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Collective Redress & Class Actions 2021

Italy: Law & Practice
and
Italy: Trends & Developments

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ITALY

Law and Practice

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1. POLICY DEVELOPMENT OF COLLECTIVE REDRESS/CLASS ACTION MECHANISMS

1.1 History and Policy Drivers of the Legislative Regime

The entry of collective redress instruments and class action into Italian law is quite recent. The first signs of a move towards ad hoc collective redress being functional to the management of proceedings which are made complex by the number of the parties potentially involved occurred at the end of the 1990s, in parallel with the development of a growing awareness of consumer issues. It must be said, however, that in the past this did not prevent the use of ordinary procedural tools, already provided for by the Civil Procedural Code, also in defence of large groups or categories of persons. We refer to the so-called multiparty proceedings, brought by several plaintiffs all having the same claims against the defendant. To this purpose, consolidation of individual actions brought for the same claims was also often used.

A first instrument of collective redress was introduced in Italy by Law No 281 of 1998. Under Article 3 of the Law, consumers and users associations became entitled to ask the court for the release of an injunction, ie, a measure aimed at preventing certain acts and behaviours being detrimental to their representatives.

Almost a decade later, in 2007, to comply with Directive 98/27/EC and Directive 2009/22/EC on injunctions for the protection of consumers' interests, the discipline of collective action for the release of an injunction was partially reformed and transferred to Articles 139 and 140 of Legislative Decree No 206 of 2005, ie, the Consumer Code. According to such provisions, consumers or consumers associations could seek injunctive relief aimed at obtaining an order by the court to the concerned business (i) to terminate a conduct which is harmful to consumers' interests, and (ii) to remove the negative consequences of such conduct. These provisions became effective as of 2009.

During the first half of the 2000s, a certain number of court cases – some of which also had an impact beyond national borders – such as the notorious Parmalat case involving a very large number of private individuals as injured parties, encouraged discussions about the adoption of another system of collective protection, such as class action, which would have made it possible to handle those situations more efficiently.

Class action was then introduced for the first time in Italy by Law No 244 of 2007 and incorporated in Article 140-bis of the Consumer Code. After being amended by Law No 99 of 2009, Article 140-bis entered into force on 1 January 2010 and was once again modified by Law Decree No 1 of 2012, as amended by Law No 27 of 2012.

More recently, Law No 31 of 2019 introduced significant changes to the discipline under consideration, and class action and collective action for the release of an injunction are now regulated by the Code of Civil Procedure, precisely in Book IV of Title VIII-bis, which consists of 15 new articles. It is worth noting that Law No 31 of 2019 entered into force on 19 May 2021 and applies only for claims related to conducts which took place from that date on.

Overall, the need to reform the discipline under consideration stemmed from a general lack of satisfaction as to the achieved results. Indeed, the aim of the reform was to favour the extended use of the collective redress regime. Whether the reform will actually reach this goal is still to be assessed.

1.2 Basis for the Legislative Regime, including Analogous International Laws

The American experience in class actions has undoubtedly influenced the Italian legislator as to the introduction of this instrument into the legal system in order to facilitate the handling of multiparty cases in a better way. For the Italian legislator, class action should provide for an increase in the level of protections of individuals, allowing the same claims to be decided in the same proceeding, in a context, such as the Italian one, where judicial decisions do not constitute binding precedents; and also provide a more efficient management of cases in courts handling one complex case at a time, rather than jeopardising activities in thousands of cases all regarding the same facts and claims.

Beyond the effort to create an instrument which complied with the principles and the structure of the national legal system, the Italian legislator looked critically at the American model, in an attempt not to replicate some aspects of that model which were perceived, based on the teachings of major US authors, as potentially distorting the fair use of such a procedural tool. When it was introduced in 2007 – although it would take two years for it to come into force, – the Italian class action presented a couple of elements of strong distinction from the US one which had inspired it. First, regarding the adhesion mechanism, the Italian legislator preferred the opt-in mechanism to the US opt-out system (which, according to some scholars, was at odds with the Italian constitutional principles). Furthermore, with respect to the opt-out system, the opt-in system was considered as less burdensome for the sued business entities but still able to ensure an adequate level of protection for consumers and users. In addition, the Italian legislator decided not to resort to a fee reward mechanism, which was present in the US model, in order to avoid introducing a "class action market". The legislator's concern was to avoid recourse to class action becoming systematic, to the detriment of other procedural instruments which may be adequate and efficient in the concrete case, for the sole purpose of feeding certain business in the legal sector.

On the other hand, the legislator adopted the US model scheme for the management of class actions. As a matter of fact, class action consisted of two procedural steps, namely of a preliminary phase for certification, where the court assesses whether there are the conditions to hold a class action, and a second phase where the court rules on the merits of the case.

In the years following the introduction of class action in Italy (which occurred in 2009), it was less successful than the government expected. There were undoubtedly important cases handled with this instrument, but recourse to it was not very frequent. It is in this context that political moves to modify such discipline started.

As a result, Law No 31 of 2019, which came into force on 19 May 2021 and applies to claims for unlawful conducts which took place on or after that date, brought several innovations to the class action regime. Relevant new elements include the following. First, a rewarding mechanism for the plaintiff's counsel has been introduced under which the unsuccessful resistant shall pay the common representative and the petitioner's attorney a fee, set as a percentage of the total amount due to the members for compensation. Authors have pointed out that the legislator has thereby introduced a punitive damage to be paid by the unsuccessful defendant. This is a significant innovation in a legal system which has always attributed to damage only the function of compensation and reparation. Again, according to authoritative commentators, this novelty could stimulate professionals to make use of this procedural tool in a bolder, but not always necessarily appropriate, manner.

