

Class Action Reform

Class actions under article 140 *bis* of the Italian Consumer Code

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A class action is a form of legal action devised to protect the 'homogeneous' individual rights of consumers and users, which was introduced (after several unsuccessful attempts) on 1 January 2010 with the entry into force of section 140-*bis* of the Italian

Consumer Code.

In the two years since this law entered into force, there has been a relatively low rate of use of class actions. This is mostly a result of the rigid wording of the law and the "filter" which an action is subjected to before being admitted as a class action.

Key Issues:

- From identical to 'homogeneous' no small move
- Preliminary review for unfair terms
- Companies Court

The pre-existing elements of a class action

A class action may be brought in all cases in which harm is alleged to have been caused to a number of consumers or users in connection with:

- Contracts entered into by many different consumers or users with the same company in the same situation, including rights pertaining to contracts entered into in accordance with sections 1341 and 1342¹ of the Italian Civil Code;
- Identical rights belonging to the end users of a given product, against the manufacturer of that product, regardless of whether or not there exists a direct contractual relationship between the manufacturer and the end user;
- Identical rights of consumers or users to receive compensation for losses caused by unfair business practices or conduct in breach of principles of fair competition.

¹ General terms of contract unilaterally prepared and contracts entered into using standard forms.

Each member of the class may bring an action seeking determination of liability and a court order for payment of damages and/or restitution of amounts already paid, including by bringing actions indirectly through consumer associations to which the member may grant a mandate or through committees to which he/she belongs. The defendants are the persons considered responsible for the above matters.

The benefits of a class action and the consequent right to compensation cover only those persons who have expressly stated their intention to take part in the class action or who have become party to the proceedings by raising claims having the same subject matter as the main claim (the "opt-in rule"). An individual consumer or user who intends to avail him/herself of the class action provisions must notify the proponent of the class action of his/her participation in the action, in writing, by a deadline set by the judge. Such deadline may not exceed 120 days, starting from the expiry of the term assigned to the plaintiff for the purpose of the public announcement of the class action².

The claim is raised before an ordinary court located in the capital of the region where the defendant company has its registered office; "ad hoc" courts are also envisaged for certain regions³. This provision must now be coordinated with the establishment of the Companies Court which is discussed below.

Finally, in order to prevent the commencement of lawsuits based upon claims that are clearly specious and unsubstantiated, there is a "filter" to be used by the court in question which, prior to entering into a consideration of the merits of the lawsuit, issues a decision on its admissibility. The lawsuit would be deemed inadmissible where:

- it is manifestly unfounded;
- there exists a conflict of interests,
- the rights subject to protection are not identical; and
- the proponent of the class action is not capable of adequately acting in the interests of the class.

If the court decides that the class action is admissible, it sets out the terms and arrangements for the announcement of the lawsuit by way of a court order to allow members of the class to join the lawsuit and commences the related proceedings.

If the court grants the claim, it issues a decision against the defendant which is not limited to the determination of the existence of individual rights, but also orders the defeated company to effect performance, or in other words to make payment of compensation to each consumer/user participating in the lawsuit. If a specific amount of damages may not be determined, the court must indicate the calculation criteria⁴.

² The first draft of the law-decree established that any interested party could give notice to join the action at the appeal stage prior to the date the relief sought is specified. This provision was later abolished. The reason could be that allowing an interested person to join the proceedings at the appeal stage would mean identifying the scope of the action (including in particular the amount sought as compensation) at an advanced stage of the proceedings and would be in contrast with the rule of procedure that precludes new claims at the appeal stage (see section 345 of the Italian Code of Civil Procedure).

³ The Court of Turin for Valle d'Aosta and Piedmont, the Court of Venice for Veneto, Trentino Alto Adige and Friuli Venezia Giulia, the Court of Rome for Latium, Marche, Abruzzo and Molise, the Court of Naples for Campania, Basilicata and Calabria. The purpose of this provision is to limit the number of courts which will have jurisdiction over class actions. The reasons for this are, on the one hand, the need to ensure that highly complex lawsuits are handled by larger, more organized courts which would be in a position to assign such lawsuits to special ad hoc sections and, on the other hand, to allow consumers to gain easier access to such courts.

⁴ The first draft of the law-decree provided for the judge to assign a time frame for the parties to reach an agreement as to the amount of compensation based on established criteria. In the absence of an agreement, the amount payable as compensation was to be decided by the court. The reasons for the subsequent removal of this provision are not known. The change appears to be aimed at avoiding making successful claimants wait long periods of time before receiving compensation.

Changes introduced by the decree-law on deregulation

Decree-law no. 1 of 24 January 2012 (Urgent provisions for competition, infrastructure development and competitiveness)⁵ amends article 140-*bis* and extends its application.

