...the draft law on

LEGAL REGIME FOR GROUP ACTIONS

Introduced into French law a decade ago, **the group action procedure has not met with the expected success**. In the light of this relative failure, which is supported by an information report to which it is a follow-up, the draft law presented by MPs Laurence Vichnievsky and Philippe Gosselin aims to encourage the use of this procedure.

To this end, it **unifies the procedural framework** and, at the same time, "triples the scope" of the group action, in terms of the subjective rights it is designed to protect, the damages that can be compensated and standing to bring an action. Aimed at introducing a "dissuasive" mechanism for any intentional breach that has caused serial damage - particularly by economic operators - **the proposed law also introduces a civil fine, the** amount of which could be raised to 3% of average annual turnover.

On the proposal of the rapporteur, the **committee welcomed the creation of a unified system**, which has the merit of making the law clearer and more accessible, but felt that **the wording of the text resulting from the work of the National Assembly was unbalanced**. The committee was in favour of broadening the scope and compensable losses of group actions, but consequently **significantly tightened the conditions for standing to bring an action because of the risk of destabilising economic operators** if group actions were unjustifiably initiated, the reputational cost of which is multiplied by publicity. It also **abolished the civil fine**, a measure whose appropriateness and constitutionality appear more than doubtful and whose scope goes beyond the present bill.

Lastly, the Committee wished to **better guarantee the legal certainty of the system**, in particular by ensuring that **the applicable provisions of European law were properly transposed**. It **adopted the draft law as amended**.

1. THE RELATIVE FAILURE OF GROUP ACTIONS IN FRANCE

A. THE RESULT OF THE SEDIMENTATION OF SUCCESSIVE INITIATIVES, THE COEXISTENCE OF RELATIVELY DISPARATE REGIMES

Envisaged in the mid-1980s by the consumer law commissions chaired by Professor Jean Calais-Auloy, French-style group action was not introduced into national law until 2014 by the so-called "Hamon" law. The culmination of a **thirty-year process** marked by lively doctrinal and political debates, the introduction of group action into French law was cautious: its scope was limited to consumer and competition law, standing to bring an action was open only to approved representative consumer defence associations, and it favoured the ***opt-in* mechanism** - under which injured parties must take the step of joining the group in order to be compensated[1] .

[1] As opposed to the *opt-out* system, in which injured parties are considered by default to be part of the group of people to be compensated, unless they refuse.

However, this initial legal regime was rapidly supplemented by the creation in 2016 of six new regimes covering health, the fight against discrimination (including discrimination attributable to a public or private employer), environmental protection and personal data, each with its own procedural features linked to the specific nature of its field of application. **The legal framework for group actions is therefore characterised by the formal coexistence of distinct** and relatively disparate **legal systems.**

B. A FAILURE THAT NEEDS TO BE PUT INTO PERSPECTIVE

The failure of the "French-style" group action is often based on the **low number of proceedings initiated and actually brought to a conclusion**. While the data provided by the Government is surprisingly discordant[1] , it can be considered that **35 group actions have been brought since the procedure was introduced in 2014**, which testifies to a relative "lack of attractiveness" of the procedure, as noted by the Department of Civil Affairs and Seals (DACS).

The results are **mixed in quantitative terms**, and are described as "*particularly negative*"[2] **in terms of the quality of the initiatives undertaken**, some of which failed to be completed, either because they were deemed inadmissible or because they were withdrawn.

Despite this observation, **the supposed failure of group actions needs to be put into perspective**. On the one hand, as a number of consumer associations interviewed by the rapporteur pointed out, this record is partly **attributable to the necessary appropriation phase involved in setting up such a procedure**. On the other hand, some group actions have flourished and resulted in compensation for damage, sometimes as part of an out-of-court settlement, particularly in the case of Depakine. However, as this record is considered insufficient, this proposed law aims to encourage the use of group actions.

2. THE PROPOSED LAW: ENCOURAGING THE USE OF GROUP ACTIONS BY COMPLYING WITH EUROPEAN LAW

A. A THREEFOLD EXTENSION OF THE SCOPE OF GROUP ACTION

Conceived as a "framework law", this draft law does **not unify the procedural regime within the same field of application**. Articles 1er and 1er *bis* of the proposed law therefore broaden the scope in three ways.

On the one hand, article 1er provides for **the universalisation of the field of application of the group action**, which could henceforth aim, in any matter, at the cessation of a breach or the reparation of a prejudice suffered as a result thereof. It also **extends the range of losses that can be compensated**: whereas some of the pre-existing sectoral schemes provided for the possibility of compensating a specific type of loss - property in consumer law, personal injury in health law - the new scheme would allow all losses to be compensated.

