France: The new "Hamon Law" introducing French class actions
New consumer law introduces significant provisions with respect to competition and distribution law

Introduction

In order to balance the powers of economic stakeholders, France has adopted a new consumer law, popularly known as the "Hamon Law".[1] The new statute, adopted by the French Parliament on 13 February 2014, was validated on 13 March 2014 by the French Constitutional Council, which left standing most of the provisions that have an impact on competition and distribution law. The law was formally promulgated on 18 March 2014, by publication in the Official Journal, although certain of its provisions will only enter into force subsequently, either on a date specified in the law or once certain implementing decrees are promulgated.

The most significant aspects of the Hamon Law are (i) the introduction of the class action, (ii) the extension of powers of agents of the French Competition Authority (FCA) and the Ministry of the Economy, and (iii) new provisions, which strengthen the framework of commercial relationships.

Class actions "à la française"

Up to the present time, consumers faced significant roadblocks to bringing legal actions, including the costs of proceedings. The law gives them a new weapon, enabling them to join an association authorised to obtain legal redress from companies which have not complied with their legal or contractual obligations. This new right of action is, nevertheless, subject to some stumbling blocks that may limit its effectiveness, particularly with regard to indemnification of damages resulting from anticompetitive practices.

Who can act?

Only duly authorised associations for the defence of consumers, which are recognised as being representative at a national level (and not *ad hoc* associations formed to deal with a particular violation), can bring class actions. Fifteen such associations are currently recognised. Businesses and professionals cannot participate in class actions as they are reserved solely for physical person consumers.

For which violations?

A class action may be brought in the event of any failure by a business to comply with its obligations, whether legal or contractual, either in the context of a sale of goods or supply of services, or with respect to anticompetitive practices.

For what remedies?

Only actual damage to economic interests may be the subject of a class action, and not corporal or moral damages (for which consumers still need to exercise ordinary remedies under law). In order to facilitate the proof of damages, the Hamon Law permits consumers, at any stage in the procedure, to request the judge to order any measure necessary for the preservation of evidence or other documents, including evidence or documents held by the company against which the action has been brought.

How?

The class action permitted under the Hamon Law functions on an "*opt in with publicity*" basis and therefore, unlike the *opt-out* system prevalent in the USA, requires a positive act on the part of consumers wishing to participate in the action.

The class action takes place in three phases.

1. **Introduction of the action:** The action is commenced by the consumer association before the *Tribunal de Grande Instance* (TGI), i.e. the primary level court of jurisdiction (any TGI is potentially competent to exercise jurisdiction, unlike what was initially contemplated) pursuant to terms which will be fixed by a decree to be adopted by the French *Conseil d'Etat* (a body which not only acts as France's highest administrative court but also has certain rule-making functions). The TGI will decide the matter on the basis of individual cases (at least 2) presented by the association and will issue a single judgment, referred to as a "declaratory judgment on liability", dealing with the issues of the legal admissibility of the class action, the liability of the business, the criteria and time periods during which consumers may join the class, the nature of damages which may be indemnified, the terms of indemnification and the measures adopted to publicise the judgment. The business may also be ordered to pay a provisional amount to cover expenses incurred by the association which are not included in judicial costs. A portion of the amounts due by the business may also be consigned with the Caisse des Dépôts et Consignations, a French financial institution.

2. **Joining the class:** Consumers may only join the class after publication of the declaratory judgment on liability. The "class" includes consumers who are in a similar or identical situation with respect to the same business(es) and which comply with criteria for joining the class determined by the judge.

The Hamon Law does, however, institute a simplified procedure in which this second phase is eliminated, in cases where the identity and number of consumers harmed are known from the outset and where such consumers have suffered damages in the same amount or in an identical amount per goods or services provided or by reference to a period or term. In such case, the judge, after having ruled on the liability of the business, may order it to indemnify the consumers directly and individually. The conditions under which this simplified procedure applies will be determined by a decree to be adopted by the *Conseil d'Etat*.

3. **Individual requests for indemnification:** The conditions of indemnification of consumers are specified in the declaratory judgment on liability, which can provide either for direct payment by the business to the members of the class or indirect payment through the association or the person assisting the association (who must be a member of a regulated legal profession, a list of which will be determined by a decree to be adopted by the *Conseil d'Etat*). In the event of difficulty, the association can bring an action for enforcement before the same TGI or have recourse to mediation in order to obtain indemnification of individual damages.

