NOVEMBER 2013

PUBLIC CLASS ACTIONS IN ITALY

In May, Jones Day published a *Commentary* discussing recent developments related to class actions in Italy. It primarily focused on the so-called "compensatory" class action ("*azione di classe risarcitoria*") provided for by Art. 140*bis* of the Italian Consumer Code (Legislative Decree n. 206/2005 and subsequent amendments). This type of class action enables groups of consumers or users and any of their relevant associations to seek compensation of damages arising from violation of their rights in the context of their relationship with business entities.

Italian law also provides for another type of class action: the so-called "public" class action, introduced by Legislative Decree n. 198/2009, which may be brought by a group of consumers and users and/or their representative associations in order to seek protection against the wrongdoings of the Italian Public Administration, including government entities or other public or private bodies providing public service. Such wrongdoings could include, for example, breaches of the rights of a plurality of individuals deriving from violations of quality and economic standards of the service rendered, any violation of terms, or failure to issue an administrative act.

Public class actions were established by Law 4 March 2009, n. 15 (a.k.a. "*Legge Brunetta*," named after the relevant Minister of Public Administration and Innovation). This law is aimed at, *inter alia*, boosting productivity in public employment as well as efficiency and transparency in the Italian Public Administration.

In this *Commentary*, we will first touch upon the main characteristics of the civil "compensatory" class action and then compare them with the "public" class action, which is the focus of this article.

"COMPENSATORY" CLASS ACTIONS IN THE CONTEXT OF UNFAIR COMMERCIAL PRACTICES

The type of class action set forth in the Italian Consumer Code may be brought by consumers, users, and relevant associations before Italian civil courts and is aimed at obtaining a declaration of the defendant's liability, as well as compensation of damages, in violations of the following specific rights, as provided for by Art. 140*bis*, par. 2, of the Italian Consumer Code:

- Contractual rights arising out of standard contractual terms and conditions binding the plaintiffs and a business entity;
- Rights in respect of defects of products or services, regardless of any contractual relationship between the plaintiffs and the manufacturer of such product/service; and
- Rights to compensation accorded to consumers or users for unfair commercial practices or anticompetitive conducts.

Compensatory class actions are therefore mainly filed against business entities, such as individuals, corporations, or other legal entities acting within the scope of their business. In addition, they may be brought against "providers of public services" ("*gestori di servizi pubblici o di pubblica utilità*", Art. 140*bis*, para. 12), which may be public entities or, alternatively, private companies providing a public service. This type of class action concerns the violation of rights of a group of consumers/users in contractual and commercial matters; it may not be brought in the context of the relationship between consumers/users or citizens and Public Administrations.

"PUBLIC" CLASS ACTIONS AGAINST THE INEFFICIENCIES OF GOVERNMENTAL ENTITIES AND OTHER PUBLIC BODIES

The public class action, introduced by Leg. Decree n. 198/2009, is more closely connected to public action or, more precisely, to the action of Public Administrations, such as government entities, public bodies, and providers of public services, and it is intended to stimulate and improve the quality of such entities' actions.

Also known as "collective action for the effectiveness of the action of government entities and the providers of public services," a public class action may be brought by the holders of relevant identical interests, such as citizens, consumers, or users or any association representing their interests, in cases in which such interests are violated by the Public Administration.

Public class actions are aimed at protecting the right holders against violations of quality standards of public services, regardless of the public or private nature of the entities providing such services. Indeed, the public class action tool is an expression of the principle contained in Art. 97 of the Italian Constitution, according to which "quality performance" and "impartiality" of the Public Administration shall always be guaranteed.

In particular, public class actions are directed to "restore the correct course of the administration's duty or the correct provision of a public service" in instances of a direct, tangible, and current violation of identical material interests of a plurality of users/consumers (Art. 1, par. 1, Leg. Decree 198/2009) caused by the Public Administration's violation of:

- Terms/deadlines or lack of issuance of general administrative acts that do not have the features of a rule of law and must be issued within a mandatory term fixed by law or regulations;
- Obligations contained in "charters of services" ("*carte di servizi*", i.e., the means through which any entity providing public services specifies the standards of its performance, declaring its goals and recognizing specific rights to citizens, users, or consumers. Therefore, through these charters, entities providing public services undertake to respect given quality and quantity standards, with the purpose of monitoring and improving the provision of such services);
- Quality and economic standards set, as to providers of public services, by the authorities in charge of the regulation and control of the sector and, as to other government entities, by the latter entities according to the applicable provisions (Art. 1, par. 1, Leg. Decree 198/2009).

