

## CLASS ACTION IN ITALY

February 4, 2008

The Italian budget law of 24 December 2007, n. 244, in force as of 1 January 2008 (hereinafter the “**Budget Law**”) introduced into Italian Law a form of class action (*azione collettiva risarcitoria*, hereinafter the “**Class Action**”) for awards of compensatory damages or payments of amounts to multiple individual consumers.

The Class Action is now regulated by sec. 140-*bis* of the Italian consumers' code<sup>1</sup> (hereinafter “**Sec. 140-bis**” and the “**Consumers' Code**”)².

The introduction of the Class Action has been controversial<sup>3</sup>. Several bills on the matter had been introduced, but never passed, since 2006<sup>4</sup>. Oddly enough, according to the press, the new regime was approved by the Senate (*Senato della Repubblica*) by mistake, as a Senator pressed the wrong button when casting his vote<sup>5</sup>.

Notwithstanding its troubled inception, the new regime is now duly enacted and will be in force from June 2008.

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Americas

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Europe

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Russia/CIS

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Asia Pacific

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1. Legislative Decree of 6 September 2005, no. 206.

2. Before the introduction of Sec. 140-*bis*, protection of collective consumers' interests was provided for only by means of injunction relief (i.e. a cease and desist order, whereby a court or another competent body orders a party to stop a certain unlawful practice). Injunction relief is provided for by Sec. 140 of the Consumers' Code implementing Dir. 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests. In a different context, another form of collective protection was introduced in Italy by the company law reform of 2003 (so called “Riforma Vietti”). Broadly, pursuant to article 2393*bis* of the Italian civil code, minority shareholders of Italian SpA (Societa' per azioni) might have legal standing to sue directors and seek damages instead of, and for the benefit of, the SpA itself. In other words, if the court finds in favour of the minority shareholders, damages are awarded to the SpA and not to the minority shareholders. Clearly, the Class Action under Sec. 140-*bis* and the action under article 2393*bis* are very different tools of ‘collective’ protection and, in principle, minority shareholders, as such, should not be deemed able to avail themselves of the Class Action to sue their company.

3. It is worth noting that the European Commission has launched a study focusing on collective redress in the EU to decide whether, and to what extent, action on collective redress is required at EU level. It has been argued that it could have been more appropriate to wait at least for the results of such study before introducing the class action in the Italian system.

4. *Disegno di legge* no. 679 of 26 July 2006, put forward by Senator Benvenuto. Since then, more than 10 bills have been proposed unsuccessfully.

5. *Class Action per un voto*, in *Il Sole 24 Ore*, 16-11-2007, 3.

### **Scope of Application**

Sec. 140-*bis*, para. 1, of the Consumers' Code introduces the possibility of bringing a Class Action only for certain consumer associations<sup>6</sup>, and other entities deemed suitably representative of the interest of a given group of consumers (hereinafter the "Consumer Associations"). In other words, the legal standing to bring a Class Action has been limited with a view to pre-empting a distorted use of this new tool by entities that are not truly representative of any collective interest. That being said, Sec. 140-*bis* does not specify the criteria to be used for assessing the representative nature of the relevant entity<sup>7</sup>.

The Class Action can be brought against any commercial, financial, banking and insurance enterprise (hereinafter the "Enterprise") for damages and claims arising from (i) standard form contracts<sup>8</sup>, (ii) tort liability, (iii) unfair trade practices and (iv) anticompetitive practices affecting a group of consumers.

### **Competent court**

Pursuant to Sec. 140-*bis*, para. 1, the Italian competent court for the purposes of the Class Action is that of the place where the Enterprise has its registered office. No criteria are set out in the event that the Enterprise has no registered office in Italy.

The lack of criteria for establishing the competent court for foreign Enterprises could be interpreted either: (i) as an indication that the Class Action cannot be brought against Enterprises which do not have a registered office in Italy; or (ii) as a shortcoming of Sec. 140-*bis*, in that, although the Class Action can actually be brought against foreign Enterprises, it remains uncertain which Italian court would be competent for the purposes of such action.

### **Opt-in System**

The new provisions establish a system whereby consumers willing to take advantage of the Class Action should opt in by notifying the relevant Consumer Association in writing. As a consequence, the court decision will be binding only on opting-in consumers.

