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Class Actions in Europe: Reality or Myth?

THE EXAMPLE OF FRANCE

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INTRODUCTION FROM THE PRACTICE CHAIR

For a number of years now, U.S. class-action lawsuits have been watched from European shores with a fair degree of interest and trepidation, as both a promise and a threat; not surprisingly, the issue has been highly controversial in Europe. Recent developments in France have now made it possible to imagine that class actions may soon become a regular part of the French legal landscape, although it appears unlikely that they will (ever) take on proportions similar to those in the United States. This *White Paper*, the first in a series of articles to be published by Jones Day addressing the issue of class actions in Europe, examines the current situation in France and the prospects for future mass litigation.

As co-chair of Jones Day's International Litigation & Arbitration Practice, I am particularly pleased to see collaborative writing from Jones Day's authorities on Antitrust & Competition Law (**Eric Morgan de Rivery**, **Olivier Cavézian**), Government Regulation and Environmental, Health & Safety (**Françoise Labrousse**), and Capital Markets and Securities (**Linda Hesse**), all in the Firm's Paris Office. Brief biographies for each may be found at the end of this *White Paper*.

For me, this is further proof that Jones Day is always able to tap into a deep well of experience offered by lawyers from different practices and nationalities to provide meaningful insight on multi-disciplinary subjects such as this.

Comments are welcome.

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CLASS ACTIONS IN EUROPE: REALITY OR MYTH? THE EXAMPLE OF FRANCE

Structural hurdles in the French legal system, such as the difficulty faced by claimants attempting to collect evidence, the principle of strict compensation for injury, and the impossibility for victims to call upon a plaintiffs' bar, have always been a significant obstacle for groups of individuals seeking to take an active part in damage litigation in France.

Nevertheless, the improved organization of consumer associations, together with a growing desire to bypass these obstacles (or at least reduce their impact), has at long last enabled the development of collective redress in France. Specifically, these changes have taken the form of a more appropriate use of existing procedural tools to compensate for the "information asymmetry" between plaintiffs and defendants in damage claims, as well as a more sophisticated approach by judges to highly technical legal areas, such as antitrust, securities, and the environment.

With regard to antitrust, France, like most other EU Member States, can produce few examples of antitrust damage claims. Consequently, the Commission of the European Union (the "Commission") has been resolutely pushing for the development of collective redress in antitrust and consumer matters. Indeed, the Commission's recent actions in this area are carried out primarily by its Directorate General for Competition, which is currently working on a directive on damages actions for infringement of EU competition rules, and by its Directorate General for Health and Consumers, which issued a Green Paper on Consumer Collective Redress in November 2008.

In the field of securities, procedures for redress available to investors under French law are limited to approved investor organizations acting on behalf of a pool of investors, as opposed to individual shareholders (*action dans l'intérêt collectif*), or, alternatively, on behalf of individual holders for losses they suffered directly (*action en représentation conjointe*). Still, two recent cases, the *Sidel* case in 2006 and the *Regina Rubens* case in 2007, illustrate what appears to be a move by the French courts toward recognizing proper shareholder claims for damages.

Finally, as far as environmental law is concerned, only group actions restricted to certain environmental associations are currently possible in France. It is generally acknowledged, however, that the adoption in 2005 of Law No. 2005-265, which created the Charter for the Environment, and in 2008 of Law No. 2008/757, which deals with environmental liability, has enhanced the development of larger group actions and that this also may represent a path toward the introduction of proper class actions in the future.

All in all, these recent initiatives in matters involving injury suffered by a wide range of victims have led to serious consideration, for the first time in decades, of the introduction of class actions into the French legal system.

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Following years of discussion without significant progress, the introduction of class actions into the French legal system is now back on the political agenda. In 2007, President Sarkozy launched a project whose aim was to introduce a class-action system for consumers. And while the various draft bills prepared by the Ministry of Justice have been postponed, the latest is expected to be released before the end of 2009.

Be that as it may, the current context supporting the development of collective redress in France—and in Europe as a whole—is expected to have a positive influence on judges facing damage claims in matters involving injury suffered by a wide range of victims. Indeed, judges may be tempted to take the lead in an area where politicians have thus far failed to meet consumers' expectations.

LIMITED ROOM FOR LUCRATIVE DAMAGE CLAIMS OR SUITABLE COLLECTIVE REDRESS UNDER FRENCH LAW

France has no tradition of introducing consumer claims and litigating on one's own account. This is due primarily to the existence of approved consumer associations, which are officially designated by the government as representatives

of consumers' general interests.[1] But there are also several structural hurdles in the French legal system that deter consumers from taking an active part in damage litigation. These are related mainly to the difficulty of gathering and presenting evidence, the principle of strict compensation for injury, and the prohibition against canvassing for victims under French law.

The first major hurdle is the difficulty faced by a claimant attempting to collect the evidence necessary to prove both the existence of a wrongdoing and the extent of his or her suffered injury. Indeed, the claimant has limited access to useful information, which is generally in the hands of the defendant, provided he or she is even aware of its existence. Moreover, estimating and substantiating the injury for which compensation is claimed can be extremely difficult, not just for the claimant but for the judge as well.

