IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE INTEL CORPORATION MICROPROCESSOR ANTITRUST LITIGATION	MDL No. 05-1717-JJF
	(DM 12)
ADVANCED MICRO DEVICES, INC. a Delaware corporation, and AMD INTERNATIONAL SALES & SERVICE, LTD., a Delaware corporation, Plaintiffs, v. INTEL CORPORATION, a Delaware corporation, and INTEL KABUSHIKI KAISHA, a Japanese corporation, Defendants.	C. A. No. 05-441 (JJF)
PHIL PAUL, on behalf of himself and all others similarly situated, Plaintiffs, v. INTEL CORPORATION, Defendant.	C.A. No. 05-485-JJF CONSOLIDATED ACTION

DECLARATION OF JEAN-PIERRE FARGES

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AFFIDAVIT OF JEAN-PIERRE FARGES

I, Jean-Pierre Farges, make the following affidavit:

1. I make this affidavit upon personal knowledge and I am competent to testify to the facts set forth herein. This declaration is based on my background in, and familiarity with, French law and procedures. The statements and opinions expressed herein are made in good faith on the basis of my understanding of the relevant facts and law.

2. I am a partner and the head of the litigation and arbitration practice at Ashurst Paris. I specialize in arbitration and litigation in contractual issues, finance, industrial risk, construction, international trade, public and administrative law disputes and regulatory issues. I have been involved in a number of major disputes before State courts and arbitral tribunals, acting for listed industrial companies, banks and funds. I am an avocat at the Paris Bar.

3. I earned my law degree, known as Doctorate in private international law on international arbitration from University of Paris I (Panthéon-Sorbonne), my Magistère (postgraduate degree) in private and public economic law from University of Paris I (Panthéon-Sorbonne), and my DESS (postgraduate degree) in business and tax law from University of Paris I (Panthéon-Sorbonne).

4. In the course of my law practice, I regularly practice before courts in France. I am familiar with French competition law and the procedural rules in the courts listed above.

1. UNION FEDERALE DES CONSOMMATEURS – QUE CHOISIR AND POTENTIAL ACTION FOR DAMAGES

(a) QC provides no information on the potential action for damages

5. I understand from Union Fédérale Des Consommateurs – Que Choisir ("QC") Brief that it envisages to start consumer damages litigation in Europe after the European Commission has adopted a final decision in its pending proceedings.

6. Indeed, page 6 of its brief, QC indicates that the request to modify certain provisions of the Protective Order is made "*to allow it access to materials produced in this litigation by Intel and third parties, and deposition transcripts, as such access will assist it in efficiently participating in the EC proceedings as well as in consumer damages litigation in Europe that is likely to follow the EC proceedings*" (underlining added). In page 7, QC also indicates that it intervenes in the litigation before the Delaware Court to seek a modification of the Protective

Order so as it may "*seek, via subsequent and related judicial proceedings, compensation, for consumers*".

7. First, I notice that QC provides the Court with no information about the "*consumer damages litigation*" mentioned in its Brief. QC does not indicate that an action has already been brought before any court in the European Union. This could be easily explained by the fact that, as QC has itself indicated in its Brief, the consumer damages litigation will follow the EC proceedings in which the EC has not yet adopted its final decision.

8. In addition, I notice that QC does not even indicate before which potential courts a consumer damages litigation could be launched.

9. It is therefore impossible to verify whether QC would fulfil the conditions to start civil actions in the Member States in which consumer damages litigation is "*likely to follow the EC proceedings*".

(b) <u>QC does not demonstrate that the conditions to start a civil action in France are fulfilled</u>

10. The possibility for an association such as QC to bring an action for damages when the interests of consumers are affected are strictly defined under French Law. Consumer associations can bring two types of actions: (i) an action for the protection of collective interest of consumers and (ii) an action in joint representation (joint action) by which they represent the interest of individual consumers.

(i) *Action for the protection of collective interest of consumers*

11. Under French Law, there are two legal grounds for actions aimed at protecting the collective interest of consumers, depending on whether the offence is a civil one or a criminal one.

12. I understand from QC's brief, that its purpose is to participate in consumer damages litigation in Europe that is likely to follow the EC proceedings. Therefore, I can imagine that QC would base its action on Article L.421-7 of the Consumer Code, which is the specific ground for actions aimed at protecting the collective interest of consumers against a civil offence.

13. For civil offences, Article L.421-7 of the Consumer Code provides that "*The associations mentioned in Article L. 421-1* [i.e. duly authorized] *may <u>intervene</u> before civil courts and, in particular, request the application of the measures provided for in Article L. 421-2, where the initial application is aimed at making whole any damage suffered by one or more consumers due to events not constituting a criminal offence.*" (underlining added). A true and correct copy of

Article L.421-7 of the French Consumer Code is attached hereto as Exhibit **[1]**. Attached hereto as Exhibit **[2]**, is an English translation of Exhibit **[1]**, which was prepared by a sworn translator.

14. This provision means that consumer associations that have been duly authorized by the public authorities and that seek for the protection of collective interest of consumers against a civil offence can only intervene in proceedings that have already been initiated by one or more consumers.

15. I am not aware that QC has demonstrated that one or several consumers already have introduced a civil action before French courts. It can therefore not intervene in such a procedure.

16. Another action is conceivable under French Law on the basis of Article L.421-1 of the Consumer Code provided that Intel's managers/directors behaviour constitutes a criminal offence (on the basis of article L.420-6 of the Commercial Code). But since I understand from QC's brief that it will not base its action on that ground, I will not discuss it. I would just notice that, to my best knowledge, criminal sanctions have never been imposed following a Commission decision in France and that the application Article L.421-1 of the Consumer Code would raise serious issues in such a case. A true and correct copy of Article L.421-1 of the French Consumer Code and of Article L.420-6 of the Commercial Code are attached hereto as Exhibit **[3]**. Attached hereto as Exhibit **[4]**, an English translation of Exhibit **[3]**, which was prepared by a sworn translator.

(ii) *Joint action (action for representation)*

17. Article L.422-1 Consumer Code states "*Where several consumers, who are natural persons, have suffered individual losses caused by the same merchant and having a common origin, any approved association recognised as a representative association at a national level pursuant to the provisions of Title I may, if duly appointed by no fewer than two of the consumers concerned, institute legal proceedings indemnification on behalf of these consumers*". A true and correct copy of Article L.422-1 of the French Consumer Code is attached hereto as Exhibit **[5]**. Attached hereto as Exhibit **[6]**, is an English translation of Exhibit **[5]**, which was prepared by a sworn translator.

18. Thus French law entrusts consumer associations to bring a representative action provided that they have received prior mandate from at least two consumers.

19. Article R.422-2 of the Consumer Code[1] specifies that "*The agency agreement must be made in writing and expressly state its purpose and grant to the nationally approved association of consumers the power to complete, in the consumer's name, all procedural actions.*"[2] A true and correct copy of Article R.422-2 of the French Consumer Code is attached hereto as Exhibit **[7]**. Attached hereto as Exhibit **[8]**, is an English translation of Exhibit **[7]**, which was prepared a sworn translator.

20. I am not aware that QC has demonstrated that it holds such mandates. In addition, it is doubtful since in its brief QC explicitly states that the consumer damages litigation will follow the European Commission proceedings in which no final decision has been rendered yet.

21. I must also recall that French law contains strict conditions for QC to obtain mandates from consumers. In particular, the possibility for QC to solicit assignments from consumers to seek damages on their behalf is very limited. Indeed, article L.422-1 of the Consumer Code states that "*The appointment of the said association may not be sought by means of a public appeal on radio or television, or by poster placement, leaflets or customized letters. The relevant appointment must be made in writing by each consumer.*" A true and correct copy of Article L.422-1 of the French Consumer Code is attached hereto as Exhibit **[5]**. Attached hereto as Exhibit **[6]**, is an English translation of Exhibit **[5]**, which was prepared by a sworn translator.

22. In its brief in support of its application pursuant to §1782, QC insists that it has brought an action against a mobile telephony operator (i.e. Bouygues Telecom) before the Paris Court on its own name (meaning an action for the protection of collective interests of consumers)[3]. Nevertheless it should be pointed out that, without adjudicating on the merits of the case, the Paris Court considered this

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1 "R" means Regulatory part of the Consumer Code by contrast to "L" that means Legislative Part of the Consumer Code.

2 Article R. 422-2 follows by stating: "The agency agreement may also provide for:

An advance made by the nationally approved association of consumers in respect of all or part, of the expenses and costs related to the procedure;

The payment of advances by the consumer;

The possibility for the nationally approved association of consumers to waive the performance of the agency agreement, after sending a formal notice to the consumer by registered mail return receipt requested in the event that the consumer's inertia is likely to slow down the process of the procedure;

Representation of the consumer by the nationally approved association of consumers upon performance of any investigation procedures;

The possibility for the nationally approved association, of exercising, in the consumer's name, any remedies, except for an appeal before the Cour the Cassation, without execution of any further agency agreement"

3 QC's brief in support of application pursuant to 28 U.S.C. §1782, Apr. 9, 2008, at 5.

action as a representative (joint) action by QC and held that QC has violated article L. 422-1 of the Consumer Code that prohibited canvassing. It decided that the writ of summons and the voluntary interventions were not admissible, and that it was not necessary to adjudicate on the other claims. A true and correct copy of the judgment of the Paris Court of Commerce is attached hereto as Exhibit **[9]**. Attached hereto as Exhibit **[10]**, is an English translation of Exhibit **[9]**, which was prepared by a sworn translator. I note that QC claim that It have, with some consumers, lodged an appeal against this judgment.

2. DISCOVERY POTENTIALLY AVAILABLE TO QC UNDER FRENCH LAW

23. In its brief, QC does not explain for which reasons it considers that the documents and evidence it seeks before the Delaware Court are outside the French Courts jurisdictional reach.

24. It should be reminded that French law already provides efficient mechanisms which allow a judge to order production of evidence either (a) in a pre trial litigation or (b) in a trial on the merits and (c) to obtain assistance from the US Courts when appropriate.

(a) Pre-trial measures can be ordered by French courts

25. Under Article 145 of the Code of Civil Procedure ("CPC"), legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of a petition or by way of a summary procedure, if there is a legitimate reason to preserve or to establish, before any legal process, the evidence of the facts upon which the resolution of the dispute depends. A true and correct copy of Article 145 of the CPC is attached hereto as Exhibit **[11]**. Attached hereto as Exhibit **[12]**, is an English translation of Exhibit **[11]**, which was prepared by sworn translator.

26. In addition, according to the French Supreme Court anything which amounts to a general investigation is not a legally permissible measure under article 145 CPC[4]. This means that, in practice, for such measure to be granted, the claimant must identify precisely the types or the nature or the subject of the documents requested.

(b) French law also provides mechanisms allowing judges to order the production of documents during legal proceedings

27. Under Article 10 of the CPC judges have the authority to order ex officio any legally appropriate investigation measures. In addition, Article 11 of the CPC (i)

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4 Cour de cassation, second civil chamber, 7 January 1999, No 97-10381, Bulletin No 3. A true and correct copy of the judgment of the Cour de cassation is attached hereto as Exhibit **[13]**. Attached hereto as Exhibit **[14]**, is an English translation of Exhibit **[13]**, which was prepared by sworn translator.

requires the parties to cooperate for the implementation of the investigation measures and (ii) provides that the judge may draw any consequence of abstention or refusal to do so. It also allows the judge, where a party holds material evidence, and upon the request of the party, to order him to produce it, where necessary under a penalty payment. The judge may also, upon the petition by one party, request or order, where necessary, under the same penalty, the production of all documents held by third parties where there is no legitimate impediment to doing so.

28. A true and correct copy of Articles 10 and 11 of the CPC is attached hereto as Exhibit **[15]**. Attached hereto as Exhibit **[16]**, is an English translation of Exhibit **[15]**, which was prepared by sworn translator.

29. If the service of documents is not been carried out (spontaneously), the judge may, without any formality, be requested to order such service (Article 133 of the CPC).

30. The judge sets, if necessary, under a periodic penalty payment, the time-limit and, where applicable, the terms and conditions of the service (Article 134 of the CPC).

31. If, during the proceeding, a party wishes to rely on a notarial deed or a deed under private signature to which he was not a party or a document held by a third party, he may request the judge, to whom the matter is referred to, to order the delivery of a certified copy or the lodging in court of the deed or the document (Article 138).

32. The judge must limit the choice of the order as to what is sufficient for the resolution of the dispute by endeavouring to select the simplest and least onerous ones (Article 147 of the CPC).

33. The judge may combine several inquiries. He may at any time, even while they are being carried out, decide to add any other necessary inquiry to those that have been ordered (Article 148 of the CPC).

34. The judge may at any time extend or restrict the scope of the prescribed inquiries (Article 149 of the CPC).

35. The judge may travel outside his jurisdiction to implement the preparatory inquiry or to supervise its implementation (Article 156 of the CPC).

36. The judge entrusted to carry out a preparatory inquiry or to supervise its implementation may order such other inquiry that the implementation of the one already ordered deems necessary (Article 166 of the CPC).

37. The difficulties to which the implementation of the preparatory inquiry would be confronted will be resolved, at the request of the parties, on the initiative of the mandated expert, or ex officio, either by the judge who carries it out or by the

judge entrusted with the supervision of its implementation (Article 167 of the CPC).

38. A true and correct copy of Articles 133, 134, 138, 147, 148, 149, 156, 166 and 167 of the CPC is attached hereto as Exhibit **[17]**. Attached hereto as Exhibit **[18]**, is an English translation of Exhibit **[17]**, which was prepared by sworn translator.

39. The parties are held to cooperate for the implementation of the investigation measures: the judge is therefore allowed to take into consideration in its final ruling abstention or refusal to do so (Article 11 of the CPC) against the party who refused.

(c) Possibility for French Courts to obtain assistance from US Courts

40. Finally, it should also be mentioned that French courts can use the mechanisms provided by The Hague Evidence Convention when needing US court assistance.

41. Indeed, the Hague Evidence Convention[5] provides legal basis for the collection of evidence abroad on civil or commercial matters for use in judicial proceedings. The French Republic and the United States of America are both contracting parties to this Convention since the early 1970's. According to this text, the evidence can be collected by letter of request, diplomatic or consular officer or appointed commission. Letter of request appears a priori to be the appropriate tool to get compulsory production of evidence abroad.

(d) Evidence can be obtained directly from the Commission

42. Since QC indicates in its brief that the consumer damages litigation will follow the EC proceedings, QC will also have the possibility to request access to the Commission's file for further private actions before the national courts on the basis of Regulation No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents[6]. This regulation states the principles, conditions and limits governing the right of access to documents of those institutions, provided for in Article 255 EC. A true and correct copy of Regulation 1049/2001 is attached hereto as Exhibit **[19]**.

43. Even if Regulation No 1049/2001 has not been adopted for that specific purpose, the CFI made clear in a recent case that it fully applies in antitrust cases. A true and correct copy of the CFI judgment is attached hereto as Exhibit **[20]**.

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5 Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters.

6 OJ 2001 L 145, p. 43.

44. As a result, the CFI annulled a Commission decision that refused to grant access to documents that were in the Commission's file relating to a cartel decision and that were requested[7] by a consumer organization constituted under Austrian in order to secure damages for the consumers.

(e) Evidence can also be obtained indirectly via French Courts

45. Evidence can also be obtained indirectly via the Courts before which QC envisages to introduce a consumer private action. Indeed, Courts can request access to information held by the European Commission.

46. The Commission has a duty to transmit information to national courts provided it respects the guarantees given to natural and legal persons by Article 287 EC[8]. A true and correct copy of Article 287 EC is attached hereto as Exhibit **[22]**.

3. RECEPTIVITY OF FRENCH COURTS AND AUTHORITIES

47. To my best knowledge, the French authorities and Courts are quite reluctant to import the US "litigation culture" and discovery system.

(a) The French authorities are reluctant to import the US "Litigation Culture" and disclosure system

48. In various circumstances, the French government and administrative bodies indicated that they were reluctant to import US "litigation culture" and disclosure system.

(i) *French officials do not seem receptive to the US disclosure procedure*

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7 Judgment of the Court of first instance of the European Communities, 13 April 2005, Verein für Konsumenteninformation (VKI) v. Commission of the European Communities, case T-2/03. Regulation 1049/2001 defines the principle of the right of access to documents of the European institutions and provides a number of exceptions to this right of access. These exceptions are in particular the protection of the purpose of inspections (think about leniency), the protection of commercial interests, the protection of court proceedings and the protection of privacy and the integrity of the individual. In its ruling the CFI recalled the case law according to which the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception. In order to apply an exception the European Commission must conduct a concrete examination of the content of each document except when a category of document is manifestly covered by an exception. In this case, the CFI stated that the Commission could not refuse access on a general analysis by reference to categories of documents of the file (to the whole file). The CFI ruled that the EC Commission should carry out a concrete, individual examination of the documents referred to in the request for access in order to determine whether any exceptions applies or whether partial access is possible.

8 See Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the Application of Articles 81 and 82 EC, Official Journal, C 101, 04/27/2004, p.54. A true and correct copy of this notice is attached hereto as Exhibit **[21]**.

49. Discovery hurts the French law principle of "access to justice" as this procedure is costly, time consuming and therefore generates unequal treatment.

50. Expressing either their personal view or the view of the institution they belong to, French officials have explained their hostility to the importation of the US disclosure procedure "as is" on many occasions. These findings were based on conceptual issues but also on the practical adverse effects of the disclosure procedure on the French system.

51. Some officials have recalled that the French and American legal systems have different approaches to such issues. When considering the practicalities of the disclosure procedure in France, a majority has pointed to the delays and the cost it generates and the risks it raises for business secrets.

52. The Ministry of Justice itself published a comparative study relating to "*Rules of evidence before civil courts and economic attractiveness of French law (France, England and Wales, United-States)*" in 2005[9]. The conclusion of that study indicates that, even if the divergence between the two systems decreases compared to the past, discrepancies remain. In particular, the study underlined the huge cost of "uncontrolled disclosure" in the US system. It concludes that "*The opposition between the two legal traditions no longer is as clear-cut as in the past. However, uncontrolled discovery seems to be one of the major factors inducing useless costs in common law countries.*". A true and correct copy of the report is attached hereto as Exhibit **[23]**. Attached hereto as Exhibit **[24]**, is an English translation of the paragraphs of the report concerning discovery issues, which was prepared by a sworn translator.

53. In its report on Class Actions, the French Working Group co-chaired by Mr. Guillaume Cerutti (Former Directorate General For Competition Policy) and Mr. Marc Guillaume (former director of the Civil Affairs and of the Seal) indicates clearly that it is opposed to importing the US disclosure system[10]. Indeed, the report indicates that "*while the discovery procedure is a fundamental instrument of the US judicial system, the procedure may not be transposed in other legal systems. Indeed, this procedure tends to challenge the guiding principles of any civil-law judicial process*" and adds that "*It is not advisable to cause our legal system to evolve in that direction, and no request has been made to that end*". A

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9 "Le droit de la preuve devant le juge civil et l'attractivité économique du droit français (France, Angleterre et Pays de Galles, Etats-Unis), Ministère de la Justice, SAEI, October 19, 2005. [Rules of evidence before civil courts and economic attractiveness of French law (France, England and Wales, United-States)]

10 See Rapport sur l'action de groupe, Groupe de travail présidé par Guillaume Cerutti et Marc Guillaume, delivered to the French Ministry of Economic and to the French Ministry of Justice on December 16th, 2005. [Report on group actions, Working Group chaired by Guillaume Cerutti and Marc Guillaume]

true and correct copy of the report is attached hereto as Exhibit **[25]**. Attached hereto as Exhibit **[26]**, is an English translation of the paragraphs of the report concerning discovery issues, which was prepared by a sworn translator.

54. In a similar approach, the recent report of the working group, set up by the Ministry of Justice for the de-criminalisation of French business law[11] presided over by the former president of the Court of Appeal of Paris, Mr. Jean-Marie Coulon, recommends the introduction of class actions in France but in a way that departs from the American system by avoiding the treble damages and the disclosure procedure. The report indicates "*In order to avoid such excesses, not only must the action be limited, but also, it is advisable not to import into our country the institutions that have generated such abuses: on the one hand, [...] and on the other hand, the discovery procedure, which has sometimes been used unfairly in order to destabilize, or spy on, an enterprise*". A true and correct copy of the report is attached hereto as Exhibit **[27]**. Attached hereto as Exhibit **[28]**, is an English translation of relevant paragraphs of the report concerning discovery issues, which was prepared by a sworn translator.

(ii) *The French Republic and the French Courts would not be receptive*

55. In some instances, the French Republic has recalled that the Hague Evidence Convention (18 March 1970) was the appropriate tool to obtain evidence abroad in the context of international litigation and that importing US discovery proceedings into a French litigation would infringe France's judicial sovereignty[12]. Attached hereto as Exhibit **[29]** is the brief amicus curiae of the Republic of France in support of the petitioners in Société Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522 (1987), in which the French government expresses this view.

56. More recently, the French Supreme Court, the Cour de cassation, has confirmed the decision to sanction a French lawyer for having violated the French Blocking Statute (adopted in 1980). A true and correct copy of the judgment of the Cour de cassation is attached hereto as Exhibit **[30]**. Attached hereto as Exhibit **[31]**, is an English translation of Exhibit **[30]**, which was prepared by a sworn translator.

57. The criminal behaviour consisted in transferring or attempting to transfer sensitive information located in France to a US lawyer in the context of a litigation opposing the State of California to a French Mutual insurer (MAAF) in order to be produced

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11 Rapport du groupe de travail sur la dépénalisation du droit des affaires, January 2008, see p. 94. [Removing criminal law rules from business law, Working Group chaired by Jean-Marie Coulon, First Honorary Presiding Judge of the Court of Appeals of Paris]

12 See the amicus curiae of the French Republic before the US Supreme Court, *Aerospatiale*, 482 US 522 (1987).

before a US Court (Executive-Life case)[13]. This demonstrates, contrary to what QC is trying to argue before the US Court, that French Courts, and in particular the Supreme Court, are attached to the use of existing tools when trying to transfer information outside the French territory. Therefore, even if the present situation is different, there is no reason to consider that the position of the French Courts would differ when a party, like QC in the present case, tries to circumvent existing French procedural rules by making forum shopping in order to gather evidence from the US.

58. Last but not least, in a recent article, published in May 2008, Mr. Luc Chatel, Secretary of State in charge of industry and consumption, and government spokesman, pleads in favour of the introduction of class action in France but also warns against the "serious excesses" observed in US[14]. In particular, he states "*group actions may lead to serious excesses, as observed in the United States*" and "*US excesses largely result from the very organization of the country's judicial system* [...]. *As regards evidence rules, the US largely relies on the highly intrusive discovery system, while French Law does not provide for any equivalent procedure*". A true and correct copy of this article is attached hereto as Exhibit **[32]**. Attached hereto as Exhibit **[33]**, is an English translation of relevant paragraphs of this article, which was prepared by a sworn translator.

(b) <u>The French position is consistent with the European Commission's position which also opposes to the importation of the US litigation culture</u>

59. The Commission has recently published a White Paper on Damages actions for breach of the EC antitrust rules. In a staff working paper accompanying it, the EC Commission has expressed a more general view about proof gathering methods (§ 93)[15].

60. This document states that "the negative effects of certain systems of disclosure must be avoided". Then it continues: "In some (non-European) jurisdictions, opponents or third persons are obliged to cooperate in potentially very wide-ranging, time-consuming and expensive disclosure procedures on the basis of rather low thresholds. In such systems, parties can be required to spend large amounts of time and resources on screening, compiling and disclosing the

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13 Cour de Cassation, Criminal Chamber, 12 December 2007, No 07-83228. The French Court confirmed that this behaviour was in breach of the French Blocking Statutes that provide the implementation of the procedure laid down in the Hague Evidence Convention.

14 Luc Chatel, "Le temps est venu d'introduire l'action de groupe dans notre pays", *Concurrences*, n° 2-2008, pp. 21-24. [Luc Chatel "The time has come to introduce group actions in our country"]

15 EC Commission, Staff Working Document, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, 2.4.2008, SEC(2008) 404. A true and correct copy of this Staff Working Document is attached hereto as Exhibit **[34]**.

requested documents, even where there is only a low probability that the case is meritorious. This creates a risk of abuse, e.g. through what is called "discovery blackmail" where the threat of potentially immense costs of disclosure procedures may be used to drive defendants to agree on an early settlement even where the claimant has a rather weak or even fully unmeritorious case. The same can occur in reverse, namely the situation where defendants with "deep pockets" use the threat of costly disclosure measures to cause the claimant to settle at a very low amount or even to abandon the case."

61. The Commission therefore proposes to ensure across the EU a minimum disclosure inter partes in antitrust damages that avoids these excesses. To this end, the Commission suggests to follow the legal tradition of Member States and build a system which relies on the central function of the court submitted with the damages claim. Disclosure measures could only be ordered by judges and would be subject to strict and active judicial control as to their necessity, scope and proportionality. The Commission clearly states that it "does not propose a system of overly broad pre-trial disclosure, which may not fit easily with the legal tradition and principles of civil procedure of Member States and which may conflict with public policy principles of some Member States"[16].

I declare, in application of Article 202 of the CPC, that I am aware that this affidavit is made to be produced before the Delaware Court and that I shall face penalties for any false statement on my behalf.

Executed on July 1st, 2008 at Paris, France.

Jean-Pierre FARGES

16 EC Commission, Staff Working Document, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, 2.4.2008, SEC(2008) 404, see §95 *in fine*.

Exhibit [1]

Article L.421-7 du Code de la consommation

Legifrance .gouv.fr
LE SERVICE PUBLIC DE LA DIFFUSION DU DROIT

Code de la consommation

- Partie législative
  - Livre IV : Les associations de consommateurs
    - Titre II : Actions en justice des associations
      - Chapitre Ier : Action exercée dans l'intérêt collectif des consommateurs
        - Section 3 : Interventions en justice.

Article L421-7

Les associations mentionnées à l'article L. 421-1 peuvent intervenir devant les juridictions civiles et demander notamment l'application des mesures prévues à l'article L. 421-2, lorsque la demande initiale a pour objet la réparation d'un préjudice subi par un ou plusieurs consommateurs à raison de faits non constitutifs d'une infraction pénale.

Cite:
Code de la consommation - art. L421-1 (V)
Code de la consommation - art. L421-2 (V)

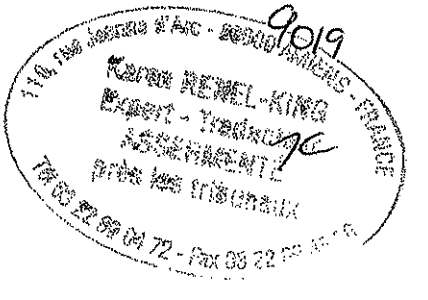
Anciens textes:
Loi n°88-14 du 5 janvier 1988 - art. 5 (Ab)

Exhibit [2]

Article L.421-7 of the French Consumer Code

Exhibit [ ]

Article L. 421-7 of the French Consumer Code



Article L. 421-7 of the French Consumer Code

The associations mentioned in Article L. 421-1 may intervene before civil courts and, in particular, request the application of the measures provided for in Article L. 421-2, where the initial application is aimed at making whole any damage suffered by one or more consumers due to events not constituting a criminal offence.

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Je, soussignée, Karen RENEL-KING
Traductrice Expert près la Cour d'Appel d'Amiens certifie que la traduction qui précède est conforme à l'original libellé en langue ...français...
visé ne varietur sous le n° ...4019...
Fait à ...Paris..., le ...01/07/08
(signature exempte de légalisation
Décret n° 53914 Art. 8 du 26.9.1953).

Exhibit [3]

Article L.421-1 du Code de la consommation et article L.420-6 du Code de commerce

Code de la consommation

Article L421-1

Les associations régulièrement déclarées ayant pour objet statutaire explicite la défense des intérêts des consommateurs peuvent, si elles ont été agréées à cette fin, exercer les droits reconnus à la partie civile relativement aux faits portant un préjudice direct ou indirect à l'intérêt collectif des consommateurs.

Les organisations définies à l'article L. 211-2 du code de l'action sociale et des familles sont dispensées de l'agrément pour agir en justice dans les conditions prévues au présent article.

Cite:
Code monétaire et financier - art. L614-6 (Ab)

Cité par:
Code de l'action sociale et des familles - art. L211-3 (V)
Code de la consommation - art. L421-2 (V)
Code de la consommation - art. L421-3 (V)
Code de la consommation - art. L421-6 (M)
Code de la consommation - art. L421-6 (M)
Code de la consommation - art. L421-6 (V)
Code de la consommation - art. L421-7 (V)
Code de la santé publique - art. L3355-1 (V)
Code de la santé publique - art. L3512-1 (M)
Code de la santé publique - art. L3512-1 (V)

Anciens textes:
Loi n°88-14 du 5 janvier 1988 - art. 1 (Ab)
Loi n°88-14 du 5 janvier 1988 - art. 1, v. init.

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Code de commerce

- Partie législative
  - LIVRE IV : De la liberté des prix et de la concurrence.
    - TITRE II : Des pratiques anticoncurrentielles.

Article L420-6

Modifié par Ordonnance n°2000-916 du 19 septembre 2000 - art. 3 (V) JORF 22 septembre 2000 en vigueur le 1er janvier 2002

Est puni d'un emprisonnement de quatre ans et d'une amende de 75000 euros le fait, pour toute personne physique de prendre frauduleusement une part personnelle et déterminante dans la conception, l'organisation ou la mise en oeuvre de pratiques visées aux articles L. 420-1 et L. 420-2.

Le tribunal peut ordonner que sa décision soit publiée intégralement ou par extraits dans les journaux qu'il désigne, aux frais du condamné.

Les actes interruptifs de la prescription devant le Conseil de la concurrence en application de l'article L. 462-7 sont également interruptifs de la prescription de l'action publique.

Cite:
Code de commerce. - art. L420-1 (M)
Code de commerce. - art. L420-2 (M)
Code de commerce. - art. L462-7 (M)

Cité par:
Loi n°2002-1062 du 6 août 2002 - art. 14 (V)
Code de commerce. - art. L420-7 (M)
Code de commerce. - art. L420-7 (V)
Code de commerce. - art. L462-6 (M)
Code de commerce. - art. L462-6 (V)

Anciens textes:
Ordonnance n°86-1243 du 1 décembre 1986 - art. 17 (Ab)
Ordonnance n°86-1243 du 1 décembre 1986 - art. 17 (M)

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Exhibit [4]

Article L.421-1 of the French Consumer Code and article L.420-6 of the French Commercial Code

Exhibit [ ]

Article L. 421-1 of the French Consumer Code and Article L. 420-6 of the French Commercial Code

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Article L. 421-1 of the French Consumer Code

Duly declared associations whose statutory object expressly provides for the protection of consumers' interests may, if they are approved for this purpose, exercise the rights conferred upon civil parties in respect of events directly or indirectly prejudicing the collective interest of consumers.

The organizations defined in Article L. 211-2 of the French Family and Social Welfare Code are not required to obtain any approval prior to instituting legal proceedings under the conditions provided for in this article.

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Article L. 420-6 of the French Commercial Code

(as amended by Ordinance No. 2000-916 of 19 September 2000 – Art. 3 (V) Official Gazette of the French Republic 22 September 2000 in force on 1 January 2002)

May incur a penalty of imprisonment of four years and a fine of € 75,000 any natural person who fraudulently plays a personal and essential role in the design, organization or implementation of any practices referred to in Articles L. 420-1 and L. 420-2.

The court may order that its decision be published, in full or in excerpts, in such newspapers as it shall determine, at the expense of the condemned person.

Any action tolling the statute of limitations before the Competition Council under Article L. 462-7 shall also toll the statute of limitations as regards the public prosecution procedure.

Je, soussignée, Karen RENEL, Traductrice Expert près la Cour d'Appel d'Amiens certifie que la traduction qui précède est conforme à l'original libellé en langue ...français...
visé ne varietur sous le n° ...8977...
Fait à ...Amiens..., le ...27/06/08...
(signature exempte de légalisation
Décret n° 53914 Art. 8 du 26.9.1953).

Karen RENEL

Exhibit [5]

Article L.422-1 du Code de la consommation

Legifrance.gouv.fr
LE SERVICE PUBLIC DE LA DIFFUSION DU DROIT

Code de la consommation

- Partie législative
  - Livre IV : Les associations de consommateurs
    - Titre II : Actions en justice des associations
      - Chapitre II : Action en représentation conjointe.

Article L422-1

Créé par Loi 93-949 1993-07-26 annexe JORF 27 juillet 1993

Lorsque plusieurs consommateurs, personnes physiques, identifiés ont subi des préjudices individuels qui ont été causés par le fait d'un même professionnel, et qui ont une origine commune, toute association agréée et reconnue représentative sur le plan national en application des dispositions du titre Ier peut, si elle a été mandatée par au moins deux des consommateurs concernés, agir en réparation devant toute juridiction au nom de ces consommateurs.

Le mandat ne peut être sollicité par voie d'appel public télévisé ou radiophonique, ni par voie d'affichage, de tract ou de lettre personnalisée. Il doit être donné par écrit par chaque consommateur.

Cité par:
Code de la consommation - art. L422-2 (V)
Code de la consommation - art. L422-3 (V)
Code de la consommation - art. R*422-1 (V)
Code de la consommation - art. R*422-3 (V)

Anciens textes:
Loi n°88-14 du 5 janvier 1988 - art. 8-1 (Ab)

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Exhibit [6]

Article L.422-1 of the French Consumer Code

Exhibit [ ]

Article L. 422-1 of the French Consumer Code

Article L. 422-1 of the French Consumer Code
Inserted by Act 93-949 of 26 July 1993, published in the Schedule to the Official Gazette of the French Republic of 27 July 1993

Where several identified consumers, who are natural persons, have suffered individual losses caused by the same merchant and having a common origin, any approved association recognized as a representative association at national level pursuant to the provisions of Title I may, if duly appointed by no fewer than two of the consumers concerned, institute legal proceedings seeking indemnification on behalf of these consumers before any court.

The appointment of the said association may not be sought by means of a public appeal on radio or television, or by poster placement, leaflets or customized letters. The relevant appointment must be made in writing by each consumer.

Je, soussignée, Karen RENEL,
Traductrice Expert près la Cour d'Appel d'Amiens certifie que la traduction qui précède est conforme à l'original
libellé en langue ...français.....
visé ne varietur sous le n° 8978
Fait à ....Paris....., le ...27/06/08
(signature exempte de légalisation
Décret n° 53914 Art. 8 du 26.9.1953).

Renel

Exhibit [7]

Article R.422-1 et article R.422-2 du Code de la consommation

Code de la consommation

Article R*422-1

Créé par Décret n°97-298 du 27 mars 1997 - art. 1 (V) JORF 3 avril 1997

Les consommateurs qui, sur le fondement des dispositions de l'article L. 422-1, entendent demander réparation des préjudices qui ont été causés par le fait du même professionnel et qui ont une origine commune peuvent donner à une association agréée de consommateurs le mandat d'agir en leur nom devant les juridictions civiles, dans les conditions fixées par le présent chapitre.

Sauf convention contraire, le mandat ainsi déterminé ne comporte pas devoir d'assistance.

Cite:
Code de la consommation - art. L422-1 (V)

Anciens textes:
Décret 92-1306 1992-12-11 art. 1

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Code de la consommation

Article R*422-2

Créé par Décret n°97-298 du 27 mars 1997 - art. 1 (V) JORF 3 avril 1997

Le mandat doit être écrit, mentionner expressément son objet et conférer à l'organisation nationale agréée de consommateurs le pouvoir d'accomplir au nom du consommateur tous les actes de procédure.

Le mandat peut prévoir en outre :

1° L'avance par l'organisation nationale agréée de consommateurs de tout ou partie des dépenses et des frais liés à la procédure ;

2° Le versement par le consommateur de provisions ;

3° La renonciation de l'organisation nationale agréée de consommateurs à l'exercice du mandat, après mise en demeure au consommateur par lettre recommandée avec demande d'avis de réception dans le cas où l'inertie de celui-ci est susceptible de ralentir le déroulement de l'instance ;

4° La représentation du consommateur par l'organisation nationale agréée lors du déroulement de mesures d'instruction ;

5° La possibilité pour l'organisation nationale agréée d'exercer au nom du consommateur les voies de recours, à l'exception du pourvoi en cassation, sans nouveau mandat.

Anciens textes:
Décret 92-1306 1992-12-11 art. 2

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Exhibit [8]

Articles R.422.1 and R.422-2 of the French Consumer Code

Exhibit [ ]

Articles R. 422-1 and R. 422-2 of the French Consumer Code

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Article R* 422-1 of the French Consumer Code

Inserted by Decree No. 97-298 of 27 March 1997 – Art. 1 (V) Official Gazette of the French Republic of 3 April 1997

Consumers who, on the basis of the provisions of Article L. 422-1, intend to seek the indemnification of losses caused by the same merchant and having the same origin, may appoint by way of an agency agreement an approved organization of consumers in order to act on their behalf in civil courts, in accordance with the terms set forth in this Chapter.

Unless otherwise agreed, the agency agreement so made does not entail any obligation to provide support.

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Article R* 422-2 of the French Consumer Code

Inserted by Decree No. 97-298 of 27 March 1997 – Art. 1 (V) Official Gazette of the French Republic of 3 April 1997

The agency agreement must be made in writing and expressly state its purpose and grant to the nationally approved association of consumers the power to complete, in the consumer's name, all procedural actions.

The agency agreement may also provide for:

1° An advance made by the nationally approved association of consumers in respect of all or part of the expenses and costs related to the procedure;
2° The payment of advances by the consumer;
3° The possibility for the nationally approved association of consumers to waive the performance of the agency agreement, after sending a formal notice to the consumer by registered mail return receipt requested in the event that the consumer's inertia is likely to slow down the process of the procedure;
4° Representation of the consumer by the nationally approved association of consumers upon performance of any investigation procedure;
5° The possibility, for the nationally approved association, of exercising, in the consumer's name, any remedies, except for an appeal before the Cour de Cassation, without execution of any further agency agreement.

Je, soussignée, Karen RENEL,
Traductrice Expert près la Cour d'Appel
d'Amiens certifie que la traduction qui
précède est conforme à l'original
libellé en langue ...Français.....
visé ne varietur sous le n° ...8979.....
Fait à ...Paris..... , le ...27/06/08
(signature exempte de légalisation
Décret n° 53914 Art. 8 du 26.9.1953).

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Exhibit [9]

Jugement du Tribunal de commerce de Paris, 15ème chambre, 6 décembre 2007, RG 2006057440

2006057440 CL*- Page 1

Demandeurs : 3543
Défendeurs : 2
Me Jean-Luc SCHMERBER (P.179)
Me Carole JOSEPH-WATRIN (E.791)

TRIBUNAL DE COMMERCE DE PARIS

JUGEMENT PRONONCE LE 6 DECEMBRE 2007

QUINZIEME CHAMBRE

RG 2006057440
15.09.2006

ENTRE : Monsieur Sébastien AMBLARD, demeurant 8 Rue François LEVEQUE (33300) BORDEAUX.

INTERVENANTS VOLONTAIRES :

- L'UNION FEDERALE DES CONSOMMATEURS QUE CHOISIR, Association loi du 1er juillet 1901, agréée en qualité d'organisation de consommateurs, dont le siège social est situé 11 Rue Guénot 75555 PARIS CEDEX 11, représentée par son Président, Monsieur Alain BAZOT, domicilié en cette qualité audit siège.
- Mademoiselle Corinne Abate, née le 1/5/1967 à SAVIGNY SUR ORGE, de nationalité française, Commerçants et assimilés (salariés de leur entreprise), demeurant BL4 151 rue du Château des rentiers, 75013 PARIS.
- Monsieur Axelle ABBADIE, né le 30/7/1951 à Alger, de nationalité française, Sans profession, demeurant 247 avenue Daumesnil, 75012 Paris.
- Monsieur Mohammed Abbas, né le 7/6/1972 à Alger, de nationalité française, Sans profession, demeurant 3 A rue de l'académie, 13001 Marseille.
- Monsieur Mohamed Abdelli, né le 7/7/1976 à Sidi Embarek (ALGERIE), de nationalité française, Sans profession, demeurant le Panoramic 2, route des certes, 74500 Evian-les-bains.
- Mademoiselle Nadia ABDELSADOK, née le 28/2/1974 à Antony, de nationalité française, Sans profession, demeurant 18 ter rue doré, 77000 Melun.
- Monsieur MOHAMED ABI AYAD, né le 17/9/1971 à PARIS, de nationalité française, Sans profession, demeurant 5 RUE WURTZ, 75013 PARIS.
- Monsieur Michaël Abitbol, né le 18/10/1977 à Vincennes, de nationalité française, Professions intermédiaires de la santé et du travail social, demeurant 10, rue Victor Letalle, 75020 Paris.
- Monsieur Adam ABREU, né le 24/6/1951 à Amarante, de nationalité portugaise, Ingénieurs et cadres techniques d'entreprises, demeurant 8 Rue Giraud Teulon 78100 St Germain en Laye.

santé et du travail social, demeurant lycée la Hotoie rue du Bâtonnier Mahiu BP 6, 80 016 Amiens cedex.

