

## Collective Actions in Italy

Rome  
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### I. Introduction

This memorandum describes the main features of the “collective actions” contemplated by recently promulgated Article 140-*bis* of the Italian Consumer Code (“Article 140-*bis*”), enacted as Article 2, paragraph 446, of Italian Law 12.24.2007 No. 244 (the “Financial Act”).<sup>1</sup>

Article 140-*bis* confers standing upon consumer associations and committees to sue enterprises for the purpose of ascertaining the entitlement to damages or restitution by a “*multitude of consumers or users*”. Any judgment rendered in such proceedings is binding upon the defendant enterprise, the plaintiff consumer association or committee, and all individuals who opted into the action or intervened in the proceedings.

If the defendant’s liability is established during an initial judicial phase, the court is required to define the general criteria to be used to determine the amount due to each consumer or user, indicating – if this is possible in light of the available evidence – the minimum of such amount. The actual determination of sums due to individuals, however, is dealt with in a second, so-called “non-contentious”, phase, which commences after notification of the judgment establishing the liability of the defendant enterprise.

Under Article 140-*bis*, consumers and users who did not opt into the collective action or otherwise intervene in the proceedings are free to bring their own, individual actions against the enterprise.

<sup>1</sup> *Italian Official Journal*, No. 300 of 12.28.2007 (S.O. No. 285).

## II. Scope

### 1. Types of disputes covered

A collective action may be brought to pursue allegations of:

- (i) wrongdoing “*in the context of legal relationships involving contracts within the purview of Article 1342 of the Italian civil code*”, *i.e.*, by execution of standard forms unilaterally prepared by the enterprise;
- (ii) “*wrongful extracontractual acts*”, *i.e.*, torts;<sup>2</sup>
- (iii) “*improper commercial practices*”, *i.e.*, commercial practices contrary to professional diligence, which materially distort or are likely to materially distort the economic behavior of consumers with regard to product selection;<sup>3</sup> and
- (iv) “*anti-competitive activities*”, such as agreements between enterprises that restrict competition and abuses of a dominant position covered by Articles 2 and 3 of Law 10.10.1990 No. 287 and Articles 81 and 82 of EC Treaty.

### 2. Covered “consumers and users”

Collective actions may be brought only if the rights of a “*multitude of consumers or users*” have been violated.

A consumer or user is defined as “*any individual who is acting for purposes falling outside his trade, business or profession*” (Article 3(a) of the Consumer Code). Accordingly, the new law on collective actions seemingly does not apply to claims on behalf of: (i) individuals acting within the scope of their trade, business or profession,<sup>4</sup> including their employment contract; or (ii) parties who are not individuals. Conversely, the new procedure would seem to cover, *inter alia*, claims by depositor-investors acting for personal purposes, rather than in connection with their trade, business or profession.

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<sup>2</sup> For example, a collective action might be brought to ascertain the liability of a manufacturer or distributor for introducing allegedly unsafe or defective products into the market (Articles 102 *et seq.* of the Consumer Code), or the liability of an audit firm for damages suffered as a consequence of its allegedly negligent auditing activities, or the liability of a financial intermediary for its allegedly wrongful placement of financial products.

<sup>3</sup> This category would include deceptive or aggressive trading practices prohibited by Legislative Decree 8.2.2007 No. 146, as well as unfair competition practices governed by Article 2598, No. 3, of the Italian civil code.

<sup>4</sup> For example, the new law would seemingly not cover Internet subscriptions entered into for trade or professional uses (even though effected by means of the same standard forms that were used by non professional customers).

The new law does not specify how many users or consumers are required in order to constitute a “*multitude*”. In light of the rationale underlying the new law (*i.e.*, facilitating the bringing of claims affecting a large number of potential plaintiffs), it would be reasonable to expect the courts to set a fairly high standard in this regard, and to reject collective actions involving a relatively small number of individuals.