Another factor discouraging damage claims in France is the principle of strict compensation for injury, a cornerstone of French law. In the French system, judges are required to determine the exact amount of the actual harm caused by a wrongdoing and are allowed to grant damages to claimants only to that extent. As a result, when balancing the costs and benefits of a damage claim, a potential claimant, such as a consumer, often comes to the conclusion that the cost of pursuing the claim will exceed any potential compensation, particularly if the injury personally suffered was not substantial. This is reinforced by the fact that a claimant normally receives only a lump-sum compensation for his legal costs, which often fails to cover the full amount of his actual expenses.

Finally, victims in France do not directly form plaintiffs' classes before the courts. Given that there is no such thing as a plaintiffs' bar in France and French legal rules prevent lawyers from canvassing for victims, it is difficult for a victim to bring a claim before a court. A potential claimant may not even know that there is litigation in progress in which he or she could claim damages.

The factors hindering efficient collective redress in France can be seen in the *www.Classaction.fr* case. In 2005, a group of lawyers tried to introduce a class-action type of

[1] Under Articles L. 421-1 *et seq.* of the French Consumer Code, approved consumer associations are entitled to "exercise the rights conferred upon civil parties in respect of events directly, or indirectly, prejudicing the collective interest of consumers."
Under Article L. 421-2 of the French Consumer Code, approved consumer associations are entitled to "ask the civil court, ruling on civil actions, or the criminal court, ruling on civil actions, to order the defendant or the accused, where appropriate subject to penalty, to take any measure intended to stop illicit actions or to remove illicit clauses from a contract or a standard contract offered to consumers."

procedure before a national court in France through its web site, classaction.fr. The group began canvassing for victims to organize a procedure. In June 2005, however, the Lille civil court (*Tribunal de grande instance*) issued an injunction requiring the group to remove from its web site any advertising violating the principle prohibiting canvassing for victims of wrongdoing.[2] In December 2005, the Paris civil court (*Tribunal de grande instance*) decided on the merits of the case that the offer of services proposed by Classaction.fr constituted illegal canvassing, and it concluded that the practices in question (which extended beyond canvassing to include such things as whether the information provided to the consumer was sufficient) had harmed consumers' collective interest.[3] The complaint had been lodged by UFC-Que Choisir, the main approved consumer association in France. In September 2007, the Paris civil court also dismissed 699 plaintiffs in a litigation in which damages were claimed against film studios that had put anti-copy systems on DVDs. The court, observing that these 699 consumers had been illegally canvassed through the Classaction.fr web site, dismissed them all, pursuant to the principle of *fraus omnia corrumpit*.[4]

THE CURRENT TREND TOWARD COMPENSATION FOR "INFORMATION ASYMMETRY" BETWEEN THE PLAINTIFFS AND DEFENDANTS IN DAMAGE CLAIMS AND A MORE SOPHISTICATED APPROACH TOWARD TECHNICAL LITIGATION

The general view is that the French legal system does not facilitate, and may completely prevent, the creation of classes in view of litigation for damages.

Still, observers have noticed a recent trend to alleviate the bigger French hurdles in the development of collective redress, mainly through the use of existing procedural tools to compensate for the "information asymmetry" that exists between the parties, along with a more sophisticated approach in judges' handling of technical litigation, such as in antitrust, securities, and environmental matters.

The most significant impetus for French class actions was provided by the European Court of Justice (the "ECJ"). In a judgment rendered in September 2006, following the request for a preliminary ruling by the French Civil Supreme Court (*Cour de cassation*) in connection with an antitrust damage claim brought by Laboratoires Boiron SA against the French central agency for social security bodies, the ECJ decided that Member States are required to make full use of any existing rules to permit victims of anticompetitive practices to exercise effectively their right to compensation for damage. In this particular case, the ECJ pointed to rules and principles that regulate production of evidence in cases involving information asymmetry (*i.e.*, those in which the claimant has no access to information or data that would support his or her assertions). In its judgment, the ECJ stated that if a judge believes that requiring a claimant to prove an anticompetitive practice (in this particular case, the existence of State aid)

> is likely to make it impossible or excessively difficult for such evidence to be produced, since *inter alia* that evidence relates to data which such [claimant] will not have, the [judge] is required to use all

[2] T.G.I. Lille [Lille Civil Court], June 14, 2005 (summary order).

[3] T.G.I. Paris [Paris Civil Court], Dec. 6, 2005. This judgment was confirmed by the Paris court of appeal (*Cour d'appel de Paris*) in a ruling dated October 17, 2006, and then by the French Civil Supreme Court (*Cour de cassation*) in a ruling dated September 30, 2008.

[4] T.G.I. Paris [Paris Civil Court], Sept. 19, 2007.

> procedures available to [him] under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document.[5]

Article 10 of the French Code for Civil Procedure (the "CCP") already grants French judges authority to order any investigatory measures (*mesures d'instruction*) legally permissible, even in the absence of any such request by the parties to the litigation. Although there is no Anglo-Saxon type of discovery procedure in France, investigatory measures such as the ones referred to in the *Boiron* ruling are available under French law. For instance, judges may order third parties to provide evidence in their possession (Article 142 CCP); more generally, they may order any investigatory measures they consider necessary (Articles 143 and 144 CCP). Such measures, available to any judge in any litigation in France, may help reallocate more evenly the burden of evidence between the parties in a damage litigation.

Besides the facilitation offered to claimants by the *Boiron* case, the French system offers certain instruments that may be useful to a victim of illicit practices who is faced with an imbalance of information. This is notably the case with Article 145 CCP, which states that

> if there is a legitimate reason to preserve or to establish, before any litigation, the evidence of the facts upon which the resolution of a dispute could depend, legally permissible investigatory measures may be ordered on request of any interested party, by way of a petition or by way of a summary procedure.

