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France: Private Antitrust Litigation

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Just a few years ago private enforcement of antitrust law was not so common in France. But this is rapidly changing. Undoubtedly the discussions on the Directive on Actions for Damages under National Law (Directive)[1] and its adoption in 2014 following the introduction of the class action into French law by the Consumer Protection Law No. 2014-344 (Hamon Law) of 17 March 2014 have encouraged victims to sue undertakings whose abuse of a dominant position or participation in a cartel have resulted in excessive prices or market foreclosure. Moreover, even though member states have until 27 December 2016 to transpose the Directive, its provisions are likely to influence French courts' rulings.

Let's recall that French civil liability is divided into contract law (article 1147 of the French Civil Code)[2] and tort law (articles 1382 and 1383 of this Code). Article 1382 provides that 'any act of a person, which causes damages to another, shall oblige the person by whose fault it occurred, to compensate it' where article 1383 states that 'one shall be liable not only by reason of one's acts, but also by reason of one's imprudence or negligence'. Breaches of antitrust law – articles L.420-1 and L.420-2 of the French Commercial Code,[3] as well as the corresponding articles 101 and 102 of the Treaty on the Functioning of European Union (TFEU) – may thus give place to actions brought on the grounds of contractual as well as tort liability.

In France as elsewhere in Europe, victims of antitrust practices – either undertakings or consumers – can seek compensation before courts based on follow-on or stand-alone actions. Follow-on actions, for which the burden of proof is alleviated, are bound to be the most frequent way to claim damages. However, stand-alone actions are still attractive especially for competitors of the alleged infringer. For instance, the Paris Court of Appeal recently dealt with an action directly brought by SFR, a French telecom operator, to claim damages against Orange for alleged anti-competitive practices.[4] Its ruling of 8 October 2014 rejected SFR's claim only because the company failed to demonstrate the existence of the relevant market on which Orange was accused of abusing its dominant position. As ruled on 24 September 2014 by the Paris Court of Appeal,[5] claimants are admissible even to seek compensation of damages caused by anti-competitive practices where the undertakings pursued have obtained a commitment decision.

Victims and infringers

The right of action is available to all those who have a legitimate interest in the success or dismissal of a claim. Courts enjoy a broad discretion to appreciate the notion of legitimate interest. Such interest is interpreted depending on the profit, or any other advantage which may result from the action. Victims of anti-competitive practices may be the clients of the infringer or indirect victims such as consumers or undertakings client of the direct victim which has suffered harm due to the antitrust practices (eg, the clients of an undertaking whose products are partially made thanks to services provided at an excessive rate by the member of a cartel). Such hypothesis is expressly provided for by article 12 of the Directive. The victim may also be an infringer's competitor as illustrated by the above-mentioned action brought by SFR against Orange.[6]

Protected interests may be individual or collective. Professional associations and labour unions have long been permitted to go before courts to defend their own collective interests. Under the French Labour Code, unions 'can, in all courts, exercise all the rights of the plaintiff whenever direct or indirect harm has been caused to the collective interests of the profession they represent'. The French Commercial Code extends this right to all 'professional organisations'. Consequently, an organisation's claim is not admissible if it only invokes the harm suffered by one or several of its members.[7]

The principle 'No one shall plead by proxy' is still very important in French law. However, in its decision on the Hamon Law dated 13 March 2014, the French Constitutional Court rejected the objection[8] according to which the consumers, whose right to redress was to be defended through a class action compulsorily led by a certified consumers' association, were not able to be fully informed in order to consent to join the action. The Court referred to the procedure set out in the Law, which states that it is up to the judge, once called upon by the consumers' association, to inform consumers to enable them to choose whether or not they intend to seek redress for their harm in accordance with the first judgment issued on the liability of the infringer.[9] The legitimacy of such an opt-in regime is enhanced by the declaratory judgment made by the court to define the conditions to be met by the consumers to be able to participate in the class action: those who have not subscribed or have forgotten to hand over the necessary information in time to be part of the action are excluded and can only claim damages through an individual action. In any case, consumers can only be individuals and not businesses and professionals. Such a restriction, which deprives small and medium-sized companies of the advantages of a class action, may be deemed regrettable.

