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CLASS ACTIONS IN ITALY: RECENT DEVELOPMENTS

Class actions in Italy are a recent introduction. Traditionally, according to the Italian system, a group of individuals whose rights were allegedly violated by the behavior of a business entity did not have the power to jointly sue such entity. In order to obtain relief, each of them had to bring separate actions, which caused disadvantages such as the risk of conflicting judgments and an undue burden on the overloaded Italian judiciary.

After years of debate, the 2007 Italian Budget Law[1] introduced a specific provision (Article 140 bis) in the Italian Consumer Code,[2] regulating the so-called "collective actions." These were intended as an avenue for consumer associations and committees to obtain—for the benefit of their members whose "collective interests" were violated—restitution and damages for certain contractual or tort claims, or in respect of unfair commercial or anti-competitive conducts.

Before becoming effective, Article 140 *bis* was subject to a number of amendments, such as those contained in Article 49 of Law no. 99 dated July 23, 2009. Collective actions were then renamed "class actions" and were directed to protect each of the plaintiffs' "individual rights," rather than their collective interests. Accordingly, the relevant *locus standi* was shifted from national consumer associations or committees to single users and consumers, either individually or represented by one of the mentioned organizations, which, lacking autonomous standing, must be duly empowered by class members themselves.

On January 1, 2010, after several postponements, Article 140 *bis* entered into force in respect of harmful events occurred after August 16, 2009.

Subsequently, Article 6 of Law Decree no. 1 dated January 24, 2012, ratified by Law no. 27 dated March 24, 2012 under the heading "Rules to make class actions effective," added a further set of amendments. The recent changes, effective as of March 25, 2012, lowered one of the admissibility thresholds: formerly, class actions were inadmissible if class members' rights for which protection was sought were not "identical," whereas these rights now need to be "homogeneous," which is a wider concept.

Class actions are not a widespread phenomenon in Italy. Only a handful of lawsuits have been brought before Italian Courts,[3] and most of them were unsuccessful. The majority was dismissed at the admissibility bar, and one was rejected on the merits. However, on February 18, 2013, the first class action was upheld on the merits by the Court of Naples (Judgment no. 2195 dated February 18, 2013).

This judgment concerned the claims brought by a group of tourists against a tour operator in respect of a purchased all-inclusive holiday package, according to which the plaintiffs were to spend a week in Zanzibar in a specific four-star resort. However, once on the island, the tourists were initially sent to a different hotel because the agreed hotel had not been fully restored. The new hotel was significantly less luxurious. Moreover, when the tourists were eventually transferred to the agreed hotel, they experienced further unexpected disadvantages, given that the pool and spa structures were not fit for use and the tourists could only use the hotel beach, which had not been decontaminated. The court upheld the claims of the lead plaintiffs and part of the group but rejected the claims of the remaining class members on the grounds that their rights were not perfectly "identical" to those of the others.[4] In this regard, the court had to apply the restrictive interpretation imposed by the 2009 version of the law; however, the same court declared in an *obiter dictum* that the new "homogeneous rights" concept introduced by the 2012 reform would improve the effectiveness of the class action tool applicable to future cases.

Despite the above, court interpretation of the new class action regime still needs to find its stability, and it will be crucial to observe how future cases unfold. Nevertheless, the main features of the recent legislative fine tuning on the subject—read in light of the very first judicial victory for the consumers—will here be described for the benefit of all entities with an interest in the Italian market.

SCOPE OF APPLICATION

Ratione Personae. Pursuant to Article 140 *bis*, not all individuals, but only "consumers" or "users" whose "homogeneous rights" appear violated, may file a class action, either directly or through one of the mentioned associations or committees. "Consumers" or "users" are defined by Article 3 of the Italian Consumer Code as: "any individual who is acting outside trade, business or profession purposes." Hence, class actions are not an option either for those who act within the scope of their trade, business, or profession, including their employment contract, or for parties who are not individuals.

Article 140 *bis* does not specify the minimum number of users or consumers requested to form the "class." In the recent case decided by the Court of Naples, there were approximately 30 class members.

As for defendants, class actions may be filed only against business entities, such as individuals, corporations, or other legal entities acting within the scope of their business. Article 140 *bis* does not clarify whether plaintiffs are allowed to file a class action against foreign companies that do not have registered offices in Italy; however, the relevant EU and international provisions on jurisdiction shall apply.[5]

According to Article 140 *bis*, the final judgment is binding upon the company/defendant, the lead plaintiff(s), and all individuals who subsequently enter into the proceedings according to the "opt in" mechanism. Nonetheless, consumers and users who do not opt into the class action retain the power to bring their own individual actions against the company, although they may not jointly start another class action against the same entity on identical grounds.