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6. As of today there are 16 accredited associations, which are listed in the website of CNCU (*Consiglio Nazionale dei consumatori e utenti*, a body established pursuant to Sec. 136 of the Consumers' Code at the Ministry of Economic Development); see <http://www.tuttoconsumatori.it/cncu/associazioni.shtml>.

7. This may eventually lead to inconsistent decisions by the courts and uncertainty as to the entities entitled to sue under Sec. 140-*bis*.

8. "Standard form contracts" means contracts offered to consumers on a take-it-or-leave-it basis as defined by Sec. 1342 of the Italian civil code. Retail banking, insurance and financial services contracts often fall into this category.

It is worth noting that Sec. 140-*bis* allows consumers to opt in until late in the proceedings, i.e. until the last hearing of the appeal judgment. A likely consequence of this late deadline may be that many consumers may decide to opt in only if the action succeeds in the first instance of the proceedings. As a result, in certain circumstances, a “domino effect” may be expected.

### **Procedure: 1 - Preliminary Assessment**

Preliminarily, the competent court must assess if the class action is admissible. In particular, it must determine that (i) the action is not preposterous, (ii) a conflict of interests<sup>9</sup> does not exist and (iii) there is a collective interest which can be suitably protected by the Class Action.

If the three-fold test is met, and the Class Action is then deemed admissible, adequate notice of the action must be given to the public by the relevant Consumer Association in order to let potentially interested consumers opt in, if they so wish.

Such preliminary assessment has been introduced as a “filter” to prevent vexatious litigants from taking actions which are manifestly groundless, and to avoid the potential negative effect on the Enterprise's reputation that such actions would have. In this respect, the Enterprise has also the possibility to appeal the court order in case it believes the court has wrongfully admitted the Class Action in the first instance.

### **Procedure: 2 - Judgement**

Following the preliminary assessment, the court can find either in favour or against the relevant Consumer Association. In the event that it finds in favour of the Consumer Association, the court does not award a specific amount of damages; rather, it sets out the criteria for determining the amount to be awarded to the opting-in consumers<sup>10</sup>. When possible, the court also establishes the minimum amount payable or refundable to each consumer.

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9. Sec. 140-*bis* does not contain any guidance as to the type of conflict of interests which would make the action inadmissible. In principle, this should probably be interpreted as a conflict between (i) the collective interest of the relevant group of consumers and (ii) a different, specific interest of the acting Consumer Association. In other words, the conflict may be deemed to arise when such entity, in bringing the Class Action, is actually pursuing its own interest rather than that of the consumers.

10. No indication is to be found under Sec. 140-*bis* in relation to how such criteria should be established. This seems to leave remarkable room for discretion to the courts.

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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Within 60 days of the judgment notice being served, the relevant Enterprise should offer to each opting-in consumer an amount determined in line with the criteria set by the court. The offer must be signed by the Enterprise, notified to each entitled consumer and filed with the court. No specific formal requirement has to be satisfied by consumers to accept the offer.

### Procedure: 3 - Arbitration

In the event that the Enterprise does not make an offer within the above-mentioned time limit, or the offer is not accepted by consumers<sup>11</sup> within 60 days of notice thereof, the presiding judge of the court promotes an “arbitration-like” procedure by appointing a panel<sup>12</sup> to determine the amount each opting-in consumer is entitled to<sup>13</sup>.

### Conclusions

Although consumers may welcome the introduction of the Class Action, it may be argued that the new regime lacks some clarity and presents a number of flaws (among others, uncertainty as to legal standing; competent court for foreign enterprises; criteria to determine damages). Such shortcomings will need to be addressed in the future either by the lawmakers or by the courts in order to achieve legal certainty and a balanced use of the Class Action in Italy.

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11. In the event that some opting-in consumers have accepted the offer made by the relevant Enterprise and some others have not done so, the settlement phase is triggered only for the latter consumers. Again, this is not expressly provided for by Sec. 140-bis but seems to be a reasonable conclusion based on the system envisaged.

12. The panel shall be composed of: (i) an attorney designated by the Consumer Association, (ii) an attorney designated by the Enterprise and (iii) an attorney appointed by the presiding judge as the chair of the panel.

13. No right of appeal against the decisions of such panel is expressly provided for under Section 140-bis.

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