Lastly, **article 1er *bis* broadly extends standing**, which is generally limited in sectoral regimes to approved associations, by granting it to associations that have been duly registered for at least two years or that represent 50 natural persons, 5 legal entities under private law entered in the trade and companies register or 5 local authorities or their groupings.

[1] The DGCCRF sent the rapporteur a list of 35 actions taken to date, whereas the DACS counted 32 actions taken since 2014 in its response to the rapporteur's questionnaire.

[2] In the words of Professor Maria-José Azar-Baud, interviewed by the rapporteur.

B. THE CREATION OF A UNIFIED LEGAL FRAMEWORK

1. A procedural framework close to current law

Title I[er] of the proposed law provides for **the unification of the procedural framework for group actions**. In so doing, it essentially reproduces the provisions of current law and retains the architecture currently provided by the common procedural foundation set out in Act 2016-1547 of 18 November 2016 *on the modernisation of justice in the 21st century*. It thus provides for the applicability of group actions for the cessation of breaches as well as for compensation for damages. In the latter case, the procedure is as follows:

- once it has been accepted that the action brought by the plaintiff is admissible, the court rules on the **liability** of the defendant;
- Once this has been established, the judge will set the **framework for compensation** to the members of the group he defines, which will take place in a second phase;
- Compensation can then be paid either **individually** or **collectively**. In the latter case, the claimant negotiates the terms of compensation for the members of the group directly with the defendant.

2. The introduction of a measure deemed to act as a deterrent: the civil fine

Article 2 *undecies* also creates **a civil penalty in the event of intentional misconduct, with a view to obtaining an undue gain or saving, having caused one or more losses to several natural or legal persons placed in a similar situation**. This fine must be requested either by the Public Prosecutor's Office, before the judicial court, or by the Government, before the administrative court. The **proceeds of the fine are allocated to the Treasury**.

The amount of the penalty must be proportionate to the seriousness of the offence committed and the profit made by the offender. **If the offender is a natural person, the amount may not exceed twice the profit made**, and if the offender is a **legal entity, the amount is set at 3% of average annual turnover**. If the fine is combined with an administrative or criminal fine imposed on the offender for the same acts, the total amount of the fines imposed may not exceed the highest legal maximum. Finally, **the risk of a civil penalty being imposed is not insurable**.

According to the rapporteurs of the National Assembly, the civil penalty mechanism described above is intended to respond to the concerns expressed by the Conseil d'État in its opinion o f 9 February 2023 on the draft law.

C. THE NEED TO TRANSPOSE APPLICABLE EUROPEAN LAW

The third ambition of this bill is to transpose the European directive on *representative actions*[1] . Adopted on **25 November 2020, the** aim of this directive is to **guarantee the existence, in each Member State, of an effective representative action mechanism to obtain injunctions and compensation. To this end,** it lays down a **set of minimum principles** with which representative action mechanisms set up in each Member State must comply, and also introduces the possibility **of cross-border group actions**.

The deadline for transposition of this directive was **25 December 2022**. While most of the principles set out in the directive already appear to be satisfied by French law, certain measures still need to be transposed to comply with European Union law, and to this end have been included in this draft law.

[1] Directive (EU) 2020/1828 of 25 November 2020 *on representative actions to protect the collective interests of consumers.*

3. THE COMMISSION'S POSITION: A WELCOME FRAMEWORK LAW WHOSE LEGAL RISKS MUST BE CIRCUMSCRIBED

A. PREVENTING THE EXCESSES OF TRIVIALISED GROUP ACTION

The Committee welcomed the proposed broadening of the scope of losses that could be compensated under the common procedural regime thus created. On the other hand, the Committee wished to further restrict the scope of the action, on the initiative of the rapporteur. On the one hand, it felt that the proposed universalisation of the scope of application would **benefit from being limited to its current perimeter in the areas of health and work**.

Secondly, **in Article 1er *bis*, the Committee has significantly tightened the conditions for granting standing**. Instead of the very liberal legal regime resulting from the work of the National Assembly, which would allow a large number of players - including malicious ones - to act in many areas, it preferred to strike a balance based on a capacity to act in various areas reserved for a **limited number of associations** offering all the necessary guarantees of seriousness and transparency. In order to ensure **that the legal framework is clear and to avoid over-transposition, the** Commission has chosen to grant standing only to **associations that are subject to approval**, the terms of which would be aligned with the conditions for granting standing in cross-border group actions.

Lastly, the committee considered that the introduction of a group action should not constitute an end in itself, and consequently, through two amendments by the rapporteur, restored the provisions of the law in force**, such as prior formal notice and the simplified group action procedure**. The Committee also **rejected the application of the provisions of the Act to actions brought in respect of events occurring prior to the Act**. In accordance with the system adopted by the legislature in Law 2016-1547 of 18 November 2016 *on the modernisation of the justice system for the 21st century*, it felt that it would be preferable to limit the application of the law **only to actions whose triggering event occurred after its entry into force,** so as not to place economic operators in difficulty who had not necessarily anticipated such a change in the legal framework and the legal risks it entails.