This procedure results in some insecurity for the businesses being sued, as they are unable to gauge the magnitude of the damages that they will be required to pay until all of the relevant consumers have made themselves known by joining the class. Nevertheless, the Constitutional Council ruled that this procedure complied with rights of defence, since the business can challenge the action of the association (by contesting the admissibility of the class action in the first place, its own alleged liability, the definition of the class of consumers alleged to have suffered damages, the criteria established for joining the class, and the nature and the extent of the damages to be indemnified, etc.), as well as challenging subsequent demands for individual indemnification.

When?

The provisions relating to class actions apply immediately to factual situations which are not time-barred, subject to promulgation of the decrees to be adopted by the *Conseil d'Etat* dealing with the conditions for commencement of the action, the simplified procedure described above and the list of regulated legal professions entitled to assist an association in the representation of consumers for the purposes of their indemnification. It should be recalled in this respect that the normal limitation period for liability is five years from the date on which the victim knew or should have known of the facts. In addition, the commencement of a class action tolls the limitation periods for individual actions in damages.

Specific provisions relating to competition law

As regards competition law, the class action follows the same principles as those above but aims at enabling consumers to obtain indemnification for damages resulting from anticompetitive practices as determined by a national or European competition authority or jurisdiction ("follow-on").

In theory, such an action may be brought before the decision of the competent authority has become final, or even before the authority issues a decision, which would require the TGI before which such action is brought to stay its own proceedings. In practice, however the association will find that it is in its own interest to wait, since a final decision determining the existence of a violation of competition law will constitute an irrebuttable presumption that the relevant business is at fault.

The declaratory judgment of liability can only be issued once the portion of the decision of the competition authority relating to the liability of the business is no longer capable of challenge. On the other hand, the fact that the amount of fines can still be contested does not present an obstacle to such judgment being issued.

This point is important for any business against which proceedings have been opened by a competition authority, as such business could be dissuaded from seeking leniency or a settlement (or non-contest of objections (*non-contestation des griefs*) before the FCA). These negotiated procedures trigger a waiver by the business of its right to contest its liability, and their use could therefore increase the risk of class actions.

It is however easy to see the limits of such actions in competition law since consumers must always prove that they suffered an actual prejudice as a result of the anticompetitive activity sanctioned by the competition authority, which can only be indemnified on condition that it is direct, actual and certain. Such proof can be particularly difficult to demonstrate due to the length of competition proceedings, unless the association acts on a considerably "upstream" basis, as soon as there is an initial suspicion of anticompetitive activity, and requests the TGI to order conservatory measures in order to preserve evidence.

With respect to limitation periods, the class action for anticompetitive practices is time-barred five years from the date on which the decision acknowledging the violation has become final (without regard to potential appeals with respect to fines). It should be noted, however, that the limitation period will be tolled in the event of the opening of a procedure by the European Commission or by a national authority of an EU Member State.

Strengthening of the powers of agents of the FCA and the Ministry of the Economy

With respect to competition investigations, the Hamon Law (i) strengthens the powers of agents of the FCA and the Ministry of Economy in the event of "simple" investigations (i.e. investigations commenced without a requirement of judicial authorisation), (ii) increases the obligation of cooperation of businesses, and (iii) creates a new power of injunctions and sanctions in the event of violation of the rules relating to price transparency, restrictive practices or other prohibited practices (particularly the fraudulent increase or decrease of prices) (Title IV of Book IV of the French Commercial Code). All of these provisions apply immediately, except those relating to powers of injunctions and sanctions, which will be the subject of subsequent decrees of the *Conseil d'Etat*.

Extension of powers of agents in simple investigations

In the case of simple investigations, agents have the power of obtaining physical access to premises, obtaining communications or the ability to take copies of professional documents, obtaining information and justifications and soliciting expert evaluations, but may not undertake

searches or seizures or interrogate people to obtain verbal evidence.