So far, France is the only country where class actions can only be brought to courts by consumers' associations that are certified and recognised as being representative at a national level. To date, 15 consumers' associations are recognised. Article L. 423-24 of the French Consumer Code provides that a certified association can ask the court to substitute a certified association which has introduced a class action, in the event it has lost its certification or is facing financial difficulties.

According to case law, in French civil liability law, where several persons have contributed to single and indivisible damage through joint behaviour, each person can be obliged to pay the full compensation of damage. Article 11 of the Directive confirms the principle of joint and several liability, but allows it to be mitigated in two hypotheses. First, small or medium-sized enterprises may be deemed 'liable only to [their] own direct and indirect purchasers' where certain conditions are fulfilled. Secondly, 'an immunity recipient is jointly and severally liable' only: 'to its direct or indirect purchasers or providers' and 'to other injured parties only where

full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law'. Obviously, this provision is aimed at encouraging undertakings to participate in leniency programmes.

However, the economic concept of 'undertaking' used in competition law is much broader than the notion of 'legal person' subject to civil liability. It remains to be seen if the simultaneous application of both legislations will reactivate the debate on the creation in French civil law of the notion of 'group'.

The burden of proof

Since a civil fault may result from a breach of competition law, obtaining the required evidence is obviously easier when the wrongdoings have already been sanctioned by a competition authority or a court (follow-on action), rather than when the action is introduced before any conviction or investigation by an authority or a court (stand-alone action). Whenever a condemnation has been pronounced by the EU Commission, French courts already abide by article 16 of Regulation No. 1/2003,[10] which prohibits national courts to 'take decisions running counter to the decision adopted by the Commission', based on the principle of loyalty.[11] Consequently, in French case law, any condemnation by the Commission – ultimately confirmed or not by the Court of Justice of the European Union (CJEU) – is deemed a civil fault within the meaning of tort law.[12]

By contrast, the French Supreme Court considered that where the conviction of the infringer is decided by the French Competition Authority (FCA), courts hearing a damage claim are not bound by that decision. However, this ruling was rendered 13 years ago.[13] The recent case-law is more nuanced: in a judgment of 25 March 2014, the French Supreme Court considered that it rests with civil courts to identify, on a case-by-case basis, the precise facts among those mentioned in the competition authorities' decisions – the National Competition Authorities (NCA) as well as the EU Commission – that are likely to engage the infringer's civil liability.[14] Based on article 9 of the Directive, the distinction of effect between decisions of the EU Commission and EU courts, on the one hand, and of NCA's on the other hand is no longer acceptable. Henceforth, final decisions adopted either by an NCA or a review court condemning an infringement of EU or national competition law 'is deemed to be irrefutably established for the purposes of an action for damages brought before […] national courts'. In the same way, French courts will have to take account of the final decision of an NCA of another member state, which will bring 'at least prima facie evidence that an infringement of competition law has occurred'. The change is important since any infringement sanctioned by an NCA or a review court will now be deemed, irrefutably or at least prima facie, a civil fault alleviating the burden of proof borne by the victims.

The Hamon Law which only allows follow-on class actions brought after the ruling issued by national or European competition authorities or courts is no longer subject to appeal[15] with regard to the establishment of the breaches so condemned, is in line with article 9 of the Directive in the way that it states that these breaches 'are deemed to have been established irrefutably'. With a view to further alleviating the burden of proof borne by consumers and preventing them from engaging in costly proceedings without being sure to be able to present evidence of the alleged misconduct to the judge, the Hamon Law establishes a three-stage procedure:

- the first one enables a certified consumer protection association to take action invoking an undertaking's liability based on breaches of competition law (to take this example) before a civil court of first instance (CFI) which issues a 'declaratory judgment' confirming (or not) the undertaking's liability, the damages eligible for compensation, the criteria governing membership of the group and the period – within two to six months – fixed to join the action and the way this judgment will be made public;
- the second stage begins with the provision of notice to consumers to obtain their consent to join the action and accept compensation in the framework of the declaratory judgment; at that stage, in the context of a simplified procedure, the court 'may order the infringers to pay direct compensation individually within such a time limit and according to such arrangements as it may specify';[16] and
- at the third and final stage the CFI rules on compensation claims by consumers who joined the action.