### 3. Potential defendants

Although Article 140-*bis* is silent in this regard, it would be reasonable to assume that foreign enterprises are fully subject to collective actions involving claims that otherwise fall within the scope of Italian jurisdiction pursuant to the criteria set forth in Law 5.31.1995 No. 218, Council Regulation (EC) No. 44/2001, the Brussels Convention of 9.27.1968, or other applicable international conventions.<sup>5</sup>

In particular, a collective action might be brought against a foreign legal entity: (a) in contractual matters (i) if the contract has been entered into between a consumer or user domiciled in Italy and an enterprise domiciled in a EU Member State whose commercial or professional activities are aimed at Italy (Articles 15.1(c), and 16.1 of Council Regulation (EC) No. 44/2001); or (ii) if the contract entered into between a consumer or user domiciled in Italy and an enterprise not domiciled in a EU Member State was preceded by a specific invitation or by advertising in Italy, and the consumer took the steps necessary to execute the contract in Italy (Articles 13.3 and 14 of Brussels Convention of 1968 and Article 3, paragraph 2, of Law No. 218/1995); or (b) in tort cases, if the harmful event “*occurred*” in Italy (Article 5, No. 3, of Brussels Convention of 1968 and Article 3, paragraph 2, of Law No. 218/1995).<sup>6</sup>

### 4. Effective date

Pursuant to Article 2, paragraph 447, and Article 3, paragraph 164, of the Financial Act, the new procedure will be effective as from July 1, 2008. However, the new law will also apply to claims relating to events occurring prior to that date, provided that the action is commenced within the time limits contemplated in the applicable statute of limitation.

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<sup>5</sup> Legal entities are subject to Italian jurisdiction if they are domiciled: (i) in Italy, for purposes of Article 3, paragraph 1, of Law No. 218/1995; (ii) in a EU Member State, under the circumstances described in Council Regulation (EC) No. 44/2001; or (iii) in a non-EU Member State, under the circumstances provided by Article 3, paragraph 2, of Law No. 218/1995 and the other cases contemplated by international conventions.

<sup>6</sup> In the case of enterprises domiciled in a EU Member State, Italian courts may also assert jurisdiction if the tort “*may occur*” in Italy (Article 5, No. 3, of Council Regulation (EC) No. 44/2001).

### III. The initial “judicial” phase

#### 1. Venue

Pursuant to Article 140-*bis*, a collective action should normally be brought before the court of the place where the enterprise is domiciled<sup>7</sup>. In the case of a foreign enterprise that is amenable to Italian jurisdiction but is not domiciled in Italy, and does not have a legal representative in Italy, venue is determined in accordance with Article 20 *et al.* of the Italian code of civil procedure, which sets forth specific criteria aimed at ensuring that the dispute is dealt with in a “convenient forum” (*e.g.*, the place where the relevant contractual obligation was to be performed or where the alleged tort was committed).

#### 2. Standing to sue

The new law grants standing to initiate a collective action to:

- (i) associations of consumers and users that are registered with the Ministry for Economic Development pursuant to Article 137 of the Consumer Code;<sup>8</sup>
- (ii) other, non-registered associations which the court finds to be “*adequately representative of the collective interests that they seek to protect*”. Case law developed in other contexts suggests that, in attempting to determine the representative nature of a non-registered association, the court should consider its business purpose, participation in public organizations (such as the National Council of Consumers and Users), and the number of its members and registered offices;<sup>9</sup> and
- (iii) *ad hoc* committees (which are also subject to a finding by the court that they are “*adequately representative*”). Unlike associations, committees do not need to have a business purpose or office, or participate in public organizations, since it suffices that they be *ad hoc* groups of individuals collecting funds for a selfless purpose announced by the committee’s promoters (Article 39 of the Italian civil

<sup>7</sup> The new law does not appear to derogate from existing rules granting first instance jurisdiction to appellate courts with regard to certain antitrust claims.

<sup>8</sup> A list of the sixteen associations which are currently registered is available on the Internet website of the Ministry for Economic Development ([http://213.175.14.65/organigramma/documento.php?id=1996&sezione=organigramma&gruppo=0&tema\\_dir=tema2](http://213.175.14.65/organigramma/documento.php?id=1996&sezione=organigramma&gruppo=0&tema_dir=tema2)). Case law developed in other contexts suggests that it is not necessary that registration “*is already perfected at the moment the claim is filed, but it is sufficient that it intervenes during the course of the proceedings*” (Court of Rome, 10.5.2000, in *Giur. Rom.*, 200, pp. 421 *et seq.*).