- Mademoiselle Gwendoline Ziolkowski, née le 1/10/1980 à Gonesse, de nationalité française, Ouvriers qualifiés de la manutention, du magasinage et du transport, demeurant 15, rue de Bertinghen, 62200 Boulogne/mer.
- Monsieur HADEF ZITOUNI, né le 11/7/1979 à COLOMBES, de nationalité française, Sans profession, demeurant 12 BIS AVENUE LORNE, 92700 COLOMBES.
- Mademoiselle Elisabeth Zozaya, née le 9/6/1965 à Biarritz, de nationalité française, Professions intermédiaires de la santé et du travail social, demeurant 123 bis avenue de Lodève, 34056 Montpellier.

PARTIES DEMANDERESSES assistées de Maître Jérôme FRANCK avocat (C.1284) et comparant par Maître Jean-Luc SCHMERBER avocat (P.179).

ET : SA BOUYGUES TELECOM, (RCS de NANTERRE B 397.480.930), dont le siège social est situé 20 Quai du point du Jour Arcs de Seine 1 (92100) BOULOGNE BILLANCOURT, représentée par son Président Directeur Général, Monsieur Philippe MONTAGNER.

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PARTIE DEFENDERESSE assistée de la SELAS VOGEL & VOGEL avocats (P.151) et comparant par Maître ***Carole JOSEPH-WATRIN*** avocat (E.791).

APRES EN AVOIR DELIBERE

LES FAITS

La SA BOUYGUES TELECOM est un opérateur de téléphonie mobile. Après une enquête et une instruction qui ont été effectuées à la suite d'une auto saisine du Conseil de la Concurrence et d'une saisine de l'association UFC-Que Choisir, le Conseil de la Concurrence, par une décision du 30 novembre 2005, confirmée par un arrêt de la Cour d'Appel de Paris en date du 12 décembre 2006, a sanctionné la SA BOUYGUES TELECOM et les sociétés ORANGE France et SFR pour des comportements prohibés par l'article L 420-1 du Code de Commerce et l'article 81 du traité instituant la Communauté Européenne, à savoir :

- d'une part, avoir régulièrement, de 1997 à 2003, échangé des informations confidentielles relatives au marché de la téléphonie mobile sur lequel elles opèrent, de nature à réduire l'autonomie commerciale de chacun des trois opérateurs et donc à altérer la concurrence sur ce marché oligopolistique,

- d'autre part s'être entendues, pendant les années 2000 à 2002 pour stabiliser leurs parts de marché respectives autour d'objectifs définis en commun.

Par un arrêt du 29 juin 2007, la Cour de Cassation a cassé et annulé l'arrêt de la Cour d'Appel de Paris du 12 décembre 2006, mais seulement en ses dispositions retenant des faits d'entente en raison d'échanges d'informations de 1997 à 2003.

LA PROCEDURE

Par **assignation du 29 août 2006** Monsieur Sébastien AMBLARD demande au Tribunal de :

Vu les articles 30 et 31 du NCPC

Vu le décret n°2005-1756 du 30 décembre 2005

-déclarer recevables les demandes de Monsieur Sébastien AMBLARD

Vu l'article 81 du Traité CE,

Vu les articles L 420-1, L 420-7 et L 464-2 du Code de Commerce,

Vu les articles 1353 et 1382 du Code Civil,

Vu la décision du Conseil de la Concurrence du 30 novembre 2005,

- constater que la SA BOUYGUES TELECOM a commis une pratique anticoncurrentielle,

- dire que ces faits sont constitutifs d'une faute dolosive,

- condamner la SA BOUYGUES TELECOM à payer la somme de 67,20 €, sauf à parfaire, à Monsieur Sébastien AMBLARD, à titre de dommages intérêts,

- dire que cette somme produira intérêts au taux légal à compter du jugement à intervenir,

- condamner la SA BOUYGUES TELECOM à lui payer la somme de 150 € au titre de l'article 700 du NCPC,

- condamner la SA BOUYGUES TELECOM aux dépens.

Par **conclusions d'intervention volontaire du 13 octobre 2006,** l'UNION FEDERALE DES CONSOMMATEURS QUE CHOISIR (ci-après UFC QUE CHOISIR) demande au Tribunal de :

Vu les articles 325 et 328 du NCPC

Vu les articles L 421-1 et L 421-7 du Code de la Consommation,

- déclarer recevables les demandes présentées par l'UFC QUE CHOISIR,

Vu l'article 81 du Traité CE,

Vu les articles L 420-1, L 420-7 et L 464-2 du Code de Commerce,
Vu les articles 1353 et 1382 du Code Civil,
Vu l'article L 421-1 du Code de la Consommation
Vu la décision du Conseil de la Concurrence du 30 novembre 2005,

- constater que la SA BOUYGUES TELECOM a commis une pratique anticoncurrentielle,
- dire que ces faits sont constitutifs d'une faute dolosive,
- condamner la SA BOUYGUES TELECOM à payer, à l'association UFC QUE CHOISIR, la somme de 55.559,22 €, à titre de dommages intérêts,
- dire que cette somme produira intérêts au taux légal à compter du jugement à intervenir,
- condamner la SA BOUYGUES TELECOM à payer à l'association UFC QUE CHOISIR, la somme de 7.000 € au titre de l'article 700 du NCPC,
- ordonner l'exécution provisoire,
- condamner la SA BOUYGUES TELECOM aux dépens.

Par **conclusions d'intervention volontaire du 22 décembre 2006** Mademoiselle Corinne ABATE et divers autres intervenants volontaires dont la liste est annexée dans la procédure, demandent au Tribunal de :
Vu les articles 325 et 328 du NCPC,
Vu les articles L 420-1, L 420-7 et L 464-2 du Code de Commerce,
Vu l'article 1382 du Code Civil,
Vu la décision du Conseil de la Concurrence du 30 novembre 2005,

- déclarer recevable l'intervention volontaire de Mademoiselle Corinne ABATE et des autres intervenants précités,

En conséquence,

- constater que la SA BOUYGUES TELECOM a commis une pratique anticoncurrentielle,
- dire que ces faits sont constitutifs d'une faute et engagent la responsabilité civile de la SA BOUYGUES TELECOM,
- condamner la SA BOUYGUES TELECOM à payer à chacun la somme mentionnée dans la liste…
- dire que cette somme produira intérêts au taux légal à compter du jugement à intervenir,
- condamner la SA BOUYGUES TELECOM à payer à chacun la somme de 150 € au titre de l'article 700 du NCPC

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Par **sommation de communiquer du 13 mars 2007 versée à la procédure le 29 mars 2007** les conseils de la SA BOUYGUES TELECOM font sommation au conseil de Monsieur Sébastien AMBLARD, de l'association UFC QUE CHOISIR, et des autres intervenants volontaires de communiquer des informations relatives aux sources de l'étude ALTEX

Par **conclusions sur les exceptions de procédure du 29 mars 2007** la SA BOUYGUES TELECOM demande au Tribunal de :

Vu les articles 110 et 117 du NCPC,
Vu les articles L 421-7 et 422-1 du Code de la Consommation,
Vu la loi du 31 décembre 1971,

- in limine litis surseoir à statuer tant qu'une décision définitive et non susceptible de recours n'aura pas été rendue dans l'affaire ayant donné lieu à la décision du Conseil de la Concurrence du 30 novembre 2005, relative à des pratiques constatées dans le secteur de la téléphonie mobile,
- in limine litis, prononcer la nullité de l'assignation et de chacune des interventions volontaires,
- si les exceptions de procédure soulevées par la SA BOUYGUES TELECOM, ne devaient pas être retenues, réserver à la SA BOUYGUES TELECOM le droit et la possibilité de conclure au fond,
- en tout état de cause, condamner l'UFC QUE CHOISIR, à payer à la SA BOUYGUES TELECOM la somme de 6.000 € au titre de l'article 700 du NCPC, ainsi qu'aux dépens.

Par **conclusions en réponse sur les exceptions de procédure du 24 mai 2007**, Monsieur Sébastien AMBLARD, l'association UFC QUE CHOISIR, et les autres intervenants volontaires demandent au Tribunal de :
- leur donner acte de ce qu'ils ne s'opposent pas à la demande de sursis à statuer pour autant que l'événement mettant un terme à celui-ci soit l'arrêt de la Cour de cassation à intervenir,
- leur donner acte de ce que la SA BOUYGUES TELECOM reconnaît que la preuve de la faute reprochée par les concluants est constituée par la décision du Conseil de la Concurrence du 30 novembre 2005,
- rejeter les exceptions de nullité soulevées,
- faire droit aux demandes des concluants, telles qu'exposées dans l'acte introductif d'instance, et les conclusions d'intervention volontaire.

Lors de l'audience du 24 mai 2007 le tribunal a confié l'affaire, sur l'incident de communication, à l'examen d'un juge rapporteur qui a convoqué les parties à son audience du 14 juin 2007.

Par **conclusions en réponse sur les exceptions de communication de pièces régularisées à l'audience du juge rapporteur du 14 juin 2007** Monsieur Sébastien AMBLARD, l'association UFC QUE CHOISIR, et les autres intervenants volontaires demandent au juge rapporteur de :

- se déclarer incompétent et renvoyer la SA BOUYGUES TELECOM à mieux se pourvoir devant la formation de jugement du tribunal de céans,

A titre subsidiaire,

- débouter la SA BOUYGUES TELECOM de sa demande,
- donner acte aux concluants de ce que les pièces versées aux débats ont été régulièrement communiquées à la SA BOUYGUES TELECOM.

Par **deux jeux de conclusions en réponse régularisées à l'audience du juge rapporteur du 14 juin 2007** la SA BOUYGUES TELECOM demande au Tribunal de :

- déclarer l'exception d'incompétence du juge rapporteur irrecevable et mal fondée,
- faire injonction à Monsieur Sébastien AMBLARD, à l'association UFC QUE CHOISIR, et aux autres intervenants volontaires de communiquer :

. les sources chiffrées utilisées dans le rapport ALTEX ayant permis d'établir les graphiques et tableaux figurant aux pages 46 et 53, étant précisé que ces sources devront être produites sous forme de copie de la source d'origine invoquée, sa date de publication et son éditeur,

. la base de calcul retenue et notamment la répartition entre les trois marchés nordiques,

. et la formule de calcul retenue pour calculer les points ayant permis d'établir la courbe et les tableaux des pages 46 et 53 de l'étude ALTEX.

Par **jugement du 21 juin 2007**, le tribunal a renvoyé la cause à l'audience du juge rapporteur pour entendre les parties sur l'incident communication et les exceptions de procédure.

Par **courrier du 23 juillet 2007 adressé au juge rapporteur et joint à la procédure**, le conseil de Monsieur Sébastien AMBLARD, de l'association UFC QUE CHOISIR et des autres intervenants volontaires transmet copie de la lettre

Karen REINEL-KING
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officielle adressée au conseil de la SA BOUYGUES TELECOM et par laquelle il indique communiquer les documents, objet de l'incident de communication.

Par **conclusions en réponse régularisées à l'audience du juge rapporteur du 20 septembre 2007, conclusions sur les exceptions de procédure et sur la demande d'injonction de communication de pièces et conclusions en réponse régularisées à l'audience du juge rapporteur du 5 octobre 2007** la SA BOUYGUES TELECOM demande au Tribunal, dans le dernier état de ses écritures, de
Vu les articles 110, 117 et 133 du NCPC,
Vu les articles L 421-7 et 422-1 du Code de la consommation,
Vu la Loi du 31 décembre 1971,
1. Lui accorder le bénéfice de ses précédentes écritures,
2. In limine litis, prononcer la nullité de l'assignation et de chacune des interventions volontaires,

3. A titre subsidiaire, si l'exception soulevée par SA BOUYGUES TELECOM ne devait pas être retenue, constater que les demandeurs n'ont toujours pas communiqué à ce jour :
- les bases de calcul de la courbe tendancielle sur laquelle, ils fondent leurs demandes d'indemnisation,
- et l'intégralité des sources chiffrées des graphes figurant aux pages 18 et 26 de l'étude ALTEX.

En conséquence,
Faire injonction aux demandeurs de communiquer :
- la méthode de calcul retenue pour passer des tendances observées sur les trois marchés nordiques à la courbe dite « de référence » de la page 46,
- les sources chiffrées des graphes figurant aux pages 18 et 26 de l'étude ALTEX,

ainsi que de lever toute incohérence sur les documents figurant dans le CD-ROM.

4. A titre subsidiaire, si l'exception de nullité soulevée par SA BOUYGUES TELECOM ne devait pas être retenue, rejeter la demande tendant à ce que le tribunal donne acte aux demandeurs « *de ce que la société BOUYGUES TELECOM reconnaît que la preuve de l'entente reprochée* [par eux] *est constituée par la décision du conseil de la Concurrence du 30 novembre 2005* », puisque tel n'est nullement le cas et que cette demande est au surplus irrecevable.

5. A titre subsidiaire, si l'exception de nullité soulevée par SA BOUYGUES TELECOM ne devait pas être retenue, réserver

en tout état de cause à SA BOUYGUES TELECOM le droit et la possibilité de conclure sur le fond et de lui accorder un délai suffisant pour le faire,

6. En tout état de cause, condamner l'UFC QUE CHOISIR à payer à la SA BOUYGUES TELECOM la somme de 6.000 € sur le fondement de l'article 700 du NCPC, ainsi qu'aux dépens.

Par **conclusions en réponse sur les exceptions de procédure et l'incident communication de pièces régularisées à l'audience du juge rapporteur du 20 septembre 2007 et conclusions en réponse sur les exceptions de procédure et l'incident communication de pièces régularisées à l'audience du juge rapporteur du 5 octobre 2007,** Monsieur Sébastien AMBLARD, l'association UFC QUE CHOISIR, et les autres intervenants volontaires demandent au Tribunal, dans le dernier état de leurs écritures, de

- leur accorder le bénéfice de leurs précédentes écritures,
- donner acte aux concluants de ce que la SA BOUYGUES TELECOM reconnaît que la preuve de la faute reprochée par les concluants est constituée par la décision du Conseil de la Concurrence du 30 novembre 2005 devenue définitive,
- constater que la SA BOUYGUES TELECOM a renoncé à sa demande de sursis à statuer devenue sans objet en raison du rejet du pourvoi prononcé par arrêt du 29 juin 2007,
- donner acte aux concluants de ce que les pièces versées au débat ont été régulièrement communiquées à la SA BOUYGUES TELECOM,
- en conséquence, déclarer la demande de la SA BOUYGUES TELECOM sans objet et l'en débouter,
- rejeter les exceptions de nullité soulevées,
- enjoindre la SA BOUYGUES TELECOM de conclure en réponse sur le bien fondé des demandes,
- en tout état de cause, faire droit aux demandes des concluants, telles qu'exposées dans l'acte introductif d'instance, et les conclusions d'intervention volontaire.

Après avoir entendu les parties sur les exceptions de procédure, et l'incident communication de pièces, lors de son audience du 5 octobre 2007, le juge rapporteur a clos les débats et indiqué que le jugement sur ces points, mis en délibéré, sera prononcé le 6 décembre 2007.

SUR LA NULLITE DE L'ASSIGNATION ET DES INTERVENTIONS VOLONTAIRES

Moyens des parties

La SA BOUYGUES TELECOM soutient que l'association UFC QUE CHOISIR a commis un détournement de procédure et violé les dispositions législatives interdisant le démarchage juridique et régissant l'action en justice des consommateurs.
La SA BOUYGUES TELECOM affirme que la violation des règles régissant le démarchage est constituée par le fait que l'association UFC QUE CHOISIR a :

- d'une part mis en ligne sur son site Internet un calculateur de préjudice individuel utilisable par tout internaute et non réservé à ses seuls adhérents. La SA BOUYGUES TELECOM fait valoir que proposer une évaluation d'un préjudice personnel, c'est à l'évidence donner un avis personnalisé sur une question juridique, le préjudice étant l'un des éléments constitutifs de la responsabilité civile ;
- d'autre part pris contact par courriel personnalisé avec les internautes ayant laissé leurs coordonnées sur le site www.cartelmobile.org, pour les inviter à se joindre à une action contentieuse, qu'ils soient ou non ses adhérents.

La SA BOUYGUES TELECOM souligne que ce n'est que de manière formelle que l'action apparaît comme ayant été introduite par Monsieur Sébastien AMBLARD, auquel l'association UFC QUE CHOISIR et d'autres clients de BOUYGUES TELECOM se seraient joints par la suite.
La SA BOUYGUES TELECOM soutient qu'en réalité, l'action a été planifiée et orchestrée par l'association UFC QUE CHOISIR qui a choisi de donner au litige l'apparence de la licéité formelle.
La SA BOUYGUES TELECOM fait valoir que l'association a mandaté un expert chargé d'évaluer le préjudice de chaque client, que c'est en se fondant sur cette étude que l'assignation a été introduite facialement au nom de M.AMBLARD, par l'avocat habituel de l'association UFC QUE CHOISIR.
La SA BOUYGUES TELECOM ajoute que l'association UFC QUE CHOISIR a de même organisé l'intervention volontaire des autres clients et les a pris en charge, demandant aujourd'hui le remboursement des frais que ceci a induit pour elle.
La SA BOUYGUES TELECOM affirme que non seulement les règles de l'intervention volontaire des associations de consommateurs ont été violées, mais encore celles régissant l'action en représentation conjointe ont été détournées.

La SA BOUYGUES TELECOM soutient que ces infractions constituent des irrégularités de fond, au sens de l'article 117 du NCPC, qui affectent la validité tant de l'acte introductif d'instance que des interventions volontaires.

Monsieur Sébastien AMBLARD, l'association UFC QUE CHOISIR, et les autres intervenants volontaires répliquent que les causes de nullité prévues par l'article 117 du NCPC, ont un caractère limitatif.
Ils font valoir que la SA BOUYGUES TELECOM n'allègue ni ne justifie que les demandeurs personnes physiques seraient frappés d'une incapacité d'ester en justice et ils soulignent que l'association UFC QUE CHOISIR est dûment représentée par son président, comme le prévoient les statuts.

Les demandeurs répliquent encore que les conditions d'un démarchage irrégulier ne sont pas réunies, qu'en effet ce dernier supposerait
- un acte positif par lequel une offre de service serait faite à une personne,
- en vue de proposer une prestation de service juridique dans le cadre d'un contrat à titre onéreux,
que ces éléments font défaut dans le cas présent.

L'association UFC QUE CHOISIR conteste qu'elle ait violé les règles régissant les actions ouvertes aux associations agréées de consommateurs et soutient que son action est fondée sur les dispositions de l'article L 421-1 du Code de la Consommation qui vise la protection des intérêts collectifs, distincts de la somme des intérêts individuels, et non sur celles de l'article L 422-1 qui vise l'action en représentation conjointe.
Elle ajoute qu'il ne saurait lui être reproché d'avoir favorisé le regroupement des victimes individuelles au moyen des dispositions existantes du NCPC, dont les demandeurs soutiennent qu'elles ont été respectées, plutôt que d'avoir choisi la voie de l'action en représentation conjointe

Sur ce

Sur la qualification de l'action au regard du Code de la Consommation

Attendu que l'action a été introduite par Monsieur AMBLARD qui réclame réparation de son préjudice, que l'UFC QUE CHOISIR est intervenue volontairement à l'instance, en sa qualité d'association agréée pour demander réparation du préjudice d'intérêt collectif sur le fondement des articles L 421-1 et L 421-7 du Code de la Consommation, que les autres intervenants volontaires se sont ultérieurement joints à l'instance,

Attendu qu'il est constant que dès le 1er décembre 2005, soit le lendemain de la décision du Conseil de la Concurrence, l' UFC QUE CHOISIR, sur son site Internet et par voie de distribution de tract invitait chaque abonné au téléphone mobile à « estimer son préjudice personnel, …, à soutenir son action » et indiquait qu'elle « se mobilisait afin que le préjudice de chaque abonné soit réparé par les opérateurs concernés »,
Attendu que, après avoir donné son adresse email et reçu un code confidentiel, le consommateur avait accès sur un site www.cartelmobile.org au calculateur de préjudice et se voyait indiquer à une rubrique intitulée « comment agir ? » : « L'UFC QUE CHOISIR se mobilise afin que le préjudice de chaque abonné soit réparé. Comme des milliers de consommateurs, pour vous joindre à son action, il vous suffit de créer votre dossier, en cliquant ici… »,
Attendu que le document intitulé « conditions d'engagement » souscrit par le consommateur, ayant fait le choix de se joindre à l'action, précise que l'UFC QUE CHOISIR choisira l'avocat qui engagera l'action au nom de l'abonné,
Attendu que la SA BOUYGUES TELECOM verse au débat plusieurs emails, datés de février et avril 2006, reçus par des consommateurs ayant donné leurs coordonnées, émanant de CARTELMOBILE- UFC QUE CHOISIR, dans lesquels, sous les titres « Derniers jours pour agir ou Dernières semaines pour agir et obtenir justice », on peut lire notamment : « … l'UFC QUE CHOISIR a engagé une action à l'encontre de chacun des opérateurs à laquelle peut se joindre tout abonné mécontent »,
Attendu que l'UFC QUE CHOISIR indiquait donc, sans ambiguïté, aux consommateurs, qu'elle leur proposait de se joindre à l'action qu'elle disait avoir engagée à l'encontre des opérateurs téléphoniques, et ce avant même que l'action n'ait été introduite par M. AMBLARD,
Attendu qu'il n'est pas contesté que ce sont les consommateurs ayant adhéré à la démarche initiée par l'UFC QUE CHOISIR dès le 1er décembre 2005, qui sont intervenus volontairement à l'instance,

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Attendu que M. AMBLARD qui a introduit l'action par acte du 29 août 2006, fait lui-même expressément référence, pour la détermination du préjudice dont il demande réparation, à l'étude réalisée, à la demande de l'UFC QUE CHOISIR, par le Cabinet ALTEX,
Attendu qu'il n'a pu avoir accès au calculateur qu'après avoir fait la même démarche que les autres consommateurs précités,
Attendu que l'avocat, mandataire de M. AMBLARD et, à ce titre, signataire de l'assignation, est également l'avocat de l'UFC QUE CHOISIR et des autres intervenants volontaires,
Attendu qu'il apparaît ainsi que l'action de M. AMBLARD a été, en réalité, conduite par l'UFC QUE CHOISIR, dans les mêmes conditions que celles des intervenants volontaires,
Attendu que le tribunal en déduit que la présente action a été initiée et organisée par l'UFC QUE CHOISIR, que l'action doit donc s'analyser comme une action en représentation conjointe et donc satisfaire aux dispositions des articles L 422-1 et R 422-1 et suivants du Code de la Consommation,

Sur les conditions de l'action en représentation conjointe

Attendu que l'article L 422-1 dispose que le mandat obtenu des consommateurs ayant subi des préjudices individuels, par une association agréée pour agir en réparation « ne peut être sollicité par voie d'appel public télévisé ou radiophonique, ni par voie d'affichage, ni par voie de tract ou de lettre personnalisée. Il doit être donné par écrit par chaque consommateur. »,
Attendu que la SA BOUYGUES TELECOM soutient que l'ensemble de la communication organisée par l'UFC QUE CHOISIR sur ses sites Internet www.quechoisir.org et www.cartelmobile.org, constitue un démarchage juridique illicite, tant au regard des articles 66-4 de la loi du 31 décembre 1971 et 1er du décret du 25 août 1972, que de l'article L 422-1 du Code de la consommation,
Attendu que l'UFC QUE CHOISIR fait valoir en réponse que

1° Les intervenants volontaires, parties à l'instance, ont pris contact avec l'UFC QUE CHOISIR pour rejoindre de leur propre initiative une action tendant à faire valoir leurs droits et à soutenir l'action politique de l'association en faveur de l'instauration d'une véritable action de groupe, que la prestation proposée par l' UFC QUE CHOISIR n'était nullement un service à caractère marchand, mais un ralliement à la cause défendue par l'association, dans l'intérêt de tous les consommateurs.

2° Il n'est pas sérieux de soutenir que la mise à disposition du consommateur d'un calculateur de préjudice

individuel constitue une consultation juridique au sens de la loi sur le démarchage juridique. Il s'agissait d'une démarche d'information rentrant pleinement dans la mission de l'UFC QUE CHOISIR, mentionnée dans ses statuts et non réservée à ses seuls adhérents.

3° Plusieurs démarches personnelles et actives du consommateur vers l'UFC QUE CHOISIR étaient nécessaires pour qu'il ait connaissance de la possibilité de constituer un dossier en ligne afin de demander en justice réparation de son préjudice personnel aux cotés de l'UFC QUE CHOISIR. Dans ces conditions, il n'est pas possible de parler de démarchage juridique, et ce d'autant plus que l'UFC QUE CHOISIR indiquait au consommateur qu'il avait la possibilité de mener une procédure indépendante.

4° Il ne s'agissait pas d'un contrat proposé à titre onéreux.

Attendu que l'UFC QUE CHOISIR est une association de consommateurs agréée en application des articles L 111-1 et suivants du Code de la consommation,
Attendu que, selon ses statuts, elle a pour objet « de promouvoir, d'appuyer et relier entre elles les actions individuelles ou collectives de consommateurs…tendant à garantir…la défense de leurs intérêts individuels et collectifs, de favoriser la prise en charge des problèmes de consommation par les consommateurs et usagers eux-mêmes…de mettre à la disposition des consommateurs et usagers les moyens d'information… qui leur sont utiles… »,
Attendu que la mise à disposition des consommateurs, gracieusement, du « calculateur de préjudice », apparaît au tribunal conforme à la mission d'information dévolue à l'association dans son objet social,
Attendu de même que la proposition faite par l'UFC QUE CHOISIR de se joindre à l'action organisée par elle, de choisir le même conseil en vue d'obtenir réparation du préjudice est conforme à l'objet social de l'UFC QUE CHOISIR, en sa qualité d'association agréée,
Attendu cependant que le Code de la Consommation définit précisément les conditions dans lesquelles les associations agréées peuvent mener leur action,
Attendu que le tribunal a estimé que l'action présente, au-delà de ses apparences formelles, constitue une action en représentation conjointe, régie par les dispositions de l'article L 422-1 du Code de la Consommation,
Attendu qu'il est établi que l'UFC QUE CHOISIR a relancé certains des abonnés qui lui avait donné leurs coordonnées

email en leur adressant des messages personnalisés, que cette action est explicitement interdite par l'article L 422-1 qui dispose qu'un mandat ne peut être sollicité par voie de lettre personnalisée,
Attendu que l'UFC QUE CHOISIR a de ce fait contrevenu aux dispositions régissant l'action en représentation conjointe ;

Sur la validité des actes de procédure

Attendu que la SA BOUYGUES TELECOM soutient que l'infraction à l'interdiction de démarchage constitue une irrégularité de fond, au sens de l'article 117 du NCPC, qui affecte la validité tant de l'acte introductif d'instance que des interventions volontaires,
Attendu que Monsieur Sébastien AMBLARD, l'association UFC QUE CHOISIR, et les autres intervenants volontaires répliquent que la SA BOUYGUES TELECOM n'allègue ni ne justifie que les demandeurs personnes physiques seraient frappés d'une incapacité d'ester en justice et ils soulignent que l'association UFC QUE CHOISIR est dûment représentée par son président, que les conditions de l'article 117 du NCPC, qui ont un caractère limitatif, ne sont donc pas réunies,
Attendu toutefois que sauf à faire perdre aux dispositions de l'article L 422-1 toute portée, l'infraction à l'interdiction du démarchage juridique, qui n'est assortie dans la loi d'aucune sanction à caractère pénal, contrairement à la loi du 31 décembre 1990 interdisant le démarchage juridique, ne peut qu'invalider l'action introduite en conséquence dudit démarchage, que le Tribunal estime, en effet, que l'adage « la fraude corrompt tout » doit, au cas d'espèce, s'appliquer,
Attendu, au surplus, que les actes de procédure ne satisfont pas aux conditions de forme imposées par le Code de la Consommation à l'action en représentation conjointe, qu'en particulier l'association UFC QUE CHOISIR ne justifie pas avoir été mandatée, par les personnes physiques qui se sont jointes à son action, dans les conditions des articles R 422-1 et R 422-2 du Code de la consommation,
Attendu qu'en conséquence le tribunal déclarera irrecevables l'assignation et les interventions volontaires ;

Sur les autres demandes

Attendu qu'il n'y a lieu de statuer sur les autres demandes,
Attendu cependant que la SA BOUYGUES TELECOM a dû pour faire reconnaître ses droits exposer des frais non compris dans les dépens, qu'il serait inéquitable de laisser à sa charge et

qu'il est donc justifié de lui allouer par application de l'Article 700 du NCPC l'indemnité demandée de 6.000 € qui sera mise à la charge de l'association UFC QUE CHOISIR,

PAR CES MOTIFS

Le Tribunal statuant publiquement par jugement contradictoire en premier ressort

Déclare irrecevables l'assignation et les interventions volontaires,

Condamne L'UNION FEDERALE DES CONSOMMATEURS QUE CHOISIR à verser à la SA BOUYGUES TELECOM la somme de 6.000 € au titre de l'article 700 du Nouveau Code de Procédure Civile,

Condamne L'UNION FEDERALE DES CONSOMMATEURS QUE CHOISIR aux dépens dont ceux à recouvrer par le Greffe liquidés à la somme de : 2873,04 TTC (dont TVA. 470,62 EUROS).

Confié lors de l'audience du 21 juin 2007 à Monsieur REIGNIER, en qualité de Juge Rapporteur.

Mis en délibéré le 5 octobre 2007.

Délibéré par Messieurs LUCQUIN, REIGNIER et DUGRENOT et prononcé à l'audience publique où siégeaient :

Monsieur GERONIMI, Président, Messieurs BOUCHER, REIGNIER, SPILET et LE MAU DE TALANCE, Juges, assistés de Monsieur DURAFOUR, Greffier. Les parties en ayant été préalablement avisées. La minute du jugement est signée par le Président du délibéré et le Greffier.

Exhibit [10]

Judgment entered by the Paris Commercial Court, 15th Chamber, 6 December 2007, General Docket No 200657440

Exhibit [ ]

Judgment entered by the Paris Commercial Court, 15th Chamber, 6 December 2007, General Docket No. 2006057440

CONCERNING THE NULLITY OF THE WRIT OF SUMMONS AND THE VOLUNTARY INTERVENTIONS

Causes of action submitted by the parties

SA BOUYGUES TELECOM contends that UFC QUE CHOISIR misused applicable procedural rules and breached the legislative provisions prohibiting any legal canvassing and governing legal actions instituted by consumers.
SA BOUYGUES TELECOM states that the violation of the rules governing canvassing consists in the fact that UFC QUE CHOISIR has:
- one the one hand, placed on its website an individual loss calculator that could be utilized by any Internet user and was not reserved solely for the association's own members. SA BOUYGUES TELECOM contends that the fact of proposing an evaluation of a personal loss obviously amounts to giving a customized opinion on a legal issue, as the loss is one of the constitutive elements of any liability in tort;
- on the other hand, UFC QUE CHOISIR contacted by customized email those Internet users who had registered their particulars on the www.cartelmobile.org website, in order to propose that such Internet users participate in a law suit, whether or not they were members of the association.

SA BOUYGUES TELECOM emphasizes that only from a formal standpoint does the action seem to have been instituted by Mr. Sébastien AMBLARD, in whose action UFC QUE CHOISIR and other customers of BOUYGUES TELECOM subsequently participated.

SA BOUYGUES TELECOM claims that in reality the action was planned and orchestrated by UFC QUE CHOISIR which chose to give to this suit the appearance of formal lawfulness.

SA BOUYGUES TELECOM submits that UFC QUE CHOISIR appointed an expert responsible for evaluating the loss sustained by each customer and that, on the basis of this study, the writ of summons was instituted apparently in the name of Mr. AMBLARD, by the customary attorney of UFC QUE CHOISIR.

SA BOUYGUES TELECOM adds that UFC QUE CHOISIR also organized the other customers' voluntary intervention and assumed the cost thereof, and now seeks the reimbursement of the expenses borne by it because of such assumption.

SA BOUYGUES TELECOM claims that not only have the rules governing the voluntary intervention of consumer associations been breached, but also that the rules governing joint actions have been breached.

SA BOUYGUES TELECOM contends that these violations are substantive in nature, within the meaning of Article 117 of the French New Code of Civil Procedure (NCPC) and that they affect the validity of the statement of claim and the voluntary interventions.

Mr. Sébastien AMBLARD, UFC QUE CHOISIR and the other parties filing a voluntary intervention respond that the causes of nullity provided for in Article 117 NCPC are limitative in nature.
They contend that SA BOUYGUES TELECOM does not allege or prove that those plaintiffs who are natural persons have lost their capacity to file legal proceedings. They emphasize that UFC QUE CHOISIR is duly represented by its Chairman, as set forth in the association's by-laws.

The plaintiffs further submit that the conditions required in order to characterize any legal canvassing are not satisfied here, as such canvassing would require:

- a positive action, through which an offer of services would be made to a person
- the goal of such proposal being the supply of legal services through a contract entailing the payment of a valuable consideration.

UFC QUE CHOISIR denies having breached the rules governing actions available to approved consumer associations and contends that its action is based on the provisions of Article L. 421-1 of the French Consumer Code, which aims at protecting collective interests, separately from the aggregate of individual interests, and is not based on the provisions of Article L. 422-1 which governs joint actions.
UFC QUE CHOISIR submits that it may not be accused of having fostered the grouping of individual victims by relying on the existing provisions of the NCPC (the plaintiffs claim that the said provisions have been complied with, instead of choosing to institute a joint action).

Whereupon, the Court

<u>As regards the characterization of the action under the French Consumer Code</u>

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The action was filed by Mr. AMBLARD who seeks the indemnification of his loss. UFC QUE CHOISIR intervened voluntarily in this suit, in its capacity as an association approved in order to seek the protection of a collective interest under Articles L. 421-1 and L. 421-7 of the French Consumer Code. The other parties subsequently joined this suit on a voluntary basis.

It appears that, as early as 1 December 2005, i.e. the day following the decision entered by the Competition Council, UFC QUE CHOISIR invited, on its website and through the circulation of leaflets, each cell phone holder to "estimate his personal loss and support its action" and indicated that it "was making any effort so that the loss suffered by each subscriber would be indemnified by the relevant operators."
After consumers provided their email address and received a confidential code, they were given access to a loss calculator on a site named www.cartelmobile.org, and were told the following "How should you act? UFC QUE CHOISIR is making any possible effort so that the loss suffered by each subscriber be cured. With thousands of consumers, you may join UFC's action. You only need to create your file, by clicking here..."
The document entitled "engagement terms" filed by consumers who chose to join the action indicates that UFC QUE CHOISIR shall choose the attorney who shall institute the action in the subscriber's name.
SA BOUYGUES TELECOM adduces as evidence several emails dated February and April 2006 received by consumers who had entered their particulars on the said site from CARTELMOBILE – UFC QUE CHOISIR. The said emails, bearing the headings such as "Last days to file an action" or "last weeks to file an action and obtain a remedy", read as follows: "UFC QUE CHOISIR filed an action against each of the operators, and any dissatisfied subscriber may join the said action."
UFC QUE CHOISIR thus indicated, without any ambiguity to consumers that it offered them the possibility of joining the action that it claims to have filed against the telephone operators, such statement being made before the action was filed by Mr. AMBLARD.
It is not disputed that the voluntary intervention in this suit was filed by the consumers who participated in the approach initiated by UFC QUE CHOISIR.

Mr. AMBLARD himself, who instituted the action by way of a writ of 29 August 2006 expressly refers, for the determination of the loss for which he seeks to be indemnified, to the study carried out by ALTEX at the request of UFC QUE CHOISIR.
Mr. AMBLARD was able to access the calculator only after taking the same steps as the other consumers referred to above.
The attorney, acting as the agent of Mr. AMBLARD is also the attorney of UFC QUE CHOISIR and the other persons filing a voluntary intervention.
Therefore, it appears that Mr. AMBLARD's action was in reality conducted by UFC QUE CHOISIR, in the same manner as the actions of the other persons filing a voluntary intervention.
The Court deducts from this that this action was instituted and organized by UFC QUE CHOISIR, and that the action must therefore be analyzed as a joint action and must comply with the provisions of Articles L. 422-1and R. 422-1 of the French Consumer Code.

Concerning the requirements applicable to joint actions

Article L. 422-1 sets forth that the power of attorney obtained from those consumers who have sustained individual losses by an association approved in order to seek remedies "may not be sought by way of television or radio announcements, or by way of posters, leaflets or customized letters. Such power of attorney must be given in writing by each consumer."
SA BOUYGUES TELECOM contends that all of the communication organized by UFC QUE CHOISIR on its www.quechoisir.org and www.cartelmobile.org amounts to unlawful legal canvassing, whether under Article 1 of the Act of 31 December 1971 and Article 1 of the Decree of 25 August 1972 or under Article L. 422-1 of the French Consumer Code.
In its response, UFC QUE CHOISIR submits that:
1° The persons filing a voluntary action, who are parties to this suit, have contacted UFC QUE CHOISIR in order to join, on their own initiative, an action aimed at asserting their rights and supporting the political action conducted by UFC QUE CHOISIR in favor of the creation of class actions. The services proposed by UFC QUE CHOISIR were not at all for profit, but consisted in supporting the cause advocated by the association, in the interest of all consumers.
2° It may not be genuinely claimed that the fact of making an individual loss calculator available to consumers amounts to a legal opinion within the meaning of the legislative

provisions on legal canvassing. The provision of such calculator corresponded to an information service fully compatible with the mandate of UFC QUE CHOISIR as set forth in its articles of association. Such service is not reserved solely for the association's members.
3° In order to inform consumers of the possibility of creating a file on line and seeking in court the indemnification of their personal loss by joining forces with UFC QUE CHOISIR, it was necessary for UFC QUE CHOISIR to approach consumers personally and actively. Under these conditions, it is not possible to characterize the association's conduct as legal canvassing, especially because UFC QUE CHOISIR indicated to consumers that they were entitled to institute proceedings independently.
4° The said contact did not consist in a proposal for the execution of a contract against valuable consideration.

UFC QUE CHOISIR is an association of consumers approved under Articles L. 111-1 *et seq.* of the French Consumer Code.
According to its by-laws, UFC QUE CHOISIR's purpose consists in "promoting, supporting and uniting the individual or collective actions of consumers, aimed at the defense of their individual and collective interests, furthering the assumption of consumption issues by consumers and users themselves and making available to consumers and users the information resources that are useful to them."
The Court finds that the provision to consumers, free of charge, of a "loss calculator" is in line with the information mandate assigned to the association by its corporate purpose.
Also, the proposal made by UFC QUE CHOISIR to join the action organized by it, to choose the same counsel in order to obtain the indemnification of the consumers' losses is in line with the corporate purpose of UFC QUE CHOISIR, as an approved association.
However, the Consumer Code specifically defines the conditions under which approved associations may act.
The Court finds that this action is, notwithstanding its formal appearance, a joint action governed by the provisions of Article L. 422-1 of the French Consumer Code.
It is proved that UFC QUE CHOISIR has approached by customized messages certain of the subscribers who had given to UFC QUE CHOISIR their email particulars. Such a step is

expressly prohibited by Article L. 422-1 which sets forth that no power of attorney may be sought by way of a customized letter.
By so doing, UFC QUE CHOISIR has breached the provisions governing joint actions.

