oversight been? Have there been controversies over the fairness or reasonableness of settlements? If cases are tried, how is evidence presented on behalf of the class or grouped claimants?

The rules are the common rules of each type of courts and no specific settlement procedure is allowed.

The French Movement of Entreprise (MEDEF) argues that settlements are very risky for companies: they lead to bargaining, and to bankruptcy of small companies. According to the Movement, legislation must not encourage parties to settle.

11. What remedies are available in representative and non-representative group litigation? When group litigation is resolved with the payment of monetary damages, how are damages allocated among claimants? *Do judges exercise oversight of fairness or process of allocation? Please provide data on outcomes of representative and non-representative group litigation over the past five years. Please indicate the source of any outcome data you provide. If no “hard” data are available, please describe the diversity or range of outcomes to the best of your ability.*

In France, the judgement based a Joint representative action is aimed at compensating personal and direct damages only. In particular, the judge can't issue any injunction. And in France, there are no punitive damages

To obtain compensation, the plaintiff must prove a personal and direct harm. Therefore, judges will compensate each plaintiff according to his personal harm.

12. Who funds group litigation: the state, legal services organizations, NGOs, private lawyers, or the claimants themselves? *Is funding perceived to be a problem, and if so, is the problem perceived as too much funding or too little? What problems have those who wish to proceed in representative or non-representative group litigation encountered in obtaining funding?*

As only authorized association can bring a Joint representative action, most of the time, the association itself funds the litigation. Rarely, the association will ask the victims to fund it themselves (by a special term included in the intrsuction³⁴). Even for associations who have numerous members, the costs of an action are so heavy that they deter them from commencing any action in the first place, except when it is really worth it. A recent example illustrates the weakness of the present situation in France.

In a decision rendered on 30 November 2005, the Competition Commission found three Mobile phone operators, Orange France, SFR and Bouygues Télécom, guilty of conspiracy to fix market share and fined them 256 million €, 220 million € and 58 million € respectively³⁵. However, to the extent that the sentences pronounced by the Competition Commission did not compensate for the losses suffered by consumers as a result of price fixing on the part of the mobile phone operators, the well-known consumer association, UFC-QUE CHOISIR, set up a website with a view to bringing legal proceedings. It did not bring a Joint representative action, because of its costs, but chose to appeal to the system of common rules, based on civil actions for damages due to unfair practice.

So far, the website www.cartemobile.org, which has already had 60,000 visitors, mainly enables each consumer to calculate his/her loss, totaling about 1.2 billion € according to UFC-QUE CHOISIR. The consumer association also states that 18,200 files have now been opened but that they will not be able to handle more than 40,000 if no reforms are made to the collective action procedure.

For over 15 years, consumer associations have begged for the introduction of a real group litigation in French procedure. In a public report, they praise the model of class action in force in Quebec and appeal for the creation of a special fund designed to help financing the proceedings.

13. Costs and benefits. *How are attorneys in group litigation paid? Please indicate whether there are special rules for paying attorneys in representative and non-representative group litigation that do not pertain in ordinary civil litigation. Do courts have responsibility for determining or approving fees in these cases? How do the private costs*

³⁴ See supra, Q. 3.

³⁵ The Court of Appeal of Paris confirmed the decision. The Cour de cassation partially revised the decision. It reduced some of the financial sanctions, but confirmed most of the unfair practices.

of group litigation compare to the costs of ordinary civil litigation, or any other available methods for resolving such situations? Do attorneys make more, the same, or less, in proportion to their time, effort and risk, by comparison to ordinary civil litigation? How do costs compare with the outcomes achieved? Please provide any quantitative data available on litigation costs over the past five years, and any available data comparing costs to outcomes. Please, indicate the source of any cost and outcome data you provide. If no “hard” data are available, please describe the range of costs to the best of your ability, and share your perceptions of the relationship between costs and outcomes.

As French legal system doesn't have true group litigation, there is no available data. Comparing the costs involved in group litigation with those of ordinary civil litigation, or any other available methods for resolving such situations, is therefore not possible.