In the event of a stand-alone action, claimants have to bring evidence of the existence of the practices and of the reasons why they represent a breach of contract or a civil fault. In such a hypothesis, the possibility to seek the opinion of the FCA as amicus curiae[17] as provided by article L. 462-3 of the French Commercial Code, may be of particular interest for the claimants. However, the court may object to the request. Two judgments rendered in 2011 illustrate the case-by-case approach of the courts. In a judgment of 30 June 2011, the Paris Court of Appeal rejected such a request[18] when by contrast, in a preliminary judgment of 16 November 2011, the same Court asked the FCA to provide advice on the anti-competitive nature of a clause in a contract between Carrefour, a distributor, and one of its franchisees.[19] The FCA may also decide to give its opinion on a case on its own initiative, as well as the French Minister of Economy. The latter may file pleadings, produce inquiry reports and official records before all civil or criminal courts, and intervene orally before these courts.

If the stand-alone claim is based on alleged breaches of articles 101 or 102 of the TFEU, the court may in any event refer to the CJEU for a preliminary ruling. Once again, courts have broad discretion to decide if it is needed when requested by the claimant. For example, in the context of a damage claim following a conviction decision in the Lysine cartel,[20] the Paris Court of Appeal did not deem appropriate to grant the plaintiff's request to ask the CJEU if requiring from the victim to prove the passing on defence does not lead to an excessive burden of proof for victims of antitrust practices.[21]

Under article 15 of Regulation 1/2003, French courts, as any other national courts in the EU, may ask the Commission to give 'its opinion on questions concerning the application of Union competition rules' and the Commission may intervene on its own initiative before a national court. For instance, it submitted amicus curiae observations on the interpretation of the notion of 'appreciable effect on trade between Member States' of anti-competitive practices to the French Supreme Court in the context of a case related to infringements of competition law on the market for mobile telephony in French overseas territories[22] and the Supreme Court followed the interpretation put forward by the Commission in its amicus curiae observations.[23]

Disclosure of evidence v professional and business secrets

French law ignores discovery (US) as well as disclosure (UK) procedures, and evidence is thus collected under the scrutiny of the seized judge. Before the trial, a claimant may refer to a civil judge to obtain the documents he or she needs to bring the case to court. According to article 145 of the French Code of Civil Procedure, the judge may collect evidence from the infringer as well as from a third party based on a procedure which is not contradictory. Business

secrecy cannot in principle be opposed by the requested party,[24] but the courts are more and more aware of the necessity to protect such commercial and industrial secrets. Two elements are taken into account by courts to limit disclosure of evidence where it does not appear indispensable for the sake of the right of defence: protection of business secrecy and respect of proportionality in the sense that the searched evidence must be identified and strictly necessary to rule the case.[25] Such an approach is in line with article 5 of the Directive. Interestingly, these provisions reflect the concerns regarding 'fishing expeditions' practiced through discovery proceedings, and which the French Blocking Statute[26] tends to oppose. Let's recall that this statute governs disclosure of documents in the course of foreign proceedings especially regarding competition matters.[27]

Once the proceedings are initiated, the plaintiff may request, under article 138 and following of the French Code of Civil Procedure, the communication of documents held by third parties (including the FCA) or by parties in the proceedings, which may be refused in case of a 'legitimate impediment'.