Concerning the validity of the procedural actions

SA BOUYGUES TELECOM contends that the violation of the prohibition of canvassing is a substantive irregularity within the meaning of Article 117 NCPC, affecting the validity of the statement of claims and the voluntary interventions.
Mr. Sébastien AMBLARD, UFC QUE CHOISIR and the other parties filing a voluntary intervention respond that SA BOUYGUES does not allege or prove that those plaintiffs who are natural persons have lost their capacity to file legal proceedings. They emphasize that UFC QUE CHOISIR is duly represented by its Chairman, and that the requirements set forth in Article 117 NCPC, which are limitative in nature, are therefore not satisfied.
However, unless the provisions of Article L. 421-1 are deprived of any meaning, the violation of the prohibition of legal canvassing, which is not accompanied by any criminal sanction (contrary to the Act of 31 December 1990 prohibiting legal canvassing) must result in the invalidity of any action filed as a result of such canvassing. The Court considers that the saying "fraud corrupts everything" must be applied here.
Also, the procedural actions do not satisfy the procedural requirements imposed by the Consumer Code as regards joint actions and in particular UFC QUE CHOISIR fails to prove that it has been appointed by the natural persons who joined its action, in accordance with the conditions laid down under Articles R. 422-1 and R. 422-2 of the French Consumer Code;

Concerning the other claims

It is not necessary to adjudicate on the other claims.
However, in order to assert its rights SA BOUYGUES TELECOM has been compelled to incur expenses that may not be directly recovered, and it would be unfair to let SA BOUYGUES TELECOM bear the same. It is therefore justified to award to SA BOUYGUES

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TELECOM the requested indemnity in the amount of € 6,000, to be paid by UFC QUE CHOISIR.

ON THESE GROUNDS

The Court, adjudicating publicly, by way of a decision entered after adversary proceedings and in first instance

Finds that the writ of summons and the voluntary interventions are not admissible

Orders UNION FEDERALE DES CONSOMMATEURS QUE CHOISIR to pay to SA BOUYGUES TELECOM the amount of € 6,000 under Article 700 of the French New Code of Civil Procedure

Orders UNION FEDERALE DES CONSOMMATEURS QUE CHOISIR to pay the legal expenses, including the legal expenses to be collected by the Registry and set at € 2,873.04 (including VAT in the amount of € 470.62).

Case entrusted during the hearing of 21 June 2007 to Mr. REIGNIER, Reporting Judge.

Referred for deliberations on 5 October 2007.

The deliberations were attended by Messrs. LUCQUIN, REIGNIER and DUGRENOT. The decision was announced during the public hearing, attended by:

Messrs. GERONIMI, Presiding Judge, Messrs. BOUCHER, REIGNIER, SPILET and LE MAU de TALANCE, Judges, supported by Mr. DURAFOUR, Clerk. The parties received advance notice of this decision. The minutes of the decision were signed by the Presiding Judge of the deliberation panel and by the Clerk.

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Paris Commercial Court
Decision entered on 6 December 2007
15th Chamber

General Docket No. 2006057440

CL* - Page 291

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Exhibit [11]

Article 145 du nouveau Code de procédure civile

Legifrance .gouv.fr
LE SERVICE PUBLIC DE LA DIFFUSION DU DROIT

Code de procédure civile

- Livre I : Dispositions communes à toutes les juridictions
  - Titre VII : L'administration judiciaire de la preuve
    - Sous-titre II : Les mesures d'instruction
      - Chapitre I : Dispositions générales
        - Section I : Décisions ordonnant des mesures d'instruction.

Article 145

S'il existe un motif légitime de conserver ou d'établir avant tout procès la preuve de faits dont pourrait dépendre la solution d'un litige, les mesures d'instruction légalement admissibles peuvent être ordonnées à la demande de tout intéressé, sur requête ou en référé.

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Exhibit [12]

Article 145 of the French New Code of Civil Procedure

Exhibit [ ]

Article L. 145 of the French New Code of Civil Procedure

8981

Article 145 of the French New Code of Civil Procedure

If there is a legitimate reason to preserve or to establish, before any legal process, the evidence of the facts upon which the resolution of the dispute might depend, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of a petition or by way of a summary procedure.

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Karen RENEL

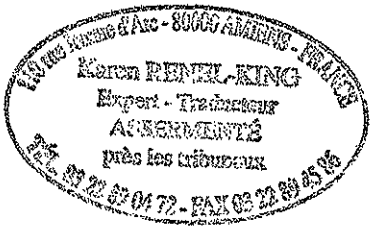

Exhibit [13]

Cour de cassation, deuxième chambre civile, 7 janvier 1999, n° 97-10381, Bull. n° 3

Cour de cassation
chambre civile 2
Audience publique du jeudi 7 janvier 1999
N° de pourvoi: 97-10831
Publié au bulletin

Rejet.

Président : M. Laplace, conseiller doyen faisant fonction. ., président
Rapporteur : M. Séné., conseiller rapporteur
Avocat général : M. Monnet., avocat général
Avocats : MM. Choucroy, Balat., avocat(s)

REPUBLIQUE FRANCAISE

AU NOM DU PEUPLE FRANCAIS

Sur le moyen unique :

Attendu, selon l'arrêt attaqué (Paris, 22 octobre 1996) que contestant les tarifs de location de salles de ventes aux enchères pratiqués par la société Drouot, la société civile professionnelle Guy Loudmer et Philippe Loudmer (la SCP), commissaire-priseur, a demandé à un juge des référés d'ordonner une mesure d'instruction sur le fondement de l'article 145 du nouveau Code de procédure civile ; que la société Drouot a interjeté appel de l'ordonnance qui avait accueilli cette demande ;

Attendu qu'il est fait grief à l'arrêt d'avoir rejeté la mesure d'instruction demandée, alors, selon le moyen, qu'il résulte des termes clairs et précis de l'ordonnance du 7 mai 1996 que la mesure d'investigation ordonnée par le premier juge avait pour objet précis et limité les tarifs de location des salles de ventes aux enchères, sous leur aspect discriminatoire à l'égard des commissaires-priseurs, si bien qu'en refusant d'ordonner la mesure d'instruction in futurum parce qu'il s'agirait d'une " mesure générale d'investigation ", la cour d'appel a dénaturé le dispositif de l'ordonnance infirmée du 7 mai 1996, violant l'article 1134 du Code civil ; alors que, d'autre part, dès lors que la mesure d'investigation avait pour objet précis le caractère discriminatoire des tarifs de location de salles de ventes aux enchères à l'égard des commissaires-priseurs, et que cet objet était aussi celui d'un litige potentiel entre les parties relatif à la mesure d'instruction demandée, la cour d'appel, dès lors qu'elle n'avait pas réfuté l'existence d'un motif légitime de la SCP de commissaires-priseurs d'établir, avant tout procès, la preuve de faits dont pourrait dépendre la solution de ce litige, ne pouvait refuser de confirmer la mesure d'instruction in futurum, sans priver sa décision de toute base légale au regard de l'article 145 du nouveau Code de procédure civile ; alors, en tout état de cause, qu'en jugeant sur le principe que la prescription d'une " mesure générale d'investigation " excédait le cadre d'une mesure d'instruction in futurum, la cour d'appel a ajouté une condition non exigée par l'article 145 du nouveau Code de procédure civile, violant cette disposition ;

Mais attendu que relevant, sans aucune dénaturation et par des appréciations souveraines sur l'existence d'un motif légitime, que la mesure d'instruction demandée s'analysait en une mesure générale d'investigation portant sur l'ensemble de l'activité de la société Drouot et tendant à apprécier cette activité et à la comparer avec celle de sociétés ayant le même objet, la cour d'appel n'a fait qu'user des pouvoirs qu'elle tient de l'article 145 du nouveau Code de procédure civile, en décidant sans ajouter au texte une condition qu'il ne contenait pas, que la mesure demandée excédait les prévisions de cet article ;

D'où il suit que le moyen n'est pas fondé ;

PAR CES MOTIFS :

REJETTE le pourvoi.

Publication : Bulletin 1999 II N° 3 p. 2

Décision attaquée : Cour d'appel de Paris, du 22 octobre 1996

Titrages et résumés : MESURES D'INSTRUCTION - Sauvegarde de la preuve avant tout procès - Mesure admissible - Mesure générale d'investigation - Ayant relevé que la mesure d'instruction demandée s'analysait

en une mesure générale d'investigation portant sur l'ensemble de l'activité d'une société et tendant à apprécier cette activité et à la comparer avec celle de sociétés ayant le même objet, une cour d'appel n'a fait qu'user des pouvoirs qu'elle tient de l'article 145 du nouveau Code de procédure civile, en décidant que la mesure demandée excédait les prévisions de cet article.

MESURES D'INSTRUCTION - Sauvegarde de la preuve avant tout procès - Mesure admissible - Mesure portant sur l'ensemble de l'activité d'une société (non) REFERE - Sauvegarde d'éléments de preuve avant tout procès - Domaine d'application - Mesure générale d'investigation (non) MESURES D'INSTRUCTION - Sauvegarde de la preuve avant tout procès - Motif légitime - Constatations suffisantes

Précédents jurisprudentiels:

Textes appliqués :

- Nouveau Code de procédure civile 145

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Exhibit [14]

Cour de cassation, second civil chamber, 7 January 1999, No 97-10381, Bulletin No 3

Exhibit [ ]

Cour de Cassation, second civil chamber, 7 January 1999, No. 97-10381, Bulletin No. 3

8182

After noting that the requested investigation measure was to be characterized as a general investigation measure covering all of a company's operations and tending to assess the same operations and to compare them with the operations of companies having the same corporate purpose, the Court of Appeals merely used its powers under Article 145 of the French New Code of Civil Procedure, by deciding that the requested measure exceeded the scope provided for in Article 145.

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Exhibit [15]

Article 10 et article 11 du nouveau Code de procédure civile

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LE SERVICE PUBLIC DE LA DIFFUSION DU DROIT

Code de procédure civile

- Livre I : Dispositions communes à toutes les juridictions
  - Titre I : Dispositions liminaires
    - Chapitre I : Les principes directeurs du procès
      - Section IV : Les preuves.

Article 10

Le juge a le pouvoir d'ordonner d'office toutes les mesures d'instruction légalement admissibles.

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Code de procédure civile

Article 11

Les parties sont tenues d'apporter leur concours aux mesures d'instruction sauf au juge à tirer toute conséquence d'une abstention ou d'un refus.

Si une partie détient un élément de preuve, le juge peut, à la requête de l'autre partie, lui enjoindre de le produire, au besoin à peine d'astreinte. Il peut, à la requête de l'une des parties, demander ou ordonner, au besoin sous la même peine, la production de tous documents détenus par des tiers s'il n'existe pas d'empêchement légitime.

Cité par:
Code du sport. - art. Annexe II-2 à l'article R232-86 (V)

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Exhibit [16]

Articles 10 and 11 of the French New Code of Civil Procedure

Exhibit [ ]

Articles 10 and 11 of the French New Code of Civil Procedure

Article 10 of the French New Code of Civil Procedure

The judge has the authority to order *sua sponte* any legally appropriate investigation measures.

Article 11 of the French New Code of Civil Procedure

The parties are obligated to cooperate with a view to the implementation of the investigation measures, and the Court shall determine any consequences of any abstention or refusal to so cooperate.

Where a party holds any evidence, the judge may, at the request of the other party, order the party holding the evidence to produce the same, where necessary under a periodic penalty payment. At the request of either party, the judge may also request or order, if necessary subject to the same penalty, the production of all documents held by third parties where there is no legitimate obstacle preventing such production.

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Exhibit [17]

Articles 133, 134, 138, 147, 148, 149, 156, 166 et 167 du nouveau Code de procédure civile

Legifrance.gouv.fr
LE SERVICE PUBLIC DE LA DIFFUSION DU DROIT

Code de procédure civile

- Livre I : Dispositions communes à toutes les juridictions
  - Titre VII : L'administration judiciaire de la preuve
    - Sous-titre I : Les pièces
      - Chapitre I : La communication des pièces entre les parties.

Article 133

Si la communication des pièces n'est pas faite, il peut être demandé, sans forme, au juge d'enjoindre cette communication.

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Code de procédure civile

- Livre I : Dispositions communes à toutes les juridictions
  - Titre VII : L'administration judiciaire de la preuve
    - Sous-titre I : Les pièces
      - Chapitre I : La communication des pièces entre les parties.

Article 134

Le juge fixe, au besoin à peine d'astreinte, le délai, et, s'il y a lieu, les modalités de la communication.

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Code de procédure civile

Article 138

Si, dans le cours d'une instance, une partie entend faire état d'un acte authentique ou sous seing privé auquel elle n'a pas été partie ou d'une pièce détenue par un tiers, elle peut demander au juge saisi de l'affaire d'ordonner la délivrance d'une expédition ou la production de l'acte ou de la pièce.

Code de procédure civile

- Livre I : Dispositions communes à toutes les juridictions
  - Titre VII : L'administration judiciaire de la preuve
    - Sous-titre II : Les mesures d'instruction
      - Chapitre I : Dispositions générales
        - Section I : Décisions ordonnant des mesures d'instruction.

Article 147

Le juge doit limiter le choix de la mesure à ce qui est suffisant pour la solution du litige, en s'attachant à retenir ce qui est le plus simple et le moins onéreux.

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Code de procédure civile

Article 148

Le juge peut conjuguer plusieurs mesures d'instruction. Il peut, à tout moment et même en cours d'exécution, décider de joindre toute autre mesure nécessaire à celles qui ont déjà été ordonnées.

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Code de procédure civile

Livre I : Dispositions communes à toutes les juridictions
Titre VII : L'administration judiciaire de la preuve
Sous-titre II : Les mesures d'instruction
Chapitre I : Dispositions générales
Section I : Décisions ordonnant des mesures d'instruction.

Article 149

Le juge peut à tout moment accroître ou restreindre l'étendue des mesures prescrites.

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Code de procédure civile

Article 156

Le juge peut se déplacer hors de son ressort pour procéder à une mesure d'instruction ou pour en contrôler l'exécution.

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Code de procédure civile

Article 166

Le juge chargé de procéder à une mesure d'instruction ou d'en contrôler l'exécution peut ordonner telle autre mesure d'instruction que rendrait opportune l'exécution de celle qui a déjà été prescrite.

Code de procédure civile

Article 167

Les difficultés auxquelles se heurterait l'exécution d'une mesure d'instruction sont réglées, à la demande des parties, à l'initiative du technicien commis, ou d'office, soit par le juge qui y procède, soit par le juge chargé du contrôle de son exécution.

Exhibit [18]

Articles 133, 134, 138, 147, 148, 149, 156, 166 et 167 of the French New Code of Civil Procedure

Exhibit [ ]

Articles 133, 134, 138, 147, 148, 149, 156, 166 and 167 of the French New Code of Civil Procedure

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Article 133 of the French New Code of Civil Procedure

If the relevant documents are not communicated (spontaneously), a petition may be submitted to the judge, without any formality, asking him to order such communication.

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Article 134 of the French New Code of Civil Procedure

The judge determines, if necessary subject to a periodical penalty payment, the time limit and where applicable the terms of the communication of evidence.

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Article 138 of the French New Code of Civil Procedure

If, during the proceedings, any party wishes to rely on any notarized deed or private deed to which the requesting party was not a party or to any document held by a third party, such requesting party may ask the judge, to whom the matter is referred, to order the delivery of a certified copy or to order the production to the court of the said deed or document.

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Article 147 of the French New Code of Civil Procedure

The judge must limit the order to what is sufficient for the resolution of the dispute, by seeking to select the simplest and least costly measures.

Article 148 of the French New Code of Civil Procedure

The judge may combine several inquiries. He may, at any time, even while such inquiries are being carried out, decide to add any other necessary inquiry to those that have already been ordered.

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Article 149 of the French New Code of Civil Procedure

The judge may, at any time, extend or restrict the scope of the prescribed inquiries.

8184

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Article 156 of the French New Code of Civil Procedure

The judge may travel outside his jurisdiction to implement the preparatory inquiry or to supervise its implementation.

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Article 166 of the French New Code of Civil Procedure

The judge, entrusted with preparatory inquiry or the supervision of its implementation, may order such other inquiry as would be made advisable by the implementation of the already ordered investigation.

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Article 167 of the French New Code of Civil Procedure

Any difficulties arising in connection with the implementation of the preparatory inquiry shall be settled, at the request of the parties, by the appointed expert, or *sua sponte*, either by the judge in charge or by the judge entrusted with the supervision of the inquiry.

Je, soussignée, Karen RENEL,
Traductrice Expert près la Cour d'Appel
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Décret n° 53914 Art. 8 du 26.9.1953).

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Exhibit [19]

Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Official Journal, L 145, 05/31/2001, p.43.

REGULATION (EC) No 1049/2001 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 30 May 2001

regarding public access to European Parliament, Council and Commission documents

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 255(2) thereof,

Having regard to the proposal from the Commission [1],

Acting in accordance with the procedure referred to in Article 251 of the Treaty [2],

Whereas:

(1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

(3) The conclusions of the European Council meetings held at Birmingham, Edinburgh and Copenhagen stressed the need to introduce greater transparency into the work of the Union institutions. This Regulation consolidates the initiatives that the institutions have already taken with a view to improving the transparency of the decision-making process.

(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.

(5) Since the question of access to documents is not covered by provisions of the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, the European Parliament, the Council and the Commission should, in accordance with Declaration No 41 attached to the Final Act of the Treaty of Amsterdam, draw guidance from this Regulation as regards documents concerning the activities covered by those two Treaties.

(6) Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.

(7) In accordance with Articles 28(1) and 41(1) of the EU Treaty, the right of access also applies to documents relating to the common foreign and security policy and to police and judicial cooperation in criminal matters. Each institution should respect its security rules.

(8) In order to ensure the full application of this Regulation to all activities of the Union, all agencies established by the institutions should apply the principles laid down in this Regulation.

(9) On account of their highly sensitive content, certain documents should be given special treatment. Arrangements for informing the European Parliament of the content of such documents should be made through interinstitutional agreement.

(10) In order to bring about greater openness in the work of the institutions, access to documents should be granted by the European Parliament, the Council and the Commission not only to documents drawn up by the institutions, but also to documents received by them. In this context, it is recalled that Declaration No 35 attached to the Final Act of the Treaty of Amsterdam provides that a Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement.

(11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.

(12) All rules concerning access to documents of the institutions should be in conformity with this Regulation.

[1] OJ C 177 E, 27.6.2000, p. 70.
[2] Opinion of the European Parliament of 3 May 2001 (not yet published in the Official Journal) and Council Decision of 28 May 2001.

(13) In order to ensure that the right of access is fully respected, a two-stage administrative procedure should apply, with the additional possibility of court proceedings or complaints to the Ombudsman.

(14) Each institution should take the measures necessary to inform the public of the new provisions in force and to train its staff to assist citizens exercising their rights under this Regulation. In order to make it easier for citizens to exercise their rights, each institution should provide access to a register of documents.

(15) Even though it is neither the object nor the effect of this Regulation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions.

(16) This Regulation is without prejudice to existing rights of access to documents for Member States, judicial authorities or investigative bodies.

(17) In accordance with Article 255(3) of the EC Treaty, each institution lays down specific provisions regarding access to its documents in its rules of procedure. Council Decision 93/731/EC of 20 December 1993 on public access to Council documents [1], Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents [2], European Parliament Decision 97/632/EC, ECSC, Euratom of 10 July 1997 on public access to European Parliament documents [3], and the rules on confidentiality of Schengen documents should therefore, if necessary, be modified or be repealed,

HAVE ADOPTED THIS REGULATION:

Article 1

Purpose

The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as 'the institutions') documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents,

(b) to establish rules ensuring the easiest possible exercise of this right, and

(c) to promote good administrative practice on access to documents.

Article 2

Beneficiaries and scope

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

2. The institutions may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

4. Without prejudice to Articles 4 and 9, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register. In particular, documents drawn up or received in the course of a legislative procedure shall be made directly accessible in accordance with Article 12.

5. Sensitive documents as defined in Article 9(1) shall be subject to special treatment in accordance with that Article.

6. This Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them.

Article 3

Definitions

For the purpose of this Regulation:

(a) 'document' shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;

(b) 'third party' shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.

[1] OJ L 340, 31.12.1993, p. 43. Decision as last amended by Decision 2000/527/EC (OJ L 212, 23.8.2000, p. 9).
[2] OJ L 46, 18.2.1994, p. 58. Decision as amended by Decision 96/567/EC, ECSC, Euratom (OJ L 247, 28.9.1996, p. 45).
[3] OJ L 263, 25.9.1997, p. 27.

Article 4

Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:
- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:
- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

Article 5

Documents in the Member States

Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation.

The Member State may instead refer the request to the institution.

Article 6

Applications

1. Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 of the EC Treaty and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.

2. If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.

3. In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

4. The institutions shall provide information and assistance to citizens on how and where applications for access to documents can be made.

Article 7

Processing of initial applications

1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.

3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application.

Article 8

Processing of confirmatory applications

1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.

2. *In exceptional cases, for example in the event of an* application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

3. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.

Article 9

Treatment of sensitive documents

1. Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as 'TRÈS SECRET/TOP SECRET', 'SECRET' or 'CONFIDENTIEL' in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.

2. Applications for access to sensitive documents under the procedures laid down in Articles 7 and 8 shall be handled only by those persons who have a right to acquaint themselves with those documents. These persons shall also, without prejudice to Article 11(2), assess which references to sensitive documents could be made in the public register.

3. *Sensitive documents shall* be recorded in the register or released only with the consent of the originator.

4. An institution which decides to refuse access to a sensitive document shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4.

5. Member States shall take appropriate measures to ensure that when handling applications for sensitive documents the *principles in this Article and Article 4 are respected.*

6. The rules of the institutions concerning sensitive documents shall be made public.

7. The Commission and the Council shall inform the European Parliament regarding sensitive documents in accordance with arrangements agreed between the institutions.

Article 10

Access following an application

1. The applicant shall have access to documents either by consulting them on the spot or by receiving a copy, including, where available, an electronic copy, according to the applicant's preference. The cost of producing and sending copies may be charged to the applicant. This charge shall not exceed the real cost of producing and sending the copies. Consultation on the spot, copies of less than 20 A4 pages and direct access in electronic form or through the register shall be free of charge.

2. If a document has already been released by the institution concerned and is easily accessible to the applicant, the institution *may fulfil its obligation of granting access to documents* by informing the applicant how to obtain the requested document.

3. *Documents shall* be supplied in an existing version and format (including electronically or in an alternative format such as Braille, large print or tape) with full regard to the applicant's preference.

Article 11

Registers

1. To make citizens' rights under this Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay.

2. For each document the register shall contain a reference number (including, where applicable, the interinstitutional reference), the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be *made in a manner which does not undermine protection of the* interests in Article 4.

3. The institutions shall immediately take the measures necessary to establish a register which shall be operational by 3 June 2002.

Article 12

Direct access in electronic form or through a register

1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.

2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.

3. Where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible.

4. Where direct access is not given through the register, the register shall as far as possible indicate where the document is located.

Article 13

Publication in the Official Journal

1. In addition to the acts referred to in Article 254(1) and (2) of the EC Treaty and the first paragraph of Article 163 of the Euratom Treaty, the following documents shall, subject to Articles 4 and 9 of this Regulation, be published in the Official Journal:

(a) Commission proposals;

(b) common positions adopted by the Council in accordance with the procedures referred to in Articles 251 and 252 of the EC Treaty and the reasons underlying those common positions, as well as the European Parliament's positions in these procedures;

(c) framework decisions and decisions referred to in Article 34(2) of the EU Treaty;

(d) conventions established by the Council in accordance with Article 34(2) of the EU Treaty;

(e) conventions signed between Member States on the basis of Article 293 of the EC Treaty;

(f) international agreements concluded by the Community or in accordance with Article 24 of the EU Treaty.

2. As far as possible, the following documents shall be published in the Official Journal:

(a) initiatives presented to the Council by a Member State pursuant to Article 67(1) of the EC Treaty or pursuant to Article 34(2) of the EU Treaty;

(b) common positions referred to in Article 34(2) of the EU Treaty;

(c) directives other than those referred to in Article 254(1) and (2) of the EC Treaty, decisions other than those referred to in Article 254(1) of the EC Treaty, recommendations and opinions.

3. Each institution may in its rules of procedure establish which further documents shall be published in the Official Journal.

Article 14

Information

1. Each institution shall take the requisite measures to inform the public of the rights they enjoy under this Regulation.

2. The Member States shall cooperate with the institutions in providing information to the citizens.

Article 15

Administrative practice in the institutions

1. The institutions shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by this Regulation.

2. The institutions shall establish an interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents.

Article 16

Reproduction of documents

This Regulation shall be without prejudice to any existing rules on copyright which may limit a third party's right to reproduce or exploit released documents.

Article 17

Reports

1. Each institution shall publish annually a report for the preceding year including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register.

2. At the latest by 31 January 2004, the Commission shall publish a report on the implementation of the principles of this Regulation and shall make recommendations, including, if appropriate, proposals for the revision of this Regulation and an action programme of measures to be taken by the institutions.

Article 18

Application measures

1. Each institution shall adapt its rules of procedure to the provisions of this Regulation. The adaptations shall take effect from 3 December 2001.

2. Within six months of the entry into force of this Regulation, the Commission shall examine the conformity of Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community [1] with this Regulation in order to ensure the preservation and archiving of documents to the fullest extent possible.

3. Within six months of the entry into force of this Regulation, the Commission shall examine the conformity of the existing rules on access to documents with this Regulation.

Article 19

Entry into force

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Communities*.

It shall be applicable from 3 December 2001.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 30 May 2001.

For the European Parliament	*For the Council*
The President	*The President*
N. FONTAINE	B. LEJON

[1] OJ L 43, 15.2.1983, p. 1.

Exhibit [20]

Judgment of the Court of first instance of the European Communities, 13 April 2005, Verein für Konsumenteninformation (VKI) v. Commission of the European Communities, case T-2/03

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)

13 April 2005 (*)

(Access to documents – Regulation (EC) No 1049/2001 – Request relating to a very large number of documents – Total refusal of access – Obligation to carry out a concrete, individual examination – Exceptions)

In Case T-2/03,

Verein für Konsumenteninformation, established in Vienna (Austria), represented by A. Klauser, lawyer,

applicant,

v

Commission of the European Communities, represented by S. Rating and P. Aalto, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

Bank für Arbeit und Wirtschaft AG, established in Vienna, represented by H.-J. Niemeyer, lawyer, with an address for service in Luxembourg,

and by

ÖsterreichischeVolksbanken AG, established in Vienna,

and

Niederösterreichische Landesbank-Hypothekenbank AG, established in Sankt Pölten (Austria),

represented by R. Roniger, A. Ablasser and W. Hemetsberger, lawyers,

interveners,

APPLICATION for annulment of Commission Decision D (2002) 330472 of 18 December 2002 relating to a request for access to the administrative file in Case COMP/36.571/D-1, Austrian banks – 'Lombard Club',

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (First Chamber, Extended Composition),

composed of B. Vesterdorf, President, M. Jaeger, P. Mengozzi, M.E. Martins Ribeiro and I. Labucka, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 28 September 2004,

gives the following

Judgment

Legal framework

1 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) defines the principles, conditions and limits governing the right of access to documents of those institutions, provided for in Article 255 EC. That regulation has been applicable since 3 December 2001.

2 Commission Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure (OJ 2001 L 345, p. 94) repealed Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58), which ensured that effect was given, as regards the Commission, to the code of conduct on public access to Council and Commission documents (OJ 1993 L 340, p. 41, 'the code of conduct').

3 Article 2 of Regulation No 1049/2001 provides:

'1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

...

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

...'

4 Article 3 of Regulation No 1049/2001 lays down certain definitions as follows:

'For the purpose of this Regulation:

(a) "document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;

(b) "third party" shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.'

5 Article 4 of Regulation No 1049/2001, relating to the exceptions to the abovementioned right of access, states:

'1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

...

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,

- court proceedings and legal advice,

- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

...

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

...'

Background to the dispute

6 The Verein für Konsumenteninformation ('the VKI' or 'the applicant') is a consumer organisation constituted under Austrian law. In order to facilitate its task of safeguarding the interests of consumers, Austrian law confers on the VKI the right to bring proceedings before the Austrian civil courts in order to assert certain financial claims of consumers, which the latter have previously assigned to it.

7 By Decision 2004/138/EC of 11 June 2002 relating to a proceeding under Article 81 of the EC Treaty (in Case COMP/36.571/D-1: Austrian banks – 'Lombard Club') (OJ 2004 L 56, p. 1), the Commission found that eight Austrian banks had participated, over a number of years, in a cartel known as the 'Lombard Club' covering almost the whole of Austria ('the Lombard Club decision'). In the Commission's view, the banks referred to had, within that cartel, inter alia, fixed jointly the interest rates for certain investments and loans. The Commission therefore imposed fines totalling EUR 124.26 million on those banks, which included in particular the Bank für Arbeit und Wirtschaft AG ('BAWAG'), the Österreichische Volksbanken-AG ('ÖVAG') and the Niederösterreichische Landesbank-Hypothekenbank AG ('NÖ-Hypobank').

8 The VKI is currently conducting several sets of proceedings against BAWAG before the Austrian courts. In those proceedings, the VKI claims that, on account of an incorrect adjustment of the interest rates applicable to variable-interest loans granted by BAWAG, the latter charged its customers too much interest over a number of years.

9 By letter of 14 June 2002, the applicant requested authorisation from the Commission to consult the administrative file relating to the Lombard Club decision. In support of its request, the VKI stated inter alia that, in order to secure damages for the consumers on whose behalf it was acting, it had to be able to put forward specific claims regarding both the illegality of BAWAG's conduct under competition law and the effects of that conduct. To that end, consultation of the Lombard Club file would have been a significant, or even indispensable, help to it.

10 By letter of 3 July 2002, the Commission asked the VKI to clarify its request and, in particular, its legal basis. In reply to that letter, the VKI stated, by letter of 8 July 2002, that its request was based inter alia on Article 255(1) and (2) EC, on Regulation No 1049/2001, on the provisions implementing that regulation and on Article 42 of the Charter of fundamental rights of the European Union proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1, 'the Charter of fundamental rights'), as well as on Articles 5 EC and 10 EC.

11 On 24 July 2002, at a meeting with the Commission's staff, the representatives of the VKI raised the possibility that the applicant could give an undertaking in writing to use the information obtained solely for the purpose of asserting consumers' claims in the national proceedings against BAWAG.

12 By letter of 12 August 2002, the VKI supplemented its request by confirming that it was prepared

to give the undertaking mentioned at the meeting on 24 July 2002.

13 By letter of 12 September 2002, the Commission, basing its decision on Regulation No 1049/2001, rejected the VKI's request in its entirety.

14 On 26 September 2002, the VKI made a confirmatory request as referred to in Article 7((2) of Regulation No 1049/2001, in which it stated, inter alia, while maintaining its request, that it was not interested primarily in the Commission's internal documents.

15 On 14 October 2002, the Commission acknowledged receipt of that confirmatory request and informed the applicant that, owing to the number of documents requested, the time-limit for replying which was applicable to the processing of its request was extended by 15 working days.

16 On 18 December 2002, the Commission adopted Decision D (2002) 330472 relating to a request for access to the administrative file in Case COMP/36.571/D-1, Austrian banks - 'Lombard Club' ('the contested decision'). The contested decision confirms the rejection of 12 September 2002.

17 In the contested decision, the Commission divided, in the first place, the documents in the Lombard Club file, except for the internal documents, into 11 separate categories. Excluding internal documents, that file contains more than 47 000 pages.

18 In the second place, the Commission detailed the reasons on which it based its view that each of the categories previously identified was covered by one or more of the exceptions provided for by Regulation No 1049/2001.

19 In the third place, the Commission took the view that, in cases where the application of certain exceptions would necessitate a balancing of the conflicting interests, the VKI had not referred to an overriding public interest in the access requested.

20 In the fourth place, the Commission listed the reasons why partial access was not possible in this case. In the Commission's view, a detailed examination of each document, which was necessary for any partial consultation, would have represented an excessive and disproportionate amount of work for it.

21 In the fifth place, the Commission took the view that no consultation of third parties in order to consider possible access to the documents of which they were the authors was necessary in this case since, pursuant to Article 4(4) of Regulation No 1049/2001, it was clear that those documents did not have to be disclosed.

22 The Commission concluded in the contested decision that the applicant's request for access had to be rejected in its entirety.

Procedure before the Court of First Instance

23 By application lodged at the Registry of the Court of First Instance on 7 January 2003, the VKI brought an action for annulment of the contested decision. By separate document lodged on the same day, it applied to have that action adjudicated on under an expedited procedure in accordance with Article 76a of the Rules of Procedure of the Court of First Instance.

24 By separate document lodged on 8 January 2003, the VKI applied for legal aid.

25 On 20 January 2003, the Commission lodged its observations on the application for an expedited procedure.

26 The First Chamber of the Court of First Instance, to which the case was assigned by decision of 20 January 2003, rejected the application for an expedited procedure by a decision of 28 January 2003, which was notified to the applicant on the following day.

27 On 18 February 2003, the Commission lodged its observations on the application for legal aid.

28 On 10 March 2003, the Commission lodged its defence.

29 The applicant's application for legal aid was rejected by order of the President of the Court of 14 March 2003.

30 By letter of 1 April 2003, the applicant waived its right to lodge a reply.

31 On 15 April 2003, BAWAG lodged an application to intervene in support of the form of order sought by the Commission. The Kingdom of Sweden and the Republic of Finland applied, on 16 and 25 April respectively, to intervene in support of the form of order sought by the VKI. Finally, on 29 April 2003, ÖVAG and NÖ-Hypobank jointly applied to intervene in support of the form of order sought by the Commission.

32 By order of the President of the First Chamber of the Court of First Instance of 1 August 2003, the Republic of Finland and the Kingdom of Sweden were granted leave to intervene in support of the form of order sought by the applicant. In the same order, BAWAG, on the one hand, and ÖVAG and NÖ-Hypobank, on the other, were granted leave to intervene in support of the form of order sought by the Commission.

33 Those applications having been made within the period prescribed in Article 115(1) of the Rules of Procedure, the interveners received, pursuant to Article 116(2) of the Rules of Procedure, a copy of every document served on the parties.

34 The Republic of Finland and the Kingdom of Sweden lodged, on 10 and 12 September 2003 respectively, applications to withdraw their interventions.

35 On 26 September 2003, BAWAG, on the one hand, and ÖVAG and NÖ-Hypobank, on the other, lodged their statements in intervention.

36 Since the VKI and the Commission did not lodge any observations on the applications to withdraw lodged by the Republic of Finland and the Kingdom of Sweden, the President of the First Chamber, by order of 6 November 2003, removed from the file of this case the interventions of those interveners and ordered the VKI and the Commission to bear their own costs in respect of those interventions.

37 On 14 November 2003, the applicant lodged its written observations on the statements in intervention, whereas those of the Commission were lodged on 11 November 2003.

38 Pursuant to Article 14 of the Rules of Procedure and acting on a proposal from the First Chamber, the Court decided, after the parties had been heard in accordance with Article 51 of those rules, to refer the case to a Chamber with an extended composition.

39 Upon hearing the Report of the Judge-Rapporteur, the Court (First Chamber, Extended Composition) decided to open the oral procedure and, as a measure of organisation of procedure provided for in Article 64 of the Rules of Procedure, put certain questions in writing to the Commission and the interveners.

40 On 6 July 2004, the Commission and the interveners replied in writing to the Court's questions.

41 The parties presented oral argument and their replies to the Court's questions at the hearing on 28 September 2004.

Forms of order sought by the parties

42 The applicant claims that the Court should:

- annul the contested decision;
- order the production of, and examine, the file in question with a view to determining whether the claims of the VKI are well founded;

- order the Commission to pay the costs.

43 The Commission contends that the Court should:

- dismiss the action;

- order the applicant to pay the costs.

44 BAWAG, in support of the Commission, submits that the Court should:

- dismiss the action;

- order the applicant to pay the costs, including those incurred by the intervener.

45 Finally, ÖVAG and NÖ-Hypobank, in support of the Commission, submit that the Court should:

- dismiss the action;

- order the applicant to pay the costs.

Law

The framework of the dispute and the admissibility of certain arguments put forward by the interveners

46 It is not disputed that the Commission adopted the contested decision under Regulation No 1049/2001.

47 The VKI's action is based, essentially, on six pleas. By its first plea, the VKI submits that it is incompatible with the right of access to documents and, in particular, with Regulation No 1049/2001 to refuse access to the whole of an administrative file without having first actually examined each of the documents contained in the file. In its second plea, the VKI claims that the Commission applied or interpreted incorrectly several of the exceptions provided for in Article 4(1) and (2) of Regulation No 1049/2001. In its third plea, the VKI argues that the Commission concluded unlawfully that the balance of the conflicting interests was not in favour of disclosure of the administrative file referred to by its request. In its fourth plea, the VKI maintains that the Commission should, at the very least, have granted it partial access to the file. By its fifth plea, the VKI claims that the failure to consult the banks which were the authors of certain documents constitutes an infringement of Article 4(4) of Regulation No 1049/2001. Finally, in its sixth plea, the applicant complains that the Commission infringed Article 255 EC, Article 42 of the Charter of fundamental rights and Articles 5 EC and 10 EC.

48 In their statements in intervention, BAWAG, on the one hand, and ÖVAG and NÖ-Hypobank, on the other, put forward a number of arguments ('the additional arguments') intended to show, in the first place, that Regulation No 1049/2001 applies only to documents produced during the Community legislative process, in the second place, that the right of access to documents concerning competition cases was, at the material time, governed only by Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), in the third place, that an association with public-law status does not enjoy the right of access provided for by Regulation No 1049/2001, in the fourth place, that the VKI's request for access was unlawful under Regulation No 1049/2001, in the fifth place, that Regulation No 1049/2001 is contrary to Article 255 EC in that it allows access to documents originating from third parties and, in the sixth place, that that regulation can apply only to documents which came into the possession of the institutions after it became applicable, that is, from 3 December 2001.

49 The additional arguments thus seek to demonstrate, firstly, that Regulation No 1049/2001 was not applicable in this case, or, secondly, that it was applied incorrectly by the Commission, or, thirdly, that it constitutes an unlawful legal basis for the contested decision.

50 Consequently, if one or more of the additional arguments were to be accepted by the Court, that would permit a finding that the contested decision is unlawful. However, it should be pointed out

that the interveners were granted leave to intervene in this case in support of the form of order sought by the Commission and that, moreover, the latter contends that the action for annulment should be dismissed.

51 When questioned in writing and at the hearing about the compatibility of the additional arguments with the form of order supported by the interveners, the latter replied in essence that, according to case-law, an intervener is entitled to advance arguments which differ from or even conflict with those of the party which he supports (Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, 17 and 18, and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale* v *Commission* [2003] ECR II-435, paragraph 145).

52 However, under the fourth paragraph of Article 40 of the Statute of the Court of Justice, which applies to the Court of First Instance by virtue of Article 53 of that Statute, an application to intervene must be limited to supporting the form of order sought by one of the parties. In addition, under Article 116(3) of the Rules of Procedure, the intervener must accept the case as it finds it at the time of its intervention. Although those provisions do not preclude an intervener from using arguments different from those used by the party it is supporting, that is nevertheless on the condition that they do not alter the framework of the dispute and that the intervention is still intended to support the form of order sought by that party (see, to that effect, Case C-245/92 P *Chemie Linz* v *Commission* [1999] ECR I-4643, paragraph 32; Case C-248/99 P *France* v *Monsanto and Commission* [2002] ECR I-1, paragraph 56; and Case T-119/02 *Royal Philips Electronics* v *Commission* [2003] ECR II-1433, paragraphs 203 and 212).

53 In this case, since, on the one hand, assuming that they are well founded, the additional arguments would permit a finding that the contested decision is unlawful and since, on the other hand, the form of order sought by the Commission is the dismissal of the action for annulment and is not supported by arguments seeking a declaration that the contested decision is unlawful, it is clear that consideration of the additional arguments would have the effect of altering the framework of the dispute as defined in the application and the defence (see, to that effect, Joined Cases T-447/93 to T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraph 122, and Case T-243/94 *British Steel* v *Commission* [1997] ECR II-1887, paragraphs 72 and 73).