However, some French peculiar features can be noticed regarding (13.1) the amount of fees (how much?), and (13.2) the burden of fees (who pays?).

13.1. Regarding the amount of fees, the traditional rule is that lawyers are paid on either a fixed sum, or (more often) a percentage of an hourly rate. **Contingency fees**, ie fees calculated on a percentage of the damages or sum recovered, are illegal in France. Seldom, complementary fees (“success fees”), whereby fees become conditional on liability are accepted, but this complement can only represent a small proportion of the total fees. Judges are particularly strict regarding the application of this rule.

13.2. As for the risks of the proceedings, the loser in a French trial takes the risk of having to pay a part or the totality of the opponent's costs, according to the judge's decision (Article 700 of the Code of Civil procedure), what is also called the “cost risk”. Exceptionally in French law, this decision is based on “Equity” and doesn't have to be motivated.

To reduce this risk, a special clause can be previously added in a contract, specifying which one of the two parties will have to bear this risk in case of lawsuits. But this is applicable neither to consumer contracts (which are not negotiated) nor, of course, to civil liability matters towards third parties.

In class actions, this means that the representative of the group (and the plaintiffs) would take a heavy cost risk, that would be, most of the time, not worthwhile, particular for actions in behalf of investors whose personal prejudice is usually seen as indirect.

14. Is the burden that group litigation places on the court more, the same, or less, than in comparable non-representative, non-group litigation? What is the average time to dispose of a group case, and how does this compare to comparable non-representative non-group litigation? *Please provide any quantitative data available on court costs and time to disposition over the past five years. Please indicate the source of any data you provide. If no “hard” data are available, please describe the range of outcomes to the best of your ability.*

Comparison is yet again not fully possible here. Special litigations, however, show how French legislation is not fitted for dealing with mass tort cases.

In the litigation involving the Mobile phone operators (see supra Q.12), the *Tribunal de grande instance de Paris* (TGI of Paris), the relevant authority to receive civil actions for damages due to unfair trade practice, had to deal with 4000 plaintiffs' files. Even if some of the plaintiffs were defended by the same lawyer, files still had to be dealt with separately. Among the many practical obstacles clerks met, putting the 4000 names in the software was a real challenge!

The same problem is encountered, once the inquiry is accepted, at the stage of compensation. Each plaintiff will ask for individual and complete compensation for each damage suffered, and judges will have to deal with all these requests.

15. *What are the current debates in your jurisdiction over the application of collective litigation rules and their consequences? How intense are the debates, how pressing is any need for reform? Have there been important evolutionary steps or trends? What major developments might follow?*

Most protagonists recognize that France would come to adopt some kind of class action, either by national means, or by European ones. But the introduction of such class actions in the French procedure has generated and still generates different and varying reactions amongst French specialists.

Theoretically, class actions device would blur Public/ private and Civil/ criminal distinctions. It would lead to delegate the attorney general functions to Private lawyers and would contravene some French principles of justice.

So far, a solution has mainly been sought through the modification of behaviour and practices. Most specialists underline that the judicial mechanisms and principles are underutilized. Hence, they invite judges to make better use of the various already existing mechanisms in French law, and to recourse to joint and aggregation alternatives that already exist in the codes, rather than plead for a radical change. Others recommend that the law be renewed rather than reformed.

By contrast, consumer associations would welcome a true class action, with great incentives for consumers, but initiated by associations only and without formal proxies.

If such a radical step was taken, the big challenge would be to “*reconcile the need to protect consumers with the need to ensure competition and the fundamental respect of French law*”. Many debates have taken place so as to enable the actors directly affected to put forward their point of view.

Four main obstacles to bringing class actions in French legislation can be identified:

15.1. Opt in vs opt out debate

This is the most important debate about Class actions in France. Protagonists are divided on the question of what model of class action to adopt. Firstly, consumer associations claim that an *opt out* model, along the lines of the Quebec one, is the only way to offer real protection to consumers; secondly, the French Movement of Entreprises (the MEDEF) is reluctant to introduce what it calls an “*American style drift, with lawsuits being brought without rhyme or reason*”, and is openly hostile to the idea of class actions.