Furthermore, the new class action expanded the discovery powers of the court, which to date had been considered outside the Italian procedural system. Upon reasoned request by the petitioner, the court may order the resistant to produce relevant evidence and documents within its possession. This order may refer to "categories of evidence" identified by their common features. In addition to this, the opt-in system has been changed. In accordance with the reform, the class members still have to opt in to adhere to the class, but they can also do so after the case is decided on the merit (and not only within a certain term after certification). Another significant change introduced by the reform is the broadening of the subjective scope of the class action. Unlike in the past, today class actions can also be brought by business entities (not only by consumers and users) for the protection of their homogenous rights against the same defendant.

It will take some time to assess how the new rules will be implemented, as they have only been in force for a few months.

1.3 Implementation of the EU Collective Redress Regime

Discussions regarding the implementation of Directive 2020/1828/EU of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC have not yet begun. This is mainly due to the fact that a reform has very recently occurred in the field.

Class action was firstly introduced in Italy by Law No 244 of 2007 and incorporated in Article 140-bis of Legislative Decree No 206 of 2005, ie, the Consumer Code, which was then modified twice, in 2009 and 2012. As also hoped for in Recommendation 2013/396/EU, Law No 31 of 2019, which came into force as recently as 19 May 2021, introduced several novelties to the existing discipline of class action aiming to ease and encourage access to this type of judicial protection.

With reference to collective redress in general, in 2007 the Italian legislator implemented both Directive 98/27/EC and Directive 2009/22/EC on injunctions for the protection of consumers' interests, by the introduction of Articles 139 and 140 of the Consumer Code. Pursuant to the provisions of Law No 31 of 2019, the relevant discipline was transferred to Article 840-sexiesdieces of the Code of Civil Procedure.

Rapid developments in this regard are expected in the coming months.

2. CURRENT LEGAL FRAMEWORK AND MECHANISMS APPLICABLE

2.1 Collective Redress and Class Action Legislation

As a result of a recent reform, which entered into force in May 2019, class action in Italy is currently regulated by two different sets of rules, depending on when the harmful conduct violating the rights claimed in court took placed. The following regulations in particular govern class action in Italy.

- Article 140-bis of the Consumer Code governs compensatory class actions for claims related to unlawful conduct which occurred until 18 May 2021, while Articles 840-bis/840-quinquiesdecies of the Code of Civil Procedure apply instead to claims relating to unlawful conduct carried out from 19 May 2021 onwards.
- The same principle applies for collective action for the release of an injunction. Articles 139 and 140 of the Consumer Code regulate

cases related to unlawful conduct carried out until 18 May 2021; whilst Article 840-sexiesdieces of the Code of Civil Procedure applies if the claims refer to unlawful conduct carried out from 19 May 2021 onwards.

3. SCOPE AND DEFINITIONAL ASPECTS OF THE LEGAL FRAMEWORK

3.1 Scope of Areas of Law to Which the Legislation Applies

Compensatory Class Action

Pursuant to Article 140-bis of the Consumer Code, class actions could only be started for claims relating to specific areas of consumer law, such as antitrust infringements, unfair commercial practices, contractual breaches, and product liability, to protect the homogeneous individual rights of a plurality of consumers and users.

Law No 31 of 2019 significantly modified the discipline of class action, broadening its scope of application. Class action can now be started by anyone claiming compensation for the violation of homogeneous individual rights to ascertain the resistant's liability. As a result, class actions are no longer limited to specific areas of law.

For homogeneous individual rights, in the absence of a definition provided by the legislator, one should intend a legal situation attributed to members of a class in which the rights of individuals are different and distinct, but all depend on a common question of fact or law capable of making a jurisdictional measure of uniform content possible (such as the US "commonality requirement").

It is worth noting that still today, even after the above recalled reform, should a class action be started for a claim related to an unlawful conduct which took place until 18 May 2021, the same class action will be governed by the provisions of the above-mentioned Article 140-bis of the Italian Consumer Code. Thus, the class action can only be brought if the claims violated fall within the scope of that provision.

Injunctive Collective Action

Pursuant to Article 139 of the Consumer Code, a collective action for the release of an injunction can be started only by consumers associations to protect the collective interests of consumers and users in the matters governed by the same Consumer Code, as well as in certain matters relating to:

- public and private broadcasting system;
- advertisement of drugs (ie, medications) for human use;
- services provided within the internal market of the European Union;
- online dispute resolution for consumers; and
- unjustified geographical blocks and other forms of discrimination based on nationality, place of residence, or place of establishment of customers within the internal market of the European Union.

Law No 31 of 2019 deeply modified the discipline of collective injunctive action broadening the scope of application. Pursuant to Article 840-sexiesdecies of the Code of Civil Procedure, this remedy is applicable to all areas of law.

Notwithstanding such a reform, Article 139 of the Consumer Code still applies when the applicant seeks relief from a harmful conduct held before 19 May 2021. In such a case, therefore, the limitations regarding the scope areas of law highlighted above still apply.