54 Moreover, the interveners' claim that the additional arguments support, in essence, the form of order sought by the Commission, namely, refusal of the access to documents requested by the applicant, must be rejected. Firstly, in this case, the Commission has certainly not contended that the requested access to the documents at issue should be refused regardless of the reasons for the contested decision, but only that the action for annulment should be dismissed. Secondly, it is not for the Court, when reviewing the lawfulness of a measure, to assume the role of the Commission and determine whether access to the contested documents is to be refused for reasons other than those mentioned in the contested decision.

55 The additional arguments must therefore be rejected as inadmissible.

The first plea, alleging failure to carry out a concrete examination of the documents referred to in the request for access, and the fourth plea, alleging infringement of the right to partial access

56 The first and fourth pleas put forward by the applicant must be examined first and together.

Arguments of the parties

– The first plea, alleging failure to carry out a concrete examination of the documents referred to in the request for access

57 In its first plea, the VKI claims that, in the contested decision, the Commission, contrary to Regulation No 1049/2001, exempted the whole of the Lombard Club file from the right of access without carrying out a concrete examination of each of the documents contained in that file. However, only actual circumstances applying to specific documents can justify an exception to the right of access to those documents.

58 In reply to the applicant's first plea, the Commission contends that, in this case, it is not necessary to determine whether it refused access to all the documents referred to in the request for access, but only whether it gave a proper statement of reasons for its refusal in respect of all those documents. However, the Commission certainly did not, in this case, exclude the whole of the Lombard Club file from the right of access but, on the contrary, explained why the reasons for

refusal listed in Article 4 of Regulation No 1049/2002 precluded disclosure of the documents in that file.

59 The Commission adds that it is not contrary to Community law to refuse access to various categories of documents without examining each of the documents in those categories where, as in this case, the reasons for the Commission's refusal are stated in respect of each category. The Court has expressly held that the Commission is entitled to subdivide a file into categories, to which it may then refuse access altogether, provided that it mentions the reasons for its refusal (Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313, paragraph 64).

60 Finally, the Commission points out that examination of the various documents and parts of documents within those categories did not take place since the effort involved in such an operation would have been disproportionate.

– The fourth plea, alleging infringement of the right to partial access

61 The VKI submits that total refusal of access to the file would have been justified only if all the documents in it were covered by at least one of the exceptions in Article 4 of Regulation No 1049/2001. Since that condition was not satisfied in this case, the applicant should at least have been entitled to partial access. The Commission's 'commendable' concern to limit its workload cannot have the consequence of destroying the chances of compensation for the damage suffered by consumers as the result of a cartel.

62 The Commission challenges the validity of those arguments. It acknowledges that the case-law of the Court of Justice and the Court of First Instance recognises the existence of a right of partial access to documents. The Commission none the less points out that such access may be refused where it involves a disproportionate effort for the institution concerned.

63 The effort required for a file of more than 47 000 pages is bound to be disproportionate. That is at the very least the case where, on the one hand, the number of documents likely to be made available in each relevant category is very small and, on the other hand, those documents are manifestly of no use. Since the documents in the file are arranged in chronological order, any partial access would involve reviewing it in its entirety. Moreover, the task of drawing up a table of contents for the whole file would, having regard to the application of the exceptions in Article 4 of Regulation No 1049/2001, be just as disproportionate as partial access. The Commission concedes that the disproportionate nature of the effort involved does not in itself constitute a reason for refusal. However, where it is clear from an analysis of strictly-defined categories of documents that access must be refused, no additional examination of each document within the relevant category is justified.

64 Both BAWAG and ÖVAG and NÖ-Hypobank essentially support the arguments of the Commission. They point out that where an applicant has expressly indicated its interest in its request for access, it is disproportionate to require the institution to which that request is made to grant partial access to documents which do not serve the purpose of the request.

Findings of the Court

65 It is common ground that the Commission did not carry out a concrete, individual examination of the documents comprising the Lombard Club file. At the hearing, the Commission confirmed that, in response to the applicant's confirmatory request, it had divided the Lombard Club file, excluding the internal documents, into 11 separate categories of documents, although without examining each of the documents. It is also clear from the contested decision that, after defining those categories, the Commission considered that 'one or more exceptions provided for in Article 4 of Regulation No 1049/2001 appl[ied] to each category of document, without there being any overriding public interest in disclosure'. The Commission then stated that, 'for reasons of proportionality, it [did] not appear either necessary or expedient to undertake an examination of the documents beyond the abovementioned categories'. The Commission further stated, 'as a subsidiary consideration', that publication of the Lombard Club decision was sufficient to 'safeguard' the interests of the applicant.

66 In the light of those considerations, it must therefore be determined whether the Commission was obliged, in principle, to carry out a concrete, individual examination of the documents referred to in the request for access, then, if so, to examine to what extent that obligation to examine could be qualified by certain exceptions based, inter alia, on the amount of work entailed by it.

– The obligation to carry out a concrete, individual examination

67 Article 2 of Regulation No 1049/2001 defines the principle of the right of access to documents of the institutions. Article 4 of Regulation No 1049/2001 sets out a number of exceptions to the right of access. Finally, Articles 6 to 8 of Regulation No 1049/2001 lay down certain procedures according to which a request for access must be processed.

68 The effect of those provisions is that the institution to which a request for access is made under Regulation No 1049/2001 is obliged to examine and reply to that request and, in particular, to determine whether any of the exceptions referred to in Article 4 of the regulation is applicable to the documents in question.

69 According to settled case-law, the examination required for the purpose of processing a request for access to documents must be specific in nature. On the one hand, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception (see, to that effect, Case T-20/99 *Denkavit Nederland* v *Commission* [2000] ECR II-3011, paragraph 45). Such application may, in principle, be justified only if the institution has previously assessed, firstly, whether access to the document would specifically and actually undermine the protected interest and, secondly, in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, there is no overriding public interest in disclosure. On the other hand, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical (see, to that effect, Case T-211/00 *Kuijer* v *Council* [2002] ECR II-485, paragraph 56, '*Kuijer II*'). Consequently, the examination which the institution must undertake in order to apply an exception must be carried out in a concrete manner and must be apparent from the reasons for the decision (see, to that effect, Case T-188/98 *Kuijer* v *Council* [2000] ECR II-1959, paragraph 38, '*Kuijer I*', and Case T-14/98 *Hautala* v *Council* [1999] ECR II-2489, paragraph 67).

70 That concrete examination must, moreover, be carried out in respect of each document referred to in the request for access. It is apparent from Regulation No 1049/2001 that all the exceptions mentioned in Article 4(1) to (3) are specified as being applicable to 'a document'.

71 The need for such a concrete, individual examination, as opposed to an abstract, general examination, is also confirmed by the case-law concerning the application of the code of conduct.

72 On the one hand, the code of conduct, the principles of which were in part reproduced in Article 4 of Regulation No 1049/2001, contained a first category of exceptions requiring the institution to refuse access to a document where disclosure 'could undermine' the interests protected by those exceptions. The Court has consistently held that the use of the conditional form 'could' means that before deciding on a request for access to documents the Commission must consider, 'for each document requested', whether, in the light of the information in its possession, disclosure is in fact likely to undermine one of the interests protected by the exceptions (Case T-124/96 *Interporc* v *Commission* [1998] ECR II-231, paragraph 52, and Case T-123/99 *JT's Corporation* v *Commission* [2000] ECR II-3269, paragraph 64). In view of the fact that the conditional form is maintained in Article 4(1) to (3) of Regulation No 1049/2001, the case-law developed in connection with the code of conduct is capable of being applied to Regulation No 1049/2001. It must therefore be held that an institution is obliged to assess in a concrete and individual manner whether exceptions to the right of access apply to each of the documents referred to in a request.

73 On the other hand, as the Commission rightly points out, the Court has in fact held, in essence, in its judgment in *WWF UK* v *Commission*, cited in paragraph 59 above (paragraph 64), that an institution is required to indicate, at the very least by reference to categories of documents, the reasons for which it considers that the documents detailed in the request received by it are related to a category of information covered by an exception. Nevertheless, regardless of whether the paragraph relied on by the Commission lays down only a rule that reasons must be stated, a concrete, individual examination is in any event necessary where, even if it is clear that a request for access refers to documents covered by an exception, only such an examination can enable the institution to assess the possibility of granting the applicant partial access under Article 4(6) of Regulation No 1049/2001. In the context of applying the code of conduct, the Court has moreover already rejected as insufficient an assessment of documents by reference to categories rather than on the basis of the actual information contained in those documents, since the examination required of an institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents (*JT's Corporation* v *Commission*, cited in paragraph 72 above, paragraph 46).

74 It must therefore be concluded that where an institution receives a request for access under Regulation No 1049/2001 it is required, in principle, to carry out a concrete, individual assessment of the content of the documents referred to in the request.

75 However, that approach, to be adopted in principle, does not mean that such an examination is required in all circumstances. Since the purpose of the concrete, individual examination which the institution must in principle undertake in response to a request for access made under Regulation No 1049/2001 is to enable the institution in question to assess, on the one hand, the extent to which an exception to the right of access is applicable and, on the other, the possibility of partial access, such an examination may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted. Such could be case, inter alia, if certain documents were either, first, manifestly covered in their entirety by an exception to the right of access or, conversely, manifestly accessible in their entirety, or, finally, had already been the subject of a concrete, individual assessment by the Commission in similar circumstances.

76 In this case, it is common ground that the Commission based the contested decision on a general analysis by reference to categories of documents of the Lombard Club file. It is also established that the Commission did not carry out a concrete, individual examination of the documents referred to in the request for access in order to assess whether the exceptions relied on applied or whether partial access could be granted.

77 It must therefore be examined whether the applicant's request related to documents in respect of which, by reason of the circumstances of the case, it was not necessary to carry out such a concrete, individual examination.

78 In that regard, the Commission took the view, in the contested decision, that the documents referred to in the applicant's request were covered by four separate exceptions to the right of access.

79 The first of the exceptions relied on by the Commission concerns the protection of the purpose of inspections, referred to in the third indent of Article 4(2) of Regulation No 1049/2001. In the contested decision, the Commission justified the application of that exception on the basis, in essence, of two factors.

80 Firstly, according to the Commission, the Lombard Club decision is the subject-matter of a number of actions for annulment before the Court of First Instance which are still pending and on which the latter has therefore not yet ruled. Consequently, access by third parties to those documents could affect the new assessment it might be called upon to make if its decision were annulled and might lead the applicants to raise certain pleas in those actions.

81 Secondly, according to the Commission, a large number of the documents in the file were provided by the undertakings penalised in the Lombard Club decision, either on the basis of the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4), which was applicable at the material time, or in connection with requests for information or investigations under Articles 11 and 14 of Regulation No 17. Consequently, allowing third parties access to those documents would deter undertakings from cooperating with the Commission and would be detrimental to inspections and investigations in future cases. The same reasoning applies to documents drawn up by third parties.

82 The Court is of the view, however, that the Commission was not entitled to reach such a general conclusion applicable to the whole of the Lombard Club file without having first carried out a concrete, individual examination of the documents comprising it.

83 Firstly, it is not clear from the contested decision that the Commission specifically ascertained that each document referred to in the request was in fact included in one of the 11 categories identified. On the contrary, the reasons for the contested decision, which were confirmed by the Commission at the hearing, indicate that the manner in which the Commission carried out that division was, at least in part, abstract. The Commission seems to have acted more on the basis of what it imagined the content of the documents in the Lombard Club file to be than on the basis of an actual examination. That division into categories therefore remains approximate, both from the point of view of its exhaustiveness and from the point of view of its accuracy.

84 Secondly, the considerations set out by the Commission in the contested decision, as moreover in

its defence, remain vague and general. In the absence of an individual examination, that is to say, document by document, they do not demonstrate with sufficient certainty and detail that the Commission's argument, even if well founded in principle, applies to all the documents in the Lombard Club file. The fears expressed by the Commission remain mere assertions and are, consequently, utterly hypothetical.

85 There is nothing to show that all the documents referred to in the request are clearly covered by the exception relied on. In point 1 of the contested decision, the Commission itself notes that 'the exception provided for in the third indent of Article 4(2) applies in large part to certain documents, or even in full to all the categories'.

86 It is true that, in the table which it attached to its defence, the Commission stated that, in its view, the exception relied on applied to all the documents referred to in the file. However, as is clear from the considerations set out in the preceding paragraph, that table contradicts the reasons for the contested decision.

87 Finally, and in any event, it is not apparent from the reasons given for the contested decision that each of the documents comprising the Lombard Club file, taken individually, is covered in its entirety by the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001. It is not clear that disclosure of any information contained in them would undermine the purposes of the Commission's inspections and investigations.

88 The absence of any concrete, individual examination of the documents referred to by the applicant's request is therefore not justified in the case of the documents allegedly covered by the first exception relied on by the Commission.

89 The same finding must apply with regard to the documents covered, according to the contested decision, by the second, third and fourth exceptions. Those exceptions relate to the protection of commercial interests (first indent of Article 4(2) of Regulation No 1049/2001), the protection of court proceedings (second indent of Article 4(2)) and the protection of privacy and the integrity of the individual (Article 4(1)(b)). It is clear from points 2, 3, 10, 12 and 13 of the contested decision that, in the Commission's view, those exceptions concern only some of the documents referred to in the request. In particular, in point 13 of the contested decision, the Commission states that 'it is possible that a large proportion of the documents drawn up by the banks concerned or by third parties also contain information the disclosure of which could affect privacy and the integrity of the individual'.

90 It is therefore apparent from the contested decision that the exceptions relied on by the Commission do not necessarily apply to the whole of the Lombard Club file and that, even in the case of the documents to which they may apply, they may concern only certain passages in those documents.

91 Finally, the interveners rely on the exception in Article 4(3) of Regulation No 1049/2001. They maintain that the Lombard Club decision has been the subject-matter of several actions for annulment and that it is therefore not yet a decision 'taken' within the meaning of Article 4(3), which justifies a total refusal of access. However, since that exception was not relied on by the Commission in the contested decision, it is not for the Court to assume the role of that institution and determine whether that exception is actually applicable to the documents referred to by the request.

92 Consequently, the Commission was bound, in principle, to carry out a concrete, individual examination of each of the documents referred to in the request in order to determine whether any exceptions applied or whether partial access was possible.

93 Nevertheless, since, in this case, the Commission did not carry out such an examination, it must be determined whether it is permissible for an institution to justify a total refusal of access by reason of the very large amount of work which, according to that institution, is entailed by such an examination.

– Application of an exception related to the amount of work involved in carrying out a concrete, individual examination

94 Under Article 6(3) of Regulation No 1049/2001, 'in the event of a request relating to a very long

document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution'.

95 In this case, it is apparent from the file that the applicant and the Commission met on 24 July 2002, but that that meeting and the contacts which followed it did not lead to a solution.

96 Regulation No 1049/2001 does not contain any provision expressly permitting the institution, in the absence of a fair solution reached together with the applicant, to limit the scope of the examination which it is normally required to carry out in response to a request for access.

97 In the introductory part of the contested decision, the Commission nevertheless, in essence, justifies the failure to carry out a concrete, individual examination of the documents in question by application of the principle of proportionality. The Commission states inter alia that 'for reasons of proportionality, it does not appear either necessary or expedient to undertake an examination of the documents beyond the [abovementioned] categories'. The Commission also relies on application of the principle of proportionality in points 10, 13 and 24 of the contested decision.

98 It must therefore be examined whether it is in fact permissible, on the basis of the principle of proportionality, to refrain from applying the principle of a concrete, individual examination of the documents referred to in a request for access under Regulation No 1049/2001.

99 According to consistent case-law, the principle of proportionality requires measures adopted by Community institutions not to exceed the limits of what is appropriate and necessary in order to attain the objectives pursued; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 60, and Case T-211/02 *Tideland Signal* v *Commission* [2002] ECR II-3781, paragraph 39). The principle of proportionality also requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 38, and *Hautala* v *Council*, cited in paragraph 69 above, paragraph 85).

100 Consequently, the refusal by an institution to examine concretely and individually the documents covered by a request for access constitutes, in principle, a manifest breach of the principle of proportionality. A concrete, individual examination of the documents in question enables the institution to achieve the aim pursued by the exceptions referred to in Article 4(1) to (3) of Regulation No 1049/2001 and results, moreover, in identification of the only documents covered, in whole or in part, by those exceptions. It therefore constitutes, for the purposes of the applicant's right of access, a measure less onerous than a complete refusal to examine the documents.

101 It should however be borne in mind that it is possible for an applicant to make a request for access, under Regulation No 1049/2001, relating to a manifestly unreasonable number of documents, perhaps for trivial reasons, thus imposing a volume of work for processing of his request which could very substantially paralyse the proper working of the institution. It should also be noted that, where a request relates to a very large number of documents, the institution's right to seek a 'fair solution' together with the applicant, pursuant to Article 6(3) of Regulation No 1049/2001, reflects the possibility of account being taken, albeit in a particularly limited way, of the need, where appropriate, to reconcile the interests of the applicant with those of good administration.

102 An institution must therefore retain the right, in particular cases where concrete, individual examination of the documents would entail an unreasonable amount of administrative work, to balance the interest in public access to the documents against the burden of work so caused, in order to safeguard, in those particular cases, the interests of good administration (see, by analogy, *Hautala* v *Council*, cited in paragraph 69 above, paragraph 86).

103 However, that possibility remains applicable only in exceptional cases.

104 Firstly, concrete, individual examination of the documents referred to in a request for access under Regulation No 1049/2001 is one of the elementary duties of an institution in response to such a request.

105 Secondly, public access to documents of the institutions is an approach to be adopted in principle, whereas the power to refuse access is the exception (see, by analogy with the principle laid down

for application of the code of conduct, *Kuijer II*, paragraph 55).

106 Thirdly, exceptions to the principle of access to documents must be interpreted strictly (see, by analogy with the code of conduct, Case T-111/00 *British American Tobacco International (Investments)* v *Commission* [2001] ECR II-2997, paragraph 40). That case-law justifies a fortiori the need to construe particularly strictly any limitations placed on the diligence which must normally be displayed by an institution in deciding to apply an exception, since such limitations increase, from the time the request is received, the risk that the right of access may be compromised.

107 Fourthly, there are many circumstances in which for the Commission to have discretion not to carry out a concrete, individual examination when such an examination is necessary would run counter to the principle of good administration, which is one of the guarantees afforded by the Community legal order in administrative procedures and to which the duty of the competent institution to examine carefully and impartially all the relevant aspects in the individual case is linked (Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 86, and Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole télévision and Others* v *Commission* [1996] ECR II-649, paragraph 93).

108 Fifthly, it is not, in principle, appropriate that account should be taken of the amount of work entailed by the exercise of the applicant's right of access and its interest in order to vary the scope of that right.

109 With regard to the applicant's interest, under Article 6(1) of Regulation No 1049/2001 he is not required to justify his request and therefore he does not normally have to demonstrate any interest.

110 As regards the amount of work entailed in processing a request for access, Regulation No 1049/2001 expressly envisages the possibility that a request for access may relate to a very large number of documents, since Articles 7(3) and 8(2) provide that the time-limits for processing initial requests and confirmatory requests may be extended in exceptional cases such as, for example, in the event of an application relating to a very long document or to a very large number of documents.

111 Sixthly, the amount of work entailed in considering a request for access depends not only on the number of documents referred to in the request and their volume, but also on their nature. Consequently, the need to undertake a concrete, individual examination of very numerous documents does not, on its own, provide any indication of the amount of work entailed in processing a request for access, since that amount of work also depends on the required depth of that examination.

112 Accordingly, it is only in exceptional cases and only where the administrative burden entailed by a concrete, individual examination of the documents proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required, that a derogation from that obligation to examine the documents may be permissible (see, by analogy, *Kuijer II*, paragraph 57).

113 In addition, in so far as the right of access to documents held by the institutions constitutes an approach to be adopted in principle, it is with the institution relying on an exception related to the unreasonableness of the task entailed by the request that the burden of proof of the scale of that task rests.

114 Finally, where the institution has adduced proof of the unreasonableness of the administrative burden entailed by a concrete, individual examination of the documents referred to in the request, it is obliged to try to consult with the applicant in order, on the one hand, to ascertain or to ask him to specify his interest in obtaining the documents in question and, on the other, to consider specifically whether and how it may adopt a measure less onerous than a concrete, individual examination of the documents. Since the right of access to documents is the principle, the institution nevertheless remains obliged, against that background, to prefer the option which, whilst not itself constituting a task which exceeds the limits of what may reasonably be required, remains the most favourable to the applicant's right of access.

115 It follows that the institution may avoid carrying out a concrete, individual examination only after it has genuinely investigated all other conceivable options and explained in detail in its decision the reasons for which those various options also involve an unreasonable amount of work.

116 It must therefore be examined, in this case, whether the Commission was in a situation where concrete, individual examination of the documents referred to in the request for access imposed on it a burden exceeding the limits of what might reasonably be required, so that, taking into account the applicant's interest, it could specifically consider other options for processing the request, with a view, where appropriate, to adopting a measure less onerous in terms of its workload.

117 With regard, first, to whether a concrete, individual examination of each of the documents referred to in the request was unreasonable, it should be noted that the contested decision does not mention the precise number of documents in the Lombard Club file, but merely the number of pages which it contains. A mere reference to a number of pages is not sufficient, as such, for the purpose of assessing the amount of work entailed by a concrete, individual examination. Nevertheless, in the light, on the one hand, of the categories identified by the Commission in the contested decision and, on the other, of the nature of the file in question, it is clearly apparent from the papers in the case that the documents referred to are very numerous.

118 In addition, consultation of a file of more than 47 000 pages comprising many documents such as those belonging to the categories identified by the Commission is likely to be an extremely large task.

119 Firstly, it is clear that the documents in the Lombard Club file are filed in chronological order. In that regard, at the hearing, the Commission stated that, in view of the date of the contested decision, the documents referred to in the applicant's request had not yet been recorded in the register provided for by Article 11 of Regulation No 1049/2001, the coverage of which, according to Article 8(1) of the Commission Decision of 5 December 2001 amending its rules of procedure, is to be extended gradually.

120 Secondly, in the light of the main categories identified by the Commission and of the reasons for the contested decision, it can be accepted that the documents referred to by the applicant's request contain a great deal of information which must be subjected to a concrete analysis in the light of the exceptions to the right of access and, in particular, information which could undermine the protection of the commercial interests of the banks involved in the Lombard Club file.

121 Thirdly, in the light of the main categories identified by the Commission, it can also be accepted that the Lombard Club file consists of a large number of documents originating from third parties. Consequently, the volume of work involved in examining concretely and individually the documents contained in that file could be increased by the need, where appropriate, to consult those third parties in accordance with Article 4(4) of Regulation No 1049/2001.

122 In this case, therefore, there are a number of factors which suggest that concrete, individual examination of all the documents in the Lombard Club file might represent a very large amount of work. Nevertheless, without there being any need to take a definitive view as to whether those factors demonstrate sufficiently in law that the amount of work involved exceeded the limits of what might reasonably be required of the Commission, it must be pointed out that the contested decision, which refuses altogether to grant the applicant any access, could in any event be lawful only if the Commission had previously explained specifically the reasons for which the alternatives to a concrete, individual examination of each of the documents referred to also represented an unreasonable amount of work.

123 In this case, the applicant informed the Commission, on 14 June 2002, that the purpose of its request was to enable it to produce certain evidence in proceedings brought against BAWAG before the Austrian courts.

124 It is also clear that, on 24 July 2002, at a meeting with the Commission's staff, the representatives of the VKI mentioned the possibility that the applicant could give an undertaking in writing to use the information obtained solely for the purpose of asserting consumers' claims.

125 In addition, in its confirmatory request of 26 September 2002, the applicant stated that it was not interested primarily in the Commission's internal documents, which prompted the latter to exclude those documents from the scope of its analysis in the contested decision.

126 Notwithstanding those considerations, it is not apparent from the reasons for the contested decision that the Commission considered specifically and exhaustively the various options available to it in order to take steps which would not impose an unreasonable amount of work on it but would, on the other hand, increase the chances that the applicant might receive, at least in respect of part of its

request, access to the documents concerned.

127 Thus, in the contested decision, the Commission stated 'as a subsidiary consideration' that publication of the Lombard Club decision was sufficient to 'safeguard' the interests of the applicant.

128 In addition, in point 24 of the contested decision, the Commission refused, in the following terms, to grant partial access to the documents included in the Lombard Club file:

'We have undertaken in this case, for the purpose of deciding on your request, a categorisation of all the documents in the file and, in the case of some, a sub-categorisation. The alternative would be to examine each document, after consulting third parties where appropriate. In this specific instance, the file consists of more than 47 000 pages, not counting the internal documents. On the basis that an examination by reference to categories indicates that the documents in the file are – with the exception of a few documents already published – very largely subject to the exceptions provided for by the regulation, a separate examination of each document would impose on the Commission an inappropriate and disproportionate amount of work. That is particularly so because the other parts of the documents, or some of them, which could possibly be disclosed, would very probably serve neither the interests [of the] VKI in proving the unlawfulness of the conduct of the banks concerned in civil proceedings, nor other public interests.'

129 It is therefore clear that the Commission took into account the applicant's interest as a very subsidiary consideration in comparing the likely effects of two types of practice, namely, in the first place, an individual examination of the documents included in the Lombard Club file and, in the second place, an examination limited to the categories established among those same documents on the basis of their nature.

130 However, it is not apparent from the reasons for the contested decision that the Commission assessed, in a concrete, specific and detailed manner, on the one hand, the other conceivable options for limiting its workload and, on the other, the reasons which could allow it to avoid carrying out any examination rather than adopting, where appropriate, a measure less restrictive of the applicant's right of access. In particular, it is not apparent from the contested decision that, as regards the identification of documents contained in a file arranged in chronological order, the Commission specifically examined the option of asking the banks involved in the Lombard Club file to provide it with the dates of the documents submitted by them, which might possibly have enabled it to find some of them more easily in its file. In addition, although the Commission stated in its defence that drawing up a table of contents would have been a disproportionate task, the examination of that option is not mentioned at all in the contested decision and therefore cannot be considered to have been specifically examined. Finally, it is likewise not apparent from the contested decision that the Commission evaluated the amount of work involved in identifying, then examining, individually and concretely, the few documents most likely to satisfy immediately and, where appropriate, partially in the first instance the applicant's interests.

131 The outright refusal by the Commission to grant the applicant access is therefore vitiated by an error of law. The first and fourth pleas must therefore be upheld. Consequently, without there being any need to rule on the other pleas put forward by the applicant, the contested decision must be annulled.

The request for production of documents

132 It is for the Community judicature to decide, in the light of the circumstances of the case and in accordance with the provisions of the Rules of Procedure on measures of inquiry, whether it is necessary for a document to be produced (Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11049, paragraph 67).

133 Since the first and fourth pleas of the applicant must be upheld without there being any need to examine the documents in question, there is certainly no need in this case to order the production requested.

Costs

134 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has

been unsuccessful, it must be ordered to pay the costs borne by the VKI, in accordance with the form of order sought by the latter.

135 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener to bear its own costs. In this case, the interveners are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)

hereby:

1. Annuls Decision D (2002) 330472 relating to a request for access to the administrative file in Case COMP/36.571/D-1, Austrian banks – 'Lombard Club';

2. Orders the Commission to pay the costs;

3. Orders the interveners to bear their own costs.

Vesterdorf Jaeger Mengozzi

Martins Ribeiro Labucka

Delivered in open court in Luxembourg on 13 April 2005.

H. Jung
Registrar

B. Vesterdorf
President

* Language of the case: German.

Exhibit [21]

Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the Application of Articles 81 and 82 EC, Official Journal, C 101, 04/27/2004, p.54.

Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC

(2004/C 101/04)

(Text with EEA relevance)

I. THE SCOPE OF THE NOTICE

1. The present notice addresses the co-operation between the Commission and the courts of the EU Member States, when the latter apply Articles 81 and 82 EC. For the purpose of this notice, the 'courts of the EU Member States' (hereinafter 'national courts') are those courts and tribunals within an EU Member State that can apply Articles 81 and 82 EC and that are authorised to ask a preliminary question to the Court of Justice of the European Communities pursuant to Article 234 EC [1].

2. The national courts may be called upon to apply Articles 81 or 82 EC in lawsuits between private parties, such as actions relating to contracts or actions for damages. They may also act as public enforcer or as review court. A national court may indeed be designated as a competition authority of a Member State (hereinafter 'the national competition authority') pursuant to Article 35(1) of Regulation (EC) No 1/2003 (hereinafter 'the regulation') [2]. In that case, the co-operation between the national courts and the Commission is not only covered by the present notice, but also by the notice on the co-operation within the network of competition authorities [3].

II. THE APPLICATION OF EC COMPETITION RULES BY NATIONAL COURTS

A. THE COMPETENCE OF NATIONAL COURTS TO APPLY EC COMPETITION RULES

3. To the extent that national courts have jurisdiction to deal with a case [4], they have the power to apply Articles 81 and 82 EC [5]. Moreover, it should be remembered that Articles 81 and 82 EC are a matter of public policy and are essential to the accomplishment of the tasks entrusted to the Community, and, in particular, for the functioning of the internal market [6]. According to the Court of Justice, where, by virtue of domestic law, national courts must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules, such as the EC competition rules, are concerned. The position is the same if domestic law confers on national courts a discretion to apply of their own motion binding rules of law: national courts must apply the EC competition rules, even when the party with an interest in application of those provisions has not relied on them, where domestic law allows such application by the national court. However, Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim [7].

4. Depending on the functions attributed to them under national law, national courts may be called upon to apply Articles 81 and 82 EC in administrative, civil or criminal proceedings [8]. In particular, where a natural or legal person asks the national court to safeguard his individual rights, national courts play a specific role in the enforcement of Articles 81 and 82 EC, which is different from the enforcement in the public interest by the Commission or by national competition authorities [9]. Indeed, national courts can give effect to Articles 81 and 82 EC by finding contracts to be void or by awards of damages.

5. National courts can apply Articles 81 and 82 EC, without it being necessary to apply national competition law in parallel. However, where a national court applies national competition law to agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States within the meaning of Article 81(1) EC [10] or to any abuse prohibited by Article 82 EC, they also have to apply EC competition rules to those agreements, decisions or practices [11].

6. The regulation does not only empower the national courts to apply EC competition law. The parallel application of national competition law to agreements, decisions of associations of undertakings and concerted practices which affect trade between Member States may not lead to a different outcome from that of EC competition law. Article 3(2) of the regulation provides that agreements, decisions or concerted practices which do not infringe

Article 81(1) EC or which fulfil the conditions of Article 81(3) EC cannot be prohibited either under national competition law [12]. On the other hand, the Court of Justice has ruled that agreements, decisions or concerted practices that violate Article 81(1) and do not fulfil the conditions of Article 81(3) EC cannot be upheld under national law [13]. As to the parallel application of national competition law and Article 82 EC in the case of unilateral conduct, Article 3 of the regulation does not provide for a similar convergence obligation. However, in case of conflicting provisions, the general principle of primacy of Community law requires national courts to disapply any provision of national law which contravenes a Community rule, regardless of whether that national law provision was adopted before or after the Community rule [14].

7. *Apart from the application of Articles 81 and 82 EC*, national courts are also competent to apply acts adopted by EU institutions in accordance with the EC Treaty or in accordance with the measures adopted to give the Treaty effect, to the extent that these acts have direct effect. National courts may thus have to enforce Commission decisions [15] or regulations applying Article 81(3) EC to certain categories of agreements, decisions or concerted practices. When applying these EC competition rules, national courts act within the framework of Community law and are consequently bound to observe the general principles of Community law [16].

8. The application of Articles 81 and 82 EC by national courts often depends on complex economic and legal assessments [17]. When applying EC competition rules, national courts are bound by the case law of the Community courts as well as by Commission regulations applying Article 81(3) EC to certain categories of agreements, decisions or concerted practices [18]. Furthermore, the application of Articles 81 and 82 EC by the Commission in a specific case binds the national courts when they apply EC competition rules in the same case in parallel with or subsequent to the Commission [19]. Finally, and without prejudice to the ultimate interpretation of the EC Treaty by the Court of Justice, national courts may find guidance in Commission regulations and decisions which present elements of analogy with the case they are dealing with, as well as in Commission notices and guidelines relating to the application of Articles 81 and 82 EC [20] and in the annual report on competition policy [21].

B. PROCEDURAL ASPECTS OF THE APPLICATION OF EC COMPETITION RULES BY NATIONAL COURTS

9. The procedural conditions for the enforcement of EC competition rules by national courts and the sanctions they can impose in case of an infringement of those rules, are largely covered by national law. However, to some extent, Community law also determines the conditions in which EC competition rules are enforced. Those Community law provisions may provide for the faculty of national courts to avail themselves of certain instruments, e.g. to ask for the Commission's opinion on questions concerning the application of EC competition rules [22] or they may create rules that have an obligatory impact on proceedings before them, e.g. allowing the Commission and national competition authorities to submit written observations [23]. These Community law provisions prevail over national rules. Therefore, national courts have to set aside national rules which, if applied, would conflict with these Community law provisions. Where such Community law provisions are directly applicable, they are a direct source of rights and duties for all those affected, and must be fully and uniformly applied in all the Member States from the date of their entry into force [24].

10. In the absence of Community law provisions on procedures and sanctions related to the enforcement of EC competition rules by national courts, the latter apply national procedural law and — to the extent that they are competent to do so — impose sanctions provided for under national law. However, the application of these national provisions must be compatible with the general principles of Community law. In this regard, it is useful to recall the case law of the Court of Justice, according to which:

(a) where there is an infringement of Community law, national law must provide for sanctions which are effective, proportionate and dissuasive [25];

(b) where the infringement of Community law causes harm to an individual, the latter should under certain conditions be able to ask the national court for damages [26];

(c) the rules on procedures and sanctions which national courts apply to enforce Community law

— must not make such enforcement excessively difficult or practically impossible (the principle of effectiveness) ([27]) and they

— must not be less favourable than the rules applicable to the enforcement of equivalent national law (the principle of equivalence) ([28]).

On the basis of the principle of primacy of Community law, a national court may not apply national rules that are incompatible with these principles.

C. PARALLEL OR CONSECUTIVE APPLICATION OF EC COMPETITION RULES BY THE COMMISSION AND BY NATIONAL COURTS

11. A national court may be applying EC competition law to an agreement, decision, concerted practice or unilateral behaviour affecting trade between Member States at the same time as the Commission or subsequent to the Commission ([29]). The following points outline some of the obligations national courts have to respect in those circumstances.

12. Where a national court comes to a decision before the Commission does, it must avoid adopting a decision that would conflict with a decision contemplated by the Commission ([30]). To that effect, the national court may ask the Commission whether it has initiated proceedings regarding the same agreements, decisions or practices ([31]) and if so, about the progress of proceedings and the likelihood of a decision in that case ([32]). The national court may, for reasons of legal certainty, also consider staying its proceedings until the Commission has reached a decision ([33]). The Commission, for its part, will endeavour to give priority to cases for which it has decided to initiate proceedings within the meaning of Article 2(1) of Commission Regulation (EC) No 773/2004 and that are the subject of national proceedings stayed in this way, in particular when the outcome of a civil dispute depends on them. However, where the national court cannot reasonably doubt the Commission's contemplated decision or where the Commission has already decided on a similar case, the national court may decide on the case pending before it in accordance with that contemplated or earlier decision without it being necessary to ask the Commission for the information mentioned above or to await the Commission's decision.

13. Where the Commission reaches a decision in a particular case before the national court, the latter cannot take a decision running counter to that of the Commission. The binding effect of the Commission's decision is of course without prejudice to the interpretation of Community law by the Court of Justice. Therefore, if the national court doubts the legality of the Commission's decision, it cannot avoid the binding effects of that decision without a ruling to the contrary by the Court of Justice ([34]). Consequently, if a national court intends to take a decision that runs counter to that of the Commission, it must refer a question to the Court of Justice for a preliminary ruling (Article 234 EC). The latter will then decide on the compatibility of the Commission's decision with Community law. However, if the Commission's decision is challenged before the Community courts pursuant to Article 230 EC and the outcome of the dispute before the national court depends on the validity of the Commission's decision, the national court should stay its proceedings pending final judgment in the action for annulment by the Community courts unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted ([35]).

14. When a national court stays proceedings, e.g. awaiting the Commission's decision (situation described in point 12 of this notice) or pending final judgement by the Community courts in an action for annulment or in a preliminary ruling procedure (situation described in point 13), it is incumbent on it to examine whether it is necessary to order interim measures in order to safeguard the interests of the parties ([36]).

III. THE CO-OPERATION BETWEEN THE COMMISSION AND NATIONAL COURTS

15. Other than the co-operation mechanism between the national courts and the Court of Justice under Article 234 EC, the EC Treaty does not explicitly provide for co-operation between the national courts and the Commission. However, in its interpretation of Article 10 EC, which obliges the Member States to facilitate the achievement of the Community's tasks, the Community courts found that this Treaty provision imposes on the European institutions and the Member States mutual duties of loyal co-operation with a view to attaining the objectives of the EC Treaty. Article 10 EC thus implies that the Commission must assist national courts when they apply Community law ([37]). Equally, national courts may be obliged to assist the Commission in the fulfilment of its tasks ([38]).

16. It is also appropriate to recall the co-operation between national courts and national authorities, in particular national competition authorities, for the application of Articles 81 and 82 EC. While the co-operation between these national authorities is primarily governed by national rules, Article 15(3) of the regulation provides for the possibility for national competition authorities to submit observations before the national courts of their Member State. Points 31 and 33 to 35 of this notice are *mutatis mutandis* applicable to those submissions.

A. THE COMMISSION AS *AMICUS CURIAE*

17. In order to assist national courts in the application of EC competition rules, the Commission is committed to help national courts where the latter find such help necessary to be able to decide on a case. Article 15 of the regulation refers to the most frequent types of such assistance: the transmission of information (points 21 to 26) and the Commission's opinions (points 27 to 30), both at the request of a national court and the possibility for the Commission to submit observations (points 31 to 35). Since the regulation provides for these types of assistance, it cannot be limited by any Member States' rule. However, in the absence of Community procedural rules to this effect and to the extent that they are necessary to facilitate these forms of assistance, Member States must adopt the appropriate procedural rules to allow both the national courts and the Commission to make full use of the possibilities the regulation offers ([39]).

18. The national court may send its request for assistance in writing to

European Commission
Directorate General for Competition
B-1049 Brussels
Belgium

or send it electronically to comp-amicus@cec.eu.int

19. It should be recalled that whatever form the co-operation with national courts takes, the Commission will respect the independence of national courts. As a consequence, the assistance offered by the Commission does not bind the national court. The Commission has also to make sure that it respects its duty of professional secrecy and that it safeguards its own functioning and independence ([40]). In fulfilling its duty under Article 10 EC, of assisting national courts in the application of EC competition rules, the Commission is committed to remaining neutral and objective in its assistance. Indeed, the Commission's assistance to national courts is part of its duty to defend the public interest. It has therefore no intention to serve the private interests of the parties involved in the case pending before the national court. As a consequence, the Commission will not hear any of the parties about its assistance to the national court. In case the Commission has been contacted by any of the parties in the case pending before the court on issues which are raised before the national court, it will inform the national court thereof, independent of whether these contacts took place before or after the national court's request for co-operation.

20. The Commission will publish a summary concerning its co-operation with national courts pursuant to this notice in its annual Report on Competition Policy. It may also make its opinions and observations available on its website.

1. The Commission's duty to transmit information to national courts

21. The duty for the Commission to assist national courts in the application of EC competition law is mainly reflected in the obligation for the Commission to transmit information it holds to national courts. A national court may, e.g., ask the Commission for documents in its possession or for information of a procedural nature to enable it to discover whether a certain case is pending before the Commission, whether the Commission has initiated a procedure or whether it has already taken a position. A national court may also ask the Commission when a decision is likely to be taken, so as to be able to determine the conditions for any decision to stay proceedings or whether interim measures need to be adopted ([41]).