In practice, the defendant Public Administrations may be government entities, other public bodies, and providers of public services, excluding independent administrative authorities, jurisdictional bodies, legislative assemblies, constitutional bodies, and the Presidency of the Council of Ministers (Art. 1, par. 1-*ter*, Leg. Decree 198/2009).

Unlike the compensatory class action, which is brought before civil courts, exclusive jurisdiction for public class

actions lies with the Italian administrative courts (Art. 1, par. 7, Leg. Decree 198/2009). Indeed, in this context, the Public Administration is not deemed to carry out civil or commercial activities but administrative activities connected to its ability to exercise public powers.

As to procedure, a public class action may be brought only after a warning letter is served on the defendant entity, ordering it to comply with its obligations or remedy its violation within a 90-day term (Art. 3, par. 1, Leg. Decree 198/2009). Only upon expiration of such term, failing a full compliance of the entity with the terms contained in the warning letter, may the right holders bring the action within one year of the expiration of the 90-day term. The statement of claim is then duly published on the official site of the defendant entity, and notice thereof is given to the Italian Public Administration Minister (Art. 1, par. 2, Leg. Decree 198/2009).

Moreover, as to the relief sought, public class actions may be directed only to obtain the removal of the inefficiency in the public service caused by the relevant violation and not to obtain compensation of damages (Art. 1, par. 6, Leg. Decree 198/2009). Hence, a decision upholding the plaintiffs' request will merely order the defendant to remedy its proven wrongdoing. Notice of the decision issued at the end of the proceedings is then duly given in the same fashion the statement of claim is communicated at the outset of the class action (Art. 4, par 2 *juncto* Art. 1, par. 2, Leg. Decree 198/2009).

In this regard, a few commentators have criticized the advantage given to Public Administrations, which may not be required to compensate damages in public class actions, compared to the less favorable position of commercial operators, which may well be required to compensate damages through the compensatory class action. In particular, this privilege is viewed as being in contrast with the recent effort to increasing efficiency and morality in the conduct of public entities, which is contained *inter alia* in the above-mentioned *Brunetta* reform. Although, ultimately, it would be possible to obtain compensation of damages from public entities through ordinary means (Art. 30 of the Code of Administrative Proceedings), such avenue is undoubtedly more burdensome.[1]

CASES

Since the introduction of public class actions, a few cases have been decided by Italian administrative courts, which gave their interpretation to some of the rules governing such procedural tool.

For instance, the Basilicata Region Administrative Regional Tribunal ("T.A.R."), in the judgment T.A.R. Basilicata, September 23, 2011, n. 478, decided on an action *inter alia* taken by a number of single users/consumers and an association, Agorà Digitale, representing the collective interest of "defending digital freedom and developing internet communications directed to involve and inform the public." The plaintiffs complained that the Basilicata Region did not publish its certified email address on its official website, as provided by law, thus forcing the citizens to physically access the Region's offices in order to use any of the regional services, since they were unable to benefit from the advantages of digital communications. The Basilicata T.A.R. ultimately held that the Region's conduct amounted to a relevant violation and ordered it to publish its certified email address on the Region's website.

However, the Tribunal issued its decision in favor of the above-mentioned association only. In fact, the T.A.R. preliminarily rejected the claim brought by the individual citizens because they merely alleged, abstractly, that the Region's behavior was not compliant with the legislative provisions and failed to prove a direct, tangible, and current violation of their rights (which is specifically prescribed by Art. 1, par. 1, Leg. Decree n. 198/2009, with the aim of preventing public class actions from being used as an alternative tool to the administrative–political control of the actions of Public Administration).

Conversely, the T.A.R. admitted the claim of the mentioned association, stating that, in respect of *locus standi* of the associations protecting collective interests, it is not

1 F. Caringella, M. Protto, *Manuale di diritto processuale amministrativo*, II edition, Dike, 2012, p. 1535.

necessary to investigate the existence of a tangible violation, given that the harmfulness of the offense is assessed in an abstract manner, in relation to the associations' effective ability to protect the interests of the category that is allegedly harmed by the conduct of the public administration. This part of the decision has been criticized by some commentators, however, based on the fact that the association only incidentally protected the interests of the harmed category (i.e., the rights of the users/consumers to "digitally" access Regional services), whereas its ultimate aim was broader access to digital technology.[2]

Under a different approach, in a subsequent decision issued by the Lazio Region T.A.R. (T.A.R. Lazio, September 3, 2012, n. 7483, in *Guida al diritto* 2012, 40, 63), the Tribunal specified that public class actions may in principle be brought by "associations or committees" pursuant to Art. 1, par. 4, Leg. Decree 198/2009. However, under the same provision, these entities must do so with the aim to "protect the interests of its members," i.e., the holders of legally relevant interests that may be subject to a direct, tangible, and current offense caused by misconducts of the Public Administration. Unlike the Basilicata T.A.R., the Lazio T.A.R. held that the plaintiff consumer association would in principle have been entitled to bring the action, but it should have done so in representation of the interests of its members, specifically indicating, for each of them, the title and the subject matter of their claim. Hence, in the case in question, the Tribunal dismissed the claim *inter alia* because these elements had not been specified by the plaintiffs.