3.2 Definition of Collective Redress/ Class Actions

The relevant law provisions provide that:

- class action is a procedural tool for the protection of individual homogeneous rights aimed at the ascertainment of liability of the resistant and at obtaining a compensatory relief for the damages suffered; and
- collective action for the release of an injunction is a procedure for the protection of collective interests aimed at obtaining an injunctive relief by the court, ordering the resistant to cease acts or conducts prejudicial to more subjects and to remove the negative consequences of such acts or conducts.

4. PROCEDURE FOR BRINGING COLLECTIVE REDRESS/CLASS ACTIONS

4.1 Mechanisms for Bringing Collective Redress/Class Actions

Compensatory Class Action

Pursuant to Article 840-ter of the Code of Civil Procedure, a class action starts with the filing of a petition by the applicant within the section specialised in business matters of the court of the place where the resistant has its registered office. This procedure applies for class actions against unlawful conducts carried out from 19 May 2021 onwards.

Class action regarding claims for unlawful conduct which took place earlier, ie, prior to 18 May 2021, is governed by Article 140-bis of the Consumer Code. Pursuant to this provision, a class action starts with the service of a writ of summons on the defendant. The writ of summons must be served also to the public prosecutor's office at the court having venue over the case, who may decide to intervene in the first phase of the proceedings (ie, that relating to the admissibility of the class action). The class action must then be enrolled before the court of the capital of the region where the defendant has its registered office.

Injunctive Collective Action

Under Article 840-sexiesdecies of the Code of Civil Procedure, the action starts with the filing of a petition within the section specialised in business matters of the court of the place where the resistant has its registered office. The petition is submitted to the public prosecutor. These rules apply to the procedure regarding claims for unlawful conducts carried out from 19 May 2021 onwards.

All other cases are regulated by Articles 139 and 140 of the Consumer Code. Accordingly, the action starts with the filing of a petition within the court of the place where at least one consumer or user has its own residence. Before the filing of the petition, the petitioner must send, by registered letter, a request to the resistant to cease its damaging behaviour. Such notice must be served at least 15 days before the petition is filed. The purpose of this provision is to encourage an out-of-court settlement of the dispute. For the same reason, the action can be anticipated by an ADR procedure to be initiated before the Chamber of Commerce of the same district of the court having jurisdiction for the proceedings or before any other ADR agency recognised by the Ministry of Economic Development.

4.2 Overview of Procedure

Compensatory Class Action

Pursuant to Articles 840-ter and following of the Code of Civil Procedure, as they have been introduced by Law No 31 of 2019 which reformed the existing rules on the issue, class action consists of proceedings developing in three phases. The first two phases are managed by a panel of three judges, while the third phase is managed by a delegated judge, as follows.

- In the certification phase of the proceedings, the court assesses the admissibility of the action. The application is declared inadmissible when (i) it is manifestly ungrounded; (ii) the court does not recognise the homogeneity of individual rights; (iii) the applicant is in conflict of interest; and/or (iv) the applicant does not appear to be able to adequately protect the class members' rights. Certification assessment can be immediately appealed before the court of appeal. After the class action is declared admissible, class members may opt in.
- By the decision admitting the claim, the same court, amongst other things (i) identifies the homogenous individual right which the defendant has violated and establishes the criteria for the adhesion to the class; and (ii) indicates which documents must be submitted by class members who intend to opt in. In the second phase of the proceedings, the court addresses the merits of the case. To do so, the court may use statistical data and simple presumptions and, upon reasoned request by the petitioner, order the resistant to submit relevant evidence within its possession. This order may also cover "categories of evidence". In the case of refusal without good reason to comply with the relevant order, the resistant may be sentenced to a fine. This evidence gathering tool is much wider that the one available in ordinary civil litigation. Upon conclusion of this phase, the court rules on the merits, with a decision subject to appeal. Class members are still granted a term to opt in. The court also appoints the delegated judge, who will manage the concluding phase of the proceedings as well as the common representative of the class members.
- In the third and last phase of the proceedings, the common representative analyses the requests of adhesions filed by the class members and submits a distribution project for the class members to the delegated judge, taking a position on each individual request. The resistant may oppose the distribution project. Subsequently, the delegated judge decides on the requests for adhesion and quantifies the sums due to the members of the class with an enforceable decree, which can be opposed.

The above procedure is applicable only to class actions regarding claims for harmful conducts that took place from 19 May 2021 onwards. For all the other cases, the provisions of Article 140-bis of the Consumer Code governing class action prior to the reform continue to apply.

Pursuant to this provision, the proceedings essentially consist of two phases. In the first phase, the court rules on the admissibility of the class. If the class action is certified, the second phase of the proceedings begins for evidence-gathering. The case is then decided on the merits. Class members can opt in after certification within the term granted by the court, but never after the decision is issued. The court provides instructions on how to advertise the certification in view of possible adhesions.

Class action (both prior to and after the reform) presents specific characteristics which distinguish the same from ordinary litigation proceedings, which remains an alternative to the same class action for individuals and multiparty litigation. In ordinary proceedings, there is no certification phase and the judge has fewer broad powers with regard to investigations and procedural orders.

Injunctive Collective Action

As of 2007, collective actions for injunctive relief have been governed by Articles 139 and 140 of the Consumer Code. These provisions have been repelled by Article 840-sexiesdecies of the Code of Civil Procedure, albeit they continue to

apply for cases regarding harmful conduct that occurred prior to 19 May 2021.