22. In order to ensure the efficiency of the co-operation with national courts, the Commission will endeavour to provide the national court with the requested information within one month from the date it receives the request. Where the Commission has to ask the national court for further clarification of its request or where the Commission has to consult those who are directly affected by the transmission of the information, that period starts to run from the moment that it receives the required information.

23. In transmitting information to national courts, the Commission has to uphold the guarantees given to natural and legal persons by Article 287 EC ([42]). Article 287 EC prevents members, officials and other servants of the Commission from disclosing information covered by the obligation of professional secrecy. The information covered by professional secrecy may be both confidential information and business secrets. Business secrets are information of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information might seriously harm the latter's interests ([43]).

24. The combined reading of Articles 10 and 287 EC does not lead to an absolute prohibition for the Commission to transmit information which is covered by the obligation of professional secrecy to national courts. The case law of the Community courts confirms that the duty of loyal co-operation requires the Commission to provide the national court with whatever information the latter asks for, even information covered by professional secrecy. However, in offering its co-operation to the national courts, the Commission may not in any circumstances undermine the guarantees laid down in Article 287 EC.

25. Consequently, before transmitting information covered by professional secrecy to a national court, the Commission will remind the court of its obligation under Community law to uphold the rights which Article 287 EC confers on natural and legal persons and it will ask the court whether it can and will guarantee protection of confidential information and business secrets. If the national court cannot offer such guarantee, the Commission shall not transmit the information covered by professional secrecy to the national court ([44]). Only when the national court has offered a guarantee that it will protect the confidential information and business secrets, will the Commission transmit the information requested, indicating those parts which are covered by professional secrecy and which parts are not and can therefore be disclosed.

26. There are further exceptions to the disclosure of information by the Commission to national courts. Particularly, the Commission may refuse to transmit information to national courts for overriding reasons relating to the need to safeguard the interests of the Community or to avoid any interference with its functioning and independence, in particular by jeopardising the accomplishment of the tasks entrusted to it ([45]). Therefore, the Commission will not transmit to national courts information voluntarily submitted by a leniency applicant without the consent of that applicant.

2. Request for an opinion on questions concerning the application of EC competition rules

27. When called upon to apply EC competition rules to a case pending before it, a national court may first seek guidance in the case law of the Community courts or in Commission regulations, decisions, notices and guidelines applying Articles 81 and 82 EC ([46]). Where these tools do not offer sufficient guidance, the national court may ask the Commission for its opinion on questions concerning the application of EC competition rules. The national court may ask the Commission for its opinion on economic, factual and legal matters ([47]). The latter is of course without prejudice to the possibility or the obligation for the national court to ask the Court of Justice for a preliminary ruling regarding the interpretation or the validity of Community law in accordance with Article 234 EC.

28. In order to enable the Commission to provide the national court with a useful opinion, it may request the national court for further information ([48]). In order to ensure the efficiency of the co-operation with national courts, the Commission will endeavour to provide the national court with the requested opinion within four months from the date it receives the request. Where the Commission has requested the national court for further information in order to enable it to formulate its opinion, that period starts to run from the moment that it receives the additional information.

29. When giving its opinion, the Commission will limit itself to providing the national court with the factual information or the economic or legal clarification asked for, without considering the merits of the case pending before the national court. Moreover, unlike the authoritative interpretation of Community law by the Community courts, the opinion of the Commission does not legally bind the national court.

30. In line with what has been said in point 19 of this notice, the Commission will not hear the parties before formulating its opinion to the national court. The latter will have to deal with the Commission's opinion in accordance with the relevant national procedural rules, which have to respect the general principles of Community law.

3. The Commission's submission of observations to the national court

31. According to Article 15(3) of the regulation, the national competition authorities and the Commission may submit observations on issues relating to the application of Articles 81 or 82 EC to a national court which is called upon to apply those provisions. The regulation distinguishes between written observations, which the national competition authorities and the Commission may submit on their own initiative, and oral observations, which can only be submitted with the permission of the national court ([49]).

32. The regulation specifies that the Commission will only submit observations when the coherent application of Articles 81 or 82 EC so requires. That being the objective of its submission, the Commission will limit its observations to an economic and legal analysis of the facts underlying the case pending before the national court.

33. In order to enable the Commission to submit useful observations, national courts may be asked to transmit or ensure the transmission to the Commission of a copy of all documents that are necessary for the assessment of the case. In line with Article 15(3), second subparagraph, of the regulation, the Commission will only use those documents for the preparation of its observations ([50]).

34. Since the regulation does not provide for a procedural framework within which the observations are to be submitted, Member States' procedural rules and practices determine the relevant procedural framework. Where a Member State has not yet established the relevant procedural framework, the national court has to determine which procedural rules are appropriate for the submission of observations in the case pending before it.

35. The procedural framework should respect the principles set out in point 10 of this notice. That implies amongst others that the procedural framework for the submission of observations on issues relating to the application of Articles 81 or 82 EC

(a) has to be compatible with the general principles of Community law, in particular the fundamental rights of the parties involved in the case;

(b) cannot make the submission of such observations excessively difficult or practically impossible (the principle of effectiveness) ([51]); and

(c) cannot make the submission of such observations more difficult than the submission of observations in court proceedings where equivalent national law is applied (the principle of equivalence).

B. THE NATIONAL COURTS FACILITATING THE ROLE OF THE COMMISSION IN THE ENFORCEMENT OF EC COMPETITION RULES

36. Since the duty of loyal co-operation also implies that Member States' authorities assist the European institutions with a view to attaining the objectives of the EC Treaty ([52]), the regulation provides for three examples of such assistance: (1) the transmission of documents necessary for the assessment of a case in which the Commission would like to submit observations (see point 33), (2) the transmission of judgements applying Articles 81 or 82 EC); and (3) the role of national courts in the context of a Commission inspection.

1. The transmission of judgements of national courts applying Articles 81 or 82 EC

37. According to Article 15(2) of the regulation, Member States shall send to the Commission a copy of any written judgement of national courts applying Articles 81 or 82 EC without delay after the full written judgement is notified to the parties. The transmission of national judgements on the application of Articles 81 or 82 EC and the resulting information on proceedings before national courts primarily enable the Commission to become aware in a timely fashion of cases for which it might be appropriate to submit observations where one of the parties lodges an appeal against the judgement.

2. The role of national courts in the context of a Commission inspection

38. Finally, national courts may play a role in the context of a Commission inspection of undertakings and associations of undertakings. The role of the national courts depends on whether the inspections are conducted in business premises or in non-business premises.

39. With regard to the inspection of business premises, national legislation may require authorisation from a national court to allow a national enforcement authority to assist the Commission in case of opposition of the undertaking concerned. Such authorisation may also be sought as a precautionary measure. When dealing with the request, the national court has the power to control that the Commission's inspection decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national court may ask the Commission, directly or through the national competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 81 and 82 EC, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned ([53]).

40. With regard to the inspection of non-business premises, the regulation requires the authorisation from a national court before a Commission decision ordering such an inspection can be executed. In that case, the national court may control that the Commission's inspection decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national court may ask the Commission, directly or through the national competition authority, for detailed explanations on those elements that are necessary to allow its control of the proportionality of the coercive measures envisaged ([54]).

41. In both cases referred to in points 39 and 40, the national court may not call into question the lawfulness of the Commission's decision or the necessity for the inspection nor can it demand that it be provided with information in the Commission's file ([55]). Furthermore, the duty of loyal co-operation requires the national court to take its decision within an appropriate timeframe that allows the Commission to effectively conduct its inspection ([56]).

IV. FINAL PROVISIONS

42. This notice is issued in order to assist national courts in the application of Articles 81 and 82 EC. It does not bind the national courts, nor does it affect the rights and obligations of the EU Member States and natural or legal persons under Community law.

43. This notice replaces the 1993 notice on co-operation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty ([57]).

([1]) For the criteria to determine which entities can be regarded as courts or tribunals within the meaning of Article 234 EC, see e.g. case C-516/99 Schmid [2002] ECR I-4573, 34: 'The Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent'.

([2]) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

([3]) Notice on the co-operation within the network of competition authorities (OJ C 101, 27.4.2004, p. 43). For the purpose of this notice, a 'national competition authority' is the authority designated by a Member State in accordance with Article 35(1) of the regulation.

([4]) The jurisdiction of a national court depends on national, European and international rules of jurisdiction. In this context, it may be recalled that Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (OJ L 12, 16.1.2001, p. 1) is applicable to all competition cases of a civil or commercial nature.

([5]) See Article 6 of the regulation.

([6]) See Articles 2 and 3 EC, case C-126/97 Eco Swiss [1999] ECR I-3055, 36; case T-34/92 Fiatagri UK and New Holland Ford [1994] ECR II-905, 39 and case T-128/98 Aéroports de Paris [2000] ECR II-3929, 241.

([7]) Joined cases C-430/93 and C-431/93 van Schijndel [1995] ECR I-4705, 13 to 15 and 22.

([8]) According to the last sentence of recital 8 of Regulation (EC) No 1/2003, the regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.

(9) Case T-24/90 Automec [1992] ECR II-2223, 85.

(10) For further clarification of the effect on trade concept, see the notice on this issue (OJ L 101, 27.4.2004, p. 81).

(11) Article 3(1) of the regulation.

(12) See also the notice on the application of Article 81(3) EC (OJ L 101, 27.4.2004, p. 2).

(13) Case 14/68 Walt Wilhelm [1969] ECR 1 and joined cases 253/78 and 1 to 3/79 Giry and Guerlain [1980] ECR 2327, 15 to 17.

(14) Case 106/77 Simmenthal [1978] ECR 629, 21 and case C-198/01, Consorzio Industrie Fiammiferi (CIF) [2003] 49.

(15) E.g. a national court may be asked to enforce a Commission decision taken pursuant to Articles 7 to 10, 23 and 24 of the regulation.

(16) See e.g. case 5/88 Wachauf [1989] ECR 2609, 19.

(17) Joined cases C-215/96 and C-216/96 Bagnasco [1999] ECR I-135, 50.

(18) Case 63/75 Fonderies Roubaix [1976] ECR 111, 9 to 11 and case C-234/89 Delimitis [1991] ECR I-935, 46.

(19) On the parallel or consecutive application of EC competition rules by national courts and the Commission, see also points 11 to 14.

(20) Case 66/86 Ahmed Saeed Flugreisen [1989] ECR 803, 27 and case C-234/89 Delimitis [1991] ECR I-935, 50. A list of Commission guidelines, notices and regulations in the field of competition policy, in particular the regulations applying Article 81(3) EC to certain categories of agreements, decisions or concerted practices, are annexed to this notice. For the decisions of the Commission applying Articles 81 and 82 EC (since 1964), see http://www.europa.eu.int/comm/competition/antitrust/cases/.

(21) Joined cases C-319/93, C-40/94 and C-224/94 Dijkstra [1995] ECR I-4471, 32.

(22) On the possibility for national courts to ask the Commission for an opinion, see further in points 27 to 30.

(23) On the submission of observations, see further in points 31 to 35.

(24) Case 106/77 Simmenthal [1978] ECR 629, 14 and 15.

(25) Case 68/88 Commission v Greece [1989] ECR 2965, 23 to 25.

(26) On damages in case of an infringement by an undertaking, see case C-453/99 Courage and Crehan [2001] ECR 6297, 26 and 27. On damages in case of an infringement by a Member State or by an authority which is an emanation of the State and on the conditions of such state liability, see e.g. joined cases C-6/90 and C-9/90 Francovich [1991] ECR I-5357, 33 to 36; case C-271/91 Marshall v Southampton and South West Hampshire Area Health Authority [1993] ECR I-4367, 30 and 34 to 35; joined cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-1029; case C-392/93 British Telecommunications [1996] ECR I-1631, 39 to 46 and joined cases C-178/94, C-179/94 and C-188/94 to 190/94 Dillenkofer [1996] ECR I-4845, 22 to 26 and 72.

(27) See e.g. case 33/76 Rewe [1976] ECR 1989, 5; case 45/76 Comet [1976] ECR 2043, 12 and case 79/83 Harz [1984] ECR 1921, 18 and 23.

(28) See e.g. case 33/76 Rewe [1976] ECR 1989, 5; case 158/80 Rewe [1981] ECR 1805, 44; case 199/82 San Giorgio [1983] ECR 3595, 12 and case C-231/96 Edis [1998] ECR I-4951, 36 and 37.

(29) Article 11(6), juncto Article 35(3) and (4) of the regulation prevents a parallel application of Articles 81 or 82 EC by the Commission and a national court only when the latter has been designated as a national competition authority.

(30) Article 16(1) of the regulation.

(31) The Commission makes the initiation of its proceedings with a view to adopting a decision pursuant to Article 7 to 10 of the regulation public (see Article 2(2) of Commission Regulation (EC) No 773/2004 of 7 April relating to proceedings pursuant to Articles 81 and 82 of the EC Treaty (OJ C 101, 27.4.2004). According to the Court of Justice, the initiation of proceedings implies an authoritative act of the Commission, evidencing its intention of taking a decision (case 48/72 Brasserie de Haecht [1973] ECR 77, 16).

(32) Case C-234/89 Delimitis [1991] ECR I-935, 53, and joined cases C-319/93, C-40/94 and C-224/94 Dijkstra [1995] ECR I-4471, 34. See further on this issue point 21 of this notice.

(33) See Article 16(1) of the regulation and case C-234/89 Delimitis [1991] ECR I-935, 47 and case C-344/98 Masterfoods [2000] ECR I-11369, 51.

(34) Case 314/85 Foto-Frost [1987] ECR 4199, 12 to 20.

(35) See Article 16(1) of the regulation and case C-344/98 Masterfoods [2000] ECR I-11369, 52 to 59.

(36) Case C-344/98 Masterfoods [2000] ECR, I-11369, 58.

(37) Case C-2/88 Imm Zwartveld [1990] ECR I-3365, 16 to 22 and case C-234/89 Delimitis [1991] I-935, 53.

(38) C-94/00 Roquette Frères [2002] ECR 9011, 31.

(39) On the compatibility of such national procedural rules with the general principles of Community law, see points 9 and 10 of this notice.

(40) On these duties, see e.g. points 23 to 26 of this notice.

(41) Case C-234/89 Delimitis [1991] ECR I-935, 53, and joined cases C-319/93, C-40/94 and C-224/94 Dijkstra [1995] ECR I-4471, 34.

(42) Case C-234/89 Delimitis [1991] I-935, 53.

(43) Case T-353/94 Postbank [1996] ECR II-921, 86 and 87 and case 145/83 Adams [1985] ECR 3539, 34.

(44) Case C-2/88 Zwartveld [1990] ECR I-4405, 10 and 11 and case T-353/94 Postbank [1996] ECR II-921, 93.

(45) Case C-2/88 Zwartveld [1990] ECR I-4405, 10 and 11; case C-275/00 First and Franex [2002] ECR I-10943, 49 and case T-353/94 Postbank [1996] ECR II-921, 93.

(46) See point 8 of this notice.

(47) Case C-234/89 Delimitis [1991] ECR I-935, 53, and joined cases C-319/93, C-40/94 and C-224/94 Dijkstra [1995] ECR I-4471, 34.

(48) Compare with case 96/81 Commission v the Netherlands [1982] ECR 1791, 7 and case 272/86 Commission v Greece [1988] ECR 4875, 30.

(49) According to Article 15(4) of the regulation, this is without prejudice to wider powers to make observations before courts conferred on national competition authorities under national law.

(50) See also Article 28(2) of the regulation, which prevents the Commission from disclosing the information it has acquired and which is covered by the obligation of professional secrecy.

(51) Joined cases 46/87 and 227/88 Hoechst [1989] ECR, 2859, 33. See also Article 15(3) of the regulation.

(52) Case C-69/90 Commission v Italy [1991] ECR 6011, 15.

(53) Article 20(6) to (8) of the regulation and case C-94/00 Roquette Frères [2002] ECR 9011.

(54) Article 21(3) of the regulation.

(55) Case C-94/00 Roquette Frères [2002] ECR 9011, 39 and 62 to 66.

(56) See also ibidem, 91 and 92.

(57) OJ C 39, 13.2.93, p. 6.

ANNEX

COMMISSION BLOCK EXEMPTION REGULATIONS, NOTICES AND GUIDELINES

This list is also available and updated on the website of the Directorate General for Competition of the European Commission:

http://europa.eu.int/comm/competition/antitrust/legislation/

A. Non-sector specific rules

1. *Notices of a general nature*

— Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5)

— Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (OJ C 368, 22.12.2001, p. 13)

— Notice on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101, 27.4.2004, p. 81)

— Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 2)

2. *Vertical agreements*

— Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999, p. 21)

— Guidelines on Vertical Restraints (OJ C 291, 13.10.2000, p. 1)

3. *Horizontal co-operation agreements*

— Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements (OJ L 304, 5.12.2000, p. 3)

— Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements (OJ L 304, 5.12.2000, p. 7)

— Guidelines on the applicability of Article 81 to horizontal co-operation agreements (OJ C 3, 6.1.2001, p. 2)

4. *Licensing agreements for the transfer of technology*

— Regulation (EC) No 773/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (OJ L 123, 27.4.2004)

— Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (OJ C 101, 27.4.2004, p. 2)

B. Sector specific rules

1. *Insurance*

— Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 53, 28.2.2003, p. 8)

2. *Motor vehicles*

— Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L 203, 1.8.2002, p. 30)

3. *Telecommunications and postal services*

— Guidelines on the application of EEC competition rules in the telecommunications sector (OJ C 233, 6.9.1991, p. 2)

— Notice on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (OJ C 39, 6.2.1998, p. 2)

— Notice on the application of the competition rules to access agreements in the telecommunications sector — Framework, relevant markets and principles (OJ C 265, 22.8.1998, p. 2)

— Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (OJ C 165, 11.7.2002, p. 6)

4. *Transport*

— Regulation (EEC) No 1617/93 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and co-ordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports (OJ L 155, 26.6.1993, p. 18)

— Communication on clarification of the Commission recommendations on the application of the competition rules to new transport infrastructure projects (OJ C 298, 30.9.1997, p. 5)

— Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) (OJ L 100, 20.4.2000, p. 24)

Exhibit [22]

Treaty Establishing the European Community (Nice consolidated version) - Article 287

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Treaty establishing the European Community (Nice consolidated version) - Part Six: General and Final Provisions - Article 287 - Article 214 - EC Treaty (Maastricht consolidated version) - Article 214 - EEC Treaty

Official Journal C 325 , 24/12/2002 P. 0147 - 0147
Official Journal C 340 , 10/11/1997 P. 0294 - Consolidated version
Official Journal C 224 , 31/08/1992 P. 0075 - Consolidated version
(EEC Treaty - no official publication available)

Treaty establishing the European Community (Nice consolidated version)

Part Six: General and Final Provisions

Article 287

Article 214 - EC Treaty (Maastricht consolidated version)

Article 214 - EEC Treaty

Article 287

The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

Exhibit [23]

Le droit de la preuve devant le juge civil et l'attractivité économique du droit français (France, Angleterre et Pays de Galles, Etats-Unis), Ministère de la Justice, Service des Affaires européennes et internationales, 19 octobre 2005

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19 octobre 2005

Ministère de la Justice

SERVICE

DES AFFAIRES EUROPEENNES ET INTERNATIONALES

Bureau du droit comparé

DOSSIER SUIVI PAR ML NADAUD-CASTANIE
L'Attractivité économique du droit\Note droit de la preuve 191005.doc

LE DROIT DE LA PREUVE DEVANT LE JUGE CIVIL ET L'ATTRACTIVITE ECONOMIQUE DU DROIT FRANÇAIS

(France, Angleterre et Pays de Galles, Etats-Unis)

Les différences culturelles entre les droits de tradition romano-germanique et les droits de *common law* sont évidentes en ce qui concerne le droit de la preuve. Ainsi en droit français, le juge établit la vérité dans son jugement, alors qu'aux Etats-Unis le tribunal confronte les versions de chaque partie, afin de faire triompher la plus vraisemblable à l'audience.

L'analyse des modes de recherche des éléments de preuve en France, en Angleterre et aux Etats-Unis (I), du rôle de l'écrit dans les pays de tradition romano-germanique et de *common law* (II) et de la complexité du droit de la preuve et des aléas liés au *jury* aux Etats-Unis (III) pourrait présenter un intérêt, à l'effet de démontrer l'attractivité économique du droit français. La question de l'expertise dans les pays de tradition civiliste et du recours aux témoins-experts (*expert witnesses)* dans les pays de *Common law* (IV) est une question-clé. Bien que la pratique des *expert witnesses* soit critiquée, l'analyse paraît plus risquée au regard de l'attractivité économique du droit français.

I – LA RECHERCHE DES ELEMENTS DE PREUVE

La production des éléments de preuve repose avant tout sur l'initiative des parties. Mais l'ampleur de cette production peut varier sensiblement selon que celle-ci s'effectue selon les principes d'un droit de *Common law* (production très complète de tous éléments de preuve, favorables ou défavorables, dont peut disposer une partie : la *discovery* ou divulgation) (A) **ou du droit d'un pays continental** (production des éléments de preuve aptes à soutenir les prétentions des parties) (B).

A) Dans les pays de *common law*

La procédure de *discovery* (ou *pre-trial discovery*) est une phase d'investigation de la cause préalable au procès. Elle fait obligation à chaque partie de divulguer à l'autre partie tous les éléments de preuve pertinents au litige dont elle dispose (faits, actes, documents ...), **y compris ceux qui lui sont défavorables,** et ce, par différents moyens (déposition sous serment, question écrite, mise en demeure de communiquer des documents, demande de reconnaissance ou de démenti d'un fait ou d'une allégation ...). **L'objectif est de garantir davantage d'égalité et de justice entre les parties, et d'abréger un procès en permettant l'élimination de certains points qui ne sont pas véritablement contestés.**

1) Angleterre et Pays de Galles

Conçue dans le but de réduire les coûts et d'accélérer la résolution des litiges, la *discovery* génèrait en pratique des frais importants et inutiles et allongeait la procédure. Des réformes récentes ont tenté d'y pallier.

Au Royaume Uni, le rapport Heilbron/Hodge de juin 1993, qui a reçu l'appui de l'ordre des avocats et des notaires, **a souligné les difficultés liées à la procédure de *discovery*** et a recommandé un contrôle plus strict par les parties et le tribunal ainsi que l'application des règles permettant de minimiser le recours à la *discovery*. Le rapport souligne que de très nombreux documents doivent être photocopiés puis analysés par les avocats des parties, alors que tous ne sont pas réellement nécessaires à la solution du litige, certains ne servant qu'à donner des indications sur le contexte. Par ailleurs, la procédure de *discovery* complique et allonge la procédure, en raison de la tendance fréquente à élargir le champ du litige. **La *City of London Law Society* s'est ainsi interrogée sur le bilan coûts/avantages de la *discovery*, au regard de l'efficacité du système. Sans remettre totalement en cause le système, elle a constaté que l'un des principaux facteurs générateurs de coûts et de délais dans le système procédural était dû à la procédure de *discovery*.** Une simple recherche de preuve était très onéreuse pour le justiciable, sans donner nécessairement les résultats escomptés.

Les *Civil Procedural Rules 1998*, entrées en vigueur le 26 avril 1999 à la suite du rapport de Lord Woolf de juillet 1996 sur la procédure civile, n'utilisent plus le terme « *discovery* », mais ceux de « *disclosure* » et « *inspection of documents* ». **Pour la filière rapide *(fast track)*, une communication standardisée entre les parties *(disclosure)* après l'échange des *pleadings* remplace la *discovery*, très lourde et très chronophage.** Pour la filière à

géométrie variable *(multi track)*, le principe est la communication standardisée des pièces entre les parties, sous réserve d'une autorisation du juge pour des demandes complémentaires *(extra disclosure)*. Le *master* peut, à la requête d'une partie, ordonner à l'autre de produire sous la forme d'un *affidavit* (déclaration écrite sous serment) la liste des documents qu'elle a en sa possession, même ceux qu'elle estime défavorables à sa défense, à l'exclusion peut-être de certains documents privilégiés, tels que les supports écrits des témoignages qui seront recueillis à l'audience. Une réponse incomplète relèverait du faux serment.

2) Etats-Unis

Aux Etats-Unis, les avocats instruisent la cause, définissent les éléments de fait et de droit à soumettre au juge, rassemblent les éléments de preuve et conduisent les auditions des témoins au cours du débat. Le juge a un rôle d' « arbitre » neutre et passif, chargé de veiller au respect des règles visant à assurer l'équilibre entre les parties.

Les *Federal Rules of Evidence 2004* régissent l'administration de la preuve devant les tribunaux fédéraux. Si de nombreux Etats se sont inspirés des règles fédérales pour leur propre législation, **les règles varient d'un Etat à l'autre en matière de *discovery***. Les principes de base sont cependant relativement similaires : **la procédure tend à rechercher les preuves, circonscrire l'objet du litige** (en éliminant les motivations types sur lesquelles la partie adverse n'entend pas se fonder lors du procès), **préserver les témoignages et les preuves, et obtenir des témoignages dans un autre Etat.**

La procédure est lourde et peut s'avérer très onéreuse :
- préparation (questionnaires, demandes de documents)
- dépositions des témoins (orales ou par déclarations écrites)
- enregistrement des dépositions (demandes de documents ou d'interrogatoires complémentaires)
- *discovery* par des *expert witnesses*, qui fait l'objet de dispositions spécifiques.

Les avocats pratiquent fréquemment la *« boilerplate discovery »* (demande de *discovery* dont le champ est très large dans la mesure où l'avocat procède par documents-types) **qui augmente les frais sans produire de résultats intéressants. La pratique recourt parfois à un arbitrage privé pour la *discovery* dans les litiges commerciaux, afin de réduire les coûts.**

Souvent utilisée comme une arme par les parties, la *discovery* présente également un risque au regard de la sécurité des affaires. Une demande de *discovery* très large formée par un concurrent dans le cadre d'une procédure peut amener une partie à devoir ouvrir ses archives et produire des documents, dont la communication pourrait être de nature à lui nuire.

Selon Walter K. Olson, les dérapages des coûts aux Etats-Unis tiennent en partie à l'ampleur de la *discovery* en droit américain. Dans son livre référence (*The litigation explosion, 1996*), sur l'explosion des litiges aux Etats-Unis, il fait une analyse critique de cette « industrie du procès » qui est préjudiciable au système judiciaire américain, notamment par la longueur et le coût des procédures. En utilisant des exemples de la vie courante (garde d'enfant, diffamation, préjudice corporel), il montre que le litige est devenu un mode de vie aux Etats-Unis. **Il insiste sur les effets pervers de la *discovery* dans l'administration de la preuve,** par exemple lorsque des avocats n'hésitent pas à louer les services d'« *expert witnesses* » peu scrupuleux. **Après la publication et le succès de**

l'ouvrage de M. Olson, l'administration Bush a repris les thèmes qu'il a développés et a appelé à une réforme du système procédural.

B) *Dans les pays civilistes*

La plupart des pays de tradition romano-germanique ne connaissent pas de procédure tendant à la recherche de preuves, similaire à la *discovery* du *common law*, et n'obligent pas les parties à produire des preuves.

En France, l'administration de la preuve devant le juge civil repose sur la communication spontanée des pièces par les parties. L'effort repose en principe sur chaque partie (l'article 9 du nouveau Code de procédure civile énonce qu'il incombe à chaque partie de prouver conformément à la loi les faits nécessaires au succès de sa prétention). **Une partie peut toutefois compléter, le cas échéant, les preuves dont elle dispose, en sollicitant du juge la production forcée des pièces que l'adversaire n'accepterait pas de verser spontanément** ou de celles détenues par un tiers, le prononcé d'une mesure d'instruction (à condition qu'il ne s'agisse pas d'un remède tendant à pallier la sous-production de pièces, comme le prévoit l'article 146 du NCPC) et les mesures tendant à la conservation ou à l'établissement de la preuve, en amont du procès au fond (article 145 du NCPC).

En droit français, jusqu'en 1972, les principes de la recherche de la preuve en matière civile *voulaient* que le procès en reste aux armes préparées par les parties pour le duel judiciaire. Il était impossible à une partie de contraindre l'autre partie à produire les pièces qu'elle détenait. L'adage de l'ancien droit *nemo tenetur edere contra se* signifiant qu'une partie n'était jamais tenue de produire une pièce susceptible de lui nuire, une partie était exposée à perdre son procès au seul motif que l'élément de preuve indispensable était détenu par l'autre partie.

L'article 10 du Code civil dispose désormais que chacun est tenu d'apporter son concours à la justice en vue de la manifestation de la vérité et que celui qui, sans motif légitime, se soustrait à cette obligation lorsqu'il en a été légalement requis, peut être contraint d'y satisfaire. **L'article 133 du nouveau Code de procédure civile permet à une partie de demander au *juge d'enjoindre une communication de pièces*, au besoin à peine d'astreinte, à condition que cette demande soit motivée et détermine les pièces recherchées. La pratique française de l'injonction de produire invite à la production utile, par opposition à la procédure de *discovery*.**

C) *Discovery* et arbitrage

L'expérience de l'arbitrage international semble démontrer l'attractivité de la tradition romano-germanique en matière de recherche des éléments de preuve. Bien que certains règlements d'arbitrage internationaux (*American Arbitration Association, London Court of International Arbitration*, Chambre de Commerce Internationale, CNUDCI) fassent place à la *discovery*, une ordonnance de procédure de la Chambre de Commerce Internationale de 1993 a refusé une demande de *discovery* trop imprécise, comme étant contraire à l'interdiction de recherche d'informations « qui fait partie des principes fondamentaux du droit procédural en droit de procédure civile dans les pays du continent européen ».

II – LE ROLE DE L'ECRIT

Les pays de tradition romano-germanique mettent l'accent sur la preuve écrite et sur les règles relatives à l'admissibilité de la preuve, alors que les pays de *common law* se focalisent sur le principe de l'oralité. Le *common law* se fixe sur les règles de procédure, afin d'établir la bonne méthode pour trouver « la vérité » lors de l'audience. Les règles de preuve sont donc en *common law* nombreuses et détaillées, afin que les parties puissent se confronter par des interrogatoires (*examinations*) et des contre-interrogatoires (*cross-examinations*).

A) Primauté de l'écrit en France

En France, la primauté de l'écrit est affirmée par l'article 1341 du Code civil : il n'est reçu aucune preuve contre et outre le contenu d'un écrit. Cette règle s'applique aux actes authentiques, aux actes sous seing privé et aux écrits qui leur sont assimilés. Le système français prend en compte les imperfections et les risques du témoignage (risques de mensonge, d'erreur ...).

Le système français met l'accent sur l'admissibilité de la preuve testimoniale dans l'espèce considérée : le fait à prouver doit être pertinent, c'est-à-dire utile à la solution du litige. Par préférence à l'enquête, qui peut être ordonnée par le juge et se dérouler devant lui, la pratique recourt aux attestations écrites des témoins, pour lesquelles le nouveau Code de procédure civile fixe des règles très précises.

En matière commerciale, la preuve est libre, les actes de commerce pouvant se prouver par tous moyens à moins qu'il n'en soit autrement disposé par la loi (article 109 du Code de commerce). La preuve des actes de commerce peut résulter des livres de commerce (article 1330 du Code civil). Certaines règles spéciales viennent contrecarrer la liberté de la preuve commerciale, par leur rigueur.

B) Principe de l'oralité en *common law*

1) Angleterre et Pays de Galles

En Angleterre et au Pays de Galles, le principe de l'oralité domine la preuve des faits et encourage l'établissement des faits de façon directe et immédiate (« *principle of immediacy* »). Il a pour inconvénient de prolonger les audiences, contribuant ainsi aux retards et aux frais de justice, d'où la tendance actuelle à augmenter le rôle des procédures écrites notamment en matière de procédure civile.

Avant la réforme introduite en 1999 suite au rapport Woolf, l'administration des preuves incombait aux parties et n'entrait pas dans les prérogatives du tribunal. Chaque partie produisait ses preuves, en principe oralement, la preuve testimoniale étant privilégiée (c'est encore le cas aujourd'hui). Lorsqu'un expert-témoin (*expert witness*) était appelé à la barre, il arrivait cependant que son témoignage soit délivré par écrit sur autorisation expresse du juge.

La durée de l'expertise est prise en compte dans l'évaluation de la durée du procès. **Les retards enregistrés dans la solution des litiges sont souvent imputés à l'expertise judiciaire. Pourtant l'expert n'a aucun intérêt à dépasser les délais impartis,** dans la mesure où l'article 284 du nouveau Code de procédure civile permet au juge de fixer la rémunération de l'expert en fonction de divers éléments, dont le respect des délais impartis.

Le coût d'une expertise « continentale » est inférieur à celui d'une expertise dans un pays de *Common law*. La qualité d'expert judiciaire attire à l'expert une clientèle privée, l'activité d'expertise judiciaire étant menée en parallèle. **Le tribunal taxe la rémunération de l'expert, ce qui garantit un niveau de rémunération raisonnable.**

En 1973, la multiplication par les experts des diligences non techniques en vue de tenter de concilier les parties, a conduit à recentrer l'expert sur la seule investigation technique. **L'article 240 du nouveau Code de procédure civile impose aux experts une interdiction stricte de concilier les parties. La voie contentieuse classique est ainsi privilégiée.** La pratique s'est attachée à aménager la rigidité du principe : l'expert judicaire fournit fréquemment aux parties un pré rapport qui leur indique les bases techniques d'un rapprochement.

Le rapport Magendie de juin 2004 marque cependant une évolution vers les modes amiables de règlement des litiges, très développés dans les pays de *common law*. Il suggère que l'expert puisse recueillir l'accord des parties qui se concilient en cours d'expertise. L'expert deviendrait un témoin rendant compte des éléments de la transaction.

B) Les *expert witnesses* en *common law*

Les systèmes de *Common law* reposent sur une procédure accusatoire : chaque partie apporte ses preuves en désignant son propre expert. L'expert fait corps avec la partie qu'il assiste. Le tribunal examine les preuves apportées par chaque partie, avant de trancher sur les questions techniques débattues. Il n'y a pas de liste d'experts, la compétence de l'expert étant déterminée par le tribunal.

Les missions des témoins experts (« *expert witnesses* ») sont beaucoup plus larges que celles des experts en droit français :

- Ils sont missionnés par les parties, afin de les aider dans leur recherche des faits et dans l'estimation des chances de succès d'une action en justice. Lors des discussions préliminaires avec un expert potentiel, l'avocat cherchera à cerner si l'expert soutiendra les moyens qu'il entend développer ;

- Ils peuvent également produire en justice leur avis (*expert opinion*), qui sera retenu comme preuve, notamment lorsqu'en raison de leur expertise, la preuve par *expert witness* a une force probante supérieure à celle qui serait fournie par un témoin non qualifié (certificats de coutume sur le droit étranger, métrés faits par les contrôleurs de chantier ...). Au Royaume-Uni, en vertu de l'article 3-1 de la loi sur les preuves en matière civile de 1972, un expert peut donner son avis sur « *tout sujet pertinent sur lequel il est qualifié pour apporter des preuves* » ;

Le juge était lié par la présentation des faits par les parties : il ne pouvait interroger les témoins que dans le but de préciser ou de clarifier une réponse déjà donnée.

La réforme de la procédure civile de 1999 a fait une place plus importante à l'écrit. Pour la filière rapide (*fast track*), il n'y a plus de déposition orale des experts à l'audience. La preuve doit désormais être délivrée par écrit, à moins que la Cour n'en décide autrement.

2) Etats-Unis

Aux Etats-Unis, les rapports entre les parties lors de l'audience, les questions des avocats et les réponses des témoins doivent impérativement être oraux.

Le demandeur débute l'introduction de ses preuves par la présentation des témoins. Un témoin peut attester un fait, expliquer ce qu'il a vu ou entendu. Il ne peut ni donner son opinion ou son impression, ni tirer de conclusions, sauf s'il s'agit d'un expert. Un avocat ne peut poser à son propre témoin des questions orientées, bien qu'il utilise souvent ce moyen pour éclaircir des faits non contestés. L'avocat de la partie adverse devra alors soulever une objection que le juge retiendra (*sustained*) ou, au contraire, qu'il ne jugera pas valable (*overruled*). Lorsque l'avocat du demandeur a terminé l'audition d'un témoin (*examination*), l'avocat de la partie adverse peut à son tour interroger le témoin (*cross examination*). Le contre-interrogatoire devra également être mené sans orienter les questions.

Dans le domaine civil, les parties font appel à des experts dans des affaires complexes (par exemple dans les procès liés à l'amiante). **C'est sur la foi de leur témoignage que le juge ou le *jury* se fondera pour prendre sa décision.**

La preuve écrite (*documentary evidence*) est admise si l'authenticité du document est établie par un témoignage décrivant les conditions dans lesquelles l'écrit a été produit ou les circonstances dans lesquelles l'écrit a été conservé.

III – LA COMPLEXITE DU DROIT DE LA PREUVE AUX ETATS-UNIS ET LES ALEAS LIES A L'INSTITUTION DU JURY

Le jury en matière civile est inconnu dans les systèmes de tradition romano-germanique. D'origine anglaise, le droit à être jugé par un *jury* dans un procès pénal ou civil est aux Etats-Unis un droit politique, inscrit dans la Constitution. En matière civile, ce droit est reconnu par le VIIe amendement à la Constitution, si l'on demande des dommages et intérêts (il s'agit d'une séquelle de l'*Equity*). Le *jury* fait participer le justiciable au fonctionnement de la justice, les jurés tranchant l'affaire au vu des valeurs de la société.

Aux Etats Unis, les procès sont et resteront sans doute, longs et coûteux en raison du caractère contradictoire de la procédure et de la tradition du *jury*. Par rapport à un procès devant un juge, le procès devant un *jury* entraîne un coût direct additionnel. Selon une étude de 1983 du *Rand Institute for Civil Justice*, le coût direct additionnel d'un procès devant un *jury* par rapport à un procès devant un juge unique est de l'ordre de 13.300 $ en moyenne. Selon cette même étude, la durée moyenne d'un procès fédéral devant un jury est de 5,19 jours, contre 2,34 jours devant un juge. Le juge fédéral Richard Posner a repris ces données dans son livre de 1999 (*The Federal Courts : Challenge and Reform*).

Le *common law* a toujours eu des règles de preuve très strictes. Toutefois, le droit de la preuve est marqué aux Etats-Unis par l'institution du *jury*, qui introduit un aléa important.

A) La complexité des règles de preuve

L'élaboration de règles extrêmement détaillées pour la production des preuves s'explique en grande partie par le souhait de limiter les pouvoirs du *jury*. Le *jury*, composé de personnes ordinaires, juge à partir du fonds d'expérience et selon la raison pratique de l'« homme moyen ». Dans une affaire civile, le *jury* doit être convaincu de la supériorité des preuves du demandeur. Le standard de preuve en matière civile est celui de la prépondérance de la preuve (*preponderance of the evidence*), qui exige qu'aucune preuve ne soit admise si sa probabilité ne dépasse pas 50%. **Les thèses des deux parties sont mises en concurrence dans une procédure accusatoire,** le demandeur et le défendeur partageant les risques de la décision à 50-50 (l'unanimité des jurés est parfois requise dans certaines juridictions, sauf si les parties y renoncent). **La règle du « ouï dire »** (« *hearsay rule* » : *Uniform Rule of Evidence 63*) **interdit généralement d'invoquer des déclarations faites en dehors du tribunal en vue de prouver un point donné, car les jurés n'ont pu observer l'attitude du témoin** pendant sa déposition (*examination*) et lors de son contre-interrogatoire par la partie adverse (*cross-examination*).

B) L'aléa du *jury*

1) La capacité du *jury* à statuer dans des affaires complexes

En droit américain, le juge ne participe pas aux délibérations des jurés. Il facilite le travail du *jury* en le préparant et en l'orientant. Il élimine les preuves non pertinentes pour la solution du litige ainsi que les preuves valables mais susceptibles d'influencer excessivement les jurés.