Because the investigation takes place before any proceeding on the merits has begun, an Article 145 CCP proceeding is particularly efficient. In practice, the victim of a wrongdoing asks the judge to order a visit to locations where evidence is expected to be found. The visit is conducted by a bailiff (*huissier*), assisted by computer and accounting experts if necessary, who searches for and copies documents that could be used in future litigation. When ordered by way of an *ex parte* petition, investigatory measures are initiated under Article 145 CCP before the defendant is even aware of the upcoming litigation.

COLLECTIVE REDRESS IN MATTERS INVOLVING INJURY SUFFERED BY A WIDE RANGE OF VICTIMS

As noted above, the French legal system does not currently provide effective and equitable compensation for a group of victims who have suffered an economic loss. Claimants bear the burden of evidence with respect to the fault, the injury, and the link between the two and, when successful, obtain only strict compensation for the injury they suffered.

Nevertheless, despite the absence of a plain-vanilla class-action regime in France, there are ways to obtain a sort of collective redress in matters involving injury suffered by a group of victims in areas such as competition law and consumer protection, securities, and the environment.

Antitrust Damages and Consumer Protection. The very nature of competition law, which generally involves fact-oriented reasoning and economic analysis, makes evidence particularly crucial in antitrust cases—and also makes it difficult to obtain. Consequently, there is a real deterrent to antitrust damage claims brought by French consumers. Even approved consumer associations, which supposedly represent consumers' general interests, are not significantly involved in antitrust litigation.[6]

To put an end to this discouraging status quo (which exists in other EU Member States as well) and to help things move forward, the Commission provided the first impetus for the concept of class action with its Green Paper on Damages Actions for Breach of the EC Antitrust Rules in 2005. In 2008, it added further stimulus by issuing a White Paper on Damages Actions for Breach of the EC Antitrust Rules and a Green Paper on Consumer Collective Redress, both envisaging the need for Member States to introduce a class-action procedure into their legal systems (see below). More recently, in April 2009, the Commission informally circulated a draft proposal for a directive, together with an explanatory memorandum, that outlines more precisely the framework within which the Commission is willing to encapsulate the

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[5] Case C-526/04, *Boiron v. ACOSS*, 2006, para. 55, 2006 O.J. (C 281) 12.

[6] During the 1997–2008 period, only 28 cases and four requests for an opinion were lodged by consumer associations before the French Competition Council (*Conseil de la concurrence*) (replaced by the Competition Authority, established in March 2009). Individual consumers are not permitted to appear before the Competition Authority, which in any case cannot grant damages.

right to damages of parties impacted by a violation of Article 81 or 82 of the EC Treaty. Of course, the draft must still go through the adoption procedure before the Council of the European Union and the European Parliament, but it gives a clear indication of where the Commission intends to go. In the same way, despite a certain number of obstacles mainly linked to domestic procedural rules, certain Member States, such as France, are demonstrating an inclination to restore a fairer balance between claimants and defendants in damage litigation, which is expected to favor the development of some form of collective redress.

Under French Law, Consumers Are Often Discouraged From Bringing Damage Claims in Antitrust Matters. It is extremely difficult for consumers to bring a successful action for antitrust damages before a court. Even if claimants are successful in proving the existence of an infringement (notably in follow-on actions, subsequent to the decision of a competition authority condemning the practice at issue), they must still demonstrate the link between the practice and the resulting loss they suffered. They also have to quantify such loss, which is very difficult in antitrust cases. In this respect, the Commission states that

> to establish their damage, claimants have to compare the anti-competitive situation to a situation which would have existed in the absence of the infringement, i.e., a hypothetical competitive market. In a breach of contract case, a claimant can normally use market prices at the time of the breach of

> contract as the benchmark for calculating his loss. However, in a typical competition case, the claimant cannot rely on the prices at the time of the infringement and has to establish what the price would have been in the absence of the restriction of competition. For this purpose, he will often depend on information that is in the sphere of the defendant and possibly their partners in the infringement: for example, notes on the price overcharges agreed secretly between cartel members, details on how and when they influenced price and other parameters of competition, or internal documents of the infringer showing his analysis of market conditions and developments. Also the reconstruction of a hypothetical competitive market to quantify the damage caused by the infringer usually presupposes knowledge of facts on the commercial activities of the infringer and other players on the relevant market.[7]

One of the few examples of antitrust damage claims brought by consumers in France is the mobile phone operators' cartel case. In November 2005, the French Competition Council imposed a €534 million fine on the three French mobile phone operators for unlawful exchange of information that had led to an increase in prices.[8] In this case, consumers could avail themselves of both the decision of the French Competition Council finding anticompetitive practices and the direct link between these and the actual loss they suffered. In December 2007, UFC-Que Choisir introduced an *action en représentation conjointe* before the Paris commercial court (*Tribunal de commerce*). The proceedings, which are still pending, have brought together more than 12,000 individual complaints. The unusually high number of consumer claims in the mobile operators' cartel case is most probably due to two circumstantial factors. First, in this case, the claimants benefit from the French Competition Council's decision, lightening their burden of evidence with respect to the companies' misbehavior. Second, this case was an extremely high-profile one. Indeed, the fine imposed by the French Competition Council on the mobile phone operators was exceptionally high by French standards. What is more, because of the "everyday life" character of the sector concerned, there has been intense consumer awareness on a very large scale, as potentially every mobile phone owner in France was a victim of the cartel (*i.e.*, approximately 30 million people). The downside of this is that at the consumer level, the actual loss is spread out among a multitude of victims, as is often the case in antitrust matters. In fact, each claimant suffered a relatively small economic loss (the average per capita damage was estimated at €60). In any event, every claimant would be granted limited damages, as under French law judges are required to award only strict compensation for actual injury suffered.

