



# ICLG

The International Comparative Legal Guide to:

## **Class & Group Actions 2014**

**6th Edition**

A practical cross-border insight into class and group actions work

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# Italy



Daniele Vecchi



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## 1 Class/Group Actions

### 1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

The Italian legal system provides for different kinds of collective redress proceedings to handle civil litigation claims concerning a plurality of individuals.

- (i) **Cumulative action.** Multiple plaintiffs may grant a single lawyer individual proxies to act on their behalf against the same defendant in a single proceeding. Such a case is a “group action” only in fact, as every single petitioner needs to give an individual Power of Attorney and is a full-rights plaintiff.
- (ii) **Representative action** for injunctive relief pursuant to Article 140 of Legislative Decree no. 206/05 (“Consumer Code”) (“Representative Action”). Pursuant to the aforesaid Article, consumer associations have the right to bring legal action for injunctive relief in favour of all consumers (not only their members); they are not allowed to claim compensation on behalf of the consumers but the cessation of an unlawful behaviour and the removal of the relevant effects. However, in some cases, with regard to the practical outcome, injunctive relief and condemnation to pay an amount may overlap (for instance in the event of a disgorgement order in order to remedy the misbehaviour effects) for unlawful profits.

The decision has effect on all the class members/consumers; no opt-in is necessary and no opt-out mechanism is available. The plaintiff can also ask for the publication of the judgments in national or local newspapers.

- (iii) **Class action** for monetary relief pursuant to Article 140 *bis* of the Consumer Code (“Class Action”). Article 140 *bis* was introduced by Law no. 244 of 24 December 2007 but was replaced by a new Article 140 *bis* enacted by Law no. 99 of 23 July 2009. Such an Article has been further amended by Article 6 of the so-called “*Decreto liberalizzazioni*” enacted by Law no. 27 of 24 March 2012; pursuant to this law provision, each member of a homogeneous class - also acting through associations or committees - may seek compensation for damages and/or restitution of undue payments.

In a preliminary stage, the Court must decide on the admissibility of the action by way of a certification order, which may be immediately challenged before the Court of Appeal. By way of the same order, the Judge will order the appropriate forms of advertisement for the proceedings so that the class members can join the Class Action; moreover, the Judge will define the characteristics necessary for becoming a member of the class. The consumers and users who intend to be bound by the Class Action decision have to

join the proceedings, without the need of the assistance of a counsel. Those who do not join the Class Action may act individually, whilst joining the Class Action shall cause the waiver of any individual action based on the same legal ground. No other Class Actions may be filed for the same facts and against the same defendant after the expiration of the terms for joining the action as set by the Judge.

With the final decision, if the plaintiff claim is upheld, the Court orders the defendant to pay the final amounts due to those who joined the action or, alternatively, establishes the criteria for the calculation of the sums to be awarded.

### 1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

For the Representative Actions for injunction, the possible application of which is very broad.

On the contrary, the object of the Class Actions is very specifically defined, because, pursuant to Article 140 *bis* of the Consumer Code, the Class Action aims to protect:

- “a) *the contractual rights of a plurality of consumers and users who find themselves in an homogeneous situation vis-à-vis the same company, including the rights related to agreements entered into through standard form and conditions;*
- b) *the homogeneous rights that end-users of a certain product have vis-à-vis the related manufacturer, even without any direct contractual relationship (i.e. product liability); and*
- c) *the homogeneous rights to compensation for the prejudice suffered by the same consumers and users as a consequence of unfair business practice or unfair competition”.*

Although this is not specifically stated by the law, subsequent to the insertion of Article 140 *bis* in the Consumer Code, most scholars inferred that it should be considered applicable to “BtoC” disputes only. On the point, still no case-law is available.

### 1.3 Does the procedure provide for the management of claims by means of class action (whether determination of one claim leads to the determination of the class) or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group?

In the Class Action proceedings, the leading plaintiff claim and the relevant outcome determine the outcome of the claim of all the class members who joined the proceedings.

