

The Italian ‘Collective Action for Damages’: An Update

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Toward the end of 2007 the Italian Parliament passed an amendment to the Consumers’ Code that now provides for a new ‘collective action for damages’. Even though the amendment has been heralded as a long-awaited major event in the field of access to justice, the new regulation shows a high level of complexity that will not advance the cause of consumers’ rights, most of all in a country in which judicial proceedings take decades to come to a final judgment.

According to the new article 140-*bis* of the Consumers’ Code, consumers associations may bring an action for monetary redress against sellers and suppliers, and claim damages arising out of contracts, torts, and unfair or restrictive trade practices insofar as the rights and interests of a plurality of consumers are adversely affected. In principle, standing to sue is granted to the consumers associations that have been accredited by the government and are included in a special list kept by the Department of Economic Development; these associations are the ones that may commence collective actions for injunctive relief based on other provisions of the Consumers’ Code that have been adopted in the past to discharge the duty to implement several European Union directives. As far as the new ‘collective action for damages’ is concerned, article 140-*bis* contemplates the possibility that other, non-accredited consumers associations will be granted standing to sue as well if they adequately represent the collective interests for whose enforcement the action is commenced.

Once the action is brought, the court must certify it as admissible and direct adequate notice as to the nature of the action and the development of the procedure. Individual consumers willing to avail themselves of the collective action and its outcome (supposing it is favorable to them) must “adhere” to the proceeding: in other words, they must opt-in. Opting-in is the only chance consumers have to be entitled to their shares of the damages awarded by the court if it finds for the plaintiff. Individual actions for damages may be brought only by the consumers who chose not to opt-in and are not bound by the judgment issued in the collective action. It is not clear how consumers may express their “adhesion,” considering that article 140-*bis* allows them also to become parties to the proceeding by way of formal intervention, that is, appointing their own lawyer and complying with all the requirements laid down by the Code of civil procedure.

The proceeding develops through convoluted steps: court orders as to the minimum amount of damages each consumer may claim, offers of settlement made by the defendant, and repeated attempts at conciliation before an *ad hoc* panel and other bodies. All in all, the new ‘collective action for damages’ does not seem very efficient and – most of all – consumer friendly.

The new regulation was supposed to come into force on June 28, 2008, but soon after the general political elections that took place in April 2008, and which witnessed the victory of a center-right coalition, rumor had it that some last-minute measures changing again the Consumers' Code or postponing the entry into force of article 140-*bis* were to be expected. In fact, around mid-June 2008 the press announced that the government intended not only to postpone to January 2009 the coming into force of article 140-*bis*, but also to modify substantially the procedural device the rule provides for. The news brought about negative comments by consumers associations, according to which the government surrendered to the pressures of Confindustria (the association representing Italian manufacturing and service companies), which on several occasions had raised strong criticism against the new collective action, seen as a declaration of war against the Italian business community and as a new hurdle that was bound to discourage foreign companies from investing in Italy. In spite of these criticisms, the government went ahead with the announced plans, and did in fact postpone to January 1, 2009 the entry into force of article 140-*bis*. As of this writing (November 30, 2008), it is still unclear what the immediate future will bring. In a press conference, the Minister for Economic Development, while announcing that no further postponement will take place, stressed the need to touch up article 140-*bis* with the sole purpose of strengthening the judicial protection afforded to consumers and avoiding, at the same time, the collapse of the court system under a tsunami of unmeritorious collective lawsuits. In the meantime, two new bills for an amendment of article 140-*bis* are pending before the House of Deputies of the Italian Parliament.

Therefore, as of now it can be said that the 'collective action for damages' is floating in a sort of limbo: it exists on paper, but maybe it will never come into force.

Scholars have already poured rivers of ink over the topic of the 'collective action for damages' in an attempt to make some sense of a piece of legislation that is anything but clear and effective. Only time will tell whether their analyses are a fruitful effort or, on the contrary, a useless exercise of their skills in the interpretation of a rule that will never become enforceable.