Des voix de plus en plus nombreuses s'interrogent sur la capacité des jurés à statuer dans des affaires très complexes. Dans une affaire d'ententes illicites extrêmement compliquée (*Japanese Electronic Products Antitrust Litigation 3rd circuit 1980*), une cour d'appel fédérale, en raison de la durée prévisible du procès, de la masse de preuves, du nombre des réclamations, des difficultés techniques de l'affaire, de la quantité d'expertises et de l'impossibilité de compartimenter les divers aspects du litige a reconnu pour la première fois une **« exception de complexité »** et s'en est remise à un collège de trois juges fédéraux. D'autres voies ont également été explorées, telles que la scission du procès ou la *bifurcation* du procès. Par ailleurs, le juge peut, avec ou sans le consentement des parties, désigner un

special master (professeur de droit ou juge à la retraite) pour l'assister lorsque les questions sont complexes. Les *special masters* présentent leurs preuves et leurs conclusions au *jury*.

2) L'explosion des dommages punitifs

Le monde des affaires peut se sentir menacé par l'imprévisibilité des jurés et se plaint de l'explosion des dommages punitifs (*punitive damages*). Les grandes entreprises risquant de voir leur responsabilité engagée, notamment dans des affaires d'atteinte à l'environnement ou de contamination collective, essaieront de les retirer du *jury* ou à tout le moins d'obtenir une composition du *jury* qui leur soit favorable. La simple sélection des jurés, qui est essentielle quant à l'issue du procès, peut prendre à elle seule plusieurs semaines.

Le système des *class actions* (action collective) et des *contingency fees* (honoraires de résultat) contribue à faire exploser les frais de justice. La majorité des affaires contentieuses seront résolues par la voie d'un accord à l'amiable.

A cause des dommages et intérêts accordés, les primes d'assurance ont grimpé dans les années 80 et certaines entreprises n'ont eu comme choix que de répercuter la hausse des primes d'assurances sur leurs clients ou de bannir toute innovation susceptible de s'avérer dangereuse. C'est la thèse soutenue notamment par Peter W. Huber, juriste et écrivain américain, dans ses ouvrages. Certaines entreprises françaises ont, semble t'il, tendance à renoncer à exercer des activités aux Etats-Unis en raison du montant dissuasif des primes d'assurance.

IV – L'EXPERTISE DANS LES PAYS DE TRADITION CIVILISTE ET LE RECOURS AUX *EXPERT WITNESSES* DU *COMMON LAW*

A) L'expertise dans les pays civilistes

Dans les systèmes de tradition romano-germanique qui reposent sur des notions inquisitoires, l'expert est désigné par le tribunal. L'expert judiciaire convoque les parties contradictoirement pour mener sa propre enquête. Il est nécessairement impartial et son rapport est destiné à éclairer le tribunal. Le corps des experts est un corps exclusif, les experts étant inscrits sur une liste d'experts agréés.

Le doyen Cornu a défini l'expertise comme une « *mesure d'instruction consistant, pour le technicien désigné par le juge, à examiner une question de fait qui requiert ses lumières et sur laquelle des constatations ou une simple consultation ne suffiraient pas à éclairer le juge et à donner un avis purement technique sans porter d'appréciation purement juridique* ».

L'expert commis doit accomplir sa mission avec conscience, objectivité et impartialité (article 237 du nouveau Code de procédure civile).

- Ils exécutent également les missions d'expertise ordonnées par un tribunal et peuvent siéger en tant qu'assesseurs afin d'aider le tribunal lors de l'examen de preuves à caractère technique.

1) Angleterre et Pays de Galles

L'évolution du modèle anglais de l'expertise s'est inspirée du principe accusatoire du système français. Les nouvelles règles de procédure prévoient que le juge dispose d'un pouvoir d'appréciation pour autoriser la preuve par expert. Il doit la restreindre à ce qui est raisonnablement nécessaire à la résolution du litige. Les nouveaux principes directeurs tendent à limiter les coûts et affirment fortement le devoir du tribunal de conduire la procédure.

a) Vers le système de l'expert unique

Au Royaume Uni, le rapport Heilbron/Hodge de 1993 a évoqué les difficultés liées aux *expert witnesses*, notamment les frais et retards excessifs, qu'un contrôle accru par les tribunaux ne peut suffire à pallier. En effet, les règles de procédure ne permettent pas à un tribunal d'exclure totalement la preuve par expert si les parties désirent y recourir. Par ailleurs, l'impartialité des experts est également en cause : le rôle de *l'expert witness*, à l'origine indépendant, a évolué vers celui de conseil « supplémentaire » de la partie qui l'a missionné, recherchant l'aval du conseil de la partie qui les a missionnés.

De plus en plus, lorsque les sommes en jeu sont faibles ou dans des affaires sans grande complexité, les parties ont été encouragées par le système anglais à ne nommer qu'un seul expert. Bien que la possibilité de désigner un seul et unique expert existe depuis 1904, la nomination d'experts uniques communs n'a été sérieusement envisagée qu'en 1998, lors des réformes de Lord Woolf sur la procédure civile. **Les réformateurs du système de procédure civile en Angleterre ont reconnu que le système d'un expert unique présentait des avantages, si les conditions s'y prêtaient. Tout en rappelant les inconvénients du système civiliste pour un *Common lawyer*** (faible taux de satisfaction, affaire en pratique décidée sur la base du rapport d'expertise et non par le juge, frais d'expertise s'ajoutant aux frais des experts de chaque partie ...), **le Barreau et la *Law Society* ont estimé que le recours à un expert désigné par le tribunal pourrait parfois s'avérer la meilleure solution et réduirait, voire supprimerait, beaucoup des problèmes liés aux *expert witnesses*.**

Toute nomination d'expert par une partie doit être autorisée par le tribunal. Lors de la conférence de mise en état, le tribunal déterminera le nombre d'experts et le nombre de disciplines dans lesquelles l'avis d'un expert est requis en fonction de la nature des points en litige, du montant des demandes et de la complexité de l'affaire. Lorsque les sommes en litige sont faibles, le tribunal encouragera les parties à nommer un seul expert, voire le leur imposera. S'il reste inhabituel que les parties suggèrent au tribunal de désigner un seul expert, le tribunal peut désigner d'office un seul expert s'il considère que le recours à un expert unique peut permettre de résoudre les faits en litige. Si le tribunal décide de nommer un seul expert, les parties devront convenir de sa désignation. A défaut, le tribunal choisira l'expert sur une liste préparée par les parties ou ordonnera que l'expert soit désigné selon toute autre procédure, au choix du tribunal. La voie rapide (*fast track*) est obligatoirement limitée à une seul expertise. **En 2002, le Département des affaires constitutionnelles a déclaré que le recours à un expert unique semblait avoir contribué à un système de justice civile moins accusatoire et avoir encouragé des transactions.**

b) La désignation de l'expert

A la différence de la France, il n'y a pas de procédure séparée pour nommer des experts : le témoignage de l'expert fait partie de la procédure au fond. La définition de la mission de l'expert incombe aux parties. Toutefois le nouveau système permet à la Cour d'intervenir .

c) L'impartialité de l'expert

En Angleterre, l'article 35 des règles de procédure civile précise que les experts ne sont pas les représentants des parties. Si le juge ou l'avocat de la partie adverse soumet à l'expert des questions spécifiques dont la réponse est défavorable à la partie qui l'a nommé, l'expert doit répondre à ces questions. **Le premier des devoirs des experts est d'apporter au tribunal une assistance indépendante par une évaluation objective et impartiale. Le devoir de l'expert envers le tribunal prévaut sur toute obligation vis-à-vis de la partie qui l'a missionné.**

Les communications d'une partie avec un expert ne sont pas protégées : selon les règles de procédure anglaise, chaque partie peut exiger la communication des conseils et des lettres d'instruction adressées à la partie adverse. **La partie ayant missionné un expert ne peut donc se fonder sur les seuls aspects de l'avis de l'expert qui lui seraient favorables.**

d) Les opérations d'expertise

Chaque expert prépare son rapport qui est produit avant l'audience. Après communication des rapports, les experts se réunissent, hors la présence des parties et du juge, afin d'identifier les points sur lesquels ils sont d'accord et ceux sur lesquels leurs opinions divergent. Les experts rédigent un compte rendu de leur réunion, qui aidera les parties à définir et à limiter les points qui seront évoqués par les experts lors de l'audience de plaidoiries. A l'audience, chaque expert sera interrogé puis contre-interrogé par les parties. Les contre-interrogatoires peuvent être longs et intensifs et la crédibilité de l'expert sera mise en question.

Les tribunaux anglais n'accordent pas d'importance au principe français du contradictoire lors du déroulement des opérations d'expertise. **Les preuves sont communiquées à toutes les parties à la procédure afin qu'elles soient contradictoires, mais les opérations des experts ne sont pas nécessairement contradictoires.**

e) Les frais

La règle habituelle est que la partie ayant gagné un procès recouvre à l'encontre de l'autre partie la plupart des frais de procédure (honoraires des avocats et rémunérations des experts).

2) Etats-Unis

Aux Etats-Unis, chaque partie désigne son ou ses *expert witnesses*. Les experts-témoins missionnés par chaque partie préparent une opinion écrite, restent disponibles pour les dépositions (les réunions pendant lesquelles l'avocat adverse peut interroger le témoin pour clarifier des points litigieux) et se présenteront devant le tribunal pour être interrogés par la partie les ayant cités (*examination*) et contre-interrogés par la partie adverse (*cross examination*).

Les procès donnent souvent lieu à des batailles d'experts, les intérêts de chaque partie étant défendus par un groupe d'expert rémunérés par elle.

a) Le juge ne peut ordonner la désignation d'un expert unique

Au cours de l'audience préliminaire, le juge peut limiter le nombre d'experts en fonction de l'importance et de la complexité du litige. Toutefois, **le juge ne peut pas d'office ordonner aux parties de désigner un expert unique, les règles de procédure civile n'envisageant pas cette possibilité.** Les *Federal Rules of Civil Procedure* et les codes de certains Etats permettent au tribunal de désigner des experts neutres qui s'ajoutent à ceux auxquels les parties ont fait appel (*Rule* 706 des FRCP). **Bien que les parties aient la possibilité de nommer un expert unique, cela reste très inhabituel dans un système aussi accusatoire.**

b) Les experts ne sont pas tenus d'un devoir supérieur envers le tribunal

Les experts ne sont pas tenus d'un devoir supérieur envers le tribunal comme au Royaume-Uni. S'ils sont à l'évidence tenus de ne pas se rendre coupables de parjure, leur loyauté va pour le reste à la partie qui les a missionnés.

c) Les opérations d'expertise

Comme dans le système anglais, il n'y a pas de procédure séparée pour nommer des experts. Ils sont nommés et interviennent dans le cadre de la procédure au fond.

Conclusion

L'opposition entre les deux traditions juridiques n'est plus aussi tranchée qu'elle l'était par le passé mais la *discovery* incontrôlée (*uncontrolled discovery*) semble être un des facteurs majeurs générant des coûts inutiles en droit des pays de *common law*. Elle oblige les avocats de chaque partie à des « parties de pêche », qui sont les heures passées à lire et à analyser le nombre, parfois impressionnant, de pièces communiquées, afin de dégager celles qu'ils utiliseront.

Les inconvénients d'une telle *discovery* ont notamment été soulignés par Lord Woolf, dans son rapport « *Access to justice* », qui a conduit à réformer la procédure civile en 1999 en Angleterre et au Pays de Galles. Ces nouvelles règles visent à créer de nouveaux équilibres entre les parties et le tribunal, à assurer une meilleure proportionnalité entre la nature de la cause et la procédure utilisée, à atténuer les effets du système contradictoire, entre autres en donnant aux tribunaux les moyens de gérer les procédures, de contrôler les expertises et de resserrer la preuve, à responsabiliser les parties et leurs avocats dans la conduite de l'instance et à instaurer des délais cibles pour encadrer l'action. Elles semblent également mettre l'accent sur les modes amiables de règlement des litiges, les favoriser et les insérer dans le contexte procédural. L'opposition n'est donc plus aussi radicale avec le système civiliste d'un pays comme la France.

Le principe de l'oralité tend également à prolonger les audiences en *common law*.

Enfin, si l'expertise « continentale » est critiquée en *common law*, le système des *expert witnesses* génère des coûts importants.

On constate que les systèmes français et anglais ont évolué au cours des dernières décennies dans le sens d'un rapprochement, chaque pays ayant, semble t'il, pris en considération les inconvénients pratiques découlant de son propre système. Le rapprochement et l'harmonisation des législations dans le cadre de l'Union européenne favorise cette convergence de vues dans des systèmes se heurtant à des difficultés comparables.

Les différences restent en revanche marquées entre le droit français et le droit américain, qui reste empreint d'une véritable culture du procès et l'explosion des litiges (*the litigation explosion*). Aux Etats-Unis, il existe une véritable industrie du procès, même si près de 90% des affaires font l'objet d'une transaction entre les parties. **L'aléa du *jury* américain reporte en amont la pression sur le système judiciaire. Le droit de la preuve devient toujours plus compliqué, son administration de plus en plus lente et coûteuse tant lors de la phase de *discovery* que du procès lui-même. Les avocats doivent compenser l'aléa de la décision du *jury* en construisant un dossier très solide.**

La question de la preuve rejoint celle du coût des procédures, élevé dans les pays de *common law*. Le coût des procédures en *common law* conduit les parties vers les modes alternatifs de règlement des litiges (*alternative dispute resolution*) et vers des transactions. Toutefois, les parties transigent souvent au dernier moment, alors qu'un temps précieux s'est déjà écoulé et que des sommes importantes ont été dépensées pendant la procédure de recherche des preuves préalable au procès.

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Exhibit [24]

Rules of evidence before civil courts and economic attractiveness of French law (France, England and Wales, United-States), Justice Ministry, European and International Affairs Department, 19 October 2005

Exhibit [ ]

Rules of evidence before civil courts and economic attractiveness of French law (France, England and Wales, United States), Justice Ministry, European and International Affairs Department, 19 October 2005

(...)
2) United States

In the United States, attorneys instruct the case, define the questions of fact and the questions of law to be submitted to the court, gather the evidence and conduct the hearings of witnesses during the debate. The judge plays the role of an "arbitrator," who is neutral and passive, and ensures compliance with the rules protecting balance between the parties.

The *Federal Rules of Evidence 2004* govern the administration of evidence before federal courts. While numerous States have drawn on federal rules in order to prepare their own legislation, **discovery rules vary from one State to the next**. However, basic principles are relatively similar: **the procedure aims at seeking the evidence, delineating the subject matter of the dispute** (by eliminating standard grounds upon which the adversary party does not intend to rely during the trial), **protecting testimonies and evidence, and obtaining witness evidence in another State.**

The procedure is cumbersome and may prove highly expensive:

- preparation (questionnaires, requests for documents)
- depositions by the witnesses (whether orally or through written declarations)
- recording of the depositions (requests for documents or additional interrogations)
- discovery by expert witnesses, governed by specific provisions.

Attorneys frequently engage in a boilerplate discovery process (request for a discovery process having a very broad scope, as the attorney is using standard documents) **which increases expenses without producing any interesting results. In practice, in order to reduce costs, the parties sometimes rely on private arbitration for the purposes of the discovery process in commercial disputes.**

While discovery is often used as a weapon by the parties, it also creates a business security risk. A very broad discovery request made by a competitor in connection with a procedure may compel a party to open up its archives and produce documents, whose disclosure might harm the said party.

According to Walter K. Olson, the excessive costs incurred in the United States in connection with legal proceedings are partly attributable to the broad range of the discovery process in US law. In his landmark work (*The Litigation Explosion*, 1996), Olson critically analyzes this "litigation industry," which is detrimental to the US judicial system, in particular because of the length and cost of the procedures. By taking examples from daily life (child custody, slander, bodily injury), Olson shows that litigation has become a way of life in the United States. **He emphasizes the perverse effects of discovery in the administration of evidence**, for instance when attorneys do not hesitate to hire unscrupulous "expert witnesses." **After the publication and success of Mr. Olson's work, the Bush administration re-used the themes that he had discussed and asked for a reform of the procedural system.**

Conclusion

The opposition between the two legal traditions no longer is as clear-cut as in the past. However, uncontrolled discovery seems to be one of the major factors inducing useless costs in common law countries. This obliges each party's attorneys to hunt for evidence by spending endless time reading and analyzing the large, and sometimes impressive, number of communicated exhibits, in order to determine which ones they shall use.

The drawbacks of such a discovery process were in particular emphasized by Lord Woolf in his report entitled "Access to Justice" which led in 1999 to a civil procedure reform in England and Wales. These new rules are aimed at striking a new balance between the parties and the court, ensuring greater proportionality between the nature of the case and the procedure used, attenuating the effects of the adversary procedure, *inter alia* by giving courts the means of managing procedures, controlling the expert assessment process, tightening evidence, increasing the responsibility of the parties and their attorneys as regards the conduct of the proceedings, and determining target lead times in order to regulate the suit. These new rules also seem to focus on, and favor, amicable dispute settlement methods, and insert them into a procedural context. Therefore, the contrast with the civil-law system of a country such as France is no longer as radical as it had been.

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Exhibit [25]

Rapport sur l'action de groupe, Groupe de travail présidé par Guillaume Cerutti et Marc Guillaume, remis le 16 décembre 2005 au Ministre de l'économie, des finances et de l'industrie et au Ministre de la Justice, Garde des Sceaux

pièce 15
affaire 4/0

Exhibit []

Rapport sur l'action de groupe, Groupe de travail présidé par Guillaume Cerutti et Marc Guillaume, remis le 16 décembre 2005 au Ministre de l'économie, des finances et de l'industrie et au Ministre de la Justice, Garde des Sceaux.

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Un tel dispositif serait de nature à faciliter une exécution volontaire de la décision de justice. En effet, alors que la poursuite par chacun des bénéficiaires de la décision de leurs intérêts propres serait facteur de développement des procédures d'exécution, l'association de consommateurs et le professionnel pourraient passer un accord de règlement des dommages et intérêts, préalablement à la mise en œuvre des voies d'exécution forcée.

A été émise l'idée de la création d'un fonds chargé de recouvrer pour le compte des victimes l'intégralité des condamnations et de les reverser en exécution de la décision judiciaire, sans possibilité de modifier le montant des préjudices tels que fixés par le juge.

La création d'un tel organisme serait étranger au droit français de l'exécution des décisions de justice. En outre, les frais générés par cet organisme ne pourraient être considérés comme des frais d'exécution et devraient être supportés par les consommateurs bénéficiaires de la décision, contrairement aux frais tarifés des huissiers de justice à la charge du professionnel condamné.

III - *Les autres questions posées par la mise en place de l'action*

A) *Le droit de la preuve*

L'efficacité de la procédure dépend pour partie des moyens d'enquête dont disposent les demandeurs pour démontrer le bien-fondé de leurs prétentions. Les Etats-Unis et le Québec ont mis en place une procédure de *discovery*, abandonnée dans cette province à compter du 1er janvier 2003. Impliquant pour une partie l'obligation de communiquer les éléments de preuve dont elle dispose, elle permet l'instauration d'une phase d'instruction pendant laquelle l'avocat du demandeur peut avoir accès à tous les faits, tous les documents détenus ou connus de la partie adverse.

Le droit français est déjà doté de mécanismes efficaces permettant à une partie d'obtenir que lui soient communiqués tous documents s'il existe un motif légitime de conserver ou d'établir avant tout procès la preuve de faits dont pourrait dépendre la

solution du litige[21] et de se faire communiquer en cours d'instance des pièces détenues par une partie ou à un tiers[22].

Une réforme de notre droit sur le modèle de la procédure de *discovery* consisterait à permettre à une partie d'obtenir de son adversaire de lui communiquer une liste des documents non versés aux débats mais en relation avec le litige et dont celui-ci aurait connaissance. Cette hypothèse présente cependant plusieurs inconvénients graves. Dans la mesure où le juge devrait examiner la légitimité de la demande forcée de production de pièces, elle induirait tout d'abord une plus grande complexité des procédures, et corrélativement un accroissement important des délais et surtout des coûts de celles-ci.

De façon plus générale, la procédure de *discovery,* si elle est un instrument fondamental de la justice anglo-saxonne, ne peut être transposée dans d'autres systèmes de droit. Elle tend en effet à remettre en cause les principes directeurs du procès civil selon lesquels il incombe à chaque partie de prouver conformément à la loi les faits nécessaires au succès de sa prétention[23]. En outre, pour être efficace, une telle procédure suppose l'existence de sanctions civiles et pénales punissant la partie qui n'a

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[21] Article 145 du nouveau code de procédure civile : « S'il existe un motif légitime de conserver ou d'établir avant tout procès la preuve de faits dont pourrait dépendre la solution d'un litige, les mesures d'instruction légalement admissibles peuvent être ordonnées à la demande de tout intéressé, sur requête ou en référé. »

22 Article 10 du code civil : « Chacun est tenu d'apporter son concours à la justice en vue de la manifestation de la vérité. Celui qui, sans motif légitime, se soustrait à cette obligation lorsqu'il en a été légalement requis, peut être contraint d'y satisfaire, au besoin à peine d'astreinte ou d'amende civile, sans préjudice de dommages et intérêts. »

Article 11 nouveau code de procédure civile : « Les parties sont tenues d'apporter leur concours aux mesures d'instruction sauf au juge à tirer toute conséquence d'une abstention ou d'un refus.
Si une partie détient un élément de preuve, le juge peut, à la requête de l'autre partie, lui enjoindre de le produire, au besoin à peine d'astreinte. Il peut, à la requête de l'une des parties, demander ou ordonner, au besoin sous la même peine, la production de tous documents détenus par des tiers s'il n'existe pas d'empêchement légitime ».

Article 138 du nouveau code de procédure civile : « Si, dans le cours d'une instance, une partie entend faire état d'un acte authentique ou sous seing privé auquel elle n'aurait pas été partie ou d'une pièce détenue par un tiers, elle peut demander au juge saisi de l'affaire d'ordonner la délivrance d'une expédition ou la production de l'acte ou de la pièce. »

Article 142 du nouveau code de procédure civile : « Les demandes de production des éléments de preuve détenus par les parties sont faites, et leur production a lieu, conformément aux dispositions des articles 138 et 139. »

[23] Article 9 du nouveau code de procédure civile

pas spontanément communiqué la liste des éléments de preuve en sa possession. Il n'est ni souhaitable ni demandé de faire évoluer en ce sens notre système juridique.

Toutefois, certains membres du groupe ont évoqué la possibilité, pour les seuls petits litiges de la consommation, de faire évoluer la procédure civile, de type accusatoire, vers une procédure de type inquisitoire.

B). *L'instauration de dommages et intérêts punitifs*

L'instauration de dommages et intérêts punitifs permettrait au juge civil de prononcer un montant de dommages et intérêts supérieur à celui nécessaire à l'indemnisation des préjudices effectivement subis par les consommateurs victimes. Elle permettrait de sanctionner le responsable d'un dommage, notamment lorsque le profit qu'il a retiré du fait dommageable est supérieur à celui du préjudice subi par la victime, ou encore lorsque le préjudice subi par un grand nombre de victimes est si faible que celles-ci n'entendent pas en demander l'indemnisation.

Pourtant, les dommages et intérêts punitifs s'apparentent à une peine privée dont l'introduction modifierait les principes directeurs du procès civil en faisant apparaître des procureurs privés qui requérraient des peines au nom d'un groupe non identifié de consommateurs. Cette pénalisation du procès civil serait autant inopportune qu'inutile compte tenu de l'efficacité des dispositions pénales en la matière. En effet, de nombreuses dispositions du droit de la consommation sont assorties de sanctions pénales et certains parquets comprennent des sections spécialisées en la matière. En outre, dans certaines matières, la direction générale de la concurrence, de la consommation et de la répression des fraudes peut désormais conclure une transaction avec un professionnel après accord du procureur de la République[24]. La voie pénale se révèle ainsi particulièrement bien adaptée à la sanction des comportement à l'origine des « préjudices diffus », en complément de l'introduction d'une action de groupe permettant d'indemniser chaque consommateur lésé.

C). *La création de mécanismes de réparation collective*

Le groupe de travail s'est interrogé sur la possibilité que la réparation du préjudice ne soit pas effectuée seulement par l'allocation de dommages et intérêts aux victimes mais aussi par d'autres méthodes conduisant à priver le professionnel d'une somme correspondant au montant global des préjudices qu'il a causé ou à réparer en nature le préjudice subi par les victimes. Il s'agirait par exemple de permettre au juge d'ordonner au professionnel la mise en oeuvre de mesures de réparation en nature appropriées.

[24] Articles L 470-4-1 du code de commerce, L 141-2 et L 216-11 du code de la consommation

Exhibit [26]

Report on group actions, Working Group chaired by Guillaume Cerutti and Marc Guillaume, delivered on 16 December 2005 to the Minister of the Economy, Finance and Industry and to the Justice Minister, Warden of the Seals

Exhibit [ ]

Report on group actions, Working Group chaired by Guillaume Cerutti and Marc Guillaume, delivered on 16 December 2005 to the Minister of the Economy, Finance and Industry and to the Justice Minister, Warden of the Seals

(...)

A) The law of evidence

The effectiveness of the procedure depends partly on the investigative resources available to the plaintiffs in order to demonstrate the merits of their claims. The United States and Quebec introduced a discovery procedure that was abandoned in Quebec effective from 1 January 2003. This procedure imposes on the parties the obligation to disclose the evidence in their possession and allows for the organization of an investigation phase during which the plaintiff's attorney may have access to all facts and all documents held by the adversary party or known to it.

French law already provides for effective mechanisms enabling a party to obtain the disclosure of any documents, if there are any legitimate reasons for protecting or providing, before any proceedings, the proof of facts that may influence the solution of a dispute,[21] and to receive, during the proceedings, documents held by a party or by a third party.[22]

A reform of our legal system aiming at the introduction of the discovery procedure would consist in enabling a party to obtain the communication, by the adversary party, of the list of all documents known to the adversary party and related to the dispute but not adduced as evidence. However, such a change would have several serious drawbacks. Insofar as the judge must review the legitimacy of the request for the compulsory production of documents, this would first induce greater procedural complexity, and at the same time considerably lengthen the procedures and increase their cost.

More generally, while the discovery procedure is a fundamental instrument of the US judicial system, the procedure may not be transposed in other legal systems. Indeed, this procedure tends to challenge the guiding principles of any civil-law judicial process, in which each party is responsible for proving, in accordance with provisions of law, the facts necessary for the

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[21] Article 145 of the French New Code of Civil Procedure: "If there is a legitimate reason to preserve or to establish, before any legal process, the evidence of the facts upon which the resolution of the dispute might depend, then legally permissible preparatory inquiries may be ordered at the request of any interested party, by *way of a petition* or by *way of a summary procedure*."

[22] Article 10 of the French Civil Code: "Each party is bound to cooperate with the court so that the truth may be identified. He who, without legitimate reason, avoids the said obligation when it has been lawfully imposed on him, may be compelled to comply with the said obligation, if need be, subject to a periodic penalty payment or a civil fine, without prejudice to any damages."

Article 11 of the French New Code of Civil Procedure: "The parties are obligated to cooperate, with a view to the implementation of the investigation measures, and the Court shall determine any consequences of any abstention or refusal to so cooperate.
Where a party holds any evidence, the judge may, at the request of the other party, order the party holding the evidence to produce the same, where necessary subject to a periodic penalty payment. At the request of either party, the judge may also request or order, if necessary subject to the same penalty, the production of all documents held by third parties where there is no legitimate obstacle preventing such production."

Article 138 of the French New Code of Civil Procedure: "If, during the proceedings, any party wishes to rely on any notarized deed or a private deed to which the requesting party was not a party or on any document held by a third party, such requesting party may ask the judge, to whom the matter is referred, to order the delivery of a certified copy or order the production to the court of the said deed or document."

Article 142 of the French New Code of Civil Procedure: "Requests for the production of evidence held by the parties are made, and the evidence is produced, in accordance with the provisions of Articles 138 and 139."

success of its claims.[23] In addition, in order to be effective, such evidence process requires the existence of civil and criminal sanctions applicable to the party that has failed to spontaneously communicate the list of the evidence in its possession. It is not advisable to cause our legal system to evolve in that direction, and no request has been made to that end.

However, certain members of the group have discussed the possibility, as regards only small consumer claims, of causing a change in the civil procedure, from an accusation process to an investigation process.

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Décret n° 53914 Art. 8 du 26.9.1953).

[23] Article 9 of the French New Code of Civil Procedure.

Exhibit [27]

La dépénalisation de la vie des affaires, Groupe de travail présidé par Jean-Marie Coulon, Premier Président honoraire de la Cour d'appel de Paris, Rapport au Garde des Sceaux, Ministre de la justice, janvier 2008

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La dépénalisation de la vie des affaires, Groupe de travail présidé par Jean-Marie Coulon, Premier Président honoraire de la Cour d'appel de Paris, Rapport au Garde des Sceaux, Ministre de la justice, janvier 2008.

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du groupe est susceptible de supporter les frais de justice exposés par la partie adverse en cas d'échec de l'action.

Ces exemples étrangers montrent que la mise en place d'une régulation des relations économiques par la justice civile est un mouvement naissant en Europe et déjà bien établi en Amérique du Nord. La France n'est d'ailleurs pas étrangère à ce mouvement, plusieurs acteurs politiques ou commissions ayant depuis deux ans proposé l'introduction en droit français d'une action de groupe.

Ainsi, le projet de loi en faveur des consommateurs déposé le 8 novembre 2006 à l'Assemblée nationale prévoyait une action de ce type. Son champ était limité aux litiges de consommation et à la réparation du préjudice matériel. Dans une première phase, le juge statuait sur le principe de la responsabilité du professionnel. L'action devait être introduite par une association de consommateurs représentative et agréée, avec le concours d'un avocat. La prescription était interrompue pour les consommateurs victimes. En cas de jugement déclarant la responsabilité, il était diffusé aux frais du professionnel une information sur le jugement avec indication du délai pendant lequel il pouvait être demandé réparation. Puis, dans une deuxième phase, il était procédé à l'indemnisation des consommateurs. La demande était adressée au professionnel. Le consommateur pouvait saisir la juridiction en cas de refus ou d'absence d'offre d'indemnité. Le juge pouvait condamner le professionnel à verser une somme allant jusqu'à 50 % de l'indemnité, à titre de pénalité.

La Commission pour la libération de la croissance française dite « commission Attali » propose quant à elle de réserver l'introduction des actions de groupe à des associations de consommateurs agréées à cette fin pour une période déterminée par le ministre de l'Économie et des Finances et de prévoir, en cas de procédure abusive, l'indemnisation par les demandeurs des dommages subis par la défense. Elle préconise de désigner de manière limitative les juridictions compétentes pour traiter ces contentieux. Par ailleurs, elle plaide pour le principe selon lequel seuls les consommateurs ayant choisi d'adhérer à l'action de groupe pourront y participer (système d'*opt in*). Enfin, elle souhaite s'assurer que toute transaction soit homologuée après examen par le tribunal compétent.

D'autres acteurs politiques sont également en faveur de l'instauration d'une action de groupe : c'est le cas du secrétaire d'état à la consommation et de certains parlementaires, qui ont préparé des projets de texte. En définitive, derrière cette grande majorité en faveur de la mise en place de l'action de groupe, la problématique centrale est de savoir comment elle peut être encadrée, afin d'éviter les dérives de certains modèles étrangers, sans pour autant empêcher qu'elle devienne un mode de régulation substitutif à la justice pénale.

Encadrer l'action de groupe pour éviter une instrumentalisation à des fins étrangères à l'indemnisation d'un préjudice collectif

Si un nombre important de personnes entendues s'est montré favorable à l'introduction d'une action de groupe ou action collective en droit français, une grande majorité a insisté sur le besoin d'encadrer une telle procédure par des garanties quant à la recevabilité des actions intentées. Il convient en effet

de se prémunir contre une évolution possible vers le régime des *class actions* américaines qui contribuent à développer l'hyper juridictionnalisation des rapports économiques. En effet, ce système amène des avocats spécialisés à mettre en péril la santé de certains secteurs économiques, en instaurant un système de chantage qui amène les entreprises à payer une indemnisation plutôt que de subir un procès médiatique dégradant leur image.

Pour éviter ces dérives, outre l'encadrement de l'action, il est préférable de ne pas importer les institutions qui amènent à produire ces dérives : d'une part les dommages-intérêts punitifs[1], qui risquent de créer une confusion entre réparation et sanction, et d'autre part la procédure de *discovery*[2], dont l'utilisation abusive conduit à une instrumentalisation à des fins de déstabilisation d'une entreprise ou d'espionnage d'un concurrent. En deuxième lieu, il est nécessaire de veiller à l'articulation des actions de groupe avec la voie pénale, afin d'éviter la possibilité d'un cumul entre les deux procédures. Il convient de ne pas reprendre en troisième lieu les dérives américaines en matière d'honoraires d'avocat. Ces dérives proviennent en partie des règles de déontologie des avocats, qui d'une part acceptent le pacte de *quota litis*, d'autre part ne limitent pas le montant des honoraires, et permettent leur fixation sur la base des dommages-intérêts perçus par le client, ce qui encourage certains conseils à engager de véritables croisades pour obtenir les indemnités les plus élevées. Enfin, ces règles de déontologie autorisent le démarchage, ce qui permet aux avocats de faire de la publicité pour constituer le groupe. Ces deux mécanismes ne sont pas possibles en droit français.

L'encadrement de l'action de groupe doit également porter sur son champ. Il convient ainsi de limiter son application aux domaines pour lesquels elle est économiquement justifiée, c'est-à-dire aux litiges pour lesquels les justiciables n'auraient pas d'intérêt économique à agir. C'est donc au droit de la consommation qu'il convient de limiter cette action.

L'opportunité d'une action de groupe dans d'autres branches du droit a pu être discutée, mais n'a pas été retenue en l'état. Ainsi, en droit des sociétés, elle se heurte à la définition du préjudice de l'actionnaire, au-delà de la baisse de l'action. En outre, elle n'a pas la même justification économique, l'actionnaire prenant par définition un risque en achetant des actions cotées, alors que le consommateur est en droit d'attendre une prestation conforme à un contrat.

Enfin, à la différence de l'action en représentation conjointe, possible devant toutes les juridictions, il y a lieu de limiter l'action de groupe aux actions devant le juge civil, à l'exclusion de la voie pénale, sans quoi cette dernière ne répondrait bien évidemment pas à l'objectif de dépénalisation[3].

(1) Les dommages-intérêts punitifs permettent au juge d'aller au-delà de la réparation du préjudice et de sanctionner un comportement fautif, procédure connue du droit anglo-saxon.

(2) La procédure de *discovery*, connue du droit anglo-saxon, consiste à demander au juge la production forcée de tous documents, sans examen de l'utilité de ces pièces pour la procédure au fond.

(3) L'article L. 422-2 du Code de la consommation dispose que l'action en représentation conjointe est recevable devant les juridictions pénales : *« Tout consommateur*

Exhibit [28]

Removing criminal law rules from business law, Working Group chaired by Jean-Marie Coulon, First Honorary Presiding Judge of the Court of Appeals of Paris, Report submitted to the Justice Minister, Warden of the Seals, January 2008

Exhibit [ ]

Removing criminal law rules from business law, Working Group chaired by Jean-Marie Coulon, First Honorary Presiding Judge of the Court of Appeals of Paris, Report submitted to the Justice Minister, Warden of the Seals, January 2008

Organizing group action in order to avoid its being used for purposes other than the indemnification of a collective loss

While a large number of those persons who were heard have proved favorable to the introduction, into French law, of a group action or collective action, a large majority has insisted on the need to limit such a procedure by defining guarantees as to the admissibility of the instituted actions. Indeed, it is necessary to prevent a possible move towards the US-style class action system leading to an extreme involvement of the judicial system in economic relationships. Indeed, this system enables specialized lawyers to endanger the health of certain industries, by creating a blackmail scheme as part of which enterprises feel compelled to grant an indemnification rather than be exposed to a lawsuit with high media coverage, likely to hurt their image.

In order to avoid such excesses, not only must the action be limited, but also, it is advisable not to import into our country the institutions that have generated such abuse: on the one hand, punitive damages[1] that risk creating a confusion between indemnification and sanction, and on the other hand, the discovery[2] procedure, which has sometimes been used unfairly in order to destabilize, or spy on, an enterprise. Second, it is necessary to make sure to properly combine group actions with the criminal law process, in order to avoid any cumulative use of the two procedures. Third, it is necessary not to imitate excessive US practices as regards attorney fees. This stems partly from attorneys' rules of ethics that allow for contingency fee arrangements, do not cap the amount of the fees, and permit the determination of the fees on the basis of the damages received by the client, such scheme driving certain counsels to embark on veritable crusades in order to obtain the highest possible damages. Finally, these rules of ethics allow for canvassing, thus enabling attorneys to advertise in order to constitute the group of plaintiffs. These two mechanisms are not allowed under French law.

The restrictions applied to group actions must also cover the scope of such actions. More specifically, it is necessary to limit the application of such actions to those areas in which they are economically justified, i.e. to those disputes in which prospective plaintiffs would not have any economic interest to take legal action. Therefore, consumer law must restrict such actions.

The possibility of a group action in other areas of our domestic law was discussed, but was not found advisable at this stage. For instance, under company law, such a group action would be made difficult by the need to define the loss sustained by shareholders, otherwise than by a share price decrease. In addition, such a group action would not have the same economic justification, as a shareholder, by definition, takes a risk by buying listed shares, while a consumer is entitled to anticipate performance in agreement with a contract.

Finally, unlike the rules applicable to joint representation actions, which may be filed before any court of law, it is necessary to restrict group actions to suits filed before a civil court, failing which such actions would obviously not reach their goal, i.e. to remove these cases from criminal court's dockets.[3]

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[1] Punitive damages enable courts to go beyond the indemnification of the loss and apply sanctions as a result of any abusive behavior. This procedure exists in US law.

[2] The discovery procedure, which exists in US law, consists in asking the court to order the compulsory submission of all documents, without any review of their usefulness in relation to the substantive procedure.

[3] Article L. 422-2 of the French Consumer Code sets forth that joint representation actions are admissible before criminal courts: *Any consumer (...)*

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Exhibit [29]

Brief of amicus curiae The Republic of France in support of the petitioners in Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522 (1987)

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE AND SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISME, *Petitioners,* v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IOWA, *Respondent.* (DENNIS JONES, JOHN and ROSA GEORGE, REAL PARTIES IN INTEREST)

No. 85-1695

SUPREME COURT OF THE UNITED STATES

1985 U.S. Briefs 1695; 1986 U.S. S. Ct. Briefs LEXIS 998

October Term, 1985

August 22, 1986

[*1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE REPUBLIC OF FRANCE IN SUPPORT OF PETITIONERS

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View Table of Authorities

INTERESTS: INTEREST OF THE REPUBLIC OF FRANCE AS *AMICUS CURIAE*

The Republic of France submits this brief *amicus curiae* upon the consent of the parties to this proceeding. The Republic of France is a party to the multilateral Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, 28 U.S.C. § 1781 (Supp. 1986), 23 U.S.T. 2555, T.I.A.S. No. 7444 (the "Hague Convention" or the "Convention"), a treaty to which the United States and sixteen other sovereign nations are also signatories. The Convention sets forth procedures for the taking of evidence in one signatory country for use in civil proceedings in another. The court below erroneously affirmed an order permitting United States litigants seeking evidence situated in France to disregard Convention procedures so long as the persons from whom the discovery is sought are parties to the litigation and subject to the American court's *in personam* jurisdiction. In order to so hold, the

court below impermissibly read into the Convention a crucial limitation that is unsupported by the language or the negotiating history of that agreement. The lower court's holding also undermines one of the essential purposes of the Convention, the prevention of conflicts between different judicial systems with overlapping sovereignty.

The Republic of France has an evident interest in regulating actions taken on French territory to carry out foreign discovery demands. Moreover, French law makes it a criminal offense for persons subject to French jurisdiction to comply with foreign evidentiary demands unless they are consistent with the provisions of a treaty such as the Hague Convention. The lower court's decision is directly in conflict with French law, as well as with the French sovereign interests that it expresses.

The Republic of France is a signatory to the Hague Convention, and its citizens are engaged in substantial international commerce and attendant litigation. It is a close trading partner and long-standing ally of the United States, with which it shares a long and proud tradition of democratic government and justice under law. It is also the nation whose sovereign interests will be directly and materially infringed by any attempt to implement the discovery program upheld by the lower court. The Republic of France thus has a substantial interest in the outcome of this appeal.