#### 1.4 Is the procedure 'opt-in' or 'opt-out'?

The Class Action procedure is an opt-in mechanism. The adoption of the opt-in system was likely the most crucial issue under discussion before the Class Action law came into force. The opt-out system would have been a more powerful means; however, this system was rejected because it was regarded as not being in compliance with the Constitutional principle of 'due process'. Consumers and users who intend to seek collective protection are requested to opt-in, joining the Class Action within a mandatory term, as set forth by the Court through the admissibility/certification order and the decision on the Class Action will only apply to all those who have joined the action. Furthermore, the possible waivers and settlements taking place between the parties shall not affect the rights of those who join collective actions but who have not expressly consented to such waivers and settlements.

The Representative Action for injunctive relief is binding over all the consumers, and no opt-out is possible.

#### 1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

A Class Action for damages should apply only in cases involving several consumers but - indeed - Article 140 *bis* does not specify how many consumers are required to be involved. It is reasonable to expect that (at least potential) numerosity will be an issue the Court will take into consideration when deciding on admissibility/certification, but sometimes the Court is not in a position to assess in advance the likely number of class members who will opt-in. As a matter of fact, the adhesion to the first certified Class Action was very low.

#### 1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

Pursuant to Article 140 *bis*, in order to admit a Class Action, the Judge has to find that the rights of the individuals to be protected are *homogeneous*. Prior to the recent amendments, it was provided that the Class Action protected only the identical rights of the individuals and the law reform was expressly aimed to stretch the scope of the Class Action.

#### 1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

Class Actions may be brought by any individual consumer, also acting through associations or committees empowered by the consumer himself. Practically, most Class Actions are started by Consumers' Associations supporting a consumer as class representative.

#### 1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

By way of the order for admissibility of the Class Action, the Court will set terms and procedures for the most appropriate publicity of the action above, also depending on the nature of the action and the numerosity of the class.

Furthermore, all certification order shall be reported to the Ministry of Economy, to be mentioned on its website.

#### 1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

The possibility of effectively bringing a Class Action has been valid since 1 January 2010, but only for damages that took place after the entering into force of the law, so the present number cannot be considered representative.

Since 2010, about thirty cases have been started, but just five have been certified. In any event, no Class Action register is available, so correct numbers are uncertain. Financial and bank services represent the first area of action, and the second area is consumer fraud and misleading trade practices.

#### 1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

The only remedy available in a Class Action is monetary compensation. When the Court accepts the action, it issues a decision ordering the payment of the final amount due to those who have joined the action (also on the basis of an equitable evaluation of damages) or establishes homogeneous criteria for the computation of the sums to be awarded.

Representative Actions provide for injunctive relief, typically a cease and desist order or the change of standard contractual terms.

## 2 Actions by Representative Bodies

#### 2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

Consumers' Associations only may initiate Representative Actions in order to stop or prevent acts prejudicial to the interests of the consumers and/or to remove the harmful effect.

Class Actions are started by consumers, who can be - and usually are - supported by consumer associations or representative bodies.

#### 2.2 Who is permitted to bring such claims e.g. public authorities, state appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

Pursuant to Article 139 of the Consumer Code, only consumer associations currently registered with the Ministry of the Economic Development have standing to bring Representative Actions. The aforesaid associations have to fulfil a number of requisites set forth in Article 137 of the Consumers Code such as having a certain national size and a documented track record.

#### 2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

Representative Actions may be started:

- i) For the cessation of behaviour contrary to consumer interest.
- ii) To implement measures aimed at reducing or eliminating the harmful effects of the above violations.

iii) For the request of the publication of the judgments in national or local newspapers.

Pursuant to Article 37 of the Consumer Code, a Representative Action may be further started in order to remove from standard contracts unfair terms and conditions causing a significant imbalance in the parties' rights and obligations.

### 2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

Injunctive relief is the only remedy available in Representative Actions, while monetary compensation is possible through the Class Actions only.