Such a legitimate impediment was recently opposed successfully by the FCA which must protect the secrecy of proceedings. Since the French Commercial Code provides that 'the disclosure by one of the parties of information regarding another party or a third party which he or she could only have known as a result of the notifications or consultations which have occurred' in the process of condemnation of antitrust practices is a criminal offence, parties have been inclined to seek disclosure of evidence by the FCA, even though they possessed such evidence. In line with the French Supreme Court, in the *Semaven* case law of 19 January 2010,[28] ruling that disclosure of documents may be allowed if necessary to the exercise of the rights of defence, the Paris Court of Appeal, on 20 November 2013,[29] refused to order the FCA to disclose evidence which the party already possessed. It confirmed, on 24 September 2014,[30] that it is the party who holds the documents who must assess whether or not it is lawful to provide them. These precedents are fully consistent with article 6 of the Directive, which provides that 'Member states shall ensure that national courts request the disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence.'

By and large, French case law is in line with the *Pfleiderer*[31] and *Donau Chemie*[32] cases, in which the CJEU ruled, based on their procedural autonomy, that national courts should weigh up the interest involved on a case-by-case basis: confidentiality on the one hand; rights of defence on the other. The increasing awareness of the necessity to protect trade secrets – as illustrated by the Directive proposal on Trade Secrets[33] – is influencing the decisions of the FCA and courts regarding access to competition files. In that context, in the *FILMM* case of 10 October 2014,[34] the Administrative Supreme Court enjoined the government to modify the decree excluding the possibility of challenging the FCA's decision to disclose documents to parties based on the interest of the rights of defence in the course of an investigation. The subsequent new decree,[35] which duly allowed challenging such decisions, may render more difficult access to the case file by the victims, with a view to protect business secrets.

A provision, introduced by the Overseas Law of 20 November 2012[36] in the French Commercial Code, states that in the course of private enforcement proceedings the FCA may disclose all documents held on the anti-competitive practices at stake except those linked to leniency programmes.[37] To be fully compatible with the Directive's provisions, settlement submissions will have to be added to the exception while only leniency statements should be concerned by the interdiction of disclosure without any assessment. The French Commercial Code restricts disclosure to non-confidential versions of the competition files. This is consistent with both the Directive and the aforementioned Directive proposal on Trade Secrets, which allows courts to order a restricted communication of confidential documents insofar as they concern business secrecy.

Proof and assessment of damages

Based on the principle of full compensation, French law – as well as EU law – prohibits punitive damages as well as unjust enrichment. The compensation for damages must be 'without loss or profit for any of the parties'.[38] Such a conception is in line with CJEU case law.[39] Damages, which may cover pecuniary loss as well as moral harm and mental anguish, must be direct and certain, not hypothetical and evaluated at the date of the judgment. Courts enjoy considerable discretion to assess their amount on a case by case basis. Damages may include increased costs and loss of market share, revenue or sales, as well as loss of opportunity. For example, the Paris Court of Appeal, in a judgment of 21 December 2012,[40] ordered France Telecom to repair the damage suffered by an alternative operator on the broadband market that had lost the opportunity to obtain funds to continue its business because of France Telecom's fraudulent tactics to discourage investors. In a judgment of 16 March 2015,[41] following the condemnation of the phone operator Orange and its subsidiary Orange Caraïbe by the FCA, the Paris Commercial Court awarded compensation to the claimant, Outremer Telecom, a competitor, notably for loss of opportunity to conquer new market shares and the subsequent loss of opportunity to increase the value of capital which should have been generated by this development of activities. In practice, overcoming the usual reluctance of courts to evaluate such loss based on an economic actualisation, the court decided to apply the mobile activities' return on capital rate of 10.4 per cent calculated by the French telecom regulator in lieu of the much more limited legal rate. With regard to class actions, the Hamon Law only provides for the redress of pecuniary loss resulting from material damages.

