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The Continuing Debate on the Introduction of Class Actions in France*

Many observers believed that the introduction of class actions in France had been dealt a fatal blow when the most recent draft law on the subject was withdrawn from the legislative agenda at the end of January 2007. However, the 20 year old debate on this issue is almost certain to continue.

A recent survey found that 84% of the French population supports the introduction of class actions in France.¹ Although consumer associations actively support the enactment of a new law on collective actions, business representatives fear that such actions may be damaging for French businesses.

Nicolas Sarkozy, the newly-elected French president, is understood to be in favour of introducing a form of class actions in France, but on the condition that they are restricted in such a way as to avoid the perceived excesses of the U.S. system.²

French Concepts of Class Actions

Some of the concerns raised in France about the prospect of introducing class actions have

resulted from the mere use of the term "class actions" and the fear that a U.S.-type class action system is being envisioned. The U.S.-type of class action has been defined as:

"a lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group; specifically a lawsuit in which the convenience either of the public or of the interested parties requires that the case be settled through litigation by or against only a part of the group of similarly situated persons or in which a person whose interests are or may be affected does not have the opportunity to protect his or her interests by appearing personally (...)."³

French consumer associations have proposed a different definition and characterized class actions, or collective or group actions, as "procedures by which, under the continuous control of the judge, an accredited association, on its own initiative, seizes the court on behalf of a group comprising an unspecified number of individuals having suffered damages arising out of the act of the same professional person."⁴

Various forms of collective actions also exist in other civil and common law jurisdictions

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¹ Survey by CSA, published in "*Les actions de groupe plébiscitées par sondage*" [*Class actions acclaimed in public survey*], La Tribune, April 5, 2007.

² "Les class actions reviennent dans le débat" [*Class actions debated anew*], La Tribune, April 4, 2007; "Sarkozy eyes are open to the American way of doing things", The Times, May 15, 2007.

³ BLACK'S LAW DICTIONARY 267 (8th ed. 2004).

⁴ Letter from consumer associations to members of Parliament and members of the Government (April 3, 2006).

such as Brazil,⁵ England,⁶ Italy,⁷ the Netherlands,⁸ Portugal,⁹ Canada,¹⁰ Spain,¹¹ and Sweden.¹² Germany has enacted a *Law on Model Proceedings for Investment Suits*, the scope of which is limited to collective actions in securities cases, but does not have a general framework for class actions.¹³

Despite the different definitions of class actions in various jurisdictions, it would seem that such procedures have several elements in common. These elements include:

- A common procedure by one person on behalf of a group;
- The procedure is based on a common legal or factual question;
- The procedure is initiated and led by a representative that must adequately represent the class.

Existing Forms of Collective Actions in France

French law already provides for certain types of collective actions. Opinion regarding the adequacy of existing procedures is divided. In a recent class action against Merck in the United States relating to the Vioxx painkiller, the New Orleans District Court said that France had a “far from inadequate” mechanism

for collective actions.¹⁴ However, according to other opinions, France does not yet have an effective mechanism for consumer class actions.¹⁵

Since 1973, consumer associations have been entitled to intervene in criminal proceedings in situations where prejudice has been caused to the collective interest of consumers.¹⁶ This possibility was extended in 1988 to allow consumer associations not only to claim for pecuniary damages but also to request injunctions to stop alleged breaches of, and to suppress abusive clauses in consumer contracts.¹⁷

Under Article L. 421-7 of the Consumer Code, consumer associations are also entitled to join civil actions initiated by one or several consumers in order to stop illicit acts or request the cancellation of unfair contract terms.

In 1992, the French legislature attempted to introduce the right for consumer associations to bring claims to defend the individual interests of their members. Article L. 422-1 of the Consumer Code¹⁸ provides that an association may initiate an action on behalf of two or more consumers (“action en représentation conjointe”). This Article provides that, when no fewer than two consumers suffer damage arising from the act of the same professional person and having a common source, these consumers can give a written mandate to an accredited association to act on their behalf in legal proceedings.

⁵ Lei da Acao Popular (1977), Lei de Acao Civil Publica (1985) (Braz.).

⁶ Civil Procedures Rules, Part 19b (Engl.).

⁷ CODICE CIVILE art. 1469 (enacted by Act No. 53, (1966)) and Act No. 281, (1998) art. 3 (Italy).

⁸ BURGERLIJK WETBOEK § 3:305(a)-(b) and Wet collectieve afwikkeling massachade [Act on Collective Settlement of Mass Damages] (July 27, 2005) (Neth.).

⁹ Act No. 83/95, art. 14 (Aug. 31, 1995) (Port.).

¹⁰ Act of June 8, 1978, Assemblée nationale, Journal des débats, B-2064 (M. Pierre Marois); Québec Civil Code art.1003 (Can.).