TITLE: BRIEF OF *AMICUS CURIAE* THE REPUBLIC OF FRANCE IN SUPPORT OF PETITIONERS

SUMMARY OF ARGUMENT

The delegates to the Hague Convention, who represented nations with different judicial systems that had all embraced different, yet effective, methods for the trial of civil and commercial matters, recognized that there is no judicial system of universal applicability. Thus, the Convention was not intended to codify one nation's rules. Instead, the drafters sought to find a common ground to resolve the international friction caused by one nation's application of its domestic discovery **[*8]** rules in another's territory. The Convention was designed to enable litigants engaged in the broad panoply of civil litigation to obtain evidence admissible in the forum state without violating the sovereign interests of the nation from whose territory that evidence was to be collected.

The Republic of France ratified the Hague Convention intending it to provide the sole means by which discovery demands emanating from other signatory countries would be carried out on French soil. The French Code of Civil Procedure was extensively amended in order to make the Convention procedures an integral part of domestic French law. French criminal law was correspondingly revised to prohibit French nationals from complying with foreign demands for evidence situated in France except where the demand is issued in accordance with the Hague Convention or another treaty to which France is a party.

The court below upheld a discovery demand aimed at the collection of evidence located in France that openly flouts Hague Convention procedures. In so doing, the court confronted the French parties controlling the evidence with equally unacceptable alternatives: defy French criminal law or risk sanctions **[*9]** in the United States proceeding. The lower court's rationale -- that the Convention does not apply if the target of the discovery demand is itself a party to the litigation -- is at odds with the language and negotiating history of the Convention. The holding below frustrates the Convention's objective of reducing tensions between nations with different judicial systems precisely in those cases where the potential for conflict is greatest: evidence situated abroad is invariably at issue where, as here, one or more of the parties is a foreigner with no ties to the United States other than participation in commerce.

The lower court's decision to disregard the Hague Convention is unwise from the viewpoint of international judicial relations. It is also entirely unnecessary to the effective gathering of evidence in this or similar cases. Contrary to the lower court's suggestion, Hague Convention procedures do not impose undue burdens or restrictions on American litigants seeking evidence in France. In most cases, voluntary compliance by the recipient of the demand results in discovery coextensive with that available under traditional American rules, with no significant delays or **[*10]** incremental costs imposed on either party. In the isolated instances where the party from whom discovery is sought

declines to cooperate voluntarily, French courts possess evidence-gathering powers that can be used effectively in aid of the American request. The Republic of France will continue to make use of those powers whenever so required under the Convention. Moreover, in the single area where the Convention leaves implementation up to the discretion of France -- Article 23 concerning pre-trial discovery of documents -- the Republic of France will use its compulsory powers to require production if the demand is formulated pursuant to the Convention, and meets minimum standards of relevance and specificity.

For the foregoing reasons, the decision of the lower court should be reversed, and this action remanded with instructions that demands for evidence situated in France be made in accordance with Hague Convention procedures.

ARGUMENT

POINT I

THE HAGUE CONVENTION IS THE EXCLUSIVE MEANS OF DISCOVERY IN TRANSNATIONAL LITIGATION AMONG THE CONVENTION'S SIGNATORIES UNLESS THE SOVEREIGN ON WHOSE TERRITORY DISCOVERY IS TO OCCUR CHOOSES OTHERWISE

A. The Negotiating [*11] History And Language Of The Convention Mandate Its Use

The Republic of France, the United States and the other signatory nations to the Hague Convention intended to provide a mechanism to define and ease discovery among parties engaged in international commercial activities. n1 The treaty was designed primarily to reconcile the procedural differences between common law discovery procedures, particularly those of the United States, and the systems of civil law nations in order to "improve mutual judicial co-operation in civil or commercial matters." Preamble to the Hague Convention, *reprinted in* 28 U.S.C. § 1781 (Supp. 1986). n2 As Secretary of State Rogers explained in his letter submitting the Convention to President Nixon:

The substantial increase in litigation with foreign aspects arising, in part, from the unparalleled expansion of international trade and travel in recent decades had intensified the need for an effective international agreement to set up a model system to bridge differences between the common law and civil law approaches to the taking of evidence abroad.

Rogers Letter, *supra* p. 4, at 324 (1973). In recognition of these [*12] differences, and accepting that no one system can have worldwide applicability, the drafters of the Convention sought to establish methods for discovery both "tolerable" to the authorities of the state where evidence is located, and "utilizable" in the forum where the action would be tried. *See* Report of the United States Delegation to Eleventh Session of Hague Conference on Private International Law, *reprinted in* 8 Int'l Legal Materials 785, 806 (1969) (hereinafter cited as the "1969 U.S. Delegation Report"). n3 The Convention is thus best understood as a conscious compromise negotiated between representatives of judicial systems with very different approaches to obtaining evidence for trial.

n1 *See* Message From the President of the United States Transmitting the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, S. Exec. Doc. No. A, 92d Cong., 2d Sess. (1972), *reprinted in* 12 Int'l Legal Materials 323 (1973) (hereinafter cited as the "Message from the President"); Letter Of Submittal From Secretary of State William P. Rogers to the President Regarding the Evidence Convention, S. Exec. Doc. No. A.1, 92d Cong., 2d Sess. (1972), *reprinted in* 12 Int'l Legal Materials 324 (1973) (hereinafter cited as the "Rogers Letter"); Senate Comm. on Foreign Relations, Evidence Convention, S. Exec. Rep. No. 92-25, 92d Cong., 2d Sess. 1-2 (1972).

n2 To a lesser extent, the Convention also harmonized conflicting notions of discovery in various common

law countries. Thus, for example, discovery in the United Kingdom is not as broad as that permitted in the United States. *See e.g.,* Wilmarth, *Lawyers and the Practice of Law in England: One American Visitor's Observation, Part II,* 14 Int'l Lawyer 171 (1980).

n3 In particular, the drafters were cognizant of and seriously concerned with addressing civil law countries' considerations of sovereignty. *Id.;* Rogers Letter, *supra* p. 4, at 324.

[*13]

This compromise was necessary to overcome the sharp differences, and consequent conflict, between the procedural rules governing discovery in civil law nations and the United States. Indeed, absent the Convention, application of the rules usually employed in French domestic litigation would frequently stymie American discovery.

In domestic actions, French law, like the laws of most civil law jurisdictions, n4 vests in the judge rather than the parties responsibility for the discovery of evidence. All requests by parties for the production of written evidence are made to the judge, who thereafter orders production of such evidence. Nouveau Code de Procedure Civile ("Nouv. C. Pr. Civ.") arts. 132-142 (78th ed. Petits Codes Dalloz 1986). The judge decides whether to order oral testimony by the parties, Nouv. C. Pr. Civ. arts. 184, 185, and non-party witnesses, Nouv. C. Pr. Civ. art. 222; *Enquete, Temoins, Attestations,* Encyclopedie Dalloz de Procedure Civile (1979), par. 94, and conducts the taking of such testimony, Nouv. C. Pr. Civ. arts. 184-231. Although parties and their counsel may be present when testimony is taken of other parties, Nouv. C. Pr. Civ. arts. 189, 192, **[*14]** or of witnesses, Nouv. C. Pr. Civ. arts. 208, 209, and may submit lists of questions to the judge to be asked orally of the parties or witnesses, the judge decides whether such questions will be asked, Nouv. C. Pr. Civ. arts. 193, 214. Direct interrogation of a party or non-party witness by the party's counsel is not permitted. Nouv. C. Pr. Civ. art. 214. *See* E. Blanc, *Nouveau Code de Procedure Civile Commente dans l'Ordre des Articles* (1985) (hereinafter cited as "Blanc"), discussion under art. 193. n5 *See generally* Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States,* 13 Int'l Law. 35 (1979).

n4 For discussions of the discovery rules of other civil law nations see, J. Merryman, *The Civil Law Tradition,* 120-131 (1969); *International Cooperation in Litigation: Europe* (H. Smit ed. 1965). *See also* Collins, *Opportunities for and Obstacles to Obtaining Evidence in England for Use in Litigation in the United States,* 13 Int'l Law. 27 (1979) (discovery in the United Kingdom is more narrow than that in the United States). Because there are over 350 jurisdictions in the world, O'Kane & O'Kane, *Taking Depositions Abroad: The Problems Still Remain,* 31 Fed'n Ins. Couns. Q. 343 (1981), numerous differences exist among approaches for evidencegathering.

n5 The scholarly opinions of legal commentators carry great weight in France and are highly regarded as persuasive authority in the French legal system. Decided case law is not controlling in French jurisprudence, in contrast to the principle of *stare decisis* in the United States. *See generally, Amos and Walton's Introduction to French Law* (3d ed. 1967).

[*15]

In contrast, discovery in the United States is managed primarily by the parties to an action. In the pre-trial stage, the judge rarely questions witnesses directly or examines documents, except to resolve disputes when party-managed discovery breaks down or in connection with substantive motions. *See, e.g.,* C. Wright and A. Miller, *Federal Practice and Procedure* §§ 2207, 2214, 2285 (1970).

The sovereignty of the Republic of France requires that the taking of evidence on French territory remain the prerogative of the French judiciary. In response to a questionnaire circulated in 1967 to participating governments prior to the Hague Conference on Private International Law, the Republic of France stated that the French conception of sovereignty and "ordre public" implies that the collection of evidence on French territory may be undertaken only by French judicial authorities. *See Reponses des Gouvernements au Questionnaire sur la Reception des Depositions a*

l'Etranger, Conference de La Haye de Droit International Prive, *IV Actes et Documents de la Onzieme Session, Obtention des Preuves a l'Etranger* 21, 33 (Bureau Permanent de la Conference ed. 1970). n6 Discovery [*16] requests in accordance with American rules by American litigants and, *a fortiori*, discovery orders by American courts directly to French nationals in France, undermine the sovereignty of the Republic of France by usurping the powers and duties of the French judiciary in the discovery process.

n6 *See also* Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Convention*, 37 Univ. Miami L. Rev. 733, 764 (1983) ("The term 'judicial sovereignty' implies respect for the exclusivity of governmental organs within their own territories -- the monopoly of governmental power that lies at the heart of territorial sovereignty.").

The Convention reconciles the different methods used by its signatories to gather evidence through the use of simplified procedures for letters of request, n7 and methods for taking evidence by diplomatic officers, consular agents and commissioners. n8 These procedures provide for the involvement or consent of the sovereign on whose territory evidence is to be obtained, while obligating that sovereign to permit, or where compulsion is required to enforce, a discovery request in litigation pending [*17] in another forum.

n7 Letters of request from the judicial authorities in one sovereign state to those in another allow the requesting state's courts to enlist the assistance of the foreign state to obtain evidence or perform some other judicial act in a judicial proceeding. Hague Convention art. 1. The Convention requires the foreign authority to "follow a request of the requesting authority that a special method or procedure be followed, unless [it] is incompatible with" the internal law or procedures of the state of execution. Hague Convention art. 9. In revising its own civil procedure code to be consistent with Hague Convention procedures, France deliberately denied to its courts the right to refuse execution of letters of request on such grounds of incompatibility. *See infra* pp. 19-20. Absent a request that a special procedure be followed, the judicial authority to which the request is made "shall apply its own law as to the methods and procedures to be followed." *Hague Convention* art. 9. Article 10 requires the authorities in the state executing a letter of request to apply the same measures of compulsion to ensure compliance with the foreign request as are available to ensure the execution of domestic orders. The enforcement measures that may be imposed by a French judge include: ordering the disclosure and production of documents, Nouv. C. Pr. Civ. arts. 133, 139, 142; imposing a daily fine for non-compliance with an order to produce documents, Nouv. C. Pr. Civ. arts. 134, 139; ordering the personal appearance of a party or witness to testify, Nouv. C. Pr. Civ. arts. 184-186, 222, *et seq.;* drawing adverse inferences from the failure to produce evidence or appear when ordered, Nouv. C. Pr. Civ. art. 198; or assessing a fine against a person who refuses to testify when ordered, Nouv. C. Pr. Civ. art. 207.

n8 Hague Convention arts. 15-17. Parties in an American litigation may obtain evidence from American parties in France by addressing themselves directly to an American diplomatic or consular official without going through French judicial channels. *See infra* pp. 24-25. Where evidence is sought from a French national or other non-American, discovery before such an official must be, and is as a matter of routine, authorized by the Civil Division of International Judicial Assistance of the Ministry of Justice. The available evidentiary procedures are virtually identical to those that may be carried out if discovery were to occur in the United States: depositions, written interrogatories, and production and inspection of documents or other physical items. Article 17 authorizes the appointment of a commissioner who has been approved by the appropriate authority in the state where discovery is to occur. If permitted by American law, a French or American lawyer could be appointed as a commissioner and conduct evidence-gathering procedures in France. Borel & Boyd, *supra* p. 6, at 42.

[*18]

The Republic of France strongly believes that the language and negotiating history of the Convention demonstrate

that it sets forth mandatory procedures by which evidence located abroad may alone be sought, unless the foreign sovereign permits otherwise. Article 27 provides, in pertinent part:

The provisions of the present Convention shall not prevent a Contracting State from . . .

(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

The negative wording of Article 27 indicates that discovery by procedures not set forth in the Convention may occur only upon the consent of the state in which the evidence or witness is located. n9 *See also* Hague Convention art. 28 (a Contracting State may ease its procedures in separate bilateral or multilateral agreements). Procedures for seeking evidence not expressly detailed by the Convention or by the laws of the state wherein evidence is sought are not permitted. n10

n9 The first time that the Solicitor General of the United States was asked to advise this Court of the executive branch's views on the Hague Convention, he stated that it "deals comprehensively with the methods available to United States courts and litigants to obtain proceedings abroad for taking evidence" and that "parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted." Brief for the United States as *amicus curiae* at 5-7, *Volkswagenwerk A.G. v. Falzon*, 465 U.S. 1014 (1984), *reprinted in* 23 Int'l Legal Materials 412, 414 (1984). *But see subsequent* Brief for the United States as *amicus curiae, Club Mediterranee S.A. v. Dorin*, 105 S. Ct. 286 (1984) (Hague Convention not exclusive) *reprinted in* 23 Int'l Legal Materials 1332 (1984); Brief for the United States as *amicus curiae, Anschuetz & Co., GmbH v. Mississippi River Bridge Authority*, 106 S. Ct. 52 (1985) (Hague Convention not exclusive).

n10 *See also* Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 Colum. J. Transnat'l L. 231 (1986) (American courts breach United States international obligations by evading mandates of Convention); Radvan, *The Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters: Several Notes Concerning its Scope, Methods and Compulsion*, 16 N.Y.U. J. Int'l L. & Pol. 1031 (1984) (American litigants must follow Convention's binding provisions); Augustine, *Obtaining International Judicial Assistance Under the Federal Rules and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters: An Exposition of the Procedures and a Practical Example: In re Westinghouse Uranium Contract Litigation*, 10 Ga. J. Int'l & Comp. L. 101 (1980) (Convention provides standardized framework replacing all previous methods for seeking evidence in transnational litigation); Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 U. Pa. L. Rev. 1461 (1984) (minimum standards established by Convention preempt all other forms of discovery); Note, *Gathering Evidence Abroad: The Hague Evidence Convention Revisited*, 16 L. & Pol'y in Int'l Bus. 963 (1984) (same).

[*19]

While Article 27 prohibits a court from requesting discovery abroad by procedures not set forth in the Convention, that provision allows states in which evidence is located discretion to provide to a requesting court broader discovery procedures than those prescribed by the Convention. Philip W. Amram, official *rapporteur* of the Hague Convention and United States representative to the committee that drafted the treaty, indicated in his Report n11 that Article 27 was designed to permit a Contracting State to provide "broader, more generous and less restrictive rules of international cooperation in the taking of evidence for the benefit of foreign courts and litigants." Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, S. Exec. Doc. No. A.1, 92nd Cong., 2d Sess. (1972), *reprinted in* 12 Int'l Legal Materials 327, 341 (1973) (hereinafter cited as the "Explanatory Report"). n12

Indeed, the negotiating history of the Convention is replete with statements that the Convention establishes minimum standards to which signatory nations must adhere, with the limited exception that a state with more liberal local law may make it available [*20] to the requesting court. n13

n11 "[W]hen the meaning of a treaty is not clear, recourse may be had to the negotiations, preparatory works, and diplomatic correspondence of the contracting parties to establish its meaning." *Arizona v. California,* 292 U.S. 341, 359-60 (1934) (citations omitted).

n12 *See also* Conference de La Haye de Droit International Prive, *IV Actes et Documents de la Onzieme Session, Obtention des Preuves a l'Etranger* 189 (Bureau Permanent de la Conference ed. 1970) (a state becoming a party to the Convention has freedom to offer unilaterally to any other state, with or without reciprocity, judicial assistance wider than the minimum presented in the Convention).

n13 *See, e.g.,* 1969 U.S. Delegation Report, *supra* p. 5, at 808; Rogers Letter, *supra* p. 4, at 324 (1973). According to well settled principles of treaty interpretation, the meaning American negotiators have attributed to the treaty should carry great weight. *See Kolovrat v. Oregon,* 366 U.S. 187, 194 (1961).

Civil law nations participating in the treaty agreed to procedures for securing evidence within their borders which required their courts [*21] to use common law practices alien to them. Article 9, which "impose[s] obligations on civil law courts to take evidence 'common-law style,'" n14 and Articles 15-17, which permit discovery to be conducted before a consular official or commissioner instead of a judge, n15 represented large and unprecedented concessions by civil law countries to the United States' desire to have American-style discovery enforced abroad. As noted by President Nixon upon recommending the Convention to the United States Senate, "ratification of the convention will require many other countries, particularly civil law countries, to make important changes in their judicial assistance practice." Message from the President, *supra* p. 4, at 323. The Republic of France and the other civil law signatories would have had little incentive to agree to these American-style innovations unless the Convention defined and limited the scope of procedures by which American litigants seek discovery abroad. *See* Oxman, *supra* p. 7, at 767. n16 The Convention should not be interpreted as if it merely gave the United States new and unilateral privileges without imposing upon it any concomitant obligation of restraint. [*22] To the contrary, the Convention should be recognized as a carefully negotiated compromise embodying reciprocal concessions by the United States and civil law countries.

n14 Notes & Comments, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad,* 67 Am. J. Int'l L. 104, 105 (1973).

n15 Articles 15-17 introduce "into the civil law world on a limited basis the concept of taking of evidence by [private] commissioners." *Id.,* at 106. *See also* Explanatory Report, *supra* p. 10, at 337-9, and 1969 U.S. Delegation Report, *supra* p. 5 at 807 (the taking of evidence by commissioners or consular officials raises serious questions of intrusion on sovereignty of civil law countries).

n16 Notwithstanding the plain language of Article 27 and the clear history of the article, some American courts have surprisingly interpreted that provision not only to permit a signatory nation to allow more liberal discovery within its borders, but also to permit an American court to order discovery abroad by methods broader than those allowed by the Convention. *See, e.g., Lasky v. Continental Products Corp.,* 569 F. Supp. 1227 (E.D. Pa. 1983). Such an interpretation renders the Convention meaningless and unjustifiably implies that the major concessions made by France and other signatories were unnecessary and useless gestures.

[*23]

B. Under French Law, The Hague Convention Is The Exclusive Means Of Discovery In Litigation Involving Parties From Different Countries

Although both the Republic of France and the United States were original signatories to the Hague Convention, its procedures were quickly disregarded by many United States litigants, who instead sought to require French persons to submit to discovery in France based solely on American discovery rules. American lawyers practiced "legal tourism" and "fishing expeditions" in France, demanding documents and oral testimony from French citizens without regard to French procedures or the United States' international obligations. *See* Borel & Boyd, *supra* p. 6, at 35. In order to insure the respect of French sovereignty and to underscore the required exclusive use of the Hague Convention procedures, in 1980 France enacted Law No. 80-538, 1980 J.O., 1799, 1980 D.S.L. 285 (the "1980 Law").

Article 1-*bis* of the 1980 Law n17 provides that:

[s]ubject to any treaties or international agreements and the laws and regulations in force, it is prohibited for any person to request, to investigate or to communicate in writing, orally or by any **[*24]** other means, documents or information relating to economic, commercial, industrial, financial or technical matters leading to the establishment of proof with a view to foreign administrative or judicial proceedings or as a part of such proceedings. n18

The 1980 Law imposes criminal penalties against persons and entities requesting or disclosing evidence by procedures not expressly permitted by the Hague Convention, other international treaties or French law. Law No. 80-538, art. 3. n19 The 1980 Law provides for the imposition of significant fines on parties complying with such discovery requests, and in the case of individuals, up to six months' imprisonment, or both. Thus, in the case of corporate parties such as the petitioners, the corporation may be liable for fines and any employee who fulfills a discovery request may be subject to fines or imprisonment as well.

n17 Article 1 of the 1980 Law prohibits communication of documents or information of an economic, technical, financial, commercial or industrial nature, where such communication would threaten French sovereign or security interests. It is not at issue here.

n18 *Reprinted and translated in* Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 Int'l Law. 585, 611 (1981).

n19 *Id.* at 609 (French original), 611 (English translation).

[*25]

The principal purpose of the 1980 Law was to require observance in France of:

[t]he rules which define the procedures for obtaining evidence abroad. These procedures result from . . . the provisions of the New Code of Civil Procedure . . . and those of the Hague Convention of March 18, 1970 . . ., together with the declaration made by the French government at the time of its ratification. . . . The procedures thus defined are aimed at giving full effect to our international relations for judicial cooperation by permitting the carrying out on our territory of letters rogatory . . ., as well as the putting into effect . . . of the procedure for obtaining evidence by commissioners. . . .

Response of the Minister of Justice to Question on Article 1-*bis* of Law No. 80-538 in the National Assembly, 1981 J.O.-Deb. Ass. Nat. (Questions), January 26, 1981 at p. 373 (no. 35893), *reprinted and translated in* Toms, *supra* p. 13, at 612 (French original), 614 (English translation). n20

n20 Under the French constitution, members of the French Parliament may submit written or oral questions to government ministers. Const. art. 48. *See also Reglement de l'Assemblee* Nationale, 133-139 (1982); *Reglement du Senat*, arts. 74-82 (1982).

[*26]

C. The Eighth Circuit's Decision Erroneously Assumes That The Discovery At Issue Will Not Infringe Upon French Sovereignty Or Violate French Law

The decision of the Eighth Circuit, which holds that an American litigant may disregard the Convention, is based on two fundamental misconceptions. First, the court relied on an artificial and untenable distinction between acts "preparatory" to compliance with a discovery order, and "actual" compliance with such an order, mistakenly concluding that "preparatory" acts do not offend French sovereignty. Second, the court erroneously assumed that the prohibitions of the 1980 Law can be waived.

The court below found that "when the district court has jurisdiction over a foreign litigant the Hague Convention *does not apply* to the production of evidence in that litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention." 782 F.2d at 124. The court based this determination on an artificial distinction between matters "preparatory" to compliance with discovery orders, such as identifying documents and gathering information, [*27] and the "actual" production of documents or interrogatory answers in the United States. *Id.* at 124-125. The court concluded that because "preparatory" acts do not require foreign attorneys actually to appear in France, French sovereignty was not infringed and the 1980 Law was not violated. *Id.*

The Eighth Circuit's reasoning and holding misconceive the 1980 Law, defy settled notions of international law and significantly offend the sovereignty of the Republic of France. The court below erroneously assumed that the powers flowing from its *in personam* jurisdiction relieved the court of any obligation to respect the territorial integrity and sovereignty of foreign states. The theory that the jurisdiction of a court over a witness places all of the witnesses' property and information, wherever located, under the control of that court without regard to the interest of the discovered party's sovereign transgresses the most elementary notions of international comity. n21 As one American commentator has noted: "The notion that jurisdiction to command appearance before the court 'domesticates' the witness or party for all purposes relevant to the litigation is [*28] fallacious." Oxman, *supra* p. 7, at 741.

n21 *See* Brief for the United States as *amicus curiae* at 7, n.3, *Volkswagenwerk A.G. v. Falzon, supra* p. 9, at 415: "The fact that a state court has personal jurisdiction over a private party . . . does not mean that treaty limits on proceedings for the taking of evidence abroad somehow do not apply to discovery orders addressed to such parties. The Evidence Convention protects the judicial sovereignty of the country in which evidence is taken, not the interests of the parties to the suit. Accordingly, its strictures apply regardless of the existence of personal jurisdiction." *See also* Oxman, *supra* p. 7, at 740: "The most cursory reading of *International Shoe Co. v. Washington* and its progeny should suggest the supremacy of context over rigid preconceived jurisdictional conclusions. *Shaffer v. Heitner,* which requires that the standards for establishing *in personam* jurisdiction apply even where the defendant's property is located within the forum state, is stood on its head by the proposition that *in personam* jurisdiction places all property wherever located under the control of a court that once purported to assert jurisdiction only over that property located within the state."

[*29]

It is a basic tenet of international law that each state has sovereignty over all activities taking place within its territory. *See The Schooner Exchange v. McFaddon,* 11 U.S. (7 Cranch) 116 (1812). A nation may not, therefore, conduct official activities in the territory of another nation without the latter's consent. *Id.* n22

n22 This principle of sovereign equality has been described by the United Nations General Assembly as including the following elements: "(a) States are juridically equal; (b) Each State enjoys the rights inherent in full sovereignty; (c) Each State has the duty to respect the personality of other States; (d) The territorial integrity and political independence of the State are inviolable. . . ." Declaration On Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United

Nations, G.A. Res. 2625, 25 U.S. GAOR Supp. (No. 28) at 21, U.N. Doc. A/8028 (1970), *reprinted in* 9 Int'l Legal Materials 1292 (1970).

The discovery demanded by the court below clearly requires activities to be conducted on French territory, even accepting the court's contrived distinction **[*30]** between "preparatory" acts and the physical production in the United States of evidence. Documents must be identified, sorted and assembled in France, answers to interrogatories must be developed and sworn to based on information situated in France, and the end result must be forwarded to the United States. n23 International law requires that United States courts refrain from ordering such activities without the consent of the Republic of France.

n23 While the court below did not discuss whether a party who is subject to an American court's jurisdiction but is a non-resident of the United States may be ordered not only to produce documents solely pursuant to American rules, but also to appear in the United States for a deposition, the Fifth Circuit has addressed this question. In *In re Messerschmitt Bolkow Blohm GmbH,* 757 F.2d 729 (5th Cir. 1985), *cert. granted sub nom. Messerschmitt Bolkow Blohm GmbH v. Walker,* 106 S. Ct. 1633 (1986), the court stated that "[b]ecause the depositions will in fact be taken in the United States, they are not governed by the Hague Convention." *Id.* at 732. *See also Wilson v. Stillman & Hoag,* 121 Misc. 2d 374, 467 N.Y.S.2d 764 (Sup. Ct. N.Y.Co. 1983). This conclusion, that ordering a person to travel for a deposition from one nation to the United States does not order an activity to be conducted in the territory of that nation, elevates the geographic fiction of "preparatory acts" to an absurdity.

[*31]

In the instant case, no such consent has been given. To the contrary, the Republic of France has made a determination consistent with international law and French international obligations that, except in accordance with the Hague Convention, a person may not "communicate in writing, orally or by any other means, documents or information . . . leading to the establishment of proof with a view to foreign . . . judicial proceedings. . . ." 1980 Law art. 1-*bis.* Absent compliance with the procedures of the Hague Convention -- under which all of the information sought by respondents could effectively be gathered -- a French person providing such evidence is clearly subject to the 1980 Law's criminal penalties.

Moreover, contrary to the assumption implicit in the lower court's decision, the 1980 Law does not empower the executive branch of the French government to grant waivers from the law's prohibitions against transnational discovery conducted outside the Hague Convention procedures. Indeed, no mechanism for obtaining such waivers exists. n24 The conclusion of the Eighth Circuit that French sovereignty is not offended by the discovery order below, which mandates the violation **[*32]** of the 1980 Law, improperly questions the importance of that law to the Republic of France. n25 For a United States court to require violation of the 1980 Law, and to determine that French sovereignty is not thereby infringed, gravely offends French sovereignty.

n24 The requirement that some American courts have sought to impose, under threat of sanctions, that a French witness seek a waiver of the 1980 Law is regarded by the Republic of France as a significant infringement or attempted infringement of its sovereignty and a material interference with its national interests. *See e.g., Graco, Inc. v. Kremlin, Inc.,* 101 F.R.D. 503 (N.D. Ill. 1984); *Wilson v. Stillman & Hoag, Inc.,* 121 Misc. 2d 374, 467 N.Y.S.2d 764 (Sup. Ct. N.Y. Co. 1983). *See also* Jacobs, *Extraterritorial Application of Competition Laws: An English View,* 13 Int'l Law. 645 (1979). No such waiver has ever been granted despite the contrary assumption of United States courts.

n25 *Cf. Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 432 (1964) ("[T]he concept of territorial sovereignty is so deep seated, [that] any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders.").

[*33]

The Hague Convention was intended to harmonize situations, such as the instant one, where two nations have jurisdiction over a witness in a manner that recognizes both the power of the court before which the litigation is pending and the interests of the foreign witness' sovereign. The Eighth Circuit's view that the Convention does not apply to parties to an action belittles the achievement of its framers, suggesting that they deliberately declined to address the principal sources of conflict in transnational civil litigation. That view is at odds with the language of the Convention, which draws no distinction between parties and non-party witnesses. It is also directly contradicted by the negotiating history of the treaty, which demonstrates that the Convention was intended to provide a comprehensive, far-reaching solution to the evidentiary problems posed by international civil litigation. If that laudable objective is to be achieved, and if the Convention is to be rescued from irrelevance, the Eighth Circuit's order must be reversed. n26

n26 In this connection, the Republic of France naturally rejects the Eighth Circuit's conclusion that a first resort to the Hague Convention would somehow be more offensive to French sovereignty than complete disregard of the treaty.

[*34]

POINT II

THE HAGUE CONVENTION PROCEDURES PROVIDE AMERICAN LITIGANTS WITH A FAIR AND REASONABLE OPPORTUNITY TO GATHER EVIDENCE

A. Compulsory Discovery Is Available Pursuant To Letters Of Request

1. The French government has revised its code of civil procedure to accommodate compulsory discovery pursuant to the Hague Convention

The French procedural rules described in Point I(A), *supra,* at one time precluded such basic American evidentiary procedures as direct and cross-examination of witnesses in the context of letters of request to be executed in France. *See, e.g.,* Gavalda, *Les Commissions Rogatoires Internationales en Matiere Civile et Commerciale* (hereinafter cited as "Gavalda"), 53 Revue Critique de Droit International Prive, 15, 37 (1964). Accordingly, following ratification of the Hague Convention, the French government included a special set of provisions on international letters of request as part of a revision of the French code of civil procedure. Articles 733 through 748 of the Nouveau Code de Procedure Civil create an exception to French procedural rules in the case of foreign litigants using Hague Convention procedures, n27 and radically [*35] depart from traditional French rules by opening the Republic of France's borders to United States-style discovery. As one French author has put it, the new articles were adopted in order

to harmonize [French] rules of procedure with those of the main international treaties in force, especially with the provisions of the [Hague Convention] in order to establish a framework for execution of letters rogatory both "tolerable in the State of execution and utilizable by the court before which the case is being argued," and to confer, therefore, full efficiency on [French] relations of mutual international cooperation.

Chatin, *Regime des Commissions Rogatoires Internationales de Droit Prive,* 66 Revue Critique de Droit International Prive 611 (1977) (translation supplied) *quoting from* Amram, *Rapport Explicatif sur La Convention de La Haye du 18 Mars 1970 sur l'Obtention des Preuves a l'Etranger en Matiere Civile ou Commerciale.* So long as foreign litigants comply with the Hague Convention, French courts will make available their coercive powers to enforce compliance with these newly adopted procedures.

n27 Articles 733 through 748 are translated into English in H. DeVries, N. Galston & R. Loening, *French Law -- Constitution and Selective Legislation* (1986).

[*36]

As a general matter, Article 739 provides that: "The rogatory commission is executed in accordance with French law unless the foreign court has requested that a special form of procedure be followed." Article 739 adopts the text of Article 9 of the Hague Convention but deliberately denies to French courts the option, permitted under Article 9, of refusing to honor the foreign court's request if the "special procedures" are incompatible with local law. Blanc, *supra* p. 6 at discussion under art. 739. Thus, a procedure requested by an American court must ordinarily be followed.

Article 739 further provides that, upon request of a party, a full transcript or recording will be made of any oral examination. This procedure was designed to replace the previous system under which only a summary was prepared, which often turned out to be inadmissible as testimony in proceedings in countries such as the United States. *See* Gavalda, *supra* p. 19, at 37. Allowing oral examinations to be transcribed was not mandated by the Convention; the provisions of the new procedural rules thus go beyond what is required by the Convention and evidence the Republic of France's good faith in [*37] promoting effective international judicial cooperation.

Article 740 provides that the parties and their counsel may, upon authorization of the French judge, question the witness directly, provided that such questions and answers are translated into French. French law thus specifically allows for both direct and cross-examination of witnesses in Hague Convention proceedings, in contrast to the usual domestic rule, *see supra* p. 6, providing that questions may only be asked by the French judge. Chatin, *supra* p. 19, at 619. n28 Moreover, Article 740 expressly permits counsel conducting such direct and cross-examination to be "foreign", *i.e.*, to participate despite lack of admission to any French bar. n29 American litigants may therefore be accompanied and represented by their American counsel in obtaining evidence pursuant to international letters of request. n30

n28 Although certain French courts had permitted cross-examination of witnesses pursuant to international letters of request prior to adoption of Articles 736-748, those cases were qualified as "exceptional." *Commission Rogatoire (Matiere Civile)*, Encyclopedie Dalloz de Droit International, P40 (1969).

n29 In this regard, French law appears to go beyond American practice, which would normally permit questioning only by a member of a United States bar, and, indeed, sometimes only by a member of the bar of the state in which the examination is conducted. *See e.g.*, Rule 2(a), General, Civil, Criminal, Admiralty & Magistrate Proceedings in the United States District Courts for the Southern and Eastern Districts of New York; N.Y. Jud. Law § 478 (Consol. 1983); Cal. Bus. & Prof. Code § 6125 (1974).

n30 The French public prosecutors are responsible for insuring that the witnesses' fundamental due process rights are respected in all of the aforementioned proceedings. Nouv. C. Pr. Civ. art. 744.

[*38]

The Republic of France has taken all necessary measures to insure the prompt and effective execution of international letters of request. Article 738 requires a judge to commence execution as soon as the letter of request is received. Article 742 adopts the provisions of Article 12 of the Hague Convention. Thus, execution of letters of request may not be refused solely because, under French law, the French courts would normally have exclusive jurisdiction over the subject matter, would not recognize the cause of action alleged, or would refuse to grant the relief sought. A French judge may refuse to execute international letters of request only where the request is outside his or her functions, *e.g.*, enforcing an administrative order or providing a legal opinion, or where French sovereignty or security would be prejudiced thereby. Nouv. C. Pr. Civ. art. 743; Hague Convention art. 12. n31

n31 In the eleven years since the Hague Convention entered into force in France, there have been no reported cases in which this "sovereignty or security" exception has been raised.

Under the revised civil procedure code, American litigants seeking compulsory discovery pursuant to [*39] Hague Convention procedures may take discovery by methods comparable to those used in the United States. Documents may be examined, interrogatory answers may be compelled, and oral examinations of witnesses may be taken although they must proceed on French soil before a French judge. There are opportunities for direct and cross-examination and no undue constraints are imposed on the scope of questioning. In deciding that compliance with the Hague Convention would "delay and frustrate the discovery process," 782 F.2d at 125, the court below simply ignored the careful and comprehensive procedures adopted by the Republic of France to insure that letters of request will result in effective discovery for foreign litigants.

2. The declaration made by the Republic of France pursuant to Article 23 does not apply to reasonably specific requests for documents having a direct and clear nexus with the subject matter of the litigation

Parties to the Hague Convention may declare that they "will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." Hague Convention art. 23. The Republic of France [*40] has made such a declaration.

In formulating its declaration under Article 23, the Republic of France intended to prohibit "legal tourism," *i.e.*, unfocused demands for documents by foreign lawyers acting without court supervision. n32 *See* Gougenheim, *Convention sur l'Obtention des Preuves a l'Etranger en Matiere Civile et Commerciale,* 96 Journal de Droit International 315, 319 (1969). As the Republic of France and the United States delegations to the Convention well understood, Article 23 was not intended to preclude American litigants from obtaining necessary evidence from abroad, but rather to prevent discovery in the nature of a "fishing expedition." *See* Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 17 Int'l Legal Materials 1417, 1421 (1978). The French declaration pursuant to Article 23 does not apply to letters of request seeking the discovery of documents, provided that the documents requested are enumerated in the letter of request and have a direct and clear nexus with the subject matter of the litigation. [*41] The request must, of course, also be consistent with the Convention's general requirements regarding the nature of the requesting authority and respect for the requested state's public policy. *See* August 19, 1986 Letter from the Minister of Justice to the Minister of Foreign Affairs, annexed hereto as Appendix B.

> n32 Recent steps to curb abuses of United States discovery procedures -- even in wholly domestic cases -- anticipate a more active role for the trial judge in scrutinizing discovery requests. *See* Fed. R. Civ. P. 26(b)(1), 26(f), 26(g) and the 1983 advisory committee notes thereto. Moreover, the draft Restatement requires that
>
> [b]efore issuing an order for production of documents, objects, or information located abroad, the court, or where authorized the agency, should scrutinize a discovery request more closely than it would scrutinize comparable requests for information located in the United States. Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, discovery (including requests for documents) may extend to any matter not privileged which is relevant to the subject matter of the action, even if the information sought would be inadmissible at trial, if it appears reasonably calculated to lead to the discovery of admissible evidence. However, the second paragraph of that Rule, added in 1983, calls for imposition by the court of limits on the extent of discovery comparable to those set out in Subsection 1(c). Given the degree of difficulty in obtaining compliance, and the amount of resistance that has developed in foreign states to discovery demands originating in the United States, it is ordinarily reasonable to limit foreign discovery to information necessary to the action (typically, evidence not otherwise readily obtainable) and directly relevant and material.
>
> *Restatement of Foreign Relations Law of the United States (Revised)* § 437[420] comment a (Tent. Draft No. 7, 1986).

[*42]

The French declaration under Article 23 does not impede international judicial assistance. The curbs that it imposes on "fishing expeditions" will not result in an ineffective system of justice. As recognized by those American state courts that require discovery demands to specifically identify the evidence sought to be examined, n33 "fishing expeditions" are not essential to achieving justice even in common law systems.

n33 *E.g.*, N.Y. Civ. Prac. R. 3120 (McKinney 1970).

In any event, the Article 23 declaration of the Republic of France does not change the treaty from a mandatory to a permissive pact; the treaty contains no language permitting any such construction and evinces no such intent by its signatories. n34 To the contrary, Article 23 and the resulting curbs upon overseas "fishing expeditions" by a few overzealous American litigants should be recognized as a small price that the United States paid in exchange for the broad benefits conferred by the Convention on the vast majority of Americans involved in international litigation.

n34 Indeed, each of the signatories to the Convention, with the exception of the United States, Barbados, Israel and Czechoslovakia, exercised to some degree its right to make an Article 23 declaration.

[*43]

B. France Permits A French Party Or Witness To Comply Voluntarily With A Discovery Request Pursuant To The Hague Convention

Far more frequent and important in practice than compulsory discovery pursuant to letters of request is voluntary discovery in France pursuant to Articles 15-17 of the Hague Convention. The overwhelming majority of discovery requests by American litigants for evidence in France are satisfied willingly in accordance with procedures before consular officials and, occasionally, commissioners, and without the need for involvement by a French court or use of its coercive powers. Indeed, the United States Embassy in Paris will facilitate such requests to discover evidence and does so on a regular basis.