It should be noted that, in line with the intention to give better protection to victims, the Directive introduces a simple presumption of harm where the action for damages is based on a cartel infringement, but not when it is based on an abuse of dominant position. Such presumption will not exempt the victim from the duty to evaluate damages. In that respect, French law does not allow the application of lump-sum methods of evaluation as is the case in some member states where a cartel is automatically assumed to have led, for example, to an additional illegitimate cost of 10 per cent of the market price. In the *Doux* case[42] of 27 February 2014, the Paris Court of Appeal accepted to evaluate damages based on an extra expenditure of 30 per cent but it was the result of an expert report produced by the claimants. Assessment of damages may greatly differ from one court to another. For example, the Paris administrative Court of First Instance, in a judgment of 1 April 2014,[43] refused to refer to the Commission's practical guide[44] to evaluate the damage suffered, expressly denying any effect to this document. On the contrary, in the above mentioned case law of 16 March 2015,[45] the Paris Commercial Court referred to the Commission's recommendation to set up the amount of the legal rates. By and large, French courts frequently express their difficulties in assessing the amount of the harm suffered, as illustrated by the judgment of 5 May 2014 of the Paris Commercial Court[46] stating 'it is difficult to evaluate accurately the damage generated by an illegal restriction of market access'. Courts are more and more inclined to have recourse to several experts, as illustrated by a ruling of 26 June 2013[47] of the Paris Court of Appeal.

They feel it is important to exchange with experts before making their own appreciation of the findings and evaluating the quantum of the damage suffered. To facilitate quantification of harm, the Directive states that national courts must be empowered to estimate the amount of harm in case the claimant is unable to do so 'on the basis of the evidence available' and that they can request the NCA's assistance to do so. In a similar way, the Paris Court of Appeal, in the previously quoted judgment of 27 February 2014,[48] qualified the findings of the Commission's decision as 'indisputable data'.

French courts accept the passing-on defence as evidenced by the judgment of 15 June 2010[49] of the French Supreme Court in a case related to the Lysine cartel. However, the burden of proof is, to date, on the victim, as confirmed by the Paris Court of Appeal in the 27 February 2014 judgment.[50] This will change since the Directive places the burden of proving that the overcharge was passed on with the defendant and no longer with the claimant.

The limitation periods

Claims for compensation are barred upon expiry of a five-year period. The limitation period runs 'from the date when the holder of a right knew or should have known the facts necessary to exercise this right'. The Directive's provisions on the limitation period seems to be even more favourable to victims since they add new criteria allowing extension of the limitation period which 'shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know':

- 'of the behaviour and the fact that it constitutes an infringement';
- 'of the fact that the infringement of competition law caused harm to it'; and
- 'the identity of the infringer'.[51]

In order to protect victims, the Hamon Law regarding class and individual actions provides that the limitation period is suspended by the opening of proceedings before the FCA, another NCA or the EU Commission. Such provision is crucial since too many victims, because of the length of proceedings, have seen their claims rejected, despite their legitimate interests, because of the limitation period. For instance, in its above-mentioned judgment of 26 June 2013,[52] the Paris Court of Appeal held that proceedings before the EU judge 'whose purpose is to determine infringement to [EU] law, to punish and not to repair the harm that may result from the commission of such offences, cannot suspend the limitation period'. The Paris CFI, in a decision of 17 December 2013,[53] also denied suspensive effect to a claim brought before the FCA. Such unfair rulings will hopefully be made impossible by virtue of the provisions introduced into the Commercial Code which reflect the Directive.

Competent jurisdictions

Pursuant to article L.420-7 of the French Commercial Code,[54] damage claims may only be brought before one of the 16 courts specialised in competition matters, including eight CFI and eight commercial courts. Such rulings may only be appealed before the Paris Court of Appeal as was confirmed on 21 February 2012 by the French Supreme Court in civil and commercial matters.[55] Lodging an appeal before another Court of Appeal would lead to a plea of non-inadmissibility[56] which can be detrimental if the deadline to submit a new appeal before the right Court of Appeal is exceeded. Specialised courts have jurisdiction not only over actions brought to ensure implementation of antitrust law, but also over antitrust damage claims. On 15 November 2012, the CFI of Saint-Malo[57] thus decided to transfer a damage claim to the CFI of Rennes, specialised in antitrust matters. Based on the principle of proper administration of justice, this judgment also duly refers to the parliamentary debates on the law which created these specialised courts, noting that such specialisation in order to efficiently tackle complex cases related to the enforcement of competition law, either public or private, clearly reflects the legislator's intention.