B. PREVENT THE LEGAL RISKS POSED BY THE PROPOSED SCHEME

1. Eliminating an inappropriate civil fine

The Committee has decided to **delete the civil penalty mechanism** provided for in the draft law. Firstly, it notes that in its opinion no. 406517 of 9 February 2023 on the initial version of the proposed law submitted to the National Assembly, **the Conseil d'État expressed *"strong reservations about the creation of this civil penalty*", which remain relevant despite the amendments made by the Members of Parliament**. Indeed, the Conseil d'Etat rightly noted that **the creation of the civil penalty "was *not preceded by an in-depth assessment of its effects and consequences in each of the areas concerned*, and *that it does not form part of a more comprehensive reform of civil liability or a reflection on the methods of punishing wrongful behaviour by economic players,* but is included in a procedural text and in an incidental manner"**[1] .

Secondly, **the creation of a sanction in the field of civil liability, in the form proposed or in the form, derived from it, of punitive damages - which has, moreover, been debated for many years - does not at all meet with consensus among the academics, legal practitioners and economic players heard by the rapporteur**. Moreover, in recent years, in its work

[1] Conseil d'État, opinion no. 406517 of 9 February 2023 on a draft law on the legal regime for group actions, point 24.

on civil liability, **the Senate has already shown particular reservations about the creation of a generalised civil fine**[1] .

Finally, bringing national law into line with the aforementioned "*Representative Actions"* Directive in no way requires the creation of a civil penalty in the event of intentional fault causing serial damage.

2. Securing the legal framework provided by the proposed law

The committee decided to set a **minimum number of two specialised judicial courts for group actions**, considering that the specialisation of the Paris court alone could prove counter-productive, while leaving it up to the Government to set the appropriate number of specialised judicial courts, which must however remain limited in order to ensure sufficient specialisation of the courts. She also specified that, unless otherwise provided for in the proposed law, **the rules of procedure under ordinary law would apply before the judicial and administrative courts**.

The Committee has also endeavoured to **improve information for litigants**. With this in mind, on the initiative of its rapporteur, it has extended the content of the **national register of group actions** established by **article 1er *sexdecies to*** all group actions, collective actions and actions for recognition of rights, whether they are in progress or closed or have been withdrawn. The aim is to make it easier for litigants to join actions that concern them or to find out whether their initiative is likely to succeed, if a similar action has been brought previously.

Lastly, the committee endeavoured to secure the procedural framework provided by the proposed law, in particular by bringing it into line with current law where it deemed this appropriate. In particular, it has abolished **the provisional enforcement of the judgment on liability** provided for in article 1er *septies*.

C. COMPLETING THE IMPERFECT TRANSPOSITION OF EUROPEAN LAW

Finally, **the Committee has endeavoured to ensure that the legal regime provided for in the draft law complies with European law**. With regard to national group actions, on the initiative of the rapporteur, it has made **the persons entitled to take action** subject **to the solvency and transparency requirements** laid down by European law. With regard to the prevention of conflicts of interest, the committee **abolished the declaration of honour provided for in article 1er *ter*, an** ineffective formality which failed to adequately transpose the conditions laid down by the aforementioned directive while creating an unnecessarily burdensome procedure for contesting inadmissibility. Instead, it has adopted **provisions giving the administrative authority and the judge real means of action** when a conflict of interest is suspected or proven, in accordance with European law.

With regard **to cross-border group actions**, the committee adopted two amendments from its rapporteur aimed at ensuring full transposition of the directive. With this in mind, **the definition of cross-border group action** in **Article *2k* A has been** replaced by the definition set out in the Directive, for the sake of clarity. In addition, **Article *2k***, which sets out the criteria that legal persons must meet in order to obtain authorisation to bring cross-border group actions, has been supplemented to include all the criteria set out in the Directive. At the same time, the wording of this article has been harmonised with that of **Article 1er *bis***, to ensure that the overall legal framework is clear.

The Committee adopted the draft law as amended.

This text will be examined from 6 February 2024 in public session.

[1] Information report no. 558 on liability, by Alain Anziani and Laurent Béteille, on behalf of the Senate Law Commission, registered on 15 July 2009, pp. 79-93.

TO FIND OUT MORE

- **Conseil d'État, General Assembly, Opinion on a draft law on the legal regime for group actions, 9 February 2023 ;**
- **Information report No. 3085 on the results of and prospects for group action by Laurence Vichnievsky and Philippe Gosselin ;**
- **"L'action de groupe à la française: parachever la protection des consommateurs", information report No. 499 (2009-2010) by Laurent Béteille and Richard Yung, submitted on behalf of the French Law Commission on 26 May 2010.**

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