¹¹ Act No. 1/2000, Ley de enjuiciamiento civil (Jan. 7, 2000) (Spain).

¹² Group Proceeding Act (Jan. 1, 2003) (Swed.).

¹³ Kapitlanleger-Musterverfahrensgesetz (KapMuG), (Aug. 16, 2005), *transcript available at* <<http://www.gesetze-im-internet.de/kapmug/>>, last visited May 14, 2007; see S. Rützel, S. Wünsche, “Class Actions” in Germany, Address for the 2006 Conference of the IBA ‘Global Actions: Global Invasion or Liberation’, *transcript available at* <www.ibanet.org>, last visited Nov. 29, 2006 (Germany).

¹⁴ In re Vioxx Prods. Liab. Litig., 448 F. Supp. 2d 741, 749. The New Orleans District Court rejected French plaintiffs’ complaints on the basis of *forum non conveniens* according to which jurisdiction may be refused because the claim should be heard in another jurisdiction for practical or legal reasons. The court decided that the case would be more appropriately heard by the French courts, because the plaintiffs lived there, they received their treatment in France and their medical files were located in France.

¹⁵ *Entretien avec Bruno Lasserre, Président du Conseil de la concurrence* [Interview with Bruno Lasserre, President of the French Competition Council], 147 LES PETITES AFFICHES 4 (July 25, 2006).

¹⁶ Act of Dec. 27, 1973 (“Royer” Act), CODE DE LA CONSOMMATION [Consumer Code], art. L. 421-1 (Fr.).

¹⁷ Loi n°88-14 relative aux actions en justice des associations agréées de consommateurs et à l’information des consommateurs [Act No. 88-14 on legal actions of accredited consumer associations and consumer information] (Jan. 5, 1988) (Fr.).

¹⁸ CODE DE LA CONSOMMATION, Art. L. 422-1 (enacted by Act of Jan. 18, 1992).

This latter procedure has not been frequently used.¹⁹ In the last fourteen years, it appears that only between 10 and 20 such collective actions have been initiated.²⁰ The relative failure of this form of collective action is attributed to the burden placed on consumer associations to bring proceedings in the name of consumers.²¹ Among other obligations, the association must obtain written authorization from each victim before initiating proceedings, may not solicit mandates by means of any kind of advertising or personal approach to individuals, and must report to the victims on the status of proceedings.

In addition to the actions open to consumer associations, French law allows associations representing specific classes of victims, such as associations of patients,²² associations protecting the environment²³ and associations of minority stockholders²⁴ to raise collective actions. For example, under the Commercial Code, stockholder associations may represent stockholders in court proceedings against directors or general managers (*directeurs généraux*) for damages caused to a company.²⁵

Investors' associations have also been granted the right by the Monetary and Financial Code to represent shareholders in litigation for the protection of their collective interests. Although these associations do not have a general right to solicit mandates by public notice, the court can authorize them to address a

personal solicitation to all shareholders of a company to join an action.²⁶

It can be noted that certain mass torts that may be indemnified under other legal systems through class action mechanisms are indemnified in France by public funding. Specific indemnification funds have been created to indemnify victims for damage caused, for example, by contaminated blood (major litigation in France in the early 1990's related to HIV contamination of blood banks),²⁷ asbestos²⁸ and certain medical accidents, and iatrogen and nosocomial infections contracted by patients in hospitals.²⁹

Legal Impediments to the Introduction of Class Actions

The relative inadequacy of the present legislative framework, the correlative waste of judicial resources and the need to tackle the issue of compensation of consumer damages have led to the continuation of the debate on the introduction of class actions under French law.

However, certain legal hurdles would need to be addressed. The French notion of standing (a right of action must be personal, present and direct), the prohibition of general rulings by the courts extending to third parties, and issues relating to due process and the right to a fair hearing could all constitute significant legal impediments to the introduction of class actions under French law.

Other concepts such as discovery, punitive damages and jury trials, that have greatly contributed to the "success" of class actions in the United States, would appear to be ruled out in France as they contradict well-established French legal principles. The potential role of lawyers in collective actions has also been scrutinized. The prohibition of personal invitation by lawyers to bring suit and the limited admissibility of contingency fees under French law are other areas where clarification would be required.

¹⁹ V. Magnier, *La class action, un remède efficace?* [*Class actions, an effective remedy?*], 5 CAHIERS DE DROIT DE L'ENTREPRISE 53, (Sept.-Oct. 2005).

²⁰ B. Le Bars, *Introduction en droit français d'une procédure d'action collective: quand la régulation se fait judiciaire* [*introduction into French law of a collective action procedure: when regulation becomes judicial*], BULLETIN JOLY SOCIETES 811 (July 2005).

