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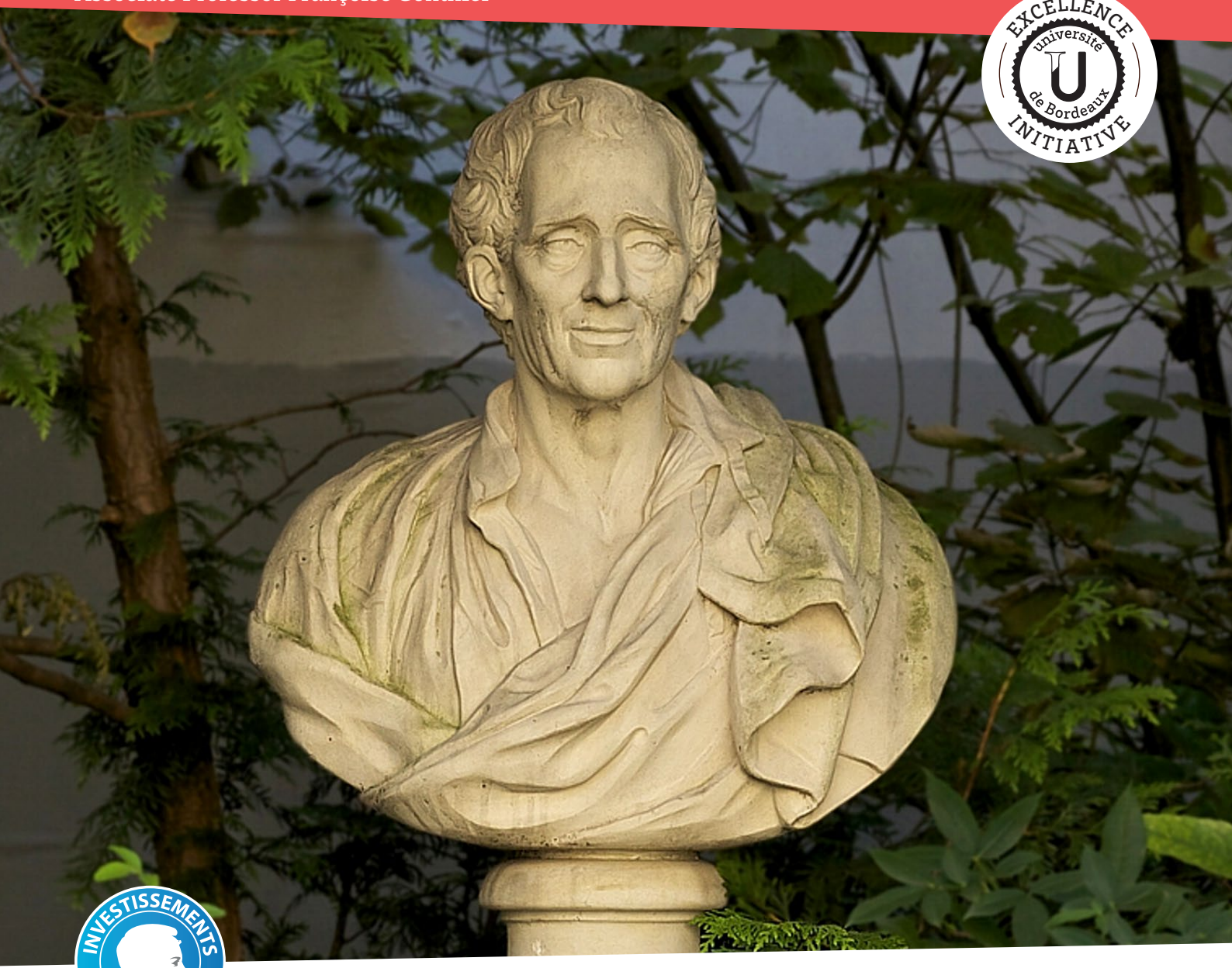

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Consumer law:

The introduction of class actions in French law

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The introduction of class actions in French law has been a laborious process. The *commission de refonte du droit de la consommation* (Commission for the Reform of Consumer Law), chaired by Jean Calais-Aulois, had recommended the adoption of class actions as early as 1985, but the draft bill inspired by the Commission's report was never tabled. Jacques Chirac made an election promise on class actions in 2005: new reports were ordered and a draft bill was adopted on 8 November 2006 then withdrawn from Parliament's agenda at the last minute. In 2007, the new President, Nicolas Sarkozy, again announced the imminent introduction of class actions, but the reform was put back several times.