An information sheet prepared by the Office of American Services of the United States Embassy in Paris (the "Information Sheet"), which explains the elements of voluntary proceedings before consular officials or commissioners, n35 is readily available to the general public at the Embassy in Paris and has been available for years. (The current form is annexed as Appendix B hereto.) As explained therein, the United States court in which the action is pending [*44] initially issues an order designating any diplomatic or consular officer of the United States stationed in Paris to take evidence. Information Sheet at A6. Oral examination of American parties or witnesses may occur before such officers at the Embassy without any further steps. If evidence is sought from French nationals or other non-Americans, and in any case where a commissioner has been named pursuant to Article 17, the Civil Division of International Judicial Assistance of the Ministry of Justice (the "Civil Division") must authorize the discovery. Information Sheet at A6-7. While the Embassy will obtain authorization from the Civil Division at no charge for any party requesting it to do so, the Civil Division will also entertain requests made directly by an interested party or its counsel. Authorization is routinely granted and requests are handled in an expeditious manner; depending on the urgency of the request, authorization has been granted within one to two days. *See* Borel & Boyd, *supra* p. 6, at 42. n36

n35 The Information Sheet also describes the Hague Convention procedures for use of letters of request.

n36 While the Embassy is unable to arrange for court reporters, the parties are free to make such arrangements. The Embassy will provide to litigants wishing to make such arrangements a list of qualified stenographers and, if necessary, interpreters.

[*45]

Under the declarations of the Republic of France made pursuant to Articles 16 and 17, the texts of which are

reprinted in Appendix C hereto (the "Declarations"), such authorization is conditioned on the evidence being taken at the Embassy. In practice, this condition is easily satisfied since, as the Information Sheet points out, the Embassy will provide the use of a hearing room free of charge. n37 The Embassy itself notifies the parties and the Civil Division of the room, date and time for the oral examination.

n37 While a United States statutory fee for the presence of a consular officer will be charged if the proceeding occurs under Articles 15 or 16, this is not true if a commissioner has been appointed pursuant to Article 17. Information Sheet at A7, 9.

While the Information Sheet does not refer to requests for interrogatory answers or documents, it is the long-standing practice, approved of by both the Embassy and the Civil Division, to handle such requests in the same expeditious manner. Once a discovery request is authorized by the Civil Division, the documents or interrogatory answers are brought to the Embassy. There, a consular official supervises the packing [*46] and sealing of documents, takes the oath of the person answering the interrogatories, and arranges for the evidence to be sent by United States Armed Forces Mail to the court that issued the production order appointing the consular official or commissioner to take evidence. The United States judge then makes the documents or interrogatory answers available to the party requesting production. Under these well-settled procedures, the full panoply of American-style discovery devices are available and may promptly be obtained. n38

n38 Appearance pursuant to Articles 16 and 17 is voluntary and, pursuant to the Declarations, non-American parties from whom discovery is sought must be informed in advance that failure to appear will not give rise to criminal proceedings in the state from which evidence is requested. However, as the Republic of France recognizes, French parties subject to a United States court's jurisdiction have a strong incentive to cooperate with American discovery requests pursuant to Articles 16 and 17; their own case could be hampered by imposition of the civil sanctions permitted under *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), and its progeny if they do not make good faith efforts to comply with American discovery requests, since France provides mechanisms for such discovery to occur.

[*47]

The willingness of the Republic of France to cooperate in litigation involving parties from another country is sincere. France has taken substantial measures to accommodate the interests of United States litigants, even though permitting American-style discovery is alien to domestic litigation in France. Under the Hague Convention and the subsequent implementing legislation enacted in France, United States-style discovery is available on both a compulsory and voluntary basis. The lower court's decision ignores the effect of these significant accommodations and, unless reversed, destroys the principal achievement of the Hague Convention -- the establishment of comprehensive methods for international judicial cooperation that respect the sovereignty of the signatory nations.

CONCLUSION

The order of the Court of Appeals should be reversed and the case remanded to the district court with instructions that demands for evidence situated in France be in accordance with Hague Convention procedures.

Respectfully submitted,

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APPENDICES

APPENDIX A

REPUBLIQUE FRANCAISE, MINISTERE DE LA JUSTICE, Direction des Affaires Civiles et du Sceau, 13, place Vendome, 75042 Paris Cedex 01, Tel. 261.80.22

19 Aout 1986

Le Garde des Sceaux, Ministre de la Justice a Monsieur le Ministre des Affaires Etrangeres, Direction des Affaires Juridiques, 37, quai d'Orsay, 75007 Paris

OBJET: Application de la Convention de la Haye du 18 mars 1970 sur l'obtention des preuves a l'etranger en matiere civile ou commerciale.

Vous avez bien voulu me faire part des difficultes que l'application de la reserve de l'article 23 souleve dans les relations avec certains Etats parties a la Convention de la Haye du 18 mars 1970 sur l'obtention des preuves a l'etranger en matiere civile et commerciale.

J'ai l'honneur de vous faire savoir que l'autorite centrale, designee conformement a l'article 2 de la Convention et qui releve du Ministere de la Justice, ne s'oppose pas a la transmission aupres **[*49]** de la juridiction francaise competente d'une commission rogatoire qui a pour objet la procedure de "pre-trial discovery of documents" lorsque celle-ci presente les garanties suivantes: les documents demandes sont enumeres dans la commission rogatoire et ont un lien direct et precis avec l'objet du litige. Il va de soi que les conditions prevues de maniere generale par la Convention en ce qui concerne la nature de l'Autorite requerante et le respect de l'ordre public de l'Etat requis doivent avoir ete observees.

Je vous suggere a cette occasion le depot par le gouvernement francais aupres du gouvernement des Pays-Bas, depositaire du traite, d'une declaration interpretative de la precedente dans le sens indique ci-dessus afin d'ameliorer la cooperation judiciaire internationale.

Pour le Garde des Sceaux, Ministre de la Justice

Pour le Directeur des Affaires Civiles et du Sceau

Le Sous-Directeur
Christian ROEHRICH

REPUBLIC OF FRANCE, MINISTRY OF JUSTICE, Office of Civil Affairs and of the Seal, 13, place Vendome, 75042 Paris Cedex 01, Tel. 261.80.22

August 19, 1986

Le Garde des Sceaux, Minister of Justice to The Minister of Foreign Affairs, Office of Legal Affairs, **[*50]** 37, quai d'Orsay, 75007 Paris

RE: Application of the Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or

Commercial Matters.

You have informed me of the difficulties that the application of the reservation under article 23 raises with respect to relations with certain States that are signatories of the Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

I have the honor of advising you that the Central Authority designated pursuant to article 2 of the Convention, which is under the jurisdiction of the Ministry of Justice, does not object to transmission to the competent French court of a letter of request whose purpose is "pre-trial discovery of documents" so long as such letter of request presents the following assurances: the requested documents must be enumerated in the letter of request and have a direct and clear nexus with the subject matter of the litigation. It goes without saying that the conditions generally provided in the Convention regarding the nature of the requesting authority and respect for the requested State's public policy must have been observed.

I suggest on this occasion that [*51] the French government deposit with the Dutch government, the depository of the treaty, a declaration interpreting the prior one as indicated above in order to improve international judicial cooperation.

For *le Garde des Sceaux*, Minister of Justice

For the Director of Civil Affairs and of the Seal

The Assistant Director
Christian ROEHRICH

APPENDIX B

INFORMATION CONCERNING DEPOSITIONS AND LETTERS ROGATORY IN FRANCE

Since October 1974 The Hague Convention of 1970 on Taking of Evidence Abroad in Civil and Commercial Matters has been in force in France. Arrangements to take evidence in France for use in civil cases before courts in the United States must therefore be made in accordance with the general provisions of that Convention, and subject to certain specific provisions established by the French Government.

The Convention of 1970 provides three means by which evidence may be taken:

1. *LETTERS ROGATORY.* By letters rogatory (letters of request) from a judicial authority in the United States to the competent authority in France requesting that authority to obtain evidence or to perform some other judicial act. (Article 1-14.) Such letters of request should [*52] be addressed by the court in the United States to the Bureau de l'Entraide Judiciaire Internationale, Direction des Affaires Civiles et du Sceau, Ministere de la Justice, 13, place Vendome, 75042 Paris, Cedex 01, France. *Letters of request must be written in French or accompanied by a translation into French.* A letter of request should specify:

(a) the authority requesting its execution and the authority requested to execute it (name of the court, or "the appropriate judicial authority of France");

(b) the names and addresses of the parties to the proceedings, and their representatives;

(c) the nature of the proceedings, and all necessary information pertaining to it;

(d) the evidence to be obtained;

(e) the names and addresses of the persons to be examined;

(f) the questions to be put to the witnesses or a statement of the subject matter on which they are to be examined;

(g) the documents or other property to be inspected;

(h) whether the evidence is to be given under oath or affirmation, and any specific form of oath that must be used;

(i) whether any special procedure or method should be followed in taking the evidence.

In the absence of special instructions [*53] under items (b) and (i), the French court executing the letter of request will follow its own normal procedures.

The court issuing the letter of request may request to be informed of the date and place of the proceedings, and parties to the case and their representatives may be present. Judges of the requesting court may also be present at the proceedings.

There are no fees required for the execution of letter [sic] of requests; however, the French court may require reimbursement for any fees paid to experts or interpreters, or expenses incurred as a result of use of special procedures requested by the U.S. court.

2. *DEPOSITIONS BEFORE A DIPLOMATIC OR CONSULAR OFFICER.* By deposition before a diplomatic or consular officer of the United States (Articles 15 and 16 of the Convention and Title 28 United States Code, Section 2072). Depositions may only be taken by commission issued by the competent court. The commission should be issued to "any consular officer of the United States stationed at Paris, France" rather than to any specific name or title of consular officer.

American consular officers may take depositions from witnesses of American nationality [*54] on Embassy premises without special restrictions. However, before evidence may be taken from French nationals or nationals of third countries, authorization must be obtained in advance from the Bureau de l'Entraide Judiciaire Internationale of the Ministry of Justice. The following specific provisions must be met:

(a) the deposition must be held on the Embassy premises;

(b) the hearing must be open to the public;

(c) the date and time of the hearing must be notified to the Ministry of Justice in advance;

(d) the witnesses must be summoned by written notice in French in advance of the hearing date (15 days advance notice). The written notice must include assurances that appearances are voluntary, that the witness may be represented by a lawyer, and that the parties to the case have consented to the deposition, or, if opposed, the reasons for their opposition.

The Embassy will obtain authorization from the Ministry of Justice. There is no charge for the use of the hearing room or for advance preparations. However, there is a statutory fee of $90.00 an hour for the deposition or fraction thereof. *The estimated fee must be deposited in advance* in the form of a certified [*55] check payable to the American Embassy, Paris, France. Any balance remaining after the service has been performed will be refunded.

The Embassy is unable to provide the service of stenographers or interpreters. It is therefore necessary for the interested parties to arrange for a court stenographer to take down the testimony and transcribe it, unless the answers are of the "Yes and No" type, and space is provided on the interrogatories for the witness to write in his own brief replies. If the testimony is to be taken in any language other than English, the interested parties must arrange for a court interpreter. A list of qualified stenographers and interpreters is attached. The Embassy will not act as agent in arranging for services of stenographers and interpreters.

IMPORTANT - PLEASE NOTE:

In all cases involving witness [sic] of French nationality or third country nationality, the Embassy must have the information or documents listed below *at least 45 days before the deposition* is to be held. This timing is necessary in order to allow sufficient time to obtain authorization from the Ministry of Justice and provide the required advance notice to witnesses. [*56]

(a) Commission to take deposition, referring to The Hague Convention, and precise information on name of court, name of judge or issuing authority, the names of parties to the case and their representatives;

(b) The names and addresses (telephone numbers, if available) of all witnesses to be summoned;

(c) The questions to be put to the witnesses or a statement of the subject matter on which they are to be examined;

(d) The names of any of the parties or their representatives who plan to attend the hearings;

(e) The name, address, and telephone number of the stenographer and interpreter who have been selected (if any);

(f) Whether the parties to the case have consented to the deposition, and if not, the reasons for any objection which has been made;

(g) A certified check for the estimated consular fee;

(h) A suggested date for the hearing (if there are preferences), not less than 45 days after Embassy receives the above information;

(i) All documents listed above must be accompanied by a translation in French, for the Ministry of Justice.

The Embassy will notify all parties planning to attend the hearing of the date set as soon as authorization has been received [*57] from the Ministry of Justice.

3. *DEPOSITIONS BEFORE A PERSON COMMISSIONED BY THE COURT*

Evidence may be taken in France by deposition before any competent person commissioned by a court in the United States. Authorization must be obtained in advance from the Bureau de l'Entraide Judiciaire Internationale of the Ministry of Justice. The hearing must be held within the Embassy property. All of the other provisions and the general procedure described above for depositions before a consular officer must be followed, except that there is no consular fee because the services of a consular officer are not required. In addition, the request for authorization from the Ministry of Justice must include:

(a) an explanation of the reasons for choosing this method of taking evidence, taking into account the judicial costs involved; and

(b) the criteria for designating the individual commissioned to take evidence.

The information required under (a) and (b) above must be supplied to the Embassy (along with the other information listed under 2, above) at least 45 days before the hearing will be held.

OAS/NOT Rev. Jan 86

APPENDIX C

Declarations of the Republic of France With [*58] Respect to the Hague Evidence Convention

In conformity with the provisions of Article 16, the Ministry of Justice, Civil Division of International Judicial Assistance, 13 Place Vendome, Paris (1er), is designated as the competent authority to give permission to diplomatic officers or consular agents of a Contracting State to take the evidence, without compulsion, of persons other than nationals of that State in aid of proceedings commenced in the courts of a State which they represent.

That permission, which shall be given to each specific case and shall be accompanied by special conditions when appropriate, shall be granted under the following general conditions:

1. Evidence shall be taken only within the confines of the Embassies or Consulates;

2. The date and time of taking the evidence shall be notified in due time to the Civil Division of International Judicial Assistance so that it may have the opportunity to be represented at the proceedings;

3. Evidence shall be taken in premises accessible to the public;

4. Persons requested to give evidence shall be served with an official instrument in French or accompanied by a translation into French, and that instrument **[*59]** shall mention:

a. That evidence is being taken in conformity with the provisions of The Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and relates to legal proceedings pending before a jurisdiction specifically designated by a Contracting State;

b. That appearance is voluntary and failure to appear will not give rise to criminal proceedings in the State of origin;

c. That the parties to the trial are consenting or, if not, the grounds of their objections;

d. That in the taking of evidence the person concerned may be legally represented;

e. That a person requested to give evidence may invoke a privilege or duty to refuse to give evidence.

A copy of these requests shall be transmitted to the Ministry of Justice.

5. The Civil Division of International Judicial Assistance shall be kept informed of any difficulty.

In conformity with the provisions of Article 17, the Ministry of Justice, Civil Division of International Judicial Assistance, 13 Place Vendome, Paris (1er), is appointed as the competent authority to give permission to persons duly appointed as commissioners to proceed, without compulsion, to take any **[*60]** evidence in aid of proceedings commenced in the courts of a Contracting State.

This permission, which shall be given for each specific case and shall be accompanied by special conditions when appropriate, shall be granted under the following general conditions:

1. Evidence shall be taken only within the Embassy confines;

2. The date and time of taking the evidence shall be notified in due time to the Civil Division of International Judicial Assistance so that it may have the opportunity to be represented at the proceedings;

3. Evidence shall be taken in premises accessible to the public;

4. Persons requested to give evidence shall be served with an official instrument in French or accompanied by a translation in French, and that instrument shall mention:

a. That evidence is being taken in conformity with the provisions of The Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and relates to legal proceedings pending before a jurisdiction specifically designated by a Contracting State;

b. That appearance is voluntary and failure to appear will not give rise to criminal proceedings in the State of origin;

c. That **[*61]** the parties to the trial are consenting and, if not, the grounds of their objections;

d. That in the taking of evidence the person concerned may be legally represented;

e. That a person requested to give evidence may invoke the privilege and duty to refuse to give evidence.

A copy of these requests shall be transmitted to the Ministry of Justice.

5. The Civil Division of International Judicial Assistance shall be kept informed of any difficulty.

The request for permission transmitted by the requesting authority to the Ministry of Justice shall specify:

1. The motives that led to choosing this method of taking evidence of preference to that of a Letter of Request, considering the judiciary costs incurred;

2. The criteria for appointing commissioners when the person appointed does not reside in France.

Exhibit [30]

Cour de cassation, chambre criminelle, 12 décembre 2007, n° 07-83228

pièce 18

annexe 50

Exhibit []

Cour de cassation, chambre criminelle, 12 décembre 2007, n° 07-83228

8988

Pièce 18 -

Et attendu que l'arrêt est régulier en la forme ;

REJETTE le pourvoi ;

Ainsi jugé et prononcé par la Cour de cassation, chambre criminelle, en son audience publique, les jour, mois et an que dessus ;

Etaient présents aux débats et au délibéré : M. Cotte président, Mme Nocquet conseiller rapporteur, M. Dulin, Mmes Thin, Desgrange, M. Rognon, Mme Ract-Madoux, M. Bayet conseillers de la chambre, M. Soulard, Mmes Slove, Degorce, Labrousse conseillers référendaires ;

Avocat général : M. Boccon-Gibod ;

Greffier de chambre : Mme Randouin ;

En foi de quoi le présent arrêt a été signé par le président, le rapporteur et le greffier de chambre ;

Publication :

Décision attaquée : Cour d'appel de Paris du 28 mars 2007

Titrages et résumés : DOCUMENTS ET RENSEIGNEMENTS D'ORDRE ECONOMIQUE OU TECHNIQUE - Communication à des personnes physiques ou morales étrangères - Communication tendant à la constitution de preuves pour une procédure étrangère - Autorisation - Mandat prévu par la Convention de La Haye du 18 mars 1970 - Défaut - Portée

Constituent, au sens de l'article 1 bis de la loi du 26 juillet 1968, modifiée, la recherche de renseignements d'ordre économique, commercial, industriel, financier ou technique tendant à la constitution de preuves en vue d'une procédure étrangère, les démarches effectuées par une personne, correspondante en France de l'avocat d'une des parties à ladite procédure, dans le but de connaître les circonstances dans lesquelles le conseil d'administration d'une société française a pris la décision d'acquérir une société étrangère. Dès lors, commet le délit réprimé par l'article 3 de la loi susvisée, la personne qui se livre à de telles démarches, sans disposer d'un mandat autorisé prévu par la Convention de La Haye du 18 mars 1970

Précédents jurisprudentiels:

Exhibit [31]

Cour de Cassation, Criminal Chamber, 12 December 2007, No 07-83228

Exhibit [ ]

Cour de Cassation, Criminal Chamber, 12 December 2007, No. 07-83228

Within the meaning of Article 1 bis of the Act of 26 July 1968, as amended, the search for economic, commercial, industrial, financial or technical information aimed at the identification of evidence with a view to foreign proceedings consists in steps taken by any person, who is the correspondent in France of the attorney of any of the parties to the said proceedings, in order to know the circumstances in which the board of directors of a French company decided to acquire a foreign company. Therefore, the offence targeted by Article 3 of the above Act is committed by any person engaging in such search without having been appointed by an authorized agency agreement provided for by the Hague Convention of 18 March 1970.

Je, soussignée, Karen RENEL, Traductrice Expert près la Cour d'Appel d'Amiens certifie que la traduction qui précède est conforme à l'original libellé en langue ..... française .....
visé ne varietur sous le n° ..8783.....
Fait à .....Roye..... , le 27/06/08
(signature exempte de légalisation
Décret n° 53914 Art. 8 du 26.9.1953).

K Renel

Exhibit [32]

Luc Chatel, "Le temps est venu d'introduire l'action de groupe dans notre pays", Concurrences, Revue des droits de la concurrence, n° 2-2008, pp. 21-24

1/1.

Annex 51

Exhibit []

Luc Chatel, "Le temps est venu d'introduire l'action de groupe dans notre pays", Concurrences, Revue des droits de la concurrence, n° 2-2008, pp. 21-24

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700 mo… pièce 19
parag 12 et 13

illicites et en suppression de clauses illicites ou abusives (article L. 421-6), action en intervention volontaire (article L. 421-7) ou bien encore action en représentation conjointe (article L. 422-1). Les actions menées dans l'intérêt collectif des consommateurs ne permettent cependant pas la réparation des dommages individuels puisque les montants obtenus sont versés à l'association de consommateurs et non aux victimes. Quant à l'action en suppression de clauses abusives ou illicites, elle n'a pas pour vocation à réparer le dommage causé mais à en éliminer les causes, en ordonnant par exemple la suppression d'une clause illicite ou abusive dans un contrat. Pour ce qui concerne le droit d'intervention devant les juridictions civiles, les associations de consommateurs ne sont présentes que comme "partie jointe", en soutien d'une demande introduite par des consommateurs agissant à titre individuel.

9. L'action en représentation conjointe s'apparente sans doute le plus à la procédure d'action de groupe puisqu'elle permet aux associations d'agir au nom d'au moins deux consommateurs et en vue de la réparation de préjudices individuels. Toutefois, l'association de consommateurs ne peut agir de sa propre initiative. De surcroît, la procédure se révèle en pratique contraignante et coûteuse, les associations de consommateurs devant collecter et gérer les mandats de chaque victime.

10. L'introduction d'une véritable action de groupe s'impose donc. Elle présenterait plusieurs vertus :

→ Elle réduirait considérablement pour les victimes le coût d'une action en justice et faciliterait de ce fait l'accès de tous à la justice.

→ Elle diminuerait les coûts de fonctionnement du système judiciaire, en évitant la duplication des procédures et permettrait ainsi de réaliser des économies d'échelle.

→ Elle mettrait les quelques professionnels indélicats face à *leurs responsabilités* et écarterait ainsi la suspicion qu'ils font porter sur les autres.

→ Elle dissuaderait les entreprises de recourir à des pratiques illicites, nuisibles pour l'efficacité économique, et les inciterait à se montrer plus attentives aux attentes et réclamations de leurs clients.

→ Finalement, elle restaurerait la confiance des consommateurs dans le bon fonctionnement de l'économie, en leur donnant un rôle de régulateur à part entière.

11. L'action de groupe n'est plus aujourd'hui le combat isolé de quelques-uns : elle mobilise toutes les familles politiques, bien au-delà des clivages partisans traditionnels. Ainsi, en novembre 2007, lors de la discussion d'un amendement sur le sujet, une convergence de vue s'est fait jour entre les différents groupes parlementaires. Les Français plébiscitent également l'action de groupe : selon un sondage CSA, publié en mars 2007, 84 % des Français sont favorables à l'introduction en France d'une *telle procédure, 57 % estimant même cette* réforme prioritaire. En dernier lieu, les rapports Coulon et Attali se sont clairement exprimés en faveur d'une action de groupe.

12. La question centrale n'est donc plus tant de savoir s'il faut introduire une action de groupe mais bien plutôt de définir les contours d'un projet raisonné, qui redonne confiance aux consommateurs tout en protégeant les entreprises d'éventuels abus.

Car nous le savons tous, l'action de groupe est susceptible de sérieuses dérives, à l'image de ce que nous avons pu observer outre-Atlantique. L'action de groupe mal encadrée peut être *dévoyée pour devenir l'instrument d'un enrichissement indu*, voire d'un lynchage médiatique, avant même que la responsabilité réelle de l'entreprise ne soit établie. Le droit légitime à la réparation cède alors la place au chantage pour se transformer parfois en droit de vie et de mort sur les entreprises. Loin de bénéficier d'abord aux victimes – en l'espèce les consommateurs – les *class actions* américaines alimentent bien souvent une véritable "industrie du procès", qui profite d'abord aux intermédiaires et à certains concurrents mal intentionnés. Les *class actions* peuvent même se retourner contre leur propre objet, la défense des consommateurs : dans certains secteurs à risque tels que la pharmacie, la perspective de réparations élevées se traduit aux États-Unis par une hausse des primes d'assurances, que les entreprises reportent ensuite sur… les prix aux consommateurs. Tous ces risques, nous les connaissons et les Américains eux-mêmes s'en inquiètent et ont d'ailleurs engagé des réformes de leur procédure de *class action*.

13. Mais, à l'inverse, n'agitons pas en permanence le chiffon rouge des *class actions* américaines pour prêcher l'immobilisme total. Prenons plutôt la mesure des excès et des errements Outre-Atlantique, pour construire un système juste et équilibré. Nous devons d'ailleurs nous méfier des parallèles, analogies et raccourcis trop rapides qui sont parfois faits entre le cas américain et ce qui pourrait advenir en France. Les dérives américaines résultent en grande partie de l'organisation même de leur système judiciaire, difficilement comparable et transposable au nôtre.

→ Ils ont des jurys populaires et des magistrats élus, nous avons des juridictions spécialisées, au travers des huit TGI spécialisés dans l'application du droit de la concurrence, et des magistrats professionnels.

→ Ils autorisent la rémunération des avocats sur le seul résultat du procès (pacte de *quota litis*) – rémunération qui peut atteindre dans certaines affaires jusqu'à 40 % du montant des réparations – cette solution n'est pas permise dans notre pays et n'est pas à l'ordre du jour.

→ Ils offrent aux avocats une grande liberté d'initiative en matière de publicité (radio, télévision) et ce à tous les stades de la procédure – notamment dans la constitution du groupe, avant même que la recevabilité et la responsabilité de l'entreprise ne soient établies – alors que notre droit l'encadre strictement.

→ Ils recourent à des dommages punitifs – les fameux "*triple dommages*" – alors que nous sommes dans une logique de réparation stricte du préjudice. Le principe de la réparation simple permet de centrer l'action de groupe sur son seul *objectif légitime, le dédommagement du consommateur lésé* et non l'enrichissement des intermédiaires, qui sont souvent les seuls grands gagnants d'un système de dommages punitifs.

→ Ils privilégient un champ très large à l'action de groupe, incluant par exemple les sinistres collectifs médicaux (tabac), l'environnement, les discriminations au travail, les atteintes aux droits de l'homme. Le récent rapport Coulon propose de limiter l'action de groupe aux seuls préjudices matériels subis par les consommateurs.

→ Ils recourent, en matière de régime de la preuve, au *mécanisme très intrusif* de la *"discovery"*[4], notre droit ne dispose pas d'une procédure équivalente.

Bref, en matière d'action de groupe, il est peu réaliste de penser que la France de demain ressemblera aux États-Unis *d'aujourd'hui*.

14. Le débat doit donc se centrer sur les modalités d'une action de groupe et plusieurs questions de fond doivent être tranchées, parmi lesquelles :

→ La place de la médiation

Différentes options peuvent être envisagées : une médiation préalable et obligatoire à toute initiative devant le juge ou bien *encore une médiation* qui interviendrait à l'issue de la phase de recevabilité par le juge. Favoriser la médiation, c'est développer dans notre pays la culture de la négociation, c'est également éviter le risque d'une "juridicisation" excessive de notre économie, en faisant du juge le dernier recours. De plus, lorsqu'*elle intervient en amont, la médiation*, discrète par nature, peut éviter à l'entreprise l'exposition médiatique et la publicité inhérente à toute décision de justice ;

→ Le système d'inclusion des bénéficiaires

Si la majorité des pays (États-Unis mais aussi Québec, Portugal) privilégient l'*opt-out*, d'autres, comme la Suède, ont fait le choix de l'*opt-in* ou d'un système mixte, en fonction du montant du dommage individuel. Je note également que dans *son récent Livre blanc* sur les actions en réparation de pratiques anticoncurrentielles, la Commission a pris position en faveur de l'*opt-in*.

→ Le champ de l'action de groupe

Les rapports Cerruti-Guillaume et Coulon préconisent de le circonscrire aux préjudices matériels subis par les consommateurs. Ce champ pourrait recouvrir les obligations contractuelles et légales du vendeur en matière commerciale *mais également* celles en matière de concurrence. Permettez-moi de développer plus avant ce dernier point.

15. L'inclusion des pratiques anticoncurrentielles dans le champ de l'action de groupe mérite d'être discutée. La *Commission européenne vient d'ailleurs* de prendre position clairement sur ce sujet, à l'occasion de la publication du Livre blanc : elle a estimé que la pleine effectivité des règles de concurrence implique non seulement une action forte des autorités de concurrence mais également la possibilité d'actions en réparation. La Commissaire chargée de la protection des consommateurs, Madame Kuneva, m'a réaffirmé à plusieurs reprises sa volonté d'avancer sur cette question, tout comme la Commissaire en charge de la concurrence, Madame Kroes.

16. L'espace de la libre concurrence s'est considérablement élargi dans notre pays, notamment à la suite du mouvement de déréglementation qui a touché les industries de réseau : téléphonie fixe hier, gaz et électricité aujourd'hui, chemins de fer demain. Cette liberté entrepreneuriale a pour contrepartie *une responsabilité* plus grande vis-à-vis des clients : la concurrence ne profite véritablement aux consommateurs que pour autant que les firmes respectent les règles du jeu concurrentiel et ne s'engagent pas dans des pratiques telles que des ententes sur les prix.

17. Si nous considérons le cas particulier des ententes sur les prix, elles causent bien souvent un dommage global important à l'économie et aux consommateurs en particulier. Les économistes estiment que cette pratique augmente les prix de l'ordre de 20 %, *ce qui est tout à fait considérable*. Cette hausse de prix est complètement artificielle. Elle ne s'accompagne d'aucune contrepartie réelle en termes de progrès économique et d'efficacité. Les consommateurs sont tout simplement spoliés : ils paient plus cher pour le même produit ou sont même *parfois contraints de renoncer* à l'acheter. Mais la perte individuelle que supporte chaque consommateur est généralement trop faible pour qu'il engage seul une action en réparation. Si l'on prend le cas de l'entente dans la téléphonie mobile entre 2000 et 2002, le dommage global a été estimé à plus d'un milliard d'euros, mais la perte pour chaque abonné se chiffre à quelques dizaines d'euros. Qui ira individuellement en justice pour si peu ? Je constate d'ailleurs que seulement 12 000 plaintes ont été déposées dans le cadre de l'action conjointe engagée par une association de consommateurs... sur un parc d'abonnés qui avoisinait les 30 millions de clients à l'époque des faits. Ce décalage entre l'ampleur des dommages causés par l'entente et les obstacles à une juste réparation vient alimenter chez les consommateurs un sentiment d'impuissance et de défiance, qui nuit au bon fonctionnement de notre économie.

18. De plus, l'action privée peut venir renforcer l'effet dissuasif de l'action publique. En effet, bien que les réparations soient d'une nature juridique différente des sanctions pécuniaires infligées par les autorités de concurrence, elles contribuent tout autant à accroître le risque financier pour une entreprise d'une violation des règles de concurrence. Cet effet ne doit pas être sous-estimé, nombre d'économistes estimant que le niveau des amendes reste encore insuffisant au regard du gain illicite et de la faible probabilité de détection.

19. L'action privée n'est pas redondante avec l'action publique et ne conduit pas à punir deux fois l'entreprise pour les mêmes faits. En effet, lorsqu'un prix augmente, certains consommateurs renoncent à consommer, tandis que d'autres

4 *Cette procédure est une phase d'investigation de la cause préalable au procès. Elle fait obligation à chaque partie de divulguer à l'autre partie tous les éléments de preuve pertinents au litige dont elle dispose (faits, actes, documents...), y compris ceux qui lui sont défavorables.*

Exhibit [33]

Luc Chatel "The time has come to introduce group actions in our country", Concurrences (a Competition Law Journal), No 2-2008, pp.21-24

Exhibit [ ]

Luc Chatel "The time has come to introduce group actions in our country" Competition Law Journal, No. 2-2008, pp. 21-24

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110, rue Jeanne d'Arc - 80000 AMIENS - FRANCE
Karen REMEL-KING
Expert - Traducteur
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Tél 03 22 69 04 72 - Fax 03 22 69 45 86

(...)

12. The central issue no longer primarily hinges on whether it is necessary to introduce a group action but rather focuses on the definition of the outlines of a reasoned project that would restore consumers' trust while protecting enterprises against possible abuses.

Indeed, as we all know, group actions may lead to serious excesses, as observed in the United States. Improperly regulated group actions may be misused in order to become an unfair enrichment tool, or to allow for "lynching" by the media, even well before it is proved that the enterprise concerned is actually liable. The legitimate right to a remedy is then replaced by blackmail, and sometimes amounts to a right of life and death over enterprises. Far from being beneficial most of all to the victims (in the instant case, consumers), US class actions very often feed a genuine "litigation industry," that is primarily profitable for intermediaries or certain malicious competitors. Class actions may even be contrary to their own purpose, i.e. the defense of consumers: in certain high-risk areas, such as pharmaceuticals, the prospect of huge damages induces in the United States a rise in insurance premiums that enterprises then pass on to consumers. We are well aware of all of these risks, and Americans themselves have voiced concerns in this respect and have launched reforms of their class action procedures.

13. However, conversely, let us not constantly wave the red flag of US class actions in order to recommend total inertia. Let us rather take stock of excesses and aberrations observed in the United States, so that we can build a fair and balanced system. Also, we must avoid too quickly coming up with any comparisons, analogies or snap judgments that are sometimes made when analyzing the US situation and what might be done in France. US excesses largely result from the very organization of the country's judicial system, which is difficult to compare with our institutions or to transpose in France.

The United States has a jury system and elected judges, while France has specialized courts, with eight First Instance courts specialized in competition matters, and also has professional judges.

The United States allows for the remuneration of attorneys on the sole basis of the trial's outcome (contingency fee arrangements, with a remuneration that may reach 40% of the amount of the damages), while such a system is not allowed in our country, and its introduction is not on the agenda.

The US gives attorneys considerable freedom as regards canvassing (radio, television), at all stages of the procedure, and in particular in order to constitute the group, even before the action is found admissible and the enterprise is found liable, while French law strictly regulates such canvassing.

US courts may order punitive damages (the notorious "treble damages"), while French law only allows the strict indemnification of the loss. The principle of mere indemnification makes it possible to focus the group action on its sole legitimate objective, i.e. the indemnification of the aggrieved consumer and not the enrichment of the intermediaries, which are often the only winners in a punitive damages system.

The US allows for a broad scope of class actions, by including in particular collective medical losses (tobacco), environmental matters, labor discrimination and human rights violations. In

France recently, the Coulon report proposed limiting group actions to the sole tangible damages sustained by consumers.

As regards evidence rules, the US largely relies on the highly intrusive discovery[1] system, while French law does not provide for any equivalent procedure.

In brief, as regards group actions, it is quite unrealistic to consider that, in the near future, the French system will resemble the system currently observed in the United States.

[1] This procedure corresponds to a pre-trial investigation phase. Under this system, each party is required to submit all evidence relevant to the dispute and available to it (facts, deeds, documents, etc.) including any evidence detrimental to the submitting party.

Je, soussignée, Karen RENEL,
Traductrice Expert près la Cour d'Appel
d'Amiens
précédente
libellé en langue
visé ne varietur sous le n° ...1889.....
Fait à ...Paris..... , le 27/06/08
(signature exempte de légalisation
Décret n° 53914 Art. 8 du 26.9.1953).

Renel

Exhibit [34]

EC Commission, Staff Working Document, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, 2.4.2008, SEC(2008) 404 (extract)

instance, one could envisage a partial shift of the burden so that the claimant would "only" have to show that there was an infringement of competition rules that may have caused damage to him whilst the defendant would have to demonstrate that his breach of the law did not cause a harm to the claimant. However, such shift would not address the difficulties victims have in obtaining information or evidence necessary to (even roughly) describe and prove the infringement. Even where victims can rely on the finding of an infringement in the decision of a competition authority, the reversal of the burden is of no real help with respect to the quantification of damages, because without access to the relevant information on how e.g. a price-fixing agreement was implemented in the specific case of the claimants, they and courts will often be unable to even roughly estimate a quantum of damage that then has to be rebutted by the defendant. Moreover, generally shifting the burden of proof would produce undesirable results because it would encourage unmeritorious claims as much as meritorious claims. This sets the wrong incentives and would entail the risks of incorrect judgments and procedural abuses referred to above.

3. *The proposed solution: a minimum level of disclosure based on fact pleading, combined with judicial control of relevance and proportionality*

93. Whilst it is essential to improve in antitrust damages cases access to evidence held by the opponent or third persons, the negative effects of certain systems of disclosure must be avoided. In some (non-European) jurisdictions, opponents or third persons are obliged to cooperate in potentially very wide-ranging, time-consuming and expensive disclosure procedures on the basis of rather low thresholds. In such systems, parties can be required to spend large amounts of time and resources on screening, compiling and disclosing the requested documents, even where there is only a low probability that the case is meritorious. This creates risks of abuses, e.g. through what is called "discovery blackmail" where the threat of potentially immense costs of disclosure procedures may be used to drive defendants to agree on an early settlement even where the claimant has a rather weak or even fully unmeritorious case. The same can occur in reverse, namely the situation where defendants with "deep pockets" use the threat of costly disclosure measures to cause the claimant to settle at a very low amount or even to abandon the case.

94. The Commission therefore proposes, to ensure across the EU a minimum level of disclosure *inter partes* in antitrust damages cases that avoids excesses in both directions, i.e. on the one hand, overly broad and costly disclosure obligations that are prone to abuses and, on the other hand, high obstacles to revealing the truth just because the relevant evidence happens to be under the control of the defendant or a third person. Claimants suing for antitrust damages should, plausibility of their claim provided, have the realistic possibility to obtain evidence that is indispensable for proving the case.

95. To this end, the Commission suggests to build on the approach adopted in the IP Directive and to follow the legal tradition of the majority of Member States. The accordingly proposed minimum standard for disclosure in antitrust damages cases is described in more detail below. It relies on the central function of the court seised with the damages claim. Disclosure measures could only be ordered by judges and

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drawing of adverse inferences as a sanction for obstructive behaviour of a party as discussed in paragraph 130 below.

would be subject to strict and active judicial control as to their necessity, scope and proportionality. The Commission thus clearly does not propose a system of overly broad pre-trial disclosure, which may not fit easily with the legal tradition and principles of civil procedure of Member States and which may conflict with public policy principles of some Member States.

96. Member States which currently apply very strict requirements in terms of specification of facts and means of evidence would have to allow for an initial alleviation of these strict requirements in antitrust damages cases. The general standard of proof for ultimately winning a case would, however, remain unaffected. Moreover, any disclosure order would presuppose that the claimant has presented reasonably available facts and evidence that are sufficient to make his claim a plausible one. The Commission considers that such a fact-pleading requirement can have useful functions in safeguarding against unmeritorious claims and in structuring and streamlining civil procedures.

97. For reasons of equality of arms, this minimum level of disclosure in antitrust damages cases should be available not only to support claims of claimants but also defences by defendants (where in the following sections reference is made to "the claimant", the same shall apply *mutatis mutandis* to defendants).

4. Conditions for obtaining a disclosure order by the court and its scope

98. The civil procedure systems of Member States should allow, as a minimum level of disclosure in antitrust damages cases, targeted disclosure measures under the condition that (a) the claimant has asserted all the facts and offered all those means of evidence that are reasonably available to him, provided that these are sufficient to make his claim a plausible one; (b) he has shown to the satisfaction of the court that he is unable, applying all efforts that can reasonably be expected, to assert the specific facts or to produce the means of evidence for which disclosure is envisaged; (c) he has specified sufficiently precise categories of information or means of evidence to be disclosed, and (d) the court is satisfied that the envisaged disclosure measure is relevant to the case as well as necessary and proportional in scope.

99. Disclosure would be ordered upon application by a party, or upon the court's own motion where necessary, and would be tailored by the court to fit the facts pleaded by the parties and the particular circumstances of the case.

a. Fact pleading: presentation of reasonably available facts and evidence sufficient to make out a plausible claim

100. The first condition for any disclosure measure under the system of access to evidence proposed in the White Paper would be reasonable fact pleading by the claimant to the extent possible in the individual case. The facts presented must be sufficient to make out a plausible claim. As regards more specifically the last aspect, a claimant for antitrust damages would have to assert, as a condition for any disclosure, sufficient facts to show that there are plausible grounds to suspect that he suffered some harm through the infringement of competition rules by the defendant.

101. The purpose of requiring from the claimant a minimum level of fact pleading, and be it through rather general factual allegations (and where required reference to less precisely identified evidence), is to provide the court with a basis (i) to filter out

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CERTIFICATE OF SERVICE

I, W. Harding Drane, Jr., hereby certify that on July 3, 2008 the attached document was hand delivered to the following persons and was electronically filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following and the document is available for viewing and downloading from CM/ECF:

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