<sup>9</sup> Court of Appeal of Rome, 9.24.2002, in *Foro it.*, 2003, I, pp. 332 *et seq.*; Court of Turin, 4.12.2000, in *Giur. it.*, 2001, pp. 505 *et seq.*; Court of Rome, 7.27.1998, in *Giust. civ.*, 1999, I, pp. 2520 *et seq.*

code). Accordingly, recognition of a committee as “*adequately representative*”, is likely to hinge on the nature of the objectives that it seeks to achieve, the number of its members, and the number of non-members contributing to the common fund.

Both in the case of non-registered associations and *ad hoc* committees, findings of “*adequate representation*” may also be influenced by the number of individuals opting into the collective action or otherwise intervening in the proceedings.

### 3. Opting into collective actions and intervening in the proceedings

Any consumer or user having an interest in the outcome of the collective action is permitted to opt into the same. Pursuant to Article 140-*bis*, the court’s judgment “*is binding [...] upon consumers or users who have opted into collective actions*”.

Consumers or users may opt into the collective action by means of a simple letter or other written communication sent to the association or committee promoting the collective action.<sup>10</sup>

Consumers and users opting into an action do not become full-fledged parties to the proceedings. Accordingly, they do not have any procedural rights (including the right to appeal). To acquire such rights, a consumer or user must become an intervenor in the proceedings. Intervention, as distinguished from merely opting in, imposes on the consumer or user the obligation to bear his own legal costs.<sup>11</sup>

The commencement of a collective action tolls the statute of limitations both for consumers or users opting into the action and for those intervening in the proceedings (provided that the period of limitation has not already run at the time of opting in or intervening).

### 4. Preliminary decision regarding “maintainability” of collective actions (the so-called “filter”)

At the initial hearing, after having heard both parties and collected preliminary evidence, the court “*rules on the maintainability of the collective action*”. Actions are not “maintainable” if:

- (i) they are “*manifestly groundless*”. This includes claims based on alleged conduct

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<sup>10</sup> The opt-in right may be exercised at any time during the first instance proceedings or even on appeal, up to and including “*the last hearing preceding the rendition of the [appellate] judgment*”.

<sup>11</sup> In first instance proceedings, intervention is allowed until the last hearing preceding the rendition of the judgment (Article 268, paragraph 1, of the Italian code of civil procedure). In appellate proceedings, however, the right to intervene is granted only to those who would in any event be entitled to challenge the judgment as third parties.

not falling within the subject matter of Article 140-*bis*, or claims aimed at protecting the rights of persons other than consumers or users;

- (ii) there exists “*a conflict of interest*”. This provision is aimed at preventing abuses by promoters of collective actions, although its practical impact is difficult to predict; or
- (iii) the court does not identify “*a collective interest which may be adequately protected by means of the collective action*”. This provision recognizes that not all disputes between a business and a multitude of consumers or users can be adequately dealt with through the exercise of a collective action. The law encompasses only disputes that are “*serial in nature*”, *i.e.*, which relate to issues of fact and law that are common to each of the relevant individuals.<sup>12</sup>

If it allows the collective action to go forward, the court will order the plaintiff(s) to give adequate notice of the suit to the public, at its own expense, in order to allow interested consumers and users to opt into the action (or intervene in the proceedings).

The court’s ruling on the “maintainability” of the action is subject to appeal.<sup>13</sup> Notice of appeal must be filed with the competent court of appeals within ten days of notice of the court of first instance’s judgment. Standing to appeal is limited to the party that commenced the action, the defendant enterprise, and any individuals who have intervened in the proceedings (but not those who have merely opted into the action).

An appeal against an order allowing the collective action to go forward does not suspend the same, unless the parties agree otherwise (Article 296 of the Italian code of civil procedure).

## 5. The judgment

If, after hearing all of the evidence, the court holds that the collective action is well founded, it will:

- (i) hold the defendant enterprise liable to pay damages (or to grant refunds) in favor

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<sup>12</sup> In cases where entitlement to damages or restitution requires the ascertainment of circumstances peculiar to each consumer or user, the court should, in principle, not recognize a collective interest that can adequately be protected through the exercise of a collective action, and should therefore dismiss the suit. For example, it is doubtful whether a collective action regarding investments in securities should be permitted to go forward if the liability of the defendant financial intermediary depends upon the ascertainment of specific circumstances relating to each individual investor involved, such as the suitability of the particular financial product involved as an investment by the individual, given the latter’s sophistication and tolerance for risk.