In the event that the infringer is a public law entity (eg, a 100 per cent state-owned company placed under the control of the state, such as SNCF, the French national railway company), damage claim actions must be brought before French administrative courts.[58] For instance, the Paris Court of Appeal ruled that it was up to these courts to rule on the damages caused by EDF's refusal to conclude an administrative contract which constituted an abuse of dominant position.[59] The Paris Court of Appeal confirms the competence of administrative courts to deal with an action related to the breach of administrative contracts by RATP, the state-owned transportation company of the Region of Paris, in which an abuse of dominant position was alleged by the claimant.[60] Nevertheless, this division of jurisdiction isn't always obvious, as illustrated by two recent decisions rendered for the same parties and the same matter, one by the Paris administrative Court of First Instance[61] and the second one by the Paris Commercial Court[62] both ruling that they had jurisdiction to rule the case.

In addition, a civil claim for damages resulting from a criminal offence may be brought before criminal courts. This applies when damages are claimed in criminal proceedings based on article L.420-6 of the French Commercial Code against a person having intentionally taken a personal and determining part in an infringement of antitrust law.[63] Penalties incurred are four years of imprisonment and a fine of €75,000 (€375,000 for legal persons). Still, those who have infringed this provision are very rarely prosecuted before criminal courts. In addition, offenders are rarely convicted except where they are also convicted of committing acts of corruption.[64]

The Hamon Law provides that class actions may be brought before all CFIs. In our view such provision introduced in the Consumer Code should not exclude the application of the specific provision conferring special jurisdiction to the courts specialised in competition matters. First, class actions are only follow-on actions based on competition law infringements. And in that regard, it is consistent to give jurisdiction to the specialised courts used to economic cases. Second, from a purely legal point of view, it could be considered that the provisions of the Commercial Code on the specialisation of courts in competition matters are special provisions that derogate from the general law on class action and should therefore prevail. While awaiting case law to clarify the issues, neither the Hamon Law's implementing decree[65] nor the ministerial circular[66] published to guide courts and tribunals solve the issue. Our preference would be to stick to the verified and effective system of specialised courts to comply with the principle of proper administration of justice.

As for territorial jurisdiction, the specialised courts having jurisdiction to rule on claims for damages caused by a breach of competition rules are:

- the court of the place of residence of the defendant; or
- the place where the harmful event occurred; or
- the place where the damage was suffered.

Concerning class actions, no option is granted, the competent court is the one of the defendant's place of residence. An additional rule provides that when the defendant does not reside in France, the Paris CFI has jurisdiction.[67]

However, when the practices have occurred in several EU member states or have produced their effects within such states, Regulation 'Brussels I bis' on jurisdiction[68] applies. The French Supreme Court, applying Brussels I[69] in a case involving multiple defendants, ruled on 26 February 2013 that it only requires from the judge to appreciate if there is a risk of irreconcilable judgments in case they were to be ruled separately.[70] The CJEU has recently ruled on the practice of forum shopping deciding that article 6 of the Regulation on multiple defendants is applicable to private enforcement claim 'even where the applicant has withdrawn its action against the sole co-defendant domiciled in the same State as the court seised, unless it is found that, at the time the proceedings were instituted, the applicant and that defendant had colluded to artificially fulfil, or prolong the fulfilment of, that provision's applicability'.[71] Such a ruling is of interest with regard to the jurisdiction of French courts since claimants will have less possibility of forum shopping. In case of conflict of laws, Regulation Rome II on applicable law applies.[72]

Conclusion

What may be more important is the change of culture owing to incentives to seek alternative solutions such as settlements. Settlement procedures are not as entrenched in French legal tradition as they are in common law countries. It may happen that, in France, in the context of a breach of competition law, the victims settle unofficially with the infringing undertaking. However, the French Code of Civil Procedure provides for alternative dispute mechanisms such as conciliation or mediation, and the Hamon Law focuses especially on mediation in the context of class actions.