The new set of rules, however, essentially repeated the content of the previous one, as far as the applicable procedure is concerned. Under both sets of rules, to initiate a collective action for injunction, the application is filed within the section specialised in business matters of the court of the place where the resistant has its registered office. The petition is submitted to the public prosecutor who may intervene in the proceedings in case he/she believes the subject of the dispute consists of a public interest to be protected. The proceedings shall proceed in the manner that the judge deems most appropriate as there is no specific rule for case management. At the conclusion of the proceedings, the court issues a decree which can be challenged.

The current proceedings do not very much differ from the ordinary urgency and interim procedure regulated by Article 700 of the Code of Civil Procedure. In this case, the applicant should provide prima facie evidence that its claim is grounded and that the relief it seeks is urgently needed. Both proceedings are characterised by expenditure and essentiality.

4.3 Standing

Compensatory Class Action

A decade after the introduction of class action in Italy, the relevant law provisions have been significantly modified.

Pursuant to Article 140-bis of the Consumer Code, class actions could only be started by consumers and users, and by associations or committees of consumers on the condition that they had been appointed by a consumer to do so. So far, this provision only applies to class action initiated or to be initiated regarding claims for unlawful conducts carried out prior to 18 May 2021.

Due to the reform introduced by Law No 31 of 2019, which became effective on 19 May 2021, in relation to claims for harmful conducts occurred from then on, the discipline of class action changed from the Consumer Code to the Code of Civil Procedure. Pursuant to Article 840-bis of the Code of Civil Procedure, class action can be started by anyone (an individual or a legal entity) complaining of an injury to his or her own individual right, which is homogeneous with those of a class of injured parties, or by an association or an organisation included in a special list whose scope of work is to protect the aforesaid right. Thus, class action is no longer a remedy that is only available to consumers and users. Furthermore, the class action can be initiated by certain associations or committees included in a special list of entities whose expertise is recognised by the Ministry of Justice.

Injunctive Collective Action

Pursuant to Article 139 of the Consumer Code, a collective action for the release of an injunction can only be proposed by consumers associations and not by individuals. This provision has been repelled by Law No 31 of 2019 which reformed the relevant discipline, but it is still applicable to cases regarding harmful conducts that occurred prior to 18 May 2021.

The other cases for harmful conducts which occurred on or after 19 May 2021 are regulated by Article 840-sexiesdecies of the Code of Civil Procedure, which provides that the action can be proposed by anyone (with no restriction) who has an interest.

4.4 Class Members, Size and Mechanism (Opt In/Out)

Compensatory Class Action

Class action, which was first introduced in Italy in 2009, was most recently reformed by Law No 31 of 2019. The new set of rules entered into force on 19 May 2021 and is applicable to claims

involving a harmful conduct which occurred from that date onwards. Otherwise, the previous set of rules still applies.

In relation to the "new" class action, pursuant to Article 840-quinquies and following of the Code of Civil Procedure, class members may opt in to the class action both after the court issues (i) the order deciding on the admissibility of the class action (certification) and (ii) the sentence deciding upon the merits of the case.

- By the order deciding on the admissibility, the court defines the characteristics of the individual homogeneous rights of class members and specifies the documentation necessary to ground the request of adhesion. The order is published in the public area of the portal managed by the Ministry of Justice within 15 days of the pronouncement. Furthermore, the court sets forth a term between 60 and 150 days from such publication for class members to opt in.
- By the decision ruling on the merits of the case, the court once again defines the characteristics of the individual homogeneous rights concerned by the sentence and specifies the documentation necessary to ground the request of adhesion. The sentence is published in the public area of the portal managed by the Ministry of Justice. Furthermore, the court declares the adhesion procedure open and fixes a term (not less than 60 days and not more than 150 days) for the adhesion by the class members and the submission of further documentation by those who had already opted in.

From a practical point of view, the opt-in right is exercised by submitting the relevant application in the portal managed by the Ministry of Justice. The class member can act personally, without being represented by a lawyer. The application must contain, amongst other things, (i) the determination of the subject of the application, (ii) the reasons for the same, and (iii) the election of domicile (ie, the address where he/she wishes to receive all communications). No limit on the number of adhesions is set forth.

The evaluation on the admissibility of the class members' adhesions is conducted in the third phase of the class action, which is managed by the delegated judge with the help of the common representative of the class members. The parties can submit briefs arguing about the admissibility of the requests of adhesion.

With regard to the "old" class action, pursuant to Article 140-bis of the Consumer Code, once the court declares the class action proceedings as admissible, it issues an order through which it establishes the following.

- The term and procedures to advertise the existence of the pending class action for allowing class members to opt in in a timely manner.
- The features of the class members, specifying the criteria based on which consumers will be included in the class.
- The term, not exceeding 120 days from the expiry of the term for carrying out the advertising, to file the application for adhesion. No limit on the number of adhesions is set forth.

At this point, class members who intend to opt-in must submit their adhesion in court. Along with their application they must provide all documents proving their claim. They must also elect a domicile for the proceedings.

Once the opting-in is completed, the court appoints auxiliaries to collect and process the data regarding the adhesions. The parties can argue on the admissibility of the adhesions. When the court decides on the merits of the case it also decides upon the admissibility of

each adhesion, having regard to the criteria set forth by the order on the admissibility of the class action. Any decision made on the merits by the court is binding only for the lead plaintiff and the members of the class who decided to opt in. Other class members are not affected by the decision.

