

antitrust law (as was the case with article 85 of the Rome Treaty). This landmark decision deserves a more detailed analysis than can be given here.<sup>49</sup>

## France\*

Following the Royer Act,<sup>1</sup> duly chartered consumer associations have standing to sue. Law number 88-14, of January 5, 1988,<sup>2</sup> reshapes the requirements for such standing and now confers to these associations a preventive role in the defense of consumers.

### I. Requirements for an Action to Lie

As under the previous system, an association may sue when the following three conditions are satisfied:<sup>3</sup>

- (i) The associations must be duly chartered. Only an association not for profit under the law of July 1, 1901, fulfills this requirement.
- (ii) The association's explicit purpose must be to defend the interests of consumers. As long as this requirement is specifically met, the association may also have additional purposes.
- (iii) The association must be chartered with a view to its representativity at a national or local level, according to conditions to be set by implementing regulations (*décret*).

Presently, an association may be chartered when it has been in existence for over a year, when it deploys an "effective and public activity in defense of consumers" and when it has a sufficient number of members (*décret* number 74-491 of May 19, 1974). These conditions will probably remain the same. But the future implementing regulations will have to establish the conditions under which the association can be disenfranchised.<sup>4</sup>

Only associations "independent from any type of professional activities" can be chartered.<sup>5</sup> The law admits, however, associations that originate from

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49. See *International Decisions*, 83 AM. J. INT'L L. 357 (1989); see also Schödermeier, *Die vermiedene Auswirkung*, 21 WIRTSCHAFT UND WEITBEWERB (1989); Vollmer & Sandage, *The Wood Pulp Case*, 23 INT'L LAW. 721 (1989).

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1. Law of 27 Dec. 1973, [1974] D.30; J.O. 13 Dec. 1973, 14139.

2. Law 88-14 of 5 Jan. 1988; J.O. 6 Jan. 1988, 219 [hereinafter the Act].

3. Act, § § 1-2.

4. *Id.* § 2(1).

5. *Id.* § 2(2).

cooperatives of consumers (*sociétés cooperatives de consommation*). As an exception, the *unions départementales* and the *union nationale des associations familiales* need not be chartered since section 3 of *décret* number 56-149 of January 24, 1956, grants them standing to defend moral and tangible interests of families.<sup>6</sup>

As before, chartered associations may sue for damages in a civil court. They may also bring criminal charges when a violation of penal law injures the collective interest of consumers.<sup>7</sup> On the other hand, consumer associations may request a civil court to order the defendant to stop the illegal conduct—for example, to suppress from proposed contracts clauses that are illegal with respect to consumers.<sup>8</sup> If necessary, a penalty for delay called *astreintes* can be applied. This action can be brought before a special master, the *judge des référés*.<sup>9</sup>

An action for damages or an injunction can only lie when the “collective interest of consumers” is injured. This notion is not legally defined. It is determined by the courts on a case-by-case basis. Judicial decisions have established that conduct contrary to the collective interest of consumers is that which runs against the purposes of the association. Several changes in the structure of the cause of action have resulted:

- (i) Collective interest is not the aggregate of each consumer’s individual interest. The injury caused must differ from the one personally suffered by the consumer.<sup>10</sup> To assess the amount of damages the court looks at: (a) expenses defrayed by the association in pursuance of its goals (lectures, publications, etc.) and those spent in the case at bar (court tax, lawyers’ fees, etc.); and (b) the specific goals that the association is supposed to defend. For instance, a case arose where two associations sued a tobacco manufacturer that breached a 1975 law rendering the use of French mandatory. The General Association of French Speakers was awarded F. 5,000 as damages since the purpose of the association “was exactly on point with the case at bar.” The Civic and Social Feminine Group received only F. 1,000 because it could not prove that its interest was specific enough.

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6. *Id.* § 1(2).

7. *Id.* § 1(2). The draft law gave associations the faculty to “file a suit in any court.” But legislators reasoned that such clause “amounted to giving chartered associations the power to dislodge individual consumers.” J.O. 10 Dec. 1987, 5227. Instead, the view of the *Cour de Cassation* was retained by which consumer associations can only request damages when the wrong is caused through the violation of a criminal law, and not to redress simple torts. Cass. Civ. 1re, 16 Jan. 1985 [1985] D. 317.