As for case law, French and American judges differ. As said above, in the Vivendi case³⁶, the defendants argued that the opt-out class actions would offend the French principles of justice. Meanwhile, the US Court considered that these principles should not apply in a securities fraud case. The Court found that the opt-out provision of the class action would not offend the doctrine *nul ne plaide par procureur*, and would provide the opportunity for individual

³⁶ In Re Vivendi Universal, SA Securities Litigation, Case 02 Civ. 5571, March 23rd 2007. See supra.

French members to appear or not. French judges would certainly reach the opposite conclusion.

Theoretically, legal arguments are put forward against the *opt out* device.

15.2.Lawyers' Ethical standards

French rules do not of course forbid a lawyer to commence an action. But some specific rules regarding “Lawyers Ethics” would be significant obstacles to class actions in practice. Many of these rules should be modified if a true class action was introduced in French law.

i. *So far, **quota litis agreement (or Contingency fees***³⁷) is forbidden in France. Most actors agree that introducing class action in France would, at least, lead to an alleviation of the prohibition. Three options can be forecast.

- First, one can consider that the prohibition of *Quota litis* agreement is consubstantial to the French deontology of the legal profession and that it can not be modified. According to that view, true class action could not exist in France, as nobody would be able to bear the cost of the procedure (unless the law created a special Fund).
- Secondly, some appeal for a total abolition of the prohibition. This proposal was recently made by the Rules Commission of the Bar Association Council. But this would entail a great change in law and practice.
- Thirdly, an intermediate option would consist in abolishing the *Quota litis* prohibition for class actions only (a proposal made by a dissent group of the Bar association). Nonetheless, this loss of Equality between parties, depending on the type proceedings could be considered as discriminating among victims, thus violating the constitutional principle of equality.

ii. As for **publicity**, attorneys are not allowed to canvass clients, according to section 161, al.2 of a 1991 Decree (n°91-1197, Nov. 27th, 1991).

In a joint representative action, it has to be reminded that nothing is said about solicitation by the Internet. Recently, a group of lawyers tried to introduce a class action but this attempt

³⁷ See *supra*, Q. 13.1.

failed, showing that rules on solicitation would have to be changed. In the so called “**Class Action.fr**” **website affair**, which started in May 2005, a website was created so that anybody from the general public could go online to join in court proceedings already in progress. Anyone could take knowledge of the writ of summons, the legal grounds and the amount being claimed, that information being directly accessible on the website. Visitors to the website were therefore invited to join in the first collective action concerning upholding the law in relation to copies of DVDs. Parties joining in the legal proceedings paid a contribution of only 12 € in order to claim damages of 1,000 €.

This attempt by lawyers at introducing class actions was heavily criticized in a summary proceedings initiated by the members of the Lille Bar, an opinion from the Paris Court of Appeal Law Society, as well as proceedings on the merits brought by several consumer associations.

○ *Opinion from the Paris Court of Appeal Law society (Ethics)*

The Paris Court of Appeal Law Society gave its opinion on 14 June 2005, in which it mainly requested the lawyers promoting the website not to set up a commercial company as a buffer between themselves and the general public or any lawyers visiting the site, but to become the first direct users in accordance with rules accepted by the Law Society. The Law Society also pointed out that the “Class Action.fr” website must respect the rules applicable to the Internet and the ethics of the legal profession. In particular, the lawyers were reminded that they have to inform each of their clients individually about just what rights they are giving up when deciding to take part in a suit directed through the website³⁸ and to make sure that none of the fee agreements offered are considered, in view of the amounts involved, to be “*de quota litis*” agreements.³⁹

³⁸ Especially as concerns the amount of the loss they are likely to be claiming.