While France was increasingly bogged down by her own prevarication, class actions were progressing in many countries, and particularly in EU States; this led the European Commission to issue a Recommendation on 11 June 2013, on the one hand to encourage Member States to make provision for class actions and, on the other hand, to harmonise national legislations by detailing a series of common non-binding principles intended to regulate the various measures (1). The Commission's recommendations were certainly the last bit of encouragement that France needed to adopt Law n°2014-344 of 17 March 2014 on consumer affairs (known as the *loi Hamon* or Hamon law), which finally instituted class actions in French law (2).

While class actions appear to be the most emblematic provision under the Law of 17 March 2014, they are only one aspect of a law that brings sweeping reforms to the *Code de la consommation* (Consumer Code). Thus, for the first time, the Law provides a definition of "consumer" (3); it also strengthens existing consumer rights (particularly the right of access to information); it transposes European Directive 2011/83/EU of 25 October 2011 on off-premises sales and distance selling and, lastly, regulates a multitude of special contracts concluded between consumers and professionals. Prior to its promulgation, the Law was referred to the Constitutional Council which, in its decision n° 2014-690 of 13 March 2014, struck down Article 67 which provided for the creation of a *registre national des crédits aux particuliers* (national register of personal loans) to prevent debt situations. The Council considered that the creation of such a scheme did not bring with it sufficient guarantees and thus constituted a disproportionate infringement of privacy in light of the aim pursued. Conversely, it ruled that class actions were not contrary to any constitutional requirements (neither to personal freedom, nor to the right to a fair trial), as consumers can only be drawn into the proceedings with their consent, while providers may assert all useful grounds during the proceedings in the defence of their interests.

It therefore appears that the Law of 17 March 2014 has succeeded in introducing a class action *à la française*, i.e. compatible with the principles of French law, and in particular those principles governing trials (4).

Before we examine the modalities of class actions, we must first explain why their introduction proved both necessary and delicate.

I- The context of the admission of class actions *à la française*

Consumer protection is a priority for the French legislature, but the proliferation of regulations imposed on providers has a purpose only if consumers benefit from effective steps to penalise any failure to comply with those regulations. Class actions have therefore emerged as the ideal procedure to remedy the absence of steps available to consumers. However, the excesses linked to the development of class actions, as have been observed in the United States, raised fears amongst many providers and a number of legal scholars. The hostility towards class actions was for a long time based on a procedural obstacle: the principle of *nul ne plaide par procureur* (only the injured party has recourse to the law), which is a fundamental principle of French civil procedure. The Law of 17 March 2014 gives precedence to consumer interests by enshrining an additional exception to that principle.

A- The deficiencies of existing actions

While consumer law instituted greater consumer protection, there was a lack of effectiveness in that protection, owing to the absence of remedies appropriate to what often proves to be mass litigation. Indeed, the failure to comply with consumer protection measures generally results in very slight damage for consumers, whilst being highly profitable for providers. Although the total sum of individual damage is high, taken individually they are too low a sum to motivate the victim to instigate legal proceedings. An individual action therefore proves to be inappropriate.

The use of consumer associations is no more effective. Indeed, accredited consumer associations were granted legal standing but only in order to protect the collective interests of consumers. Thus, in the event of a criminal offence, aside from compensation for the damage to those collective interests, consumer associations may, in bringing a civil action, petition both the civil and criminal courts to order the cessation of illegal practices or the removal of abusive or illegal clauses in consumer contracts (5). These actions, provided by the *Code de la consommation*, do not allow actions to be brought by associations in defence of the individual interests of consumers. This is why, in order to improve consumer protection, the Law of 18 January 1992 created *l'action en représentation conjointe* (6), or joint representation action, which allows any accredited consumer association, recognised and representative on a national level, to bring an action before any court for compensation for the damage suffered individually by a more or less large number of identified consumers, on condition that this damage is the result of the activities of the same provider and that the cause of the damage is the same for each consumer. In order for the association to bring an action, a minimum of two consumers must give the association a written mandate.