Still, in compliance with the ECJ's *Boiron* ruling (see above), the judge in an antitrust case is now required to use investigatory measures where he or she finds it impossible or excessively difficult for the claimant to produce fundamental evidence held by the defendant or a third party. This undoubtedly grants new opportunities for claimants in antitrust litigation, which is generally characterized by asymmetric information between consumers/plaintiffs and companies/defendants.

Another step toward a more sophisticated approach to damage claims in France was taken in December 2005, when the government adopted a decree designating specialized courts throughout the French territory to exercise exclusive regional jurisdiction over litigation in antitrust, intellectual property, and restructuring.[9] In each of these technical areas, judges must have an appropriate understanding of any nonlegal issues (economics, accounting, etc.) that are inextricably linked to the proper implementation of legal provisions. This is a prerequisite for a fair outcome of such litigation and, where the case allows, for a suitable award of damages. With respect to litigation relating to anticompetitive practices, eight civil courts (*Tribunal de grande instance*) and eight commercial courts (*Tribunal de commerce*) have been designated. Because of this specialization, it is likely that the judges of these courts will increase their "antitrust awareness" and improve their ability to deal with the technical economic issues of antitrust damage claims.

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7 *Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules*, para. 89, SEC (2008) 404.

8 Decision No. 05-D-65, Nov. 30, 2005. Confirmed by the Paris court of appeal (*Cour d'appel de Paris*) on December 12, 2006, then appealed to the Civil Supreme Court (*Cour de cassation*), which remanded the case on June 29, 2007, to the Paris court of appeal. On March 11, 2009, the Paris court of appeal rejected the appeal.

9 Decree No. 2005-1756, Dec. 30, 2005, Journal Officiel de la République Française [J.O.] No. 304, Dec. 31, 2005, p. 20831.

The Impetus Given by the Commission for the Introduction of Collective Redress in EU Member States. The Commission has repeatedly acted as a driving force in the field of collective redress in the EU, and access to justice has long been one of its concerns, triggering the Commission's proactive attitude. One of the earlier examples of the key role played by the Commission in terms of access to justice goes back to the directive of May 19, 1998, on injunctions for the protection of consumer interests. In this text, the Commission harmonized the Member States' rules on actions for an injunction requiring the cessation or prohibition of any infringement harmful to the collective interests of consumers. However, such actions could not be considered collective actions proper, since they aimed to protect collective interests rather than the individual interests of consumers. The next step was taken in 1999 in the Commission's Green Paper on Liability for Defective Products. This text set out a proposal concerning access to justice for victims of defective products by way of collective actions. However, this purpose was not incorporated into Directive 1999/34/EC on product liability.

In recent years, the Commission provided a stronger impetus for the introduction of collective redress mechanisms in the EU in two areas: competition law and consumer protection. Unfortunately, with its two distinct time frames, this dual approach may hinder the adoption of an integrated system of collective redress within the EU.

Damages Actions for Breach of the EC Antitrust Rules. The Commission's most daring initiative in the field of collective redress was put forward by its Directorate General for Competition (the "DG COMP"), first published as a Green Paper on Damages Actions for Breach of the EC Antitrust Rules in December 2005,[10] then as a White Paper in April 2008,[11] and most recently as an informal draft of a proposal for a directive, together with its explanatory memorandum. Until this latest draft, the Commission had recommended the implementation of two mechanisms of collective redress: representative actions brought by qualified entities on behalf of identifiable victims on the one hand, and opt-in collective actions, in which victims combine their individual claims into a single action, on the other.

On March 26, 2009, the European Parliament adopted a resolution regarding the DG COMP White Paper.[12] In this resolution, the European Parliament clearly advocates the adoption of an opt-in type of collective redress in the EU, with strict compensation for injury suffered to be paid to an identified group of plaintiffs.

The DG COMP has now circulated a draft proposal for a legislative framework governing damages actions for infringement of EU competition rules, which is expected to be finalized in the course of 2009. Despite the European Parliament's opinion, the draft proposal introduces an opt-out system in which qualified entities (*e.g.*, trade and consumer associations) are able to bring an action for damages on behalf of a group of victims of competition-law infringements, without being required to individually identify all the injured parties belonging to the group.

When the present Paper went to press, we were advised that the discussion of the draft directive by the European Commissioners, initially scheduled for the beginning of October 2009, has been postponed. Though the Commission has not officially commented on the reasons for the postponement, one may reasonably expect that the draft will have to be amended to alleviate concerns regarding the most controversial proposals, such as the introduction of an opt-out system and disclosure issues. Although Neelie Kroes, the European Commissioner for Competition, appears adamant about moving forward with the project, the precise content of the final proposal as well as the agenda for the adoption of the text remain highly speculative.

