

## INTERNATIONAL CLASS ACTION UPDATE



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### FRANCE ADOPTS NEW CLASS ACTION LAW

President François Hollande has signed into law France's new Consumer Law, which includes a class action procedure for consumer protection and antitrust claims. While the law took effect when signed on March 19, 2014, this procedure, which has several problematic features, is not immediately effective.

It has survived a Constitutional Council review, and the government has already indicated that it wishes to extend the model to health and environmental claims. Companies that might be the target of such claims are well advised not only to learn about this new law, but to engage in this approaching debate.

#### The Class Action Procedure

- **Standing:** Only consumer associations that are officially recognized as representative on a national level are authorized to initiate a class action on behalf of individual consumers. Presently, 15 such associations have been so recognized.
- **Scope:** Class actions are available only to recover pecuniary damages for injuries allegedly suffered by consumers due to the same breach of contract or statutory duty by the same defendant in connection with the sale of goods or the supply of services (excluding personal injuries) or as a result of anti-competitive practices.
- **Jurisdiction/Venue:** Class actions may be filed in any civil courts.
- **Decision on Liability + Certification:** During the first phase, the consumer association files a claim based on several exemplary individual cases. The civil court then decides the defendant's general liability toward the class based on these exemplary cases. In the same ruling, the civil court orders that a class be certified, defines the class and the means of notifying absent class members, and determines the compensation to be paid to the class members. The defendant may appeal this decision immediately.

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- **Opt-in to Enforce:** In the second phase, once the appeals are exhausted, notice is provided to the absent class members as defined in the judgment; they are given between two and six months to join the case and enforce their claim.
- **Simplified Procedure:** If the necessary information about the affected class of consumers is clearly identifiable (i.e., their names, the number in the class, the total damages), then the judge has the authority to order the defendant to compensate each of the consumers directly and individually.
- **Exception to the Prospective-Only Application:** Plaintiffs may initiate a class action based on breaches of competition law that occurred before the entry into force of the Consumer Law, except (i) if the claim is time-barred or (ii) when the ruling acknowledging the breaches of competition law became final before the bill took effect (March 19, 2014).

### Significant Flaws in this Procedure

#### General liability is determined before a class of claimants is certified.

By assessing general liability before a class is formed, the procedure forces a defendant to defend a claim without knowing all of the opposing parties and therefore the potential extent of its liability for the claim. It also deprives the defendant of defenses it might have if the claim were brought individually, e.g., lack of reliance, assumption of the risk and other contributory conduct on the consumer's part.

While these defenses may be raised against the class representatives, because the consumer association selects them unilaterally without a response by the defendant as to whether they are truly representative, they will likely be carefully selected and vetted to avoid or mitigate such affirmative defenses. Even if these defenses might still be available during the liquidation phase for the remaining class members, that is little comfort to a company which faces a general declaration of bad conduct and the resulting media attention and stock depression that inevitably follow.

The procedure also creates one-way *res judicata*. If the court rules at the end of the first phase that the defendant is not liable, this judgment would not bind the absent class members because they would not yet have joined the case. They could therefore initiate individual lawsuits against the defendant on the same grounds or benefit from another consumer association's successful attempt to initiate an identical class action in another court, provided this second class action was filed before the first class action judgment is rendered.

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This flaw could have been avoided if a class certification stage had been inserted ahead of the determination of general liability, as recommended by the European Commission and as adopted by other European member states. An amendment to do so was, however, defeated in Parliament. Socialist majority members reportedly expressed concern that such a preliminary phase would overly complicate and delay the process.

### **A mechanism to stay or consolidate competing classes does not exist.**

As it currently stands, no specific means for staying or consolidating overlapping putative classes is provided. The law would therefore allow consumer associations to bring multiple attempts with different class representatives in different civil courts in the hope of eventually obtaining a nation-wide class action. The consumer associations would only need to win once and might not be encumbered by failures in the competing classes; conversely, the potential defendant must win every time to avoid a nation-wide class. Once judgment is rendered in one, however, no new class action may be filed that targets the same set of facts and damage claims. Notwithstanding, this problem should be addressed during the implementation decree's drafting or through the general civil procedure rules.

### **Constitutional Challenges and Implementation Decree**

After Parliament adopted the Consumer Bill, the principal opposition party, the *Union pour un Mouvement Populaire*, challenged the bill's constitutionality before the Constitutional Council. With minimal analysis and explanation, the Council concluded that the class action procedure was constitutional. The bill was then forwarded to the president for signature and publication in the *Official Journal*.

Most of the provisions entered into force on March 19; however, the class-action provisions will not take effect until the implementation decree is published, which is expected this summer. The decree will provide more technical information about the law's operation and interpretation. For example, in its current form, the law provides little guidance for courts about the criteria to apply in determining whether a claim is appropriate for class resolution.

### **Plans for Expansion**

In recent years, several high-profile scandals related to products such as breast implants, weight-loss drugs and horsemeat have occurred. Each time, considerable public outcry and political rhetoric about the need for a class action to redress affected individuals followed. Perhaps for that reason the Consumer Law's final class action paragraph states that within 30 months of the law's effective date, the

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government must submit to Parliament its assessment of the class action procedure and its plan for extending it to health and environmental claims.

In addition, a number of attempts to expedite that 30-month timeline have been made. Several minority parties proposed amendments to extend the Consumer Law's scope or simply proposed stand-alone bills to introduce a class action for these types of claims. The Ministry of Social Affairs and Health has announced on several occasions that it is looking into this issue as well, and it may do so as part of its anticipated National Health Strategy Act, which is also expected this summer.

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