In addition, the Lazio T.A.R. dismissed the claim for another reason. The plaintiffs based their claims on the fact that the sued Public Administrations did not adopt adequate measures to prevent hydrogeological risks in several different geographical areas. However, the relevant situations were numerous and diverse, and the plaintiffs failed to allege which public act was lacking in each situation. In addition, such situations were described only in general terms by the plaintiffs. Therefore, the T.A.R. dismissed the claim, stating that the general principle of sufficient specificity of the object of judicial claims ("*petitum*"), which also applies to public class actions, was not respected in the case at hand.[3]

Finally, in a recent decision issued by the same Lazio Region T.A.R. (T.A.R. Lazio, September 6, 2013, n. 8154), the Tribunal upheld the action taken by a number of plaintiffs complaining that certain Public Administrations systematically failed to meet the set 90-day term in issuing their residence permits and that they suffered inconveniences due to the delay. In particular, they requested the judge: (i) to order the timely issuance of such residence permits and (ii) to take any possible measure to persuade the Public Administrations involved to apply a specific interpretation of the Italian immigration law, in connection with the merits of such residence permits.

The Tribunal upheld the first request, holding that it fell within the first prerequisite set forth for public class actions by Art. 1, par 1, Leg. Decree 198/2009, given that it concerned the violation of terms to adopt general administrative acts. The second request was dismissed, stating that a class action directed to persuade the Public Administration to adopt a specific interpretation of the law lay outside the scope of application of the public class action itself, as conceived by Leg. Decree 198/2009, and, moreover, it would have amounted to an undue interference with the inherent powers of the Public Administration.

RELATIONSHIP BETWEEN "COMPENSATORY" AND "PUBLIC" CLASS ACTIONS

Compensatory and public class actions may overlap when they are brought against providers of public services, which may be sued both in a civil compensatory class action for violations concerning contractual rights of users and consumers, and in a public class action for one of the described inefficiencies in the standards of the services provided.

The common requirement for both actions is the violation of rights of a plurality of plaintiffs. However, the actions differ in

2 E. Zampetti, *Class action pubblica ed effettività della tutela. Public class action and effectiveness of judicial protection*, in Foro amm. TAR 2011, 12, 4104.

3 See comment by D. Giuliani, *La c.d. class action pubblica: una tutela potenziale*, in Corriere del merito, 2013, fasc. 1, pag. 97-102.

respect of the results: a compensatory class action, if successful, may end with a decision on the compensation of the damages suffered by the plaintiffs. Conversely, compensation of damages may never be granted by the administrative judge in a public class action. In other words, the first action is directed to obtain monetary compensation of damages, whereas the second is aimed at obtaining the judge's order compelling the government entity or the services' provider to comply with their obligations of duly providing public services to the users/consumers.

In fact, the rationale underlying the two actions is very different. On the one hand, compensatory class actions protect identical rights of consumers and users vis-à-vis companies, in the context of violations deriving from the imbalance of their positions on the market, with results affecting the contacts between the parties (whether contractual or not). On the other hand, public class actions have direct effects on the very process of production and management of public services and are directed to obtain any relevant specific performance.[4]

As to the risk of parallel proceedings, Art. 2, Leg. Decree n. 198/2009 governs the relationship between the two actions. If, for the same violation, a compensatory class action is already pending, a public class action may not subsequently be brought. However, when a public class action has been brought first, such action shall be stayed until the second compensatory class action has been finally decided.[5]

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Lamberto Schiona
Milan
+39.02.7645.4001
lschiona@jonesday.com

Margherita Magillo
Milan
+39.02.7645.4001
mmagillo@jonesday.com

4 *See inter alia* Italian Council of State's Opinion, June 9, 2009, n. 1943.
5 G. Palliggiano, *Così il giudice si insinua nelle disfunzioni degli enti*, in Guida al Diritto, 12.2.2011, n. 7, p. 40.