In addition to a number of minor additions (right of agents to be assisted by any qualified person, right to verify identity), the Hamon Law substantially modifies the right of access of agents by granting them:

- Access not only to all premises, terrains or means of transport for professional use, but also to premises which serve both as a dwelling and as a place of business. In this case, however, the Hamon Law grants the occupant of the premises a right of opposition which, if exercised, requires the agents to obtain an authorisation of the "*juge des libertés et de la detention*" (a judge with special jurisdiction regarding individual liberties) of the TGI with jurisdiction. The law also provides that investigations may only occur between the hours of 8:00 am and 8:00 pm, but agents may have access to professional premises outside of these hours if such premises are open to the public or if production, manufacture, transformation, conditioning, transportation or commercialisation activities are then in progress; and
- Most significantly, access to software and computerised data, which constitutes a major risk for businesses taking into account the ever-increasing dematerialisation of information. In order to scrutinise operations which use computerised data, agents are therefore granted access "*to software and stored data, as well as to the restitution in unencrypted form of information which facilitates the accomplishment of their mission*", and "*to request the transcription by any appropriate means of documents directly utilisable for the purposes of their scrutiny*." This new right, which can be considered as constituting a genuine right to data capture without judicial authorisation, was the subject of strong opposition when the bill was debated in Parliament. However, according to the parliamentary debates, no actual verification, search or seizure of computerised data should be possible in this respect. The agents may only use this procedure for documents of which they have a clear knowledge and they have no coercive power to require the business to furnish data and software. However, in the absence of precision in the text, these "guarantees" seem to be limited and argue in favour of vigilance in order to avoid any risk of abuse. The companies should therefore train their IT personnel, who will in practice become the "guardians" of the companies' rights.

The Hamon Law has also increased the scope of such powers by modifying article L. 450-1 to permit the FCA to use them not only for investigations of anticompetitive practices and business concentrations, but also for the application of the provisions relating to the attributions of the FCA, to procedure, decisions and appeals (Title VI of Book IV of the French Commercial Code), which means that new cases of simple investigations may arise, particularly with respect to sectorial investigations, injunctions or undertakings.

Lightened formalism and heavier sanctions for all competition investigations

From now on, a simple copy of minutes taken during an inspection can be communicated to a business, rather than a double of the original as previously required, which implicitly authorises agents to communicate such minutes on an *a posteriori* basis. Businesses should therefore be increasingly vigilant following an investigation and will benefit from scrupulously noting the contents thereof in order to preserve their rights.

With respect to sanctions, the law hardens the obligation of businesses to cooperate with investigations by increasing the amount of sanctions in the event of obstruction, increasing the penalties of imprisonment from six months to two years, and fines from €7,500 to €300,000. It should be recalled that agents can also impose other sanctions, whether for obstruction (1 per cent of the total turnover of the business), refusal to respond to a request for information or to a convocation (injunctions up to 5 per cent of daily average turnover for each day of delay) or insulting behaviour (6 months' imprisonment and €7,500 of fines).

New powers of injunctions and administrative sanctions

In the event of violation of the rules on price transparency, restrictive practices or other prohibited practices (Title IV of Book IV of the French Commercial Code), the Hamon Law grants the officials of the Ministry of the Economy a new power of injunction enabling them to require a business to comply with its obligations, to cease any illegal activity or to eliminate any illicit clause. In addition, in the event of refusal to comply with such an injunction, the administrative authority charged with competition and consumer affairs can impose an administrative fine of up to €3,000 for physical persons or €15,000 for legal entities.

Some new aspects of distribution law

Sanction of maximum payment terms

Thirteen years after the introduction of maximum payment terms of 45 days from the end of the month or 60 calendar days to article L. 441-6 of the French Commercial Code by the Law on New Economic Regulations (NRE Law), the Hamon Law deals with the absence of any specific sanction in the event of non-compliance with these terms. This is a particularly important change given that in practice, the DGCCRF considers that such maximum payment terms have extraterritorial effect.

From now on, the violation of such maximum payment terms, and the fact of non-compliance with the rules stating the manner in which such terms are calculated (they run from the date on which the invoice is issued), will be subject to an administrative fine which can go as high as €75,000 for physical persons or €375,000 for legal entities, doubled in the event of repeated non-compliance within two years from the date on which the initial decision to impose sanctions becomes final. In the absence of precision in the law, it can be feared that each individual late payment can give rise to a sanction, even when the payments result from the same contract. This new sanction can therefore result in extremely heavy fines for the purchaser, and even for the supplier.