The increasing financial cost of litigation (especially in the field of evidence gathering) but also the reputational risk of litigation are incentives for defendants to seek a settlement. A recent reform of civil procedure rules[73] compels claimants to seek an amicable resolution of disputes before sending a writ of summons. While this new provision specifies that it may not be applicable where there is a legitimate impediment, notably in the event the matter deals with public order, it seems it cannot be affirmed that this obligation does not apply to private antitrust litigation. However, these provisions must still be interpreted by French courts.

Notes

1 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union.

2 Article 1147 of French Civil Code: 'A debtor shall be ordered to pay damages, in the proper circumstance, either on account of the non-performance of the obligation, or on account of the delay in performing, whenever he cannot establish that the non-performance was due to an external cause that cannot be imputed to him provided, moreover, there is no bad faith on his part.'

3 Article L. 420-1 prohibits common actions, agreements, express or tacit undertakings or coalitions 'when they have the aim or may have the effect of preventing, restricting or distorting the free play of competition in a market', while article L. 420-2 prohibits abuses of dominant position and of economic dependence.

4 Paris Court of Appeal, 8 October 2014, *SA Orange v SA Société Française de Radiotéléphonie – SFR*, No. 14/05766.

5 Paris Court of Appeal, 24 September 2014, *SA Eco-Emballages and others*, No. 12/06864.

6 Paris Court of Appeal, 8 October 2014, *SA Orange v SA Société Française de Radiotéléphonie – SFR*, No. 14/05766, quoted above.

7 French Supreme Court, commercial, 24 November 2009, *Syndicat des détaillants spécialisés du disque v Auchan France*, No. 08-13052.

8 Pursuant to the French Constitution, 60 MPs or 60 Senators may refer to the Constitutional Court to review the constitutionality of an Act before its promulgation.

9 Decision No. 2014-690 DC, 13 March 2014, point 16.

10 Council Regulation (EC) No. 1/2003 of 16 December 2002.

11 Article 4 (3) of the Treaty on the EU.

12 Paris Court of Appeal, 26 June 2013, *JCB Sales LTD v SA Central Parts,* No. 12/04441.

13 French Supreme Court, commercial, 17 July 2001, *Société Toulousaine Entretien Automobile v Société Accessoires et fournitures électriques pour auto*, No. 99-17251.

14 French Supreme Court, commercial, 25 March 2014, *France Telecom v Cowes*, No. 13-13839.

15 In its judgment on the Hamon Law, the French Constitutional Court underlined that if the law does not preclude the possibility to initiate a class action 'even though proceedings before the court or authority competent in the area of competition law have not been definitively concluded... the court seized under such circumstances cannot itself assess the breaches alleged and must defer judgement until the ruling no the breaches is no longer subject to appeal'.

16 Even though the liability of business may be established where the undertakings concerned do not even know the identity and number of consumers who may wish to join the action, the French Constitutional Court did not consider that the rights of defence of the defendants were insufficiently guaranteed. See above-mentioned Decision of 13 March 2014, points 17, 18 and 19.

17 Amicus curiae differ from witnesses and experts: they give their opinion to the court on a general topic that may apply to several cases and that often relates to a frequently debated subject.

18 Paris Court of Appeal, 30 June 2011, *SARL Socplast and SARL Balnora v SA Valorplast and SA Eco-Emballages*, No. 09/10289.

19 Paris Court of Appeal, 16 November 2011, *SAS Carrefour Proximité France and SAS Champion Supermarché France CSF v Société Etablissement Ségurel*, No. 09/16817.