In some cases, anyway, with regard to the practical outcome, the injunctive order and condemnation to pay an amount may overlap.

## 3 Court Procedures

### 3.1 Is the trial by a judge or a jury?

Representative Actions for injunctive relief are tried and decided by a single Judge.

Class Actions are tried and decided by a three-Judge Panel.

### 3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

No specialist Judge and/or Courts are appointed to manage Representative Actions; for Class Actions, the Court of the regional capital where the defendants have the registered office has jurisdiction.

### 3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off date by which claimants must join the litigation?

For the Representative Actions, where no admissibility/certification steps are taken, the class is defined directly by the plaintiff claim, if the same is upheld by the Court.

As far as Class Actions are concerned, the potential members of the class are identified in general terms by the plaintiff claim but it is the Court - by way of an admissibility/certification order - that defines the class. The Court sets a mandatory term, not exceeding 120 days from the expiration of the term set for the advertising, within which the deeds for joining the Class Action shall be filed with the Court clerk's office. A copy of the order will be sent by the Court clerk's office to the Ministry of Economic Development, which will act to ensure additional forms of publicity, also through publication on its website.

### 3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Italian Courts do not use "test" or "model" cases, also, because the

rule of *stare decisis* does not apply in the Italian legal system, no Court decision is binding for other Judges.

### 3.5 Are any other case management procedures typically used in the context of class/group litigation?

No. However, the Class Actions brought for the same fact and towards the same entity are consolidated *ex officio*.

### 3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

Pursuant to the general law provisions, the Court may appoint an expert in order that he/she replies to the Court's specific technical questions, and such rule applies also in collective redress proceedings. If the Court appoints an expert, the parties are allowed to retain their own experts in order to work together with the Court-appointed expert.

### 3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Technically speaking, expert testimony is not possible, as the witnesses are only in fact witnesses; pre-trial deposition or pre-trial exchange of documents is not provided for by the Italian legal system.

In any event, the parties are entitled to file expert reports.

### 3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

Documentary pre-trial discovery is not contemplated by Italian legal systems.

Pursuant to the Italian Civil Procedural Code, during the trial the Judge may order the parties of the proceedings, or a third party, to allow technical investigations as well as to exhibit specific documentary evidence.

### 3.9 How long does it normally take to get to trial?

As said, the pre-trial does not exist. Therefore, the time to get to trial is the usual period of time granted for defensive reasons between the service of the writ of summons and the first hearing according to general rules (90 days for local and/or 150 days for cross-border litigation).

In Representative Actions, the consumer associations have to send a warning notice, giving a term of at least 15 days to cease the challenged behaviour before starting the proceedings.

### 3.10 What appeal options are available?

The order on admissibility/certification may be challenged before the Court of Appeal within a mandatory term of 30 days after having been served with the order, but the appeal proceedings do not stay the proceedings before the first degree Court. Pursuant to the Court of Cassation case-law, the Court of Appeal decision on admissibility/certification cannot further be challenged.

The final decision on the Class Action and on the Representative

Action may be challenged before the Court of Appeals within the ordinary term of six months from its publication and/or within 30 days of its service and the Court of Appeal has broader than usual discretionary powers in order to suspend the enforceability of the first degree decision. As per the general rule, the Court of Appeal decision can be challenged before the Court of Cassation.

## 4 Time Limits

### 4.1 Are there any time limits on bringing or issuing court proceedings?

Any right to damages shall be activated within the statute of limitation period.

Pursuant to Article 2943 of the Italian Civil Code, the statute of limitation may be tolled by sending a notice of complaint, also through an out-of-court request. As a consequence, the period for the action can be prolonged without limitation.

### 4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have a discretion to disapply time limits?

In general terms, civil proceedings in connection with a breach of contract have to be brought within ten years of the contractual breach, but specific contracts (for example: insurance) have specific deadlines.

General torts actions have to be brought within five years of the commission of the unlawful act, while product liability damages are to be brought within three years.