Ratione Materiae. Under Article 140 *bis*, paragraph 2, class actions in Italy may be grounded on alleged violations of the following rights:

- Rights arising out of standard contractual terms and conditions binding the plaintiffs and the business entity (letter (a));
- Rights in respect of defects of products or services, regardless of any contractual relationship between the plaintiffs and the manufacturer (letter (b)); and
- Rights to compensation accorded to consumers or users for unfair commercial practices or anticompetitive conducts (letter (c)).

The relief sought consists in a declaratory judgment on the company's liability, compensation of damages, and restitution of any undue payment.

Unlike the U.S. legal system, Italian law encompasses only compensatory and not punitive damages. Therefore, any sum that the defendant company might be required to pay would merely be directed to compensate an actual prejudice suffered by the plaintiffs. Obviously, without punitive damages as an available remedy, Italian consumers—compared to their U.S. counterparts—are less incentivized to use the class action tool, also because they would have less individual leverage in any related settlement negotiation.

PROCEDURAL ISSUES

Service and Competence. Class actions begin with the lead plaintiff filing a writ of summons in accordance with Italian Civil Procedure, pursuant to which a claim must be served on the defendant at least 90 days before the first hearing. The writ must also be served on the public prosecutor, who has a part in the admissibility bar phase. Within 10 days of service, the writ and the relevant documents must then be filed with the competent court.

Pursuant to Article 140 *bis*, paragraph 4, in respect of class actions, the competent court is the one located in the regional capital of the territory where the defendant has its registered offices.

Opting In. As mentioned, unlike the U.S., Italy has adopted an "opt in" model, according to which affected consumers or users may join the lead plaintiff by filing a written declaration and evidence supporting their claim. The most recent amendments to Article 140 bis introduced the possibility to file such declarations by certified mail, email, or fax and, regardless of the method, this may be done without the assistance of a lawyer. Prospective class members have the right to opt in until the term set by the judge during the first hearing (120 days maximum).

Opting in, for class members, amounts to a waiver of their right to start any different legal proceedings on the same grounds for which they are seeking protection through the class action. Moreover, those who opt in will be bound by the final judgment.

The Admissibility Bar. At the first hearing, the court must determine whether the claim is admissible through a procedural order similar to U.S. certification. At the same hearing, the court may stay a proceeding if a claim regarding the same facts is pending before an administrative court, or if an independent administrative agency or authority is investigating the same issue.

On the one hand, as set forth in paragraph 6 of Article 140 *bis*, the claim will be declared inadmissible if: (i) prima facie appears "clearly ungrounded"; (ii) a "conflict of interest" exists (particularly with regard to any relationship between the associations representing the consumers and the defendant); (iii) the plaintiffs' rights are not "homogeneous"; and (iv) the lead plaintiff is incapable of handling the interests of the class (i.e., it lacks the necessary administrative, secretarial, and arguably financial means).

As noted, one of the most significant changes introduced by the 2012 reform was the substitution of the term "identical rights" with "homogeneous rights," which lowered the admissibility bar. In the above-mentioned decision, the Court of Naples confirmed the restrictive interpretation of identical rights as rights that must coincide as to all elements, except the right holder. Moreover, the court essentially welcomed the 2012 introduction of the "homogeneous rights" concept applicable to future cases, which is also praised by the first commentators on the judgment.[6]

On the other hand, as set forth in paragraphs 9-11 of Article 140 *bis*, an admissibility order shall set out: (i) the characteristics of the rights that may obtain protection through the class action; (ii) the form of the advertisement directed to inform other class members of the possibility to opt into the class action; (iii) the term for opting in within 120 days; and (iv) procedural rules relating to the following phase of the proceedings, including taking of evidence.

Pursuant to paragraph 7 of Article 140 *bis*, any order on admissibility may be challenged before the competent court of appeal within 30 days, but any such appeal—which must

be decided in 40 days—does not stay the assessment on the merits of the class action that was declared admissible.

