



JONES DAY  
**COMMENTARY**

## CLASS ACTIONS IN FRANCE: COMING SOON?

On May 2, the French Minister in charge of consumers, Benoît Hamon, proposed to the French cabinet meeting (*conseil des ministres*) a bill introducing the class action device (*action de groupe*) in France. This bill fulfills the promise made by French President François Hollande during his campaign for the presidency in 2012 to implement the class action device in France.

### THE CONTEXT

French law already has two types of collective actions. The collective interest action ("*action d'intérêt collectif*"), prescribed by Article L.421-6 of the French consumer code, allows an accredited consumer association<sup>1</sup> to bring a collective action to seek compensation for the loss suffered by a group of consumers. This action is different from the class action in that only the collective loss is compensated, as opposed to the individual loss suffered by each consumer.

Another type of action, prescribed by Article L.422-1 of the French consumer code, is closer to the class action as it is understood in the United States. This type of action is the joint representation action

("action en représentation conjointe"), which allows an accredited consumer association to bring an action on behalf of several consumers to seek their individual compensation.

However, since this joint representation action became available in 1992, it has been used only five times.<sup>2</sup> The joint representation action is cited regularly as an example of the failure of collective actions in France and the perceived need for changes in the French legal system to implement efficient collective action options. The failure of this type of collective action to be used widely is rooted in specific rules of French civil procedure, which are regarded as obstacles to collective actions.

Despite these obstacles, consumer associations have been fairly active in recent years trying to convince the government to introduce an efficient type of collective action that would allow consumers to pursue companies believed to be violation of consumer protection laws. Some bills seeking to implement class actions have been put on the table in past years but have never been successful.

Before drafting the most recent bill to implement class actions in France, Benoît Hamon collected the opinions of consumers as well as the French National Consumer Council (the “CNC” or *Conseil National de la Consommation*). The results of these surveys indicate that 74 percent of the surveyed consumers are in favor of the introduction of the class action on France.

## THE BILL

Benoît Hamon’s bill, which was proposed at the cabinet meeting and discussed by the Parliament on June 24, had to take into account various French procedural rules, which, as noted above, have long been viewed as obstacles to the implementation of the class action in France.

**An Opt-In System.** The main procedural hurdle in the French system for the implementation of class actions is the adage “*nul ne plaide par procureur*” (“no one shall plead by proxy”). This means that anyone filing a claim with French courts must be identified in person. That is why only the “opt-in” system of class action is possible in France, meaning that consumers willing to take part to a class action have to name themselves. This system is opposed to the “opt-out” system, which is found in some countries such as the United States, where all consumers who have suffered loss automatically become parties to the proceedings unless they have expressly stated the contrary.

In light of these French rules of civil procedure, the “opt-in” system is the only possible approach and is the one proposed by Benoît Hamon in the bill.

**A Limited Field: Consumer and Competition Law.** In the bill, class actions are strictly limited to the field of breaches of consumer and competition laws. Benoît Hamon pointed out that it is a first step and that in the future, he would be willing to extend class actions to other fields such as environment and health.<sup>3</sup>

**An Action that Can Be Filed Only by Accredited Consumer Associations.** Only accredited French consumer associations will be allowed to act on behalf of consumers in the context of class actions. French lawyers have expressed

strong objections to their exclusion from these proceedings. Benoît Hamon stated that he wanted to prevent lawyers from bringing abusive actions, as many people were willing to “make money to the detriment of consumers.” On May 24, the French National Council of Bars (*Conseil National des Barreaux*) proposed a counter-bill, in which lawyers play an active role in class actions, hoping that the Parliament would take this counter-bill into account.

Christiane Féral-Schul, president of the Paris Bar, pointed out that strict ethics rules governing lawyers obviate any need to exclude lawyers from class actions on the grounds of potential abuses.<sup>4</sup> In particular, French lawyers are not allowed to fix their fees via a *quota litis* agreement, meaning that they are not allowed to fix their fees only in consideration of the outcome of the claim.<sup>5</sup> The fees must be fixed in consideration of the type of matter and the work done. A complementary success fee can be agreed among the parties, but it cannot be the main compensation received by the lawyer. This rule is said to be a safeguard against the possibility of lawyers bringing abusive class actions to obtain a percentage of the damages awarded to the consumers, as they would be paid by the consumers in consideration of the work done. Beyond the prohibition of the *quota litis* agreement, French lawyers must act with dignity, conscientiously, independently, and with humanity, which, it is claimed, should prevent them from acting to the detriment of consumers and in their own interest.