Personal conditions of the claimant normally do not affect the calculation of the time limits and the Court has no discretionary power at all to disregard time limits.

### 4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

The limitation period commences on the day on which the claimant became aware, or should have been aware, with reasonable care, of all the facts constituting his cause of action. Concealment or fraud affecting the claimant's knowledge would normally prevent the statute of limitations from beginning to run.

## 5 Remedies

### 5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

The Italian legal system is aimed at consenting to the full recovery of all the suffered damages, both economic (pecuniary loss, out-of-pocket expenses, loss of profit) and non-economic (biological damages - which represent all damages to the psychological and physical integrity of a person, and as such can be proven by way of medical assessments).

Moral damages (pain and suffering damages) and the so-called "existential damages" (any event which impacts on the normal life or on the relationships of a person and which negatively affects the existence of such person in a consistent or permanent manner) are recoverable only in cases provided for by the law, mainly in cases of criminal offences or breach of human rights recognised by the Italian Constitution.

### 5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

Costs of medical monitoring where a product in question has not yet malfunctioned would normally not be considered an actual and recoverable damage, but the Court could take a different position should it deem the medical monitoring the most reasonable approach.

### 5.3 Are punitive damages recoverable? If so, are there any restrictions?

The function of damages in Italy is to give full compensation, but solely compensation. In general terms, there are no "punitive damages" and the consolidated case-law states that punitive damages are against the "mere compensation principle" adopted by Italian law.

It is to be noted, however, that recently certain pieces of legislation, mainly of European derivation, have appeared to some extent to depart from this principle, admitting compensation at least partially unrelated to the damages suffered.

### 5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

In general terms, no limit exists to damages recoverable from a defendant. As far as contract liability is concerned, the recoverable damages are only the ones which are foreseeable.

### 5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

Class Action damages are quantified directly by the Judge or upon the criteria provided by the same. Although we do not yet have Class Action final decisions, it is expected that the damages will be directly quantified per class member, and not for the class as a whole.

### 5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

Article 140 *bis* of the Consumer Code provides that the settlement agreement is binding only for those class members who expressly adhere to it. In other words, the settlement also works with an opt-in mechanism.

Under some circumstances, the criteria for calculation of the damages can be agreed between the parties, and such agreement has to be approved by the Court.

## 6 Costs

### 6.1 Can the successful party recover: (a) court fees or other incidental expenses; (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

The 'loser pays' rule applies to Class Actions as well as Representative Actions. The Court, in its final decision, orders the

losing party to refund the winning party for the legal costs and fees, unless it deems that, exceptionally, it is unfair to consent to such recovery. In any event, the recovery does not consider the effective legal fees, but the activities before the Court quantified on the basis of the base of a general regulation approved by the Ministry of Justice with Ministerial Decree no. 140 of 22 July 2012. As a matter of fact, the legal fees are refunded only partially.

**6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?**

The leading plaintiff bears all the litigation costs relating to a Class Action, as the promoting consumer association bears all the litigation costs relating to a Representative Action.

In both cases, however, the promoting entity can ask for "joining fees" from intervening parties.

**6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?**

The discontinuation of the action by the plaintiff does normally require the defendant's consent, subject to the plaintiff paying the litigation costs. No consequences exist for intervening parties in the Class Action.

**6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?**

Litigation costs are assessed by the Courts at the end of the proceedings, on the basis of a Ministry of Justice general regulation. The Court can limit, or in some cases exclude, the cost recovery giving a clear reasoning on the point.

## 7 Funding

**7.1 Is public funding e.g. legal aid, available?**

Legal aid in civil proceedings is regulated by R.D.L. no. 3282 of 30 December 1923, amended by DPR no. 115 of 30 May 2002 and it is possible but it is not very frequent.

**7.2 If so, are there any restrictions on the availability of public funding?**

Parties eligible to receive legal aid are individuals and legal entities with a low taxable income, as documented by their most recent tax return.