In spite of the uncertain fate of the 'collective action for damages', it may be of some interest to the reader to take a look at an English translation of article 140-*bis* as it stands right now (my translation).

Consumers' Code
Article 140-*bis*. Collective Action for Damages

1. The qualified entities referred to by article 139 and the other entities mentioned by sec. 2 of this article shall be entitled to bring an action for the protection of the collective interests belonging to consumers and users. They shall petition the court sitting in the place in which the undertaking

has its seat for a judgment ascertaining the right to the compensation for damages, and the right to the restitution of the sums due to individual consumers or users when these rights arise out of contracts governed by art. 1342 of the civil code, or are the result of torts, unfair commercial practices, or anti-competitive business practices, as long as the rights of a plurality of consumers or users have been infringed.

2. As provided for by sec. 1, standing to sue shall be granted also to associations and committees that adequately represent the collective interests at stake. Individual consumers or users willing to avail themselves of the judicial protection afforded by this article shall give written notice to the representative party of their adhesion to the collective lawsuit. Such notice may be given until the hearing during which the summing up takes place, even in the appellate proceeding. Individual consumers or users may always join the collective action in order to plead claims asserting the same right to relief. A collective lawsuit, once started, as well as an adhesion to it, shall toll the statute of limitation according to article 2945 of the civil code.

3. At the first hearing, the court, having heard the parties and made summary inquiries if that is deemed to be necessary, shall enter an order on the admissibility of the claim. Such an order shall be subject to an appeal brought to the court of appeal sitting in chamber. The claim shall be declared inadmissible when it is clearly groundless, when there is a conflict of interests, or when, according to the court, no collective interest worth the judicial protection afforded by this article exists. The court may postpone the ruling on the admissibility of the claim when the same facts are being investigated by an independent agency. The court, if it finds the claim admissible, shall require that the plaintiff gives appropriate publicity to the claim, and shall enter all the orders necessary for the development of the proceeding.

4. The court, if it finds for the plaintiff, shall establish the criteria according to which it will determine the damages to be awarded, as well as the sums to be returned, to the consumers or users who joined the collective action or adhered to the lawsuit. If possible, the court shall determine the minimum amount of money each consumer or user shall be granted. Within sixty days of the judgment having been served, the undertaking may serve on each consumer or user a written offer for a specified sum of money; the offer must be filed with the court. An offer accepted in any form whatsoever shall be enforceable by a writ of execution.

5. The judgment entered by the court shall bind the consumers and users who became parties to the collective action. The right of consumers and users who neither joined the lawsuit, nor adhered to it, to bring individual actions shall be preserved.

6. If the undertaking has failed to make an offer according to the terms stated in sec. 4 or if the offer has not been accepted within sixty days from the date of its service, the President Judge of the court shall set up a single conciliation chamber for the calculation of the amount of money to be awarded or returned to the consumers or users who joined the collective action or adhered to the lawsuit, provided that they submit an application to this end. The chamber of conciliation shall consist of an attorney appointed by the plaintiff and an attorney appointed by the defendant; it shall be presided over by an attorney appointed by the President Judge of the court, and chosen from among the attorneys qualified to practice before the highest Italian courts. The conciliation chamber shall draw a settlement as to the terms, the dates, and the sums of money to be awarded to individual consumers and users. The settlement, signed by the president of the conciliation chamber, shall be enforceable by a writ of execution. As an alternative, upon joint request of both the plaintiff and the defendant, the President Judge of the court shall direct that the non-contentious disposition of the lawsuit takes place before one of the conciliation bodies established by article 38 of statutory instrument no. 5 of January 17, 2003 (*governing special procedures and out-of-court*

conciliation in commercial cases) and operating in the place where the court sits. Articles 39 and 40 of statutory instrument no. 5 of January 17, 2003 shall apply, if compatible.