The Final Judgment. If the lawsuit is successful, the court issues a judgment finding the defendant company liable, either ordering it to pay damages to the plaintiffs in a given sum or specifying the criteria for determining the quantum thereof. With regard to the latter case, the most recent amendments to Article 140 *bis* set a 90-day deadline for the parties to find an agreement on quantum, which would be directly enforceable. In abeyance of such agreement, one of the parties may request the court to liquidate damages. In this respect, the Court of Naples did not avail itself of the simplified method of setting the criteria and expressly quantified the amount of damages in €1,300, directed to compensate the "ruined holiday" of each successful class member.

The final judgment becomes enforceable only after 180 days from issuance, but the losing party is encouraged to pay within such period, as its payment would be free from interest and additional taxes.

As noted, the judgment binds the original plaintiffs and those who timely opted into the class action. All other individuals who failed to opt in, but whose rights were hindered by the same behavior of the company, do not directly benefit from the decision. As noted, they may still independently sue the same company, but only individually and not through another class action (Article 140 *bis*, paragraph 14). Conversely, any inadmissibility order, being of procedural nature, would not prevent losing parties to bring a new class action against the same company.

The final judgment may be appealed before the competent court of appeal, which, if so requested, may even suspend its enforceability, taking into account the total amount due by the defendant, the number of creditors, and any prospective difficulty in recovering the amounts paid should the appeal be successful. In any case, the court of appeal may order to put the sum into escrow.

On a different note, should the class action be concluded without a final judgment, there are options for those whose claims remain unsatisfied. Pursuant to the newly introduced paragraph 15 of Article 140 *bis*, if the original plaintiff settles its claim (individually or with other class members) or if the class action is otherwise cancelled, the rights of class members who failed to agree on such measures "are not prejudiced." Therefore, in the former case, the class action would continue with the remaining adherents, and, in the latter case, class members would be entitled to bring new proceedings (and arguably a class action) against the company.

CONCLUSION

After the third round of amendments and only one victory for the consumers, Italian class actions appear to have a long way to go before reaching full maturation. Indeed, the system still shows structural shortcomings that need more than court interpretation in order to be resolved.

First of all, the "opt in" system makes it difficult for Italian class actions to collect a large number of participants. In this regard, Italy is still far from the U.S., where, thanks to the opposite "opt out" system, class actions are automatically participated in by a large number of right holders (i.e., a whole class, except those who opt out), which serves as a deterrent vis-à-vis the business entities. These entities, in any case, would not risk being condemned to punitive damages in Italy, which also renders Italian class actions less appealing.

Moreover, there are no financial incentives in Italy for prospective class action plaintiffs or their lawyers. Indeed, the Italian system does not even provide for a "lead counsel" or "class counsel," (i.e., the law firm or lawyer) that prosecutes a class action on behalf of the class members in the U.S. Therefore, it appears unlikely that the use of class actions will be promoted through the action of individuals—who may not have the necessary means to handle the lawsuit and may for this reason risk an order of inadmissibility—or lawyers, who are not incentivized to invest in this sector. Finally, there are also difficulties for consumer associations or committees, which do not have direct standing and would therefore be subject to the procedural conduct of the single plaintiffs, who may autonomously decide to accept settlement offers made by the companies.

Hence, even if the decision rendered of the Court of Naples may be Italian class actions' first step forward, several weakness need to be overcome before these actions become an effective tool for consumers or a tangible disincentive for business entities.

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ENDNOTES

1 Article 2, Law no. 244 dated December 24, 2007, i.e., "*Legge Finanziaria*."

2 Legislative Decree no. 206 dated September 6, 2005.

3 Ten, according to a very recent review, of which six were dismissed (five at the admissibility bar, one on the merits); three were merely declared admissible and are still pending, and only one was recently upheld on the merits by the Court of Naples (*see* G. Finocchiaro, *Con la prima vittoria di una class action italiana il fronte dei consumatori "allerta" le imprese, in Guida al diritto*, n. 12, March 16, 2013, p. 12 ff.).

4 For example, the court rejected the claims of those plaintiffs who had been transferred to a different alternative resort whose poorer quality had not been proved. Moreover, it rejected the claims of those tourists who spent the whole week in the agreed hotel, despite the disadvantages. In any case, the court stated that these claims had wrongly been declared admissible, given that they did not concern rights "identical" to those of the lead plaintiffs.

5 Namely, EU Regulation 44/2001 in the case of companies registered within an EU member state, or the 1968 Brussels Convention in the case of companies registered outside the EU.

6 G. Finocchiaro, *L'azione collettiva deve poter essere proposta anche per tutelare diritti di consistenze diverse, in Guida al diritto*, no. 12, March 16, 2013, p. 22.