Injunctive Collective Action

Unlike class action, the collective action for the release of an injunction does not provide any rule on opting in or opting out. In this case, the decision of the court automatically and indistinctly impacts on all the subjects concerned by the conduct which the same decision prohibits.

4.5 Joinder

Compensatory Class Action

Overall, class members have to opt in to join a class action. In case more class actions are initiated for the same claim, they shall be joined. No specific rule is set forth to join third parties to the class action. Voluntary intervention by a third party is not allowed.

Injunctive Collective Action

If a collective action for injunction is started, there is no need to opt in to the proceedings: the court order shall affect all the subjects concerned. Also, in this case, no specific rules are set forth to join third parties to the proceedings.

4.6 Case Management Powers of Courts

As a general principle applicable to all civil proceedings pursuant to Article 175 of the Code of Civil Procedure, the court manages the timetable of the proceedings in the way it believes is the most appropriate to ensure a fair and prompt progress of the proceedings. In particular, the court schedules hearings and ordinary terms, ie, terms within which the parties must carry out certain procedural activities (eg, filing of briefs, service). By doing so, the court must ensure the safeguarding of both the parties' right of defence and the right to a reasonable duration of the proceedings, which are both guaranteed under the provisions of the Italian Constitution. To do so, the court must prevent any parties to the proceedings, the judge managing the case included, from putting into place useless and superfluous activities which would result in or be aimed at delaying the duration of the proceedings.

With reference to test cases, such a procedural tool is not available in Italy. It should be noted that under the Italian law, precedents are binding only between the parties to the proceedings in which such precedent was issued. Although previous judgments may guide courts to a correct interpretation and application of the relevant rules, they are not binding upon them. Furthermore, any modification to an existing law can only be made by the legislator. To this end, case law developments may only be inspirational.

4.7 Length and Timetable for Proceedings

Compensatory Class Action

The average length of a class action is from one and a half to three years, depending on the complexity of the dispute, with specific reference to the evidence gathering activity, and the workload of the court seized.

Injunctive Collective Action

For collective action for the release of an injunction, the purpose of this procedural tool is to obtain an order from the court in the shortest time possible. The urgency phase can take from a few weeks to several months, depending on the complexity of the case.

4.8 Mechanisms for Changes to Length/Timetable/Disposal of Proceedings

No procedural mechanism aimed at deviating from the ordinary length length/timetabling is provided by the Italian law in relation to both class action and collective action for the release of an injunction (as well as in ordinary litigation).

4.9 Funding and Costs

In Italy, the general rule for costs is "the loser pays". When the court issues its final decision it also awards costs and, in most instances, establishes that the losing party must pay an amount as a contribution to both the expenses and the fees incurred in by the winning party. This contribution is determined by the court based on certain parametres established by the law, which take into account amongst other things the value of the claim and it is usually lower than actual expenses and costs incurred. Nevertheless, the court can set off all or part of the expenses between the parties if:

- it ascertains that the costs to be reimbursed to the winning party are excessive or superfluous;
- all the parties are losing under some aspects of the issue;
- there are serious and exceptional reasons to do so; and
- the case regards a new matter that has never been decided before by case law or the final decision departs from case law, establishing a principle that revises or overrules what had been established until then by case law.

Lastly, irrespective of the outcome of the proceedings, the court may order one of the parties that acted in bad faith in starting or defending a case to pay the other party an amount quantified by the court at its discretion (usually an amount equal to or a multiple of the legal fees) as punitive damage.

With specific reference to class action proceedings, Law No 31 of 2019 which came into force on 19 May 2021 and applies to cases regarding claims for harmful conducts carried out from that day on, introduced a significant novelty with respect to the discipline of costs. Particularly, the unsuccessful respondent has to pay (i) the common representative of the class, and (ii) the plaintiff's lawyer a "reward fee" which is set as a percentage of the total amount due to the class members as established by the court. Such amount can be increased or reduced to an extent not exceeding 50% based, amongst other things, on the complexity of the claim, the recourse to auxiliaries, and the number of members.

Third party funding is not forbidden but is not common in Italy. However, in light of the new discipline of class action, the introduction of the reward fee may change such scenario and favour the recourse to such tool.

Lastly, as a general remark, it is worth noting that in Italy an indigent party can access legal aid via the local Bar association on the condition that the claim is not clearly groundless. However, legal aid is not often resorted to due to its limitation in admissibility and because, overall, litigation in Italy is not very expensive.

4.10 Disclosure and Privilege

The Italian legal system does not include pre-trial and trial disclosure, as it is intended in the US legal system.

4.11 Remedies

Compensatory Class Action

The remedies available through compensatory class action are (i) compensation for damages and (ii) restitution. Having said this, pursuant to Italian law, any damage suffered by the injured party is recoverable. This includes both pecuniary and non-pecuniary damage. The basic prin-

ciple regulating damage compensation is that the payment of damages to the victim shall result in the complete repair of the damage suffered.

The damage is quantified by the judge on the basis of the evidence submitted. As to non-pecuniary damage, the judge refers to specific tables setting forth the relevant criteria established by the law.

In accordance with the principle highlighted above (ie, compensation for damage is aimed only at refunding the damaged party), under Italian law, punitive damages are not allowed. However, it is worth noting that one of the novelties introduced by Law No 31 of 2009, which reformed the discipline of class action, is the so called "reward fee", ie, an amount which the resistant has to pay to the common representative and the petitioner's attorney, set as a percentage of the total amount due to the members as compensation. Considering the foregoing, authors and the business community are concerned that by such a tool the legislator has introduced punitive damage to the Italian legal system, because this amount has to be added to the overall amount due to class members for recovery.