²¹ *Projet de loi en faveur des consommateurs* [*Draft law in favour of consumer protection*], document No. 3430, Exposé des motifs [Recitals]; M. Mazière, *A qui profiteraient les class actions à la française?* [*Who would take benefit from French style class actions?*], 125 PHARMACEUTIQUES 19, March 2005.

²² CODE LA SANTE PUBLIQUE [Public Health Code], art. 1114-2 (Fr.).

²³ CODE DE L'ENVIRONNEMENT [Environment Code], art. L. 142-2 (Fr.).

²⁴ CODE DE COMMERCE [Commercial Code], art. L. 225-103, L. 225-105, L. 225-120 and L. 225-252 (Fr.).

²⁵ CODE DE COMMERCE [Commercial Code], art. L. 225-252 (Fr.).

²⁶ CODE MONÉTAIRE ET FINANCIER [Monetary and Financial Code], art. L. 452-2 to -4 (Fr.).

²⁷ Act No. 91-1406 (Dec 31, 1991), art. 47 (Fr.).

²⁸ Act No. 2000-1257 (Dec. 23, 2000), art. 53; Decree No. 2001-963, (Oct. 23, 2001) (Fr.).

²⁹ CODE LA SANTE PUBLIQUE [Public Health Code], articles L. 1142-1 and L. 1142-22 (Fr.).

Likely Proposals

Three different draft laws were put forward to the French Senate (Sénat) and House of Representatives (Assemblée Nationale) in 2006, the latest of which was the Government proposal that was withdrawn from the parliamentary agenda in January 2007 (the “Government Proposal”).³⁰ The Government Proposal was the most restrictive of the three proposals and was heavily criticized by consumer associations for being excessively business-oriented and ineffective in practice, notably as it still required the individual intervention of consumers.³¹

The Government Proposal provided, among other things, that only contractual claims would be covered and all kinds of tort liability of professionals would be excluded; that a restricted number of accredited consumer associations would enjoy a monopoly for representing consumers in class actions; and that there would be an “opt-in” mechanism, according to which only consumers who make known their intent to join the suit would be represented.

It seems very likely that any new proposal will also be limited. However, any new proposals in France will have to be considered in light of the fact that the European Union seems likely to become more open to consumer class actions. The Bulgarian Commissioner in charge of consumer protection has noted that no consumer protection class action mechanism is available in most EU Member States. In March 2007, the European Commission stated that it was considering “action on collective redress mechanisms for consumers for infringement of consumer protection rules and breach of EU anti-trust rules” and said that consumers “must be able to obtain redress when maliciously misled”.³² The Commission indicated that it was consulting with both business and consumer representatives and it is expected that a white paper will be issued before early 2008.

Thus, France will not be able to escape the fact that there seems to be a growing trend in favour of class actions and, where such a mechanism is absent, towards a form of justice without borders, at least in some sectors affected by class actions. For example, in addition to U.S. nationals, persons of French and other nationalities who purchased or otherwise acquired

ordinary shares or American Depository Shares of Vivendi Universal S.A. (“Vivendi”) during a given period have been certified as a class in a securities fraud class action against Vivendi and its two most senior officers in the US District Court for the Southern District of New York. The court noted that the plaintiffs were properly availing themselves of “causes of actions and procedural devices unavailable in France,” but went on to say that although “opt-out” class actions are not at present permitted in France, “the ground is shifting quickly.”³³

Conclusion

The newly-elected French government will not have class actions at the top of its agenda. However, nor will it be able to side-step the issue for very long, notably due to the proposals that will emerge from the European Commission in the coming months. These proposals will need to be carefully monitored, particularly given the growing global trend for collective remedies before national courts and an increasing interest in whether certain collective actions could be resolved by arbitration.³⁴



This article was authored by Gillian Lemaire and Romain Dupeyré.

³⁰ *Projet de loi en faveur des consommateurs* [Draft law in favour of consumers protection], document No. 3430.

³¹ “*Les ‘class actions’ à la française font leur chemin*” [French class actions are gaining ground], LE FIGARO, Aug. 5, 2006.

³² “*Kuneva launches new Consumer Strategy and backs plans for collective redress*”, EU Press release IP/07/320; “*EU open to consumer class actions*”, Times Online, March 13, 2007.

³³ *In re Vivendi Universal, S.A. Securities Litigation*, 2007 U.S. Dist. LEXIS 21115, March 22, 2007.

³⁴ For example, at the date of writing it has been reported in the Wall Street Journal (Kara Scannell, “*SEC Explores Opening Door to Arbitration*”, Wall Street Journal, April 16, 2007) that the US Securities and Exchange Commission is studying whether public companies should be allowed to change their bylaws to provide for compulsory arbitration of shareholder disputes against the company.

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