The law, as amended, will no longer refer to "identical" rights of claimants to bring a class action seeking compensation for damages. It will be sufficient if the rights being enforced are 'homogeneous'. According to explanatory notes to the law decree, one of the aims is to give the provision greater harmony. The first paragraph of the provisions in the original law explicitly refers to 'homogeneous' individual rights of consumers and users (*the homogeneous individual rights of consumers and users under paragraph 2 are also subject to protection through class actions in accordance with the provisions of this section*). In the subsequent paragraph, however, as mentioned, the law referred to "identical" situations and rights providing access to the protection of a class action.

The reform has removed this apparent inconsistency and, first and foremost, "*remedied a provision, which according to the most learned legal authority, risked being difficult to apply and therefore, in the end, contrary to the underlying rationale for the provisions. The requirement that the rights be identical, strictly interpreted, could prove difficult to satisfy on the facts*" (See the explanatory notes).

As an example of a case in which it would be difficult to find identical rights, reference is explicitly made to the case of financial instruments. According to consolidated legal authority (and some case precedents as well) the provisions could not apply to financial market investors specifically because the provisions (in addition to having been inserted in the Italian Consumer Code and expressly identifying "consumers" and "users" as the persons protected rather than investors) expressly refer to rights (and consequent damages) that are "identical", which would not be likely to be found in connection with the purchase of financial instruments.

The new version of the law was also conceived in the context of "investment bank insolvencies". If an "investor subscribed securities on different occasions, investing different amounts, the subjective situation would be unique and could not be repeated" and any requirement that there be "identical" harm could not be satisfied. The situations in which investors might find themselves could certainly be considered 'homogenous' but not "identical".

Administrative protection against unfair terms

The decree-law also introduced article 37-*bis* to the Italian Consumer Code. This provision is inserted after article 37 and concerns injunctions available to consumer associations against professionals who use general contract conditions that have been found to be abusive. This provides an additional important protection against unfair terms between professionals and consumers. Consumers may file a complaint with the Italian Competition Authority alleging the unfairness of the terms inserted in agreements between professionals (or undertakings) and consumers. The Italian Competition Authority may determine whether terms are unfair and professionals / undertakings may ask the Authority in advance to determine whether the clauses they intend to insert in forms or contractual agreements are unfair. If these clauses are determined in advance to be fair they cannot subsequently be found to be unfair.

In the first case, i.e. the case in which the terms are found to be unfair following a consumer complaint or Authority decision, the Authority orders publication of the decision on its web site, on the undertaking's web site and "by any other means considered appropriate to fully inform consumers".

The administrative courts have jurisdiction to review Authority decisions under the new provisions and the ordinary courts continue to have jurisdiction to determine the validity of clauses and order compensation for damages.

⁵ The decree-law on deregulation was published in the *Gazzetta Ufficiale della Repubblica Italiana* no. 19 of 24 January 2012 (ordinary supplement no. 18) and must be converted into law within the following sixty days. Since amendments may be made during the conversion, the final text will only be available after its conversion into law.

The Companies Court

The decree-law also introduces the Companies Court⁶. This is not a special court but an expansion of the existing specialised sections of courts (which have jurisdiction over intellectual property matters). They will be referred to as sections "specialised in company matters" and will have jurisdiction over copyright matters, class action matters (in accordance with the aforementioned territorial jurisdiction), company matters (i.e. actions between shareholders, actions regarding the transfer of holdings, shareholders' agreements, challenges to shareholders' meeting resolutions, liability actions, etc.) as well as public works, services, or supply contracts with European relevance involving an undertaking as a party.

The explanatory notes to the decree-law state that the provisions seek to draw upon the positive experience of the specialised intellectual property sections, giving them jurisdiction to decide disputes in company matters, public works, services, or supply contracts with European relevance (above-threshold contracts) and class actions governed by section 140-*bis* of the Italian Consumer Code. The aim (by concentrating cases with fewer judicial venues) is to reduce the time needed to decide disputes involving medium to large-sized undertakings as a party, and to increase, therefore, the competitiveness of these undertakings on the market.

Comments

Attorney Fabio Guastadisegni, partner in charge of the L&DR practice area remarks:

"the amendment introduced by the deregulation decree was designed to extend the use of class actions which until now have been mostly blocked by the Court filter and deemed inadmissible in advance. The Court originally used the filter to determine, among other things, whether the rights claimed were 'identical'. After the reform, however, it will be sufficient if the rights of the class members are 'homogeneous' (a clearly wider concept)".

⁶Section 2 introduced an amendment to legislative decree no. 168 of 26 June 2003, creating the sections specialised in intellectual property.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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