**The Advertisement of the Claim: A Real Change in the French Legal System.** Another obstacle to the introduction of class actions in France is the prohibition of advertisement for legal services.<sup>6</sup> Additionally, French consumer associations may not seek consumer mandates by means of a public appeal on radio or television, or by means of posting information, tracts, or personalized letters when they initiate a joint action.

For example, on December 6, 2005, the Paris District Court (*Tribunal de Grande Instance de Paris*) ordered a company that had created a web site to advertise the filing of collective actions ([www.classaction.fr](http://www.classaction.fr)) to stop its activity, ruling that it was a breach of the prohibition of advertisement for legal services.

These prohibitions, it is claimed, prevent consumers from being aware of the existence of the class actions. That is why the Benoît Hamon bill provides that consumer associations will be allowed to advertise proposed class actions under certain conditions defined by the court. This is a major development, as the prohibition of advertisement is currently the main reason why joint representative actions are not efficient and rarely used.

**A Claim in Two Steps.** The Benoît Hamon bill provides a class action in two steps.

First, an accredited consumer association will bring proceedings before French courts<sup>7</sup> to seek the liability of a company for the breach of consumer or competition law. During this first step, in which consumers are not yet involved, the court will decide whether the summoned company is liable or not and whether a class action is appropriate for the matter or not. A class action will be considered appropriate if at least two consumers have suffered the same loss because of a breach of consumer or competition law by the summoned company.

Second, if the court finds the summoned company liable and rules that a class action is appropriate, it will define the conditions of the class action. In particular, it will order the communication of information to the concerned consumers. As a result, the consumers will be aware of the class action and will know the amount of the compensation they are entitled to receive. This will allow them to decide whether they wish to participate to the class action.

**The Limited Scope of Damages to be Awarded by French Courts.** Only tangible damages will be granted in the context of a class action. The French legal system forbids punitive damages. In addition, as moral damage and body injury are individual and cannot be considered as a common damage, they will also be excluded from the damages to be awarded.

Given the fact that only tangible damages will be granted and that there are no punitive damages in France, lawyers are prevented from bringing class actions only to try to make money “to the detriment of consumers,” as articulated by Benoît Hamon.

## THE BILL: THE FIRST STEP OF A LONG JOURNEY

Eventually, this bill might become the first law introducing class actions in France, after years of debate and aborted bills on this issue.

However, French lawyers insist that the bill as it is presented needs changes, specifically to remedy the exclusion of lawyers from the proceedings. The French bar regards this exclusion as the product of unjustified suspicion of lawyers and a lack of respect for their professional rules,<sup>8</sup> as well as a violation of the bar’s monopoly on legal services,<sup>9</sup> under which only lawyers are entitled to represent parties before French courts.

Lawyers have already raised their objections to the bill as presented to date and hope that the Parliament will take these objections, and particularly the counter-bill drafted by the French National Council of Bars, into account before passing the bill.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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## ENDNOTES

- 1 Article R.411-1 provides the conditions under which a French consumer association can be accredited. To date, there are 17 accredited consumer associations in France at a national level.
- 2 Laurent Beteille and Richard Yung, “*L’action de groupe à la française : parachever la protection des consommateurs,*” rapport d’information no. 499, Sénat, 2009-2010, p. 17.
- 3 Mathieu Bruckmüller, “*Benoît Hamon, le ministre détaille les class action à la française,*” *20 Minutes*, May 3, 2013.
- 4 Sébastien Lernoùd, “*Benoît Hamon défend les ‘class actions’ à la française,*” *Le Parisien*, May 2, 2013.
- 5 Article 11.3 of the national Regulations of the lawyers profession (RIN : *Règlement Intérieur National*).
- 6 Article 10.1 of the national Regulations of the lawyers profession (RIN : *Règlement Intérieur National*) provides that lawyers cannot advertise by means of leaflets, posters, motion pictures, radio, and television broadcasts.
- 7 Only a limited number of specialized courts in France will be competent for class actions.
- 8 Which are very strictly defined by the national Regulations of the lawyers profession (RIN : *Règlement Intérieur National*).
- 9 Provided by Article 4 of the law no. 71-1130 reforming the French legal profession.