³⁹ The lawyers were reminded that they had to “show moderation in how they presented the website”, “abstain from any solicitation of the general public to join in the legal actions either “anticipated” or in progress”, to refrain from putting writs of summons onto the website for legal actions already initiated or “anticipated” by the promoters of the website itself acting in a capacity as claimants in those actions; ensure that the general conditions of the website comply with the internal rules of the Paris Law Society relating to attorney-client relationships in legal proceedings; not to enter into negotiations with the defense without informing their clients; obtain prior, written authorization from the clients, if need be by email, to make settlements and draw fees from their Carpa accounts; obtain the agreement of their clients before deciding to waive immediate execution in the collective actions they initiate, and not to force such a decision on their clients if immediate execution is ordered.

- **The summary order rendered by the Tribunal de Grande Instance of Lille on June 14th, 2005:**

On June 3rd 2005, the law firm ADNS took legal action against the administrators of the website and against the company Class Action.fr. Its main objective was to request the Lille first instance civil court, ruling in matters of urgency, to rule that defendants are not allowed to make any offers of services whatsoever and to stop all illegal solicitation and legal advice. In a summary order rendered on 14 June 2005, the Lille court ruled that the claims made against the administrators of the website were inadmissible, since service was irregular, the writs not having been served at the address where the defendants had elected domicile. The main part of the judgement ruled that *“advertising Class Action.fr’s legal services through the website, this being a commercial company and not a legal entity authorised to provide legal advice, was clearly illegal and that the offers made on the website were illicit acts of solicitation which amounted to unfair competition with the rest of the legal profession”*.

Consequently, the court of Lille ordered Class Action.fr to withdraw from the website all advertising, offers of services and solicitation aimed at providing legal advice, drafting legal documents and legal assistance contracts, within 48 hours of the court order being notified, under threat of a 1,000 € fine per day of lateness for two months

- **The judgment rendered by the Tribunal de Grande Instance of Paris on December 6th, 2005 :**

Legal action was taken on 13 July 2005 by several consumer associations⁴⁰. Their main complaint was that the services offered by the website Class Action.fr constituted illicit solicitation⁴¹. In a judgment rendered on 6 December 2005, the court granted the claimants’ requests and prohibited mandates to sue from being collected online.⁴²

⁴⁰ As ADEIC, UFC-QUE CHOISIR, UFCS...

⁴¹ The claimants also asked the court to rule that certain terms contained in the general conditions, in particular those giving lawyers total freedom as to the choice of jurisdiction and legal grounds, the amount of the claim, negotiation of settlements, were illegal and unfair.

⁴² This prohibition was accompanied by a 15,000 Euro fine for any offence observed. The judgment also banned all advertising from the website likely to induce consumers into error and ruled, subject to the same fine, that certain conditions offered to consumers were unfair and illegal.

It is clear from the reactions to the website that French legislation is not fitted for class actions initiated by lawyers. Many changes in Ethics and amendments in the law would need to occur before group litigation could exist in France.

15.3.Punitive damages

Class actions do enable a plethora of complaints to be “amalgamated”, but they also give rise to a fear of an explosion in the number of lawsuits.

In France, there is a very real concern about a drift in the number of lawsuits if class action were introduced. Such a drift has been observed in the USA, and its cause, according to most protagonists, is more likely to be the award of astronomical amounts of damages and interest, known as punitive damages, rather than the special characteristics of the class action.

Under French law, damages are awarded according to the principle of compensation for the entire loss, even though some would like to introduce the concept of “diffused” injury, whose scope has not yet been grasped fully⁴³. According to some protagonists, the introduction of punitive damages would be a bad idea, as things stand and would only serve to introduce criminal sanctions into the civil court system when there is already provision for such punishment under the criminal law system. They fear for a “Judiciarisation” of the Economy.