The same sanction applies in the event of a clause or a practice which aims at abusively delaying the starting point of the maximum payment terms.

It should be recalled that up to now, violation of the maximum payment terms could only result in damages based on article L.442-6 I 7° and/or a civil fine based on article L.442-6 III. The Hamon Law having eliminated the first of such provisions, these sanctions are no longer applicable.

On the other hand, due to poor drafting, the violation of such maximum payment terms is now sanctioned more severely than non-compliance with the provisions relating to the standard payment term of 30 days following delivery (applicable in the absence of clauses on payment terms), the payment term in matters of transport, and late payment penalties (article L.441-6 paragraphs 8, 11 and 12), which are still subject to the sanctions of €15,000 provided for in the last paragraph of article L.441-6 I. The Constitutional Council noted that, as this paragraph had not been abrogated by the Hamon Law (which is probably the result of an error), it was not possible to provide a double sanction for the same facts. Therefore, although initially conceived as a uniform sanction for violations of article L.441-6 paragraphs 8, 9, 11 and 12, the new fine of €75,000 / 375,000 is finally applicable only to violations of the maximum payment terms of 45 days from the end of the month or 60 calendar days of paragraph 9.

It should be noted that these new provisions apply immediately, which requires businesses to modify, as necessary, their practices quickly in order to be compliant.

Reinforced rules on commercial negotiation

Probably in order to thwart the use of general purchasing conditions or standard contracts which are still widely used in business by large distribution networks and purchasing divisions of large businesses, the Hamon Law places general sales conditions and price grids of the supplier at the heart of commercial negotiations by modifying articles L.441-6 and L.441-7 of the French Commercial Code.

The formalism of the so-called “single agreement” (which is aimed at accumulating all relevant terms and conditions agreed between the parties in a single document) (article L.441-7) is further reinforced in order to include rebates and other kinds of discounts negotiated by the purchaser in exchange for services rendered to the supplier. The purchaser must henceforth precisely justify performance in conformity with the agreement in the event of a written request of the supplier who, as necessary, may petition the administrative authority charged with competition and consumer affairs. In addition, any violation of the obligations relating to the “single agreement” can result in an administrative sanction of €75,000 for physical persons or €375,000 for legal entitles, doubled in the event of repeated offences within two years from the date on which the initial decision imposing sanctions became final.

Moreover, the list of practices prohibited by article L. 442-6 has been modified, particularly by insertion in paragraph 1 of a new example of an advantage which does not correspond to any commercial service actually rendered or manifestly disproportionate ("*additional request, in the course of performance of the agreement, aiming at abusively maintaining or increasing margins or profitability*"), and the addition of a new paragraph relating specifically to abusive actions of purchasers with respect to pricing.

The modifications to articles L.441-7 and L.442-6 I are however only applicable to contracts concluded after 1 July 2014.

Conclusion

Despite its title, the "consumer law" goes far beyond the mere framework of relations between businesses and consumers and introduces new provisions with respect to competition and distribution law. Although the class action is probably the most significant new development, the impact of other provisions which on their face may seem harmless and which reinforce the investigatory powers of competition authorities and increase the potential liability of businesses in many respects by adding a new arsenal of sanctions should not be underestimated.

Mélanie Thill-Thayara
Partner, Norton Rose Fulbright LLP, Paris
melanie.thill-tayara@nortonrosefulbright.com

Marta Giner Asins
Partner, Norton Rose Fulbright LLP, Paris
marta.ginerasins@nortonrosefulbright.com

Arnaud Sanz
Senior Associate, Norton Rose Fulbright LLP, Paris
arnaud.sanz@nortonrosefulbright.com

Footnote:

1. LOI n° 2014-344 du 17 mars 2014 relative à la consommation

Italy: New developments in the "Pfizer saga"
A recent judgment provides further guidance on the interaction between antitrust law and patent law in the pharmaceutical sector

The Italian Supreme Administrative Court's recent judgment in the Pfizer case, which upheld a decision by the Italian Competition Authority (ICA) finding Pfizer in breach of Article 102 of the Treaty on the Functioning of the European Union (TFEU), represents a key development