Consumer Collective Redress. The work of the DG COMP, which focuses on competition law, is but a single piece of a wider puzzle. Indeed, on the broader subject of consumer collective redress, the Directorate General for Health and Consumers (the "DG SANCO") launched several studies in March 2007 evaluating the effectiveness and efficiency of national collective redress systems within Member States, as well as the problems faced by consumers in obtaining redress. Observing that EU consumers who want to pursue a case face substantial barriers in terms of access,

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10 *Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 final (Dec. 19, 2005).

11 *Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2008) 165 final (Apr. 2, 2008).

12 Resolution on the White Paper on Damages Actions for Breach of the EC Antitrust Rules, EUR. PARL. DOC. P6_TA (2009) 0187 (2009).

effectiveness, and affordability, the DG SANCO adopted on November 27, 2008, a Green Paper on Consumer Collective Redress,[13] which presented for further discussion several options for improving consumer redress in the EU.

These options are (i) no immediate action; (ii) cooperation between Member States, extending national collective redress systems to consumers from Member States without a collective redress mechanism; (iii) a mix of policy instruments to strengthen consumer redress (including collective consumer alternative dispute mechanisms, granting national enforcement authorities the power to request companies to compensate other companies, and extending the scope of national small claims procedures to mass claims); and (iv) EU measures ensuring that a judicial collective redress procedure exists in all Member States. At this early stage of the process, the DG SANCO already stated that a U.S.-style class action is not envisaged. According to the Commission, the "toxic cocktail" of the U.S. system (*i.e.*, the combination of contingency fees, punitive damages, pre-trial discovery, and opt-out systems) should not be introduced in Europe. Interested parties were given until March 1, 2009, to comment on the Green Paper. The Commission examined all the comments received and issued a consultation aiming to present a first working analysis of the impact of the options in light of the replies to the Green Paper. The next step would be the publication of a policy paper, hopefully before the end of 2009.

The Lack of an Integrated Approach Within the Commission. In 2008, the European Economic and Social Committee issued an opinion defining the collective actions system and its role in the context of EC consumer law and stated that it

> has always advocated the definition at Community level of a collective action designed to secure effective compensation in the event of the infringement of collective or diffuse rights . . . . The purpose of this own-initiative opinion is to promote a broad-based discussion on the role and legal arrangements for collective action at Community level, in particular in the area of consumer law and competition law.[14]

Stressing that measures at Community level must not lead to arbitrary or unnecessary fragmentation of procedural national laws, the European Parliament also expressed in its resolution on the DG COMP's White Paper its opinion that a horizontal or integrated approach could cover procedural rules that are common to collective redress mechanisms in different areas of law. It further insisted on the fact that actions for damages for breach of EC competition rules should be treated consistently with other noncontractual claims to the extent possible. The European Parliament, however, acknowledged that such an integrated approach must not delay or avoid the development of proposals and measures identified as necessary for the full enforcement of EC competition law, taking into account that some of the measures envisaged in the field of competition law could be extended to other sectors.

Indeed, the DG COMP believes that continuing with a separate approach for competition law is likely to be more efficient than implementing a horizontal framework for collective redress applicable to all types of infringements. In a press release following the European Parliament's resolution, Commissioner Neelie Kroes stated that "the call for consistency must not unduly delay the development of measures identified as necessary for the full enforcement of EC competition rules."[15]

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[13] *Commission Green Paper on Consumer Collective Redress*, COM (2008) 794 final (Nov. 27, 2008).

[14] *Opinion of the European Economic and Social Committee on Defining the Collective Actions System and its Role in the Context of Community Consumer Law*, 2008 O.J. (C 162) 51.

[15] *Antitrust: Commissioner Kroes Welcomes the European Parliament's Cross-Party Support for Damages for Consumer and Business Victims of Competition Breaches*, MEMO/09/135 (Mar. 26, 2009).

The fact is, through competition law, the Commission is attempting to put an end to the stalemate that has paralyzed the legal process in Member States such as France for more than 20 years, by following "the further guiding principle that the legal framework for more effective antitrust damages actions should be based on a genuinely European approach."[16] In doing so, the Commission is set on opening the path toward the implementation of common standards for collective redress, with respect to competition law and consumer protection. However, in its White Paper, the DG COMP prudently acknowledged the fact that combined efforts at both Community and national levels are required.

Securities Class Actions. While efforts to introduce collective actions in France have historically focused on class actions for the defense of consumer interests, various waves of legislative action have grappled with the same question with respect to securities laws. The ambivalence of French public opinion has been reflected in the fact that no final legislation has been adopted in this area. Resistance to the adoption of a class-action procedure under the securities laws centers generally on the idea that, because investing is inherently risky, investors assume the risk of loss when they buy or sell securities. Further, issues have been raised with respect to injury, both in the basic definition of injury—*i.e.*, whether loss of value can constitute real injury—and, to the extent that it can, how to measure that injury in a reliable way.

The Development of a Securities Class Action in France. Since 1994, securities investors in France have had a right of action against management if the action is brought by investor organizations in an *action en représentation conjointe*. Investors can also bring an *action dans l'intérêt collectif*, which allows certain approved investor organizations to initiate proceedings, including a civil action in connection with a criminal case, with respect to events that directly or indirectly harm the collective interest of shareholders of the same listed company. However, further attempts to expand investor rights as part of the 2003 Financial Security Law (*loi de sécurité financière*) proved unsuccessful. The French upper chamber of Parliament, the *Sénat*, rejected a proposal to recognize the losses of individual investors as separate and distinct from losses incurred by the company itself. Instead, the *Sénat* simplified the procedures for approving investor organizations that can bring actions under the pre-existing procedures. The subject of class actions resurfaced during the drafting of the more recent Economic Modernization Law (*loi de la modernisation de l'économie*), adopted on August 4, 2008, although only with respect to consumer law. The final law, aimed at increasing the attractiveness of the French market, remained decidedly silent on the topic of class actions for consumers and investors alike.

