

The Italian Class Action

By Micael Montinari and Dorella Concadoro

At the end of a long process, Italy now has the class action. This is an important success for consumers and the relevant associations.

However, below we outline some aspects of Italian class actions that could reduce the impact of this new remedy. Further, there are some measures that enterprises could take to avoid a class action or limit the risks deriving from an unsuccessful outcome.

Background

Before Law 99/2009 was enacted, Italian law did not provide consumers with the class action, although several attempts were made by the parliament in recent years. The final introduction of the class action was made through the amendment of section 140 *bis* of Law Decree 206/2005 (the Consumer Code) by section 49 of Law 99/2009. After several postponements, class actions became available to consumers beginning January 1, 2010, and in connection with facts occurring from August 16, 2009.

Who May Bring a Class Action?

Pursuant to the new version of section 140 *bis*, the class action may be brought by the following plaintiffs:

- each individual consumer member of the class
- the associations to which the consumer or the consumers gave a proper mandate
- the committees that the consumer or the consumers join

In this respect, one of the most significant aspects of a class action is the possibility for each consumer to join a class action already brought by a plaintiff. Furthermore, the legal

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assistance by a counsel is not required. The only necessary qualification to join a class action is the quality of “consumer,” according to the definition in the Consumer Code. On the contrary, this kind of action cannot be brought by an enterprise or a professional.

Against Whom May a Class Action Be Brought?

The class action may be brought only against enterprises that carry out an economic activity, regardless of its legal structure, and which may infringe the rights of a large number of consumers and users. The sectors which will be most affected are banking, insurance, tourism, telecommunication, food, and pharmaceutical.

What Are the Rights Enforceable by a Class Action?

Pursuant to paragraph 2 of section 140 *bis*, the rights that may be enforced by means of class action are the following:

- contractual rights of a class of consumers and/or users who are in the same position toward the same company, including the rights arising from the contracts entered into by signing a form containing the general term and conditions
- the rights common to the final consumers and/or users of a product toward the manufacturer, regardless the existence of a direct contractual relationship
- the rights common to the consumers and/or users who are entitled to claim for damages suffered because of unfair business practices

What Cases May Cause a Class Action?

Most likely, class actions will regard cases under the first and third bullet points above. It is not a case that the first class actions have been brought against two major banks with regard to certain commercial practices. Obviously, there will be also class actions on product-liability cases, but the chances that such cases occur are much less compared to the potential issues between consumers and big companies on oppressive clauses, misleading advertising, unfair business practices, etc. Furthermore, it is sure that the new rules of class actions will not apply to compensation for the damages indirectly caused to a large number of individuals by the pollution deriving from a plant of an enterprise—the only individuals who can bring a class action must be “consumers.”

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What Are the Main Procedural Rules?

Section 140 *bis* states some procedural rules that make the class action partially different from an ordinary proceeding.

- **Preliminary exam of the case**

After a first hearing, the court decides on the acceptability of the claim. The claim is immediately dismissed when:

- It is manifestly groundless.
- There is a conflict of interest between the plaintiff or plaintiffs and the class.
- The enforced rights are not identical.
- The plaintiff/promoter is found incapable to take care of the interests of the class.

- **Publicity**

When the court declares the acceptability of the claim, it also provides for the terms of the publicity to be performed to allow the participation by the interested consumers. The performance of the publicity, which has to borne by the claimant, is a precondition of the proceeding.

- **Term to join the class action**

The members of the class may join the class action within the term scheduled for by the court. Such term can not be longer than 120 days starting from the deadline for the performance of publicity. Then, unlike in other countries where there is the “opting-out” rule, Italian class actions provide for the “opting-in” rule.

- **Procedure**

The court provides for the course of the proceeding, to avoid inefficiencies. It also regulates the investigation process and each procedural step, removing all the

useless formalities. In this respect, the court has discretionary powers and that, in some cases, could increase the chances of a very long proceeding.

- **Decision**

Unlike the ordinary proceeding, the judgment that rules upon the class action becomes enforceable after 180 days starting from its publication. Furthermore, its enforceability may be suspended taking into consideration, among other things, the overall amount of debt burdening the enterprise. That means that in many cases the enforceability of the judgment could be suspended.

What Are the Critical Points of Section 140 *bis*?

- **The quantification of compensation**

One of the critical points of Italian class action is the vagueness of section 140 *bis* about the quantification of the compensation to be paid to the consumers.

More specifically, the judge may, alternatively:

- set the amounts to be paid to each member of the class
- identify the criteria for the calculation of the sums to be paid

Therefore, in the second case, there could be disputes on the application of the criteria identified by the court. Moreover, a separate and additional proceeding could be needed to have this dispute resolved.

- **The suspension of the lawsuit when an investigation is pending before an independent authority**

Another point to be highlighted is the possibility for the court to suspend the lawsuit when an investigation is pending before an independent authority. This possibility is excessively vague because section 140 *bis* does not clarify which are the authorities before whom the investigation may take place. Moreover, on one hand, this possibility may be an advantage for the enterprises, because it may cause an extension of the duration of the lawsuit. On the other hand, it could cause some risks, because most likely the judge will base his or her decision on the judgment already expressed by the authority, which could be in favor of the consumers.

What Measures May Reduce the Impact of a Class Action?

In light of the above, we point out some measures that to a certain extent could reduce the impact of a class action.

- **Conciliation clause**

First, the B2C contracts could provide for a clause that binds the parties to attempt a conciliation before starting a legal action. However, such provision could be deemed by a court as aggressive commercial practices or oppressive clauses. In any event, this measure does not reduce the risk of class actions relating to the rights of the consumers of a final product toward the relevant manufacturer, without a direct contractual relationship. It will be interesting to see how Italy will implement the regulation on conciliation and mediation that has been already enacted at the European Union level. Of course, in this respect if the implementing domestic rules will provide for a compulsory attempt to reach a conciliation agreement in B2C disputes, then enterprises will increase their chances to avoid class actions.

- **The pre-quantification of the damages**

The pre-quantification of damages by the contract seems a solution easier to be adopted. In fact, the fixing of a cap of liability for the enterprises could limit the risk of a punitive quantification of damages. Otherwise, that quantification by the judge could be too discretionary considering the vagueness of the relevant rule.

- **The possibility to reach a settlement with the whole class**

Probably the best way to efficiently respond to the class action would be reaching a settlement with the whole class that started the legal action. Such a solution would close the lawsuit with a sole settlement agreement. Therefore, the most practicable way is to propose a settlement with the help of the judge.

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