8. Act, art. 3.

9. C. Pr. Civ. art. 809; Bull. Civ. I, 1 Dec. 1987 (case unpublished).

10. Bull. Crim., 20 May 1985, 485; J.C.P. IV No. 37, 10 Nov. 1985 [1986], 37.

- (ii) The cause of action is not limited to the breach of law specifically enacted for consumer protection.<sup>11</sup>
- (iii) The action lies even when there is a potential damage for consumers. The *Cour de Cassation* has ruled that an association can sue when the product in question is being marketed wholesale.<sup>12</sup>

## II. Intervention

Since a consumer files a claim in a civil court seeking damages for noncriminal acts, chartered associations may intervene before such court.<sup>13</sup> Associations may request an order to prevent a defendant from further illegal action or the suppression of illicit clauses in consumer contracts.<sup>14</sup> Following procedural rules<sup>15</sup> associations may support the request of the consumer-plaintiff (*intervention accessoire*) or petition for greater damages to their benefit (*intervention principale*). Associations may request damages for any injury caused to consumers as a group.

## III. Suppression of Abusive Clauses

Chartered associations may request a civil court to order, under penalty of *astreintes* if necessary, the deletion of abusive clauses in the contract forms usually submitted to consumers.<sup>16</sup> This new rule has the following characteristics:

- (i) The rule is a preventive measure that can be introduced even before the association proves an injury to the collective interest of consumers.
- (ii) The notion of the abusive clause is rooted in the law of January 10, 1978, on consumer protection and information.<sup>17</sup> The question arises as to whether an association may only request the suppression of clauses classified as objectionable through an administrative ruling, based on the 1978 law, or if any abusive clause may be attacked. In a decision of July 16, 1987, the *Cour de Cassation* considered any clause imposed on the consumer through the abuse of economic power that results in an excessive advantage for the other party to be abusive and nonwritten. Apparently, this latter view will most likely prevail.

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11. Bull. Crim., 4 Jan. 1984, 8; Bull. Crim., 15 May 1984; *contra* G.P. 10 Apr. 1986, 522.

12. Bull. Crim., 7 Jan. 1987, 94. Certain courts, however, hold that in the absence of a consumer's claim, the association lacks standing since its interest is covered by the State (*Ministère Public*). See, e.g., Reims, 2 B.L.D. 31 (1984).

13. Act, art. 5.

14. *Id.* arts. 3, 5.

15. C. Pr. Civ. art. 328.

16. Act, art. 6.

17. Law 78-22 of 10 Jan. 1978, [1978] D. 84.

- (iii) A request for modification of terms can only affect nonexecuted contracts. Further, the request can only be addressed to “model contracts usually proposed by enterprises to consumers,” normally sales. Consequently, fully negotiated contracts are excluded.

#### IV. Administrative Action Used as Evidence

The State may produce in court any official document (e.g. inspections, sanctions, etc.) that is relevant to the case.<sup>18</sup> The purpose of this rule is to allow consumer associations a greater leeway in court, allowing the associations, after the administrative authorities have intervened, to use the administrative records as evidence.<sup>19</sup>

#### V. Postponement of the Penalty

Once a consumers' association has been admitted as a party, a penal court may, after finding a defendant guilty, postpone the sentence while ordering the defendant to stop the illegal acts, or to remove illegal clauses from contracts proposed to consumers.<sup>20</sup> The court's order can be issued under penalty of *astreintes*.

Within one year after the postponement, a hearing to pronounce final judgment must take place.<sup>21</sup> Here, if applicable, the *astreinte* is liquidated, the court having the power to condone this fine altogether or to reduce its amount. The *astreinte* is collected by the Treasury in the same way as are penal fines. This type of *astreinte* does not authorize imprisonment for failure to pay.

The *astreinte* is automatically canceled once it is established that the defendant has obeyed an injunction under penalty of *astreinte* issued by another criminal court to block a similar offense.<sup>22</sup>

#### VI. Publicity of Judgments

The court may order the publicity of the judgment “by any appropriate means.”<sup>23</sup> Publicity can be assured through newspapers, posters and radio or television announcements. In the case of a penal judgment, such publicity can be used even if not specifically foreseen by the law. The placement of posters is done under the conditions and penalties established in article 51 of the Penal Code. Hiding or defacing the posters is punished with either a fine of F. 500 to

18. Act, art. 7.

19. Senate Report Nr. 128, at 25.

20. Act, art. 8.

21. Bull. Civ. I, 1 Dec. 1987, 166.

22. Act, art. 4. This feature is introduced to prevent double jeopardy when two criminal courts intervene in respect of one type of model contract. If defendant obeys the first injunction it seems unfair to subject him to penalties by another court. *See* Senate Report Nr. 128, at 31.

23. Act, art. 8.