Class actions were also proposed in 2008 in the report prepared by the commission headed by Jean-Marie Coulon (the "Coulon Report") that reviewed possible reform of the way criminal law applies to companies and their directors and senior managers. In line with previous debates and proposals on the subject, the Coulon Report considered class actions appropriate only in the context of consumer law and rejected their application in the context of shareholder litigation. Following this proposal, the French government announced that it was not against the introduction of class actions in France, provided that the corporate legal environment is reformed first. As noted in the Coulon Report, the French government's view is that class actions will be beneficial only when fully compatible with the general principles of French law and only if they do not harm economic stability and do not lead to the excesses and abuses observed in other jurisdictions. The subject is expected to be revisited during debates on the proposed decriminalization of company law when a new law is introduced to Parliament.

Procedures for Redress Available to Investors Under French Law. Articles L. 452-1 *et seq.* of the French Monetary and Financial Code provide for two types of collective actions. In an *action dans l'intérêt collectif*, an approved investor organization brings the proceeding on behalf of the investor pool itself rather than any individual shareholder. The investor organization must either (i) meet strict requirements related to shareholding and have filed its bylaws with the French securities regulator *Autorité des marchés financiers* (the "AMF"); or (ii) be approved by the AMF after showing that it was created at least six months earlier, has a minimum of 200 members, and fulfills various requirements with respect to expertise and ethics. Any damages awarded in a case are paid to the investor organization, not the individual shareholders.

[16] *Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules*, p. 3, COM (2008) 165 final (Apr. 2, 2008).

More commonly, an action is brought as an *action en représentation conjointe*. Any approved organization, as described above, may jointly represent two or more security holders who seek damages against the same defendant. As opposed to the *action dans l'intérêt collectif*, such actions are brought on behalf of the holders themselves for loss they have directly suffered. Therefore, the damages and interest that the defendant is sentenced to pay, if found liable, must be paid to the investor-plaintiffs, since the only purpose of this suit is to receive compensation for individual loss suffered. If the suit fails, the investor-plaintiffs lose their individual right of recourse.

Representative organizations must operate on behalf of the investor-plaintiffs under power of attorney. While the law prohibits investor organizations from canvassing for potential plaintiffs, in certain civil or commercial cases, the president of either the civil court of first instance (*Tribunal de grande instance*) or the commercial court (*Tribunal de commerce*) may authorize canvassing. In such case, the investor organization may seek powers of attorney from potential claimants through various means of communication.

Recent Trends to Compensate Victims of Securities Violations. Two recent cases provide examples of an *action en représentation conjointe* and illustrate what appears to be a move by French courts towards recognizing shareholder injury. In these cases, the courts seemed to identify damage to shareholders that was distinct from the injury suffered by the company that issued the securities. The courts used alternate theories for evaluating shareholder injury in the absence of legislative guidance on the subject.

In the 2006 *Sidel* case, the Paris criminal court (*Tribunal de grande instance de Paris,* sitting as the French criminal court of first instance) held Sidel's management criminally liable for preparing false accounting figures, disseminating false and misleading information about the company, and insider trading.[17] The court also held the company criminally liable on the basis of *respondeat superior*. More than 700 shareholders, represented by two investor organizations, joined the criminal action through a French procedure allowing shareholders to join criminal cases as civil plaintiffs. The civil plaintiffs were heard on the first two claims.

[17] T. corr. Paris [Paris Criminal Court], 11e ch/1, Sept. 12, 2006, *Sidel*, No. 0018992026.

Shareholders had to overcome two obstacles in order to prevail in their claims against Sidel's management. In a civil action, in order to hold a manager personally liable, shareholders normally must prove that the manager acted outside the scope of his employment; however, because the claim was brought before a criminal court, this element of proof was not necessary. Shareholders must also prove they suffered individual harm. A decrease in share price has long been considered by the court as a collective injury suffered only by the company, with the shareholder suffering merely indirect injury. The innovation of the *Sidel* court, however, was to evaluate injury on a theory of lost opportunity to invest or divest. Under current jurisprudence, the mere fact that investors sold their shares at a loss has not in and of itself caused injury, since stock prices are by nature speculative. However, the court argued, false and/or misleading information, which led investors to believe that Sidel's financial situation and opportunities were better than in reality, caused them to invest in or keep shares whose real value was inferior to the actual stock price. In other words, had the investors been better informed, they might not have purchased Sidel's shares in the first place or might have sold the shares they did hold. This loss could then be compensated.

However, one of the difficulties that courts face in securities claims is the evaluation of the injury, particularly when the court must evaluate, as in this case, the relationship between false and/or misleading information communicated to the market and an investor's decision to invest or divest in the subject shares. The *Sidel* court elected to grant a fixed amount of €10 per share in damages to the 700 shareholders, which amounted to a total of €1,897,031.

The judgment on the civil-law questions was appealed. The court of appeal of Paris (*Cour d'appel de Paris*) affirmed the judgment,[18] ruling that the shareholders lost an opportunity to make an informed decision. It also affirmed the damages awarded with regard to this "lost opportunity," without making any further remarks on how the damages were or should have been calculated. Several parties to the case filed an appeal before the French Supreme Court (*Cour de cassation*), but as of the time of publication, no decision has yet been handed down.