20 EU Commission, 7 June 2000 relating to a proceeding pursuant to article 81 of the EC Treaty and article 53 of the EEA Agreement (Case COMP/36.545/F3 *Amino Acids*).

21 Paris Court of Appeal, 27 February 2014, *SNC Doux Aliments Bretagne and others v Ajinomoto Eurolysine and SA Ceva Santé Animale*, No. 10/18285.

22 Opinion of the EU Commission of 13 October 2011, joint cases V 1025772, Y 1025775, Q 1025882.

23 French Supreme Court, commercial, 31 January 2012, *Orange Caraïbe*, No. 10-25772, 10-25775, 10-25882.

24 French Supreme Court, commercial, 19 March 2013, *Square v Pemaco*, No. 12-13880.

25 Colmar Court of Appeal, 22 January 2014, *SA Amonit v SARL Entreprise pour la conservation du patrimoine*, No. 13/00908: related to the alleged breach of a non-compete clause by a former employee.

26 Law No. 68-678 of 26 July 1968.

27 Le droit de la preuve à l'heure de l'extraterritorialité, Noëlle Lenoir, *Revue Française de Droit Administratif*, May–June 2014.

28 French Supreme Court, commercial, 19 January 2010, *Semavem v JVC France*, No. 08-19761.

29 Paris Court of Appeal, 20 November 2013, *Monsieur le Président de l'Autorité de la concurrence v SAS Ma Liste de Courses*, No. 12/05813.

30 Paris Court of Appeal, 24 September 2014, *SA Eco-Emballages and others*, No. 12/06864, quoted above.

31 CJEU, 14 June 2011, *Pfleiderer AG v Bundeskartellamt*, C-360/09.
32 CJEU, 6 June 2013, *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, C-536/11.
33 Article 8 of this proposed Directive lodged by the Commission on 28 November 2013 (No. 2013/0402 COD) deals with the question of 'the preservation of confidentiality of trade secrets in the course of legal proceedings'.
34 Administrative Supreme Court, 10 October 2014, *Syndicat national des fabricants d'isolants en laines minérales manufacturées*, No. 367807.
35 Decree No. 2015-521 of 11 May 2015.
36 Law No. 2012-1270 of 20 November 2012.
37 In addition the French Freedom of information Act of 17 July 1978 was modified to introduce in this Act a provision to deny to citizens access to 'documents elaborated or held by the FCA within the framework of the exercise of its powers of investigation, instruction and decision'.
38 French Supreme Court, criminal, 1 March 2011, *Mr. X*, No. 10-85965.
39 CJEU, 13 July 2006, *Manfredi*, C-295/04 to C-298/04.
40 Paris Court of Appeal, 21 December 2012, *COWES v France Telecom*, No. 11/03000 (please note that this judgment has been overturned by the French Supreme Court on 25 March 2014, No. 13-13839, above quoted, but only on the notion of civil fault).
41 Paris commercial Court, 16 March 2015, *SAS Outremer Telecom v SA Orange Caraïbe and SA Orange*, No. 2010073867.
42 Paris Court of Appeal, 27 February 2014, *SNC Doux Aliments Bretagne and others v Société Ajinomoto Eurolysine*, No. 10/18285, quoted above.
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Kramer Levin is a full-service law firm with extensive capabilities and substantial experience. From our offices in New York, Silicon Valley and Paris, we represent clients from Global 1000 companies to emerging growth entities across a wide range of industries. Our Paris office advises clients on a broad range of matters involving European competition and trade law, including:

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- state aid and EU subsidies – with specific expertise in various public aid schemes, in particular aids to airports, the automobile and aerospace industries, and for research;
- internal market – providing legal assistance on issues relating to the free circulation of goods, services and capital, freedom of establishment and secondary EU legislation, regarding regulatory matters and litigation; and
- consumer protection and advertising – with particular skills in consumer protection law, the introduction of products on the market, the preparation of general terms and conditions of sale, canvassing, remote sale and e-commerce, in both the commercial and financial services sectors.

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