A party that is eligible must submit a claim for legal aid, and a special commission will evaluate the claim and the grounds of the action as well.

**7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?**

To a certain extent, parties may agree in writing on contingency or conditional fees.

**7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?**

Third party funding is possible but not frequent.

## 8 Other Mechanisms

**8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.**

Assignment of a consumer claim to a consumer association is, in theory, possible but not frequent. Consumer associations prefer to act in support of a private party.

**8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.**

Actions for injunctive relief may also be brought by professional commercial claimants, but not by lawyers.

**8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?**

Class Actions for damages, as well as Representative Actions for injunctive relief, may not be commenced in the context of criminal proceedings, while it is quite common that the damaged parties intervene individually in criminal proceedings in order to recover individual damages. As an example, in the *Parmalat* case (financial default and bankruptcy), several thousands of investors filed their requests for damages within the Criminal Court.

**8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?**

Article 140 of the Consumer Code provides for a conciliation procedure to be attempted prior to commencing a Representative Action, before one of the conciliation bodies listed in Article 141 of the Consumer Code.

Class Action law does not provide for a conciliation phase prior to and/or during the admission of the proceedings; however, the parties, at any stage of the proceedings, can ask the Judge to attempt conciliation.

Out-of-court mediation or arbitration is possible before several conciliation bodies and the Chambers of Commerce.

**8.5 Are statutory compensation schemes available e.g. for small claims?**

There are no collective compensation schemes available under Italian Law, and a Class Action for small claims is subject to ordinary rules.

However, as of 1 January 2009, the small cross-border claims may be compensated pursuant to Regulation (EC) No 861/2007 (the "Regulation") establishing a European Small Claims Procedure ("ESCP"). The aim of the Regulation is to simplify and speed up litigation concerning small civil claims by creating an ESCP available to litigants in cross-border disputes as an alternative to the procedures existing under national laws.

The Regulation shall apply to civil and commercial matters where the value of the claim does not exceed Euro 2,000. Revenue, customs or administrative matters, employment law, arbitration and bankruptcy proceedings, personal status proceedings, among other matters, are excluded by the application of the Regulation. Access is not restricted to consumers. The claims brought pursuant to ESCP are not registered in Italy.

#### 8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

The settlement proceeding can end with a monetary compensation or with a voluntary discontinuance of a behaviour, but not with an injunctive order.



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Daniele Vecchi, Partner of the Litigation department, practices in general commercial and civil litigation and is a specialist in product liability. He has extensive experience in defending companies in consumer and group actions involving smoking products, foods and pharmaceuticals.

Over the course of his career he has worked extensively with in-house counsels and lawyers in Italy and abroad developing International defence strategies with important expert witnesses. Internationally recognised as a leading expert on Product Liability and Class Actions, he contributes to International publications and speaks at national and International conferences.

## 9 Other Matters

### 9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Article 140 *bis* of the Consumer Code does not rule anything in this respect. However, if the Italian Court has jurisdiction based on applicable Italian and EC rules on jurisdictional competence, this forum shopping may be feasible.

### 9.2 Are there any changes in the law proposed to promote class/group actions in Italy?

The consumer associations are still pushing for some amendments of the current Law and tried to challenge it before the Constitutional Court. However, at the moment no further amendments to the Law are expected.



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Federica Cinquetti has significant litigation experience which primarily focuses on product liability matters, recall procedures, and consumer's claims and she has also been involved in several legislative monitoring projects such as the implementation of class actions in Italy. Over the last 12 years she has assisted several companies facing consumer's claims and multi-claimant group actions. She also advises in all aspects of product liability and safety issues.



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GOGC&P has a vast experience in all areas of litigation and arbitration and are the client's choice for all major and most challenging cases. GOGC&P has developed an extensive expertise and experience in Class Actions and monitoring of the increasing trend both in Italy and internationally. In this area, the firm assists and represents both domestic and foreign companies on matters related to consumer's claims and multi-claimant group actions.

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