This procedure was a failure: it was only used a dozen times in 20 years. This failure is explained by the fact that the action cannot be publicised and requires significant financial means that consumer associations do not always have.

Class actions then emerged as the most appropriate means to allow mass litigation, the protection of consumers' personal interests and the moralization of trade to be managed at the same time by

deterring offenders from pursuing illegal practices. However, there remained an obstacle to the admission of class actions: the *nul ne plaide par procureur* principle.

B- The procedural obstacle to class actions

The *action de groupe* is a direct translation into French of "class action". A class action is an action by which one person is authorised to represent a group of persons in legal proceedings without having obtained their consent beforehand. It first appeared in the United Kingdom and spread to the United States, Quebec and many other countries. The forms vary from country to country, but generally there are two systems: the opt-in system, under which only those persons who have agreed to the action are included; and the opt-out system, under which all victims, even those who have not expressly agreed, are included in the action and those who expressly refuse are excluded. The class action is a collective action within the meaning of the Recommendation of 11 June 2013 as it allows compensation to be paid to a group of persons who have been the victims of the same action or event. It is also an action bought in the personal interest of others. Article 31 of the *Code de procédure civile* (civil procedure code) provides that "*the action is open to all those who have a legitimate interest in the success or dismissal of a claim*". In order to bring a legal action, there must therefore be proof of an interest to act which must be an actual, existing, personal and direct interest. To require that the interest be person is to require that any advantage that the action is likely to yield for the litigant will benefit them personally and directly. The principle is contained in an adage: *nul ne plaide par procureur* (only the injured party has recourse to the law), which means that a person may not in theory act in another's interests. This requirement does not preclude the possibility of being represented in bringing legal action. In the event of such representation, it is the represented person who remains the party to the proceedings, and it is they who must meet the conditions for bringing the action by proving a personal interest in particular. Thus consumer groups can bring actions as representatives, on the basis of a power that is attributed to them by mandate: this is the case with joint representation actions.

If the principle is strictly observed, class actions are not possible as they allow actions to be brought in another's interests without obtaining their prior consent or receiving a mandate to that effect.

The principle is not, however, absolute. The legislature may set it aside by giving legal standing to a person who cannot establish a personal interest in bringing a legal action.

In order to have legal standing, the rule is that it suffices to have an interest in bringing an action, in such a way that the person who has an interest in bringing an action necessarily has legal standing. Exceptionally, for some actions known as *actions attitrées* or dedicated actions, a personal interest will not suffice: a person must also establish that he or she has the legal standing required by law. In this sense, divorce proceedings are a dedicated action: it may be argued that the children concerned have a legitimate interest in bringing such an action, but the legislature gives legal standing to the spouses only, thus in turn preventing children from petitioning for their parents' divorce. The independence of legal standing is all the more evident in a very small number of cases by becoming the only condition for the right to bring an action. This is the case where the law recognizes a person's or a group's legal standing to bring an action in

another person's personal interest or in the collective interest. This person or group is then recognised as having their own right in the interests of a third party: they have the right to bring an action, although they have no personal interest in doing so, owing solely to the fact that the law gives them legal standing to do so. This undermines the *nul ne plaide par procureur* principle. There are only a few exceptions and these are always provided by law. Thus Article 46 (1) of Law n°85-98 of 25 January 1985 on the administration and compulsory liquidation of companies provides that the creditors' representative alone may act in the creditors' interests. It is the representative who brings the action, and it is on that basis that the grounds of the action are examined. Equally, a trade union is authorised in certain situations provided by the *Code du travail* (Labour Code) to act in the individual interest of a salaried employee who, as such, exercises his or her own right to bring an action. The Law of 17 March 2014 simply introduces a new exception to the *nul ne plaide par procureur* rule: the class action. This exception applies to a very narrow category of actions for the time being, as it only concerns consumer law and competition law and may only be brought by accredited consumer associations, as established by the modalities of class actions provided by the Law of 17 March 2014.