In a similar case, the Paris criminal court (*Tribunal de grande instance de Paris*, sitting as the French criminal court of first instance) evaluated damages in a different manner.[19] In this case, shareholders of the clothing company Regina Rubens joined as civil plaintiffs in the criminal proceedings held before the same court that decided the *Sidel* case, alleging dissemination of false information by the company. The court also agreed to hear the claims of a shareholder's association, brought on behalf of the association itself, as well as those of the company brought by its new owner. The court confirmed the ruling in *Sidel* and awarded damages to shareholders on the same lost-opportunity theory. One major difference with the *Sidel* case is that here, the court elected to award differing amounts of damages, based on the time when the investor-plaintiff acquired the shares. For each shareholder who had purchased shares at the beginning of the fraud (which lasted over a period of several years), the court awarded a lump-sum payment equal to one-half of the purchase price. For shareholders who had acquired shares "in the heart of the fraud," the court evaluated damages based on actual loss, calculated as the difference between the purchase price and the share price on October 20, 2006.

In the end, however, the damages awarded were relatively small in comparison with those awarded in U.S. securities class actions: the five largest shareholders together received a total of less than €8,000. The court awarded the investor organization, *Association des petits porteurs actifs* (Association for Small Shareholders or "APPAC"), a symbolic €1 for moral damages. On appeal, the Paris court of appeal (*Cour d'appel de Paris*) affirmed the lower court's analysis with respect to the individual shareholders.[20]

Although these cases are quite different from class actions as they are known in the United States, organizations defending shareholder rights believe these decisions could be applied in larger cases, resulting in higher damages. Already, shareholders are increasingly bringing suit in French courts through the approved investor organizations in order to obtain damages. For example, in 2009, an investor organization filed a complaint against the French bank Natixis for false information, misleading financial statements, and artificially inflated dividend distributions. French shareholders have

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18 CA Paris [Paris Court of Appeal], 9e ch., Sect. B, Oct. 17, 2008, *Sidel*, No. 06/09036.

19 T. corr. Paris [Paris Criminal Court], 11e ch/1, Jan. 22, 2007, *Mmes X et Y, société Regina Rubens SA, société LV Capital, Association des petits porteurs actifs* (APPAC) *et al.*, No. 0106896030.

20 CA Paris [Paris Court of Appeal], 9e ch., Sect. B, Sept. 14, 2007, No. 07/01477.

also been seeking redress through other means. Indeed, instead of class-action procedures being exported to France, class actions involving French shareholders are taking place in the United States (for example, recent claims have involved, among others, Vivendi and EADS).

Environmental Group Actions. The environmental, health, and security field is typically an area suited for class actions. Because of the specific nature of environmental damage (either to the collective interests of the victims or to the environment itself), class actions could be an appropriate solution for the indemnification of such damage. Indeed, such damage can easily lead to harmful consequences that are similar for a broad range of persons and thus generate mass claims.

Such mass environmental claims could be filed after major industrial accidents or pollution by oil spills or toxic waste. For example, the *Amoco Cadiz* and *Erika* shipwrecks resulted in claims from a large number of "persons" (*i.e.*, natural persons, associations, and companies). The Toulouse chemical plant explosion[21] in September 2001 also resulted in claims from a large number of persons.

Today, French law permits group actions limited to certain environmental associations to address damage both to persons (such as nuisance, loss of property value, and health damage) and to the environment itself.

Damage to Persons. Under applicable French environmental laws, particularly Article L. 142-2 of the Environmental Code, certified environmental associations are entitled to "exercise the rights recognized as those of the civil party with regard to acts which directly or indirectly damage the collective interests that they defend and which constitute an infringement of the legislative provisions relating to the protection of nature and the environment."[22] Furthermore, Article L. 142-3 of the Environmental Code allows "several identified persons [who] have suffered individual damages caused by the act of a single person and with a common origin" to mandate any certified environmental association to "seek redress before any tribunal on behalf of these persons . . . if it has been appointed by at least two of the concerned persons."[23] In order to bring suit on behalf of victims of environmental damage on the grounds of Article L. 142-2 of the Environmental Code, the certified environmental association must prove the following three elements: (i) the cause of action, (ii) that it has received governmental certification, and (iii) the existence of a preliminary infringement of the environmental legislative provisions. These three conditions limit the possibility of actions of certified environmental associations under applicable environmental laws. In the *Erika* case, several complaints lodged by various associations could not move forward because of the requirements that must be met before a suit is brought to court and also because these associations were considered insufficiently representative.[24] The fact that the claimant must prove an infringement of French environmental laws in order to succeed may constitute another obstacle.

By contrast, class actions would put an end to the need for such prerequisites, since they would likely be based on civil-law principles (proof of (i) fault/negligence, (ii) resulting in damage, and (iii) causation). Class actions would also allow broader groups of people to bring lawsuits to court in order to claim damages for their personal injury; at present, such suits are open only to certified environmental associations. In the event of industrial accidents, victims may be more likely to elect to become members of a class action, since the time, costs, and energy typically required to bring suit are prohibitive for individual complainants. For such individual victims, class actions offer the opportunity

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[21] An explosion occurred on September 21, 2001, at an industrial plant that produces chemicals and is located in the vicinity of Toulouse, France.