Two years ago, a delegation to the French *Assemblée Nationale* to the EU was created in reaction to the proposals made by the European Commission in its Green Paper in respect of “actions in damages for breach in the EC antitrust rules”⁴⁴. In its report dated June 2006⁴⁵, the parliamentary delegation gave a scathing answer to the Commission’s proposals. For the French delegates, the Commission’s approach is based on a “partial diagnosis” and a “biased premise”. The very small numbers of actions in damages does not correspond to a lack of judicial means offered to the victims but is fundamentally linked to “an inadequacy in spreading competition knowledge”. According to its analysis of the American model, the

⁴³ Diffused injury can be defined as an injury made to several consumers or buyers, claiming damages for too small amounts, making it impossible for them to bring an action in practice.

⁴⁴ Livre Vert sur les actions en dommages et intérêts pour infraction aux règles communautaires sur les ententes et les abus de position dominante (COM [2005] 672 final/E 3047), SEC (2005) 1732, http://eur-lex.europa.eu/LexUriServ/site/fr/com/2005/com2005_0672fr01.pdf.

⁴⁵ Rapport d’information déposé par la délégation de l’Assemblée Nationale pour l’Union européenne sur le Livre Vert sur les actions en dommages et intérêts pour infraction aux règles communautaires sur les ententes et les abus de position dominante (COM [2005] 672 final/E 3047), déposé le 28 juin 2006 (<http://www.assemblee-nationale.fr/12/europe/rap-info/i3200/asp>).

French delegation considers that the class action is much more beneficial to lawyers than claimants. Fees take up a large part of the amount of damages given by judges. As for French deputies, the proceedings of class action in force in Quebec offer many more guarantees than the American model. Again, it has been observed that, “contrary to American judges, Canadian judges are reluctant to sentence to very large amounts of damages” (p.50).

It must be underlined that, sometimes, the French *Cour de cassation* does not hesitate to sentence to very large amount of financial sanctions, in particular when considering a breach of Antitrust rules. These financial sanctions look very similar to punitive damages. The question is: how far, in the absence of special rules, can judges decide in a Civil law system? According to the former First President of the *Cour de cassation*, Guy CANIVET, the main failure of the French damages policy is to stay at the level of a rough estimation: “we have to change our approach. The first step is to award damages which give complete compensation for the damage suffered”... “Judges do not exert sufficient attention over the assessment of the real extent of the damage suffered. Progress needs to be made concerning methods and expertise regarding the assessment of damage, especially when compared with methods in force abroad”⁴⁶.

15.4. The Domain of the action

A last question is to precisely limit the domain of a true class action. So far, only consumer protection was scrutinized. Today, an extension of the domain of group litigations is debated.

On September 21st 2006, the French Competition Authority (Conseil de la concurrence) published its opinion concerning “class actions and unfair practice”⁴⁷. The Authority considers that “it is both useful and desirable to create class actions under civil actions in order to bring competition actions in a more efficient and fair way”. At the same time, it underlined that “the development of the collective action cannot be regarded as a remedy to cure all the problems specific to civil proceedings”.

The French authority brings more concrete answers than the European Commission on class actions. According to the French authority, four questions must be examined: the need for an

⁴⁶ La Tribune, March 16th, 2006.

⁴⁷ Avis du 21 septembre 2006 relatif à l’introduction de l’action de groupe en matière de pratiques anticoncurrentielles (<http://www.conseil-concurrence.fr/doc/classactions.pdf>).

extensive knowledge of competition law, the standard of proof, establishing the bond of causality and problems involved with the quantification of damages. Concerning these questions, the EU in its Green paper and the Competition authority in its opinion have very different points of view and are even sometimes in opposition. Moreover, the French Authority considers it necessary to preserve the impact of the leniency program. Its effectiveness can be severely weakened if claimants have the opportunity to bring class actions. As a matter of fact, leniency programs are fitted for antitrust breaches, not for individual claims.

The Authority also considered it important to launch a debate on the best way to “organize both proceedings of public actions and class actions for breaches in antitrust rules”.

16. Overall, how would you evaluate the mechanism(s) success in achieving major changes in behavior, activities or policy, relative to the costs incurred by public and private actors?

NA