Injunctive Collective Action

Turning to collective action for the release of an injunction, the petitioner can ask the court to:

- inhibit acts and conducts which are harmful to the interests of the petitioners (eg, stop using a contractual clause that is considered to be unlawful);
- order the resistant to take the appropriate initiatives to correct or eliminate the harmful effects of its conduct; and
- order the resistant to spread the court's order in the manner and within the timeframe defined in the same order by using the most appropriate means of communication.

4.12 Settlement and ADR Mechanisms

Compensatory Class Action

Under Italian law, disputes can be settled both before and during the course of the proceedings. In the first instance, parties can do so on their own with the assistance of their lawyers (ie, assisted negotiation) or with the assistance of an appointed third party-institution (ie, mediation). In the second instance, the settlement agreement can be reached by the parties on their own, again with the assistance of their lawyers or under the guidance of the court.

In line with the above, under the Italian ADR law (alternative dispute resolution rules), mechanisms in some cases are mandatory for the parties before starting litigation in court. For example, the parties to a dispute for the payment of any amount between EUR1,100 and EUR50,000 must try to conduct assisted negotiation in the presence of their lawyers in an attempt to solve the dispute amicably. Moreover, before starting an action in court in relation to a dispute concerning property rights, insurance, banking and financial contracts, compensation for damages resulting from the circulation of vehicles and boats, and medical and healthcare liability, the parties must try to conduct a mediation for the same purpose. Lastly, since 1 May 2020, an attempt at mediation before starting a legal action is mandatory for disputes related to contractual breaches caused by the compliance with COVID-19 measures.

With specific reference to class action proceedings, Article 140-bis of the Consumer Code provides that class actions can also be settled by the parties (the plaintiff, acting as class representative, and the defendant) out of court, without the need of the court's approval. This rule is now applicable for class actions regarding claims for harmful conduct that occurred prior to 18 May 2021.

Law No 31 of 2019 introduced rules aimed at encouraging and favouring out of court settlement. Pursuant to Article 840-quaterdecies of the Procedural Code, which was introduced by that Law and is applicable to class actions regarding claims for harmful conduct that occurred after 19 May 2021, the following mechanisms exist.

- Until the oral discussion of the case, having regard to the value of the dispute and the overall complexity of the case, the court may formulate a settlement proposal, which is published on a portal held by the Ministry of Justice and communicated to the class members. The class members who opted in and wish to adhere to the settlement agreement can do so by filing their declarations of adherence within the court file.
- After the court issues the sentence ruling upon the merits of the case, the common representative of the class members can negotiate with the defendant to reach a settlement. After the draft of the settlement agreement is published within the portal of the Ministry of Justice, class members can raise their objections to the same draft of the agreement. The settlement agreement must be approved by the delegated judge. Should this be the case, the judge authorises the common representative to sign the settlement agreement on behalf of all the class members. At this point, only the class members who had previously raised their objections to the settlement can opt out.

Injunctive Collective Action

Turning now to collective action for the release of an injunction, pursuant to Article 140 of the Consumer Code, the action can be anticipated by an ADR procedure to be started before the Chamber of Commerce of the same district of the court having jurisdiction for the proceedings or before any other ADR agency recognised by the Ministry of Economic Development. Law No 31 of 2019 which reformed the relevant proceedings repealed this provision. The latter, however, is still applicable for collective actions regarding claims for harmful conduct that occurred prior to 18 May 2021.

4.13 Judgments and Enforcement of Judgments

In Italy, with very limited exceptions, a decision issued at the conclusion of the first and second decrees of proceedings can be challenged before a higher court, without any court's leave or authorisation. Decisions which order the losing party to (i) give something (eg, payment order) or (ii) do or not to do something, are immediately and provisionally enforceable. This means that the decisions can be enforced even if they are not final.

Compensatory Class Action

Pursuant to Article 140-bis of the Consumer Code, the decision ruling on the merits of the case becomes enforceable within 180 days of its publication. Afterwards, in the case the losing party does not comply with the sentence, enforcement proceedings may be started. This provision is currently only applicable to class actions for claims regarding harmful conduct that occurred prior to 18 May 2021.

For all other class actions, the provisions of Article 840-octies of the Code of Civil Procedure apply, as they have been introduced by Law No 31 of 2019 for the reform of the procedural instrument in question. Pursuant to said provisions, at the end of the third phase of the proceedings – which follows the issuance of a favourable decision on the merits – the delegated judge in charge of managing admissions issues a decree through which he/she rules upon the adhesion requests and condemns the resistant to the payment of the sums or things due to each adherent as compensation for damage or restitution. The order is communicated to the parties and is

immediately enforceable. Within 30 days of such communication, the resistant can file an appeal against the order which, in any event, remains enforceable unless the court competent for the appeal, upon reasoned request of the appellant, decides otherwise. Having said that, if the resistant does not spontaneously fulfil its obligations, the common representative of the class members, when authorised by the delegated judge, initiates the enforcement.

In any event, the decision issued by the court in a class action is only binding for the subjects who decided to adhere to the class action and for no one else.