<sup>13</sup> If the alleged conduct is already the subject of proceedings pending before an Italian independent authority (such as the national antitrust authority), the court may postpone its ruling on the “maintainability” of the collective action until the independent authority has rendered its own decision.

of the interested consumers or users; and

- (ii) specify the criteria on the basis of which the amounts due to each consumer or user are to be determined and, if the evidence is sufficient for this purpose, fix the minimum amount due.

The defendant is entitled to appeal any adverse judgment. Likewise, the plaintiff association or committee, as well as any individual who intervened in the proceedings (but not individuals who merely opted into the collective action), can file an appeal against any adverse judgment (including, in the case of intervenors, any judgment that excludes them from the class of consumers or users held by the court to be entitled to benefit from the judgment).

#### 6. Individual actions

The fifth paragraph of Article 140-*bis* entitles individuals “*who have not opted into the collective action, and who have not otherwise intervened in the proceedings*”, to commence their own separate action against the enterprise. Conversely, both individuals who have opted in and those who have intervened are precluded from asserting individual actions.

Accordingly, the enterprise runs the risk of having to defend itself in a large number of proceedings involving the same alleged conduct, over a prolonged period. In particular, based on the general provisions of Italian civil procedure, it would seem that: (i) consumers or users who did not opt into the collective action and did not intervene in the proceedings may sue the enterprise, individually or jointly, under Article 103 of the Italian code of civil procedure; and (ii) different consumer associations and/or committees could separately pursue similar collective actions, insofar as Article 140-*bis* does not rule out this possibility.

#### 7. Interim measures

Under general rules of Italian civil procedure, interim injunctive relief may be sought in order to protect any right that is sought to be recognized in proceedings on the merits. Insofar as Article 140-*bis* is silent in this respect, consumer associations and committees are likely to argue that they have standing to request interim injunctive relief in support of collective actions initiated by them. For example, consumer associations and committees could request interim injunctive relief pursuant to Article 700 of the Italian code of civil procedure aimed at avoiding the worsening of a damage resulting from alleged unfair competition practices, or a freezing order pursuant to Article 671 of the Italian code of civil procedure in the event there exists an alleged risk that the assets of the enterprise will prove insufficient to satisfy individual claims for damages or restitution, should the court find liability on the part of the enterprise.

#### IV. The second “non-contentious” phase

##### 1. Settlement proposals and settlement burden

As noted, the new law provides that the actual amounts owed to individual consumers or users are to be determined in a second, so-called “non-contentious”, phase.

Under the new law, the enterprise is required, within sixty days of service of any judgment finding liability, to propose “*in writing, the payment of a sum which is communicated to the individuals entitled to it and filed with the clerk of the court*”, such sum to be determined in accordance with the criteria set forth in the judgment. If accepted by a consumer or user, such a settlement proposal constitutes a final order enforceable as such by such consumer or user.

In the event either that the enterprise fails to formulate a settlement proposal within the allotted time, or any individual fails to accept such a proposal within sixty days of notice thereof, the president of the competent court may establish a “*settlement body for the determination of the sum to be awarded*” to any individual involved who has so requested. Such a settlement body is composed of three lawyers, two of which are nominated by the parties and the third, who serves as chairman, by such president of the court. The settlement body determines, “*through minutes executed by its chairman*” – whose provisions are legally enforceable – “*the modalities, terms, and amounts to be awarded to individuals*”, based on the criteria specified in the judgment.

##### 2. The conciliation procedure before the “conciliation bodies” contemplated by Article 38 of Legislative Decree 1.17.2003 No. 5

Alternatively, in the event of agreement between the defendant and the relevant plaintiff association or committee, the president of the court may defer the dispute relating to the *quantum* of damages to any “conciliation body” registered at the Ministry of Justice.<sup>14</sup>

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For further information about any of the issues raised in this memorandum, please feel free to contact Ferdinando Emanuele or Francesco De Biasi in the Firm’s Rome office (+39.06.69.52.21).

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<sup>14</sup> Seemingly, neither intervenors nor individuals opting in are entitled to object to such an agreement. An updated list of these “conciliation bodies” is available on the Internet website of the Italian Ministry of Justice ([http://www.giustizia.it/ministero/struttura/dipartimenti/elenco\\_conciliatori.htm](http://www.giustizia.it/ministero/struttura/dipartimenti/elenco_conciliatori.htm)).



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