II- The modalities of class actions provided by the Law of 17 March 2014

The Law of 17 March 2014 sought to introduce a modest innovation by granting a narrow scope of application for class actions. It provides for an original standard procedure, together with a simplified procedure and a specific one for anti-competitive practices.

A- The limited field of application for class actions

Class actions are, first of all, limited in their scope as they are the preserve of consumer law. Previous bills had intended to introduce a general class action for all catastrophes - including those linked to the environment and health - regulated by the Civil Code so as to underscore its general nature. The Law of 17 March did not make the same choice: it limits class actions to damage within the scope of consumer law or some aspects of competition law, which is why these actions are regulated by the *Code de la consommation*.

So class actions are reserved for consumers. Since the Law of 17 March 2014 came into force, "within the meaning of the present Code, shall be deemed a consumer any natural person who acts for purposes that do not fall within the scope of their commercial, industrial, craft or professional activities". It must therefore be deduced that class actions are reserved for natural persons and thus exclude legal persons, as these cannot be considered as consumers.

Class actions are also limited in terms of their purpose, as they may only be brought for compensation in respect of individual damage suffered by a consumer as a result of negligence on the part of a professional in respect of their legal or contractual obligations in the sale of goods or the supply of services, or as a result of certain anti-competition practices. Furthermore, the action may only brought for compensation in respect of material damage. Article L.423-1 of the *Code de la consommation* provides that "a class action may only concern the compensation for financial loss resulting from material damage suffered by consumers". Thus personal injury is excluded, as is financial loss resulting from personal injury, such as the loss of professional income or the costs associated with the assistance of a third party. Non-financial losses, resulting in particular from the violation of a personality right such as the right to privacy or image rights, are also excluded.

Compensation for other kinds of damage can only be sought in the context of traditional proceedings. Where a victim suffers damage other than material damage, they must bring an individual action for compensation for all damage before one single court. Finally, class actions are limited in terms of whom may bring the action, as they are the preserve of accredited consumer protection associations that are representative on a national level and accredited under the terms of Article L. 411-1 of the *Code de la consommation* (7). In reserving legal standing – and, therefore, the right to bring an action – for such consumer associations, the legislature clearly wishes to remain consistent insofar as those same associations are competent to bring the other actions provided in the individual or collective interest of the consumer. These associations thus appeared to be the best placed and most legitimate to act in the collective interest of a group of consumers. It was also certainly a matter of avoiding American-style aberrations by preventing an excess of zeal on the part of some lawyers or even vexatious applications through the prior scrutiny of such associations.

This choice has, however, been criticised. The legal conditions for obtaining accreditation are such that only a handful of associations are successful. The lack of accredited associations will necessarily restrict the number of class actions brought. Furthermore, the financial burden may well prove too great for those associations that have the monopoly on class actions, insofar as, unlike previous proposals, the law does not make provision public funding to be made available for publicity and the costs associated with recovery and redistribution. It is this lack of funding that is already partly to blame for the failure of joint representation actions.

B- Procedure

In reality, the 2014 Law provides for three procedures: a specific procedure for anti-competitive practices; a standard procedure; and a simplified procedure.

Articles L 423-1 and L 423-17 to L 423-19 of the *Code de la consommation* set down specific rules for the scenario in which a class action is brought in order to obtain compensation for damage suffered as a result of anti-competitive practices. Indeed, where the alleged deficiencies on the part of a provider concern the observance of the rules defined under Title II, Book IV of the *Code du commerce* or Articles 101 and 102 of the Treaty on the Functioning of the European Union, the provider cannot be found liable in the context of a class action, but rather on the basis of a decision against the provider handed down by the Competition Authority or the competent authorities of the European Union, a decision which finds deficiencies and can no longer be appealed by the party concerned as regards the identification of those deficiencies. This mechanism is the follow-on system, the adoption of which in French law raised many reservations as to the length of the procedure and the submission of France's ordinary courts to decisions of the Competition Authority.