[22] Article L. 142-2 of the Environmental Code states: "The certified associations mentioned in Article L. 141-2 may exercise the rights recognized as those of the civil party with regard to acts which directly or indirectly damage the collective interests that they defend and which constitute an infringement of the legislative provisions relating to the protection of nature and the environment, to the improvement of the living environment, to the protection of water, air, soils, sites and landscapes, to town planning, or those whose purpose is the control of pollution and nuisance, and of the enactments for their application."

[23] Pursuant to Article L. 142-3 of the French Environmental Code*:* "When, in the domains mentioned in Article L. 142-2, several identified persons have suffered individual damages caused by the act of a single person and with a common origin, any association certified under Article L. 141-1 may, if it has been appointed by at least two of the persons concerned, seek redress before any tribunal on behalf of these persons.

"The appointment may not be solicited. It must be given in writing by each person concerned. Any person who has given his or her agreement for an action to be brought before a criminal court is considered, in this case, as exercising the rights recognized as those of the civil party, in accordance with the *Code de procédure pénale* [French Code for Criminal Procedure]. However, any notifications are addressed to the association.

"The association which brings a legal action in accordance with the provisions of the previous paragraphs may claim for damages before the *juge d'instruction* [judge of investigation] or the tribunal having jurisdiction over the headquarters of the enterprise implicated or, failing this, of the place of the first infringement."

[24] T. corr. Paris [Paris Criminal Court], Jan. 16, 2008, No. 9934895010.

to share with the other members of the class legal and evidence costs, which are generally very high in the area of the environment, particularly with regard to environmental and technical expertise.

Damage to the Environment. Recent constitutional case law in the area of the environment, as well as the implementation in France of Directive 2004/35/EC of April 21, 2004, on environmental liability with regard to the prevention and remedying of environmental damage, reveals that a legal scheme to address environmental damage per se is becoming more complete and complex.

On March 1, 2005, France adopted a new constitutional law, No. 2005-205, which created the Charter for the Environment (the "Charter"). The Charter, composed of a preamble and 10 articles, proclaims the general principles of environmental law, among which are the right to live in a balanced and healthy environment (Article 1),[25] the duty for everyone to participate in preserving and enhancing the environment (Article 2),[26] the "polluter pays" principle (Article 4),[27] the precautionary principle (Article 5),[28] and the principle of public information (Article 7).[29] The fact that the Charter is physically "annexed" to the French Constitution but has not been made part of it raised the issue of the

[25] Pursuant to Article 1: "Everyone has the right to live in a balanced environment which shows due respect for health."

[26] Pursuant to Article 2: "Everyone is under a duty to participate in preserving and enhancing the environment."

[27] Pursuant to Article 4: "Everyone shall be required, in the conditions provided for by law, to contribute to the making good of any damage he or she may have caused to the environment."

[28] Pursuant to Article 5: "When the occurrence of any damage, albeit unpredictable in the current state of scientific knowledge, may seriously and irreversibly harm the environment, public authorities shall, with due respect for the principle of precaution and the areas within their jurisdiction, ensure the implementation of procedures for risk assessment and the adoption of temporary measures commensurate with the risk involved in order to preclude the occurrence of such damage."

[29] Pursuant to Article 7: "Everyone has the right, in the conditions and to the extent provided for by law, to have access to information pertaining to the environment in the possession of public bodies and to participate in the public decision-taking process likely to affect the environment."

Charter's constitutional value. On June 19, 2008, the French Constitutional Supreme Court, the *Conseil constitutionnel*, confirmed the Charter's constitutional value in its *OGM* decision.[30] On October 3, 2008, less than four months after the *OGM* decision, the Administrative Supreme Court, the *Conseil d'Etat*, rendered a decision that also confirmed the Charter's constitutional value and the direct applicability to public authorities of Article 7, the public-information principle.[31] Thus, it would appear that the *Conseil d'Etat* will enforce the direct applicability of the principles contained in the Charter, putting those principles on an equal footing with all the French "fundamental freedoms" that are directly applicable before any court.

More recently, on August 1, 2008, the French Parliament adopted Law No. 2008/757 on environmental liability, which transposes into the French legal system the EU Environmental Liability Directive, No. 2004/35/EC. This law has introduced a double system of liability: a "no-fault" liability system, and a system of liability for wrongful negligence. Decree No. 2009-468, implementing Law No. 2008/757, was adopted on April 23, 2009. This decree has been codified in the French Environmental Code in Articles R. 161-1 to R. 163-1. Pursuant to Article R. 162-3 of the Environmental Code, certified associations for the protection of the environment mentioned in Article L. 142-1 of the Code may inform the appropriate authorities of the facts that establish the existence of damage or a threat of damage to the environment. Pursuant to the "polluter pays" principle, the corresponding liability applies to the operator, provided that (i) the operator can be identified, (ii) the damage is concrete and quantifiable, and (iii) a causal link can be duly established between the damage and the activity of the operator.

Both the Charter and the law of August 1, 2008, illustrate the ongoing modification and proliferation of environmental regulations and principles in France, thus increasing the environmental liabilities of operators and extending the intervention and legal actions of environmental associations. The current French regulations and principles thus offer fertile ground for the development of group actions today and of class actions tomorrow.

30 CC [Constitutional Court], Decision No. 2008-564 DC, June 19, 2008, *Law Relating to Genetically Modified Organisms*.

31 CE Ass., Oct. 3, 2008, *Commune d'Annecy*, No. 297931.

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