Injunctive Collective Action

Collective action for injunction was governed by Articles 139 and 140 of the Consumer Code. By effect of the reform introduced by Law No 31 of 2019, the matter is now regulated by Article 840-sexiesdecies of the Code of Civil Procedure. The old provisions still apply for class action for claims regarding harmful conduct that occurred prior to 18 May 2021.

Pursuant to both the old and the new sets of rules, at the end of the proceedings the court orders the resistant to cease acts or conduct that are prejudicial to a certain number of subjects and/or to remove the negative consequences of such acts or conduct. The court may sentence the resistant who does not comply with its orders to the payment of a quantified amount for each subsequent violation or for each delay in the compliance. According to the old set of rules, the amount to be paid by the resistant is fixed up to a maximum amount (ie, from EUR516 to EUR1,032 for each failure or day of delay). The sums eventually paid by the resistant must be allocated by decree of the Minister for the Economy and Finance to the Ministry of Economic Development's budget fund to finance initiatives for the benefit of consumers. However, pursuant to the new set of rules, the relevant amount is not capped, and the payment must be made in favour of the winning party who can immediately enforce the decision in case of non-compliance by the resistant.

5. LEGISLATIVE REFORM

5.1 Policy Development

Law No 31 of 2019, which entered into force on 19 May 2021, profoundly reformed the class action regime in Italy to encourage recourse to this remedy. One of the most significant innovations brought by the reform was the introduction of the IT platform specifically dedicated to class action within the Telematic Services Portal held by the Ministry of Justice. Via this platform, it is now possible to consult the court files of all the pending class actions and access the relative documents. All court orders, including the order ruling on the admissibility of the class action and the decision ruling on the merits of the case, are published on the platform. Class members can submit their request to join the class action directly within the court file of the class action registered on the platform. This is an important development with respect to the previous regime, according to which the relevant requests had to be filed at the clerk's office of the competent court.

The Ministry of Justice has also made useful guidelines available to class members, illustrating how to access the portal, join the class action, and consult the court file.

That said, as the reform entered into force very recently, the operativity of these new tools is still to be tested. Their efficiency and accessibility may have an impact on the actual effectiveness of the reform, in so far as it aimed to increase the recourse to class action.

5.2 Legislative Reform

Both class action and the collective action for the release of an injunction have been subject to a significant reform, as set forth by Law No 31 of 2019. The entry into force of such a law was postponed three times, from 19 April 2020 to 19 May 2021, when it finally became effective.

In the meantime, the European legislator enacted EU Directive 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC. EU Directive 2020/1828 sets out rules strengthening the level of protection granted to consumers and users across the EU and shall be implemented by member states by 25 December 2022.

Considering that the above-mentioned reform has just come into force, no widespread discussions regarding the implementation of EU Directive 1828/2020 have started in Italy yet. However, this scenario may soon change. Furthermore, it will be necessary to reconsider the existing legislation to comply with EU legislation.

5.3 Impact of Brexit

National class actions and collective actions for the release of injunctions have not been directly impacted by Brexit.

Generally speaking, Brexit had and still has an impact in relation to the recognition and the enforcement in the UK of any decision issued by an Italian court, as the simplified mechanism introduced for such purpose by Regulation (EU) No 1215/2012 will no longer be applicable to all decisions issued or to be issued in proceedings initiated after 31 December 2020. Instead, private international rules or applicable bilateral conventions will apply to all these decisions.

5.4 Impact of COVID-19

The healthcare emergency caused by the spread of COVID-19 had consequences on judicial activities in Italy, in relation to all kinds of procedures, including compensatory class actions and collective actions for injunction, which consequently suffered severe slowdowns. With the aim of limiting the spread of COVID-19, with reference to all civil proceedings from 9 March 2020 to 11 May 2020, procedural terms were stayed and hearings were postponed, unless the object of the dispute was considered as urgent and where a delay could have caused serious harm to the parties (eg, family cases, and cases regarding personal rights and status).

Legislative activities also suffered a setback due to the COVID-19 pandemic. Since the government and the legislator were focused on the effective handling of the healthcare emergency, all matters that were not considered to be urgent were postponed. Class action and collective action for the release of injunction were significantly reformed by Law No 31 of 2019. The latter was published in the Italian Official Journal on 18 April 2019 and should have entered into force on 19 April 2020. However, the entry into force of the Law was postponed several times: first until 19 October 2020 and twice during the pandemic, until 19 November 2020 and then again until 19 May 2021.

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Trends and Developments

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Italian Class Action: Overview and Future Developments

Italy is notoriously a country of litigators. The number of first-instance proceedings initiated every year in civil courts is in the region of 2 million. Any party has the unconditional right to appeal to the Supreme Court, which is called to issue over 40,000 decisions every year. Furthermore, recourse to litigation is relatively inexpensive: court fees payable by plaintiffs for the filing of a lawsuit are relatively low and there are plenty of lawyers offering affordable rates. Consequently, Italian courts are obliged to manage a continuous flow of new cases, which inevitably causes slowdowns, and prevents the justice system from proceeding rapidly and therefore from meeting the needs and expectations of the plaintiffs, in particular the business world, which of course requires prompt and effective responses.

When class actions were first introduced to Italy in 2009, there were high expectations amongst the experts and the public that class action could rationalise and (at least partially) resolve the problem of excessive litigation. This tool was aimed at providing consumers with more efficient and faster protection. While consumers could continue to bring their actions individually or join forces to bring mass actions against a single defendant, class action offered them an easier way to act in court and protect their rights. Class action was also aimed at reducing the courts' workload and balancing the power of defendant corporations. There should no longer be several judges dealing with the same cases in several proceedings all around the country, but a single court would be able to deal with a single case, in the interests of all the parties involved. In this way, the system could be slimmed down for the benefit of all involved.