The standard procedure provided under Article L 423-3 and subsequent of the *Code de la consommation* falls within the remit of the *Tribunal de grande instance*'s jurisdiction. As representation by a lawyer is compulsory there, while the latter does not have legal standing, he still has a part to play in the procedure as a representative *ad litem*. An accredited consumer association must issue a writ in order to bring a class action. The court must then rule, in the same decision, on the admissibility of the action, the provider's liability in light of the individual cases presented by the association, and finally on the formation of the group. The court

determines the group of consumers to whom the provider is liable, and sets the criteria for membership of the group and the damage likely to be compensated, as well as the various aspects allowing the damage to be assessed. In this way, the particularities of this procedure in comparison with the systems operating in other countries lay in the fact that the consumer can wait for the court's decision before deciding whether to bring an individual action or a class action by opting to join the group.

Where the court finds the provider liable, it orders advertising formalities, the costs of which are borne by the provider, to inform consumers likely to belong to the group and sets the timescale for consumers to join the group in order to obtain compensation for the damage suffered (the timescale cannot be less than two months or greater than six months following the completion of the advertising formalities ordered by the court). In this initial phase, the association does not act by representation but by virtue of its own right (8). As regards the modalities for joining the group, in accordance with the Recommendation of the European Commission of 11 June 2013, there is an opt-in system under which only those persons who have expressed their willingness to do so can join the group: consumers wishing to receive compensation must therefore join the group. Article L. 423-5 of the *Code de la consommation* states that "*membership of the group shall be equivalent to a mandate to the association for the purposes of obtaining compensation*". From that moment on, the action becomes a joint representation action as the association no longer acts by virtue of its own right but as the representative of the consumer (so there is no longer any exception to the *nul ne plaide par procureur* rule).

The provider held liable must then pay compensation to each consumer in the group within the timeframe set by the court. The provider may however challenge some consumers' membership of the group before the same regional court, which triggers a second hearing on the enforcement of the initial judgment. The court will then rule in one same judgment on all of the difficulties relating to enforcement. Any sum received by the association as part of the compensation to the consumers affected must be paid into a deposit account opened with the *Caisse des dépôts et consignation* (French Deposit and Consignment Office).

The Law of 17 March 2014 also institutes a simplified procedure, provided under Article L. 423-10 of the *Code de la consommation* and applicable where "the identity of number of consumers affected are known and where those consumers have suffered damage in the same sum, an identical sum per service provided or an identical sum by reference to a period or duration…". In such cases, the court ruling on the provider's liability can order that provider to compensate victims directly and individually within the timeframe and in accordance with the formalities set by the court. The consumers concerned having already been identified, the requirements concerning group membership and publicity are replaced with individual information to be supplied by the provider at their expense in order to allow the identified consumers to agree to be compensated in accordance with the terms of the court's decision.

To conclude, in accordance with the European Commission's wishes expressed in its Recommendation of 11 June 2013, which advocates the use of alternative dispute resolution methods, the possibility of resorting to mediation is expressly envisaged under Articles L 423-15 and L 423-16 of the *Code de la consommation*. However, only the applicant consumer association can take part in such mediation and any settlement negotiated on behalf of the group must, in

order to be legally binding, be submitted for approval to the court, which ensures that the settlement conforms to the interests of those to whom it is intended to apply.

Notes:

(1) The Commission's recommendations can be accessed via the website: ec.europa.eu

(2) « *L'action de groupe à la française, une curiosité* » K. Haeri et B. Javaux, JCP 2014, p. 375; « *L'exorbitance de l'action de groupe à la française* » N. Molfessis, D. 2014, p.947; « *La nouvelle action de groupe* » V. Rebeyrol, D. 2014, p. 940; « *Introduction de l'action de groupe en droit français* » M. Bacache, JCP 2014, p. 377; « *L'introduction de l'action de groupe en droit français* » D. Mainguy et M. Depincé, JCP ent 2014, p. 1144.

(3) See below.

(4) The original French expression, *action de groupe à la française*, is borrowed from Serge Guinchard, « *Une class action à la française ?* » D. 2005 p. 2180. The rules on class actions are set down under Articles L 423-1 to L 423-26 of the *Code de la consommation*.

(5) Articles L.421-1 and L.421-2 of the *Code de la consommation*

(6) Articles L.422-1 to L.422-3 of the *Code de la consommation*

(7) Currently 16 associations.

(8) There is, therefore, a real exception to the *nul ne plaide par procureur* rule.