However, these unreasonably high expectations have not been met and class action has not been as successful as many had hoped. Plaintiffs discovered that class actions were complex to manage, certification requirements (commonality as first) were not easy to meet, unsuitable cases were promoted and, at first, most certification was denied. Furthermore, the average plaintiff has no interest in starting a complex class action rather than a simpler individual case, lacking any economic incentive; therefore, class actions were mainly initiated by consumer associations for self-advertising purposes. Consequently, in the last 12 years, the number of class actions in Italy has remained fairly limited. There has been an average of around ten class actions per year, of which less than a half were certified.

Over time, consumer associations began to select more suitable cases, which were more appropriate for class action, and learned how to manage them. The rate of certification grew, whilst most of the promoted cases were certified. Important cases have also been registered, perhaps most noteworthy being the class action initiated within the court of Venice in relation to the well-known Dieselgate case (which is in fact only one of several similar actions initiated all over the world), for which 65,000 consumers opted in, resulting in the order for the defendant to pay over EUR100 million.

In the meantime, however, the general opinion was that the class action system was not working as it should and was in need of reform. In our view, this is not entirely true: the system was

sophisticated enough to allow the meritorious cases to move forward and block the less "serious" matters. However, said opinion become widely accepted, and consumer associations and some political forces began to push for reform.

Under such political pressure, in 2019, the Italian legislator made a series of radical interventions aimed at reforming the class action system, with a view to significantly increasing recourse to this procedural tool and rendering it more "plaintiff friendly".

A number of the new features introduced by the legislator were aimed at encouraging greater recourse to class action. Firstly, it extended both the objective and subjective scopes of application of class action. The new class action is a general tool and can have unlimited object, whilst the previous one was limited to consumer matters. Thus, it can now also be used for litigating business-to-business cases. Secondly, the legislator introduced a reward mechanism for the lawyer representing the class representative (and therefore the class members): if the class action is successful, the plaintiff's lawyer will be awarded a percentage of the aggregate damage awarded to the class members overall, in addition to his/her ordinary fees. The mechanism for opting in was also changed to maximise adhesion, consenting individuals to opt in even after the decision of the case on the merits. Furthermore, a discovery mechanism (only in favour of the plaintiff) was introduced.

Amongst the novelties introduced by the reform is the fact that the plaintiff's lawyer could receive an award. This arouses the perplexity of the business world, being concerned not so much about a possible increase in the number of class actions, but about the creation of a class action market, which could lead to the kind of market abuse well known in the US market, which most European jurists stated they would like to avoid.

It is also worth noting that the new class action provides for recourse to new digital tools for publicity, to reach as many interested parties as possible and allow the class action members' adhesion to the maximum extent possible. For some time now, civil proceedings in Italy have been digital, ie, briefs, documents, and decisions during the course of the proceedings can be filed digitally. All this is part of what has been an experimental project aimed at simplifying procedural activities. This digitalisation has been reinforced during the COVID-19 pandemic, allowing cases to be discussed via videoconference during lockdown.

Further considerations concern so-called third-party funding. As mentioned above, recourse to justice in Italy is relatively inexpensive so this in itself would not make this instrument particularly interesting for the Italian market. However, the management of a class action by those who promote it requires the investment of significant resources and means. Commonly, law firms in Italy representing consumers in this kind of litigation do not have sufficiently large and organised structures to deal with highly complex proceedings. It is also difficult for consumer associations, despite them being very much in force in Italy, to have sufficient resources to invest in supporting certain initiatives. It is therefore possible that in this new climate, brought about by the reform, a particular interest in this means may be kindled. At this time, the relative discipline is not regulated in any way. However, if together with the new class action, recourse to third-party funding were to gain ground, it would certainly be impossible to exclude an intervention by the legislator aimed at defining, at least, the essential components of this instrument.

The new set of rules governing class action were postponed to allow the implementation of the information advertising system; it has only been in place for a few months and currently coexists with the old one (because the new regulation applies only to cases relating to claims for damages for prejudicial conduct that occurred after 18 May 2021). Whether the new class action will be more successful than the previous one therefore remains to be seen. Moreover, we cannot take for granted that the recent class action will continue as it is in Italy, due to the approaching implementation of the EU Directive 2020/1828. Discussions in Italy for the transposition of this Directive have not started. It is likely, however, that rapid developments in this regard will take place in the near future.

Further to the express support for the promotion of class action, we should also mention the current extension, in Italian case law, of available causes of actions. Product liability, "exposure to a danger" claims, environmental damages, privacy and antitrust damages are the kind of actions currently under development by the courts, which could be specifically suitable for class action. In recent months, there has been increased talk of actions to protect consumers against damage suffered in relation to the COVID-19 pandemic, eg, poor management of the emergency and the release of non-compliant and unsafe products. In the coming months, we will have the chance to verify how many of these potential initiatives will actually be implemented, but it likely that they will be sensitive matters in upcoming litigation.

Looking to the future, it is reasonable to expect a massive increase in class action litigation. Class action will become a rich market, where the plaintiffs' Bar can collect attractive awards and advertising. And, last but not least, we can also expect interesting times for defence lawyers.

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