

Class/collective actions in Italy: overview

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OVERVIEW OF CLASS/COLLECTIVE ACTIONS AND CURRENT TRENDS

1. What is the definition of class/collective actions in your jurisdiction? Are they popular and what are the current trends?

Definition of class/collective actions

Pursuant to Article 140-bis of Legislative Decree No. 206/2005 (Consumer Code), a class action is an action which can be brought by consumers to protect their collective or their individual interests, provided they are homogeneous.

To this end, members of the class can seek redress (directly or through a representative body) for a breach of contract or for a violation of consumer regulations.

The class action governed by Article 140-bis of the Consumer Code should not be confused with the actions which representative entities can bring under Article 140 to seek injunctive relief against violations of the collective interests of consumers.

Use of class/collective actions

Class actions have been introduced in the Italian legal system through Article 140-bis of the Consumer Code (*Law No. 244 of 24th December 2007, Article 2, §446*). After several delays and significant amendments, Article 140-bis of the Consumer Code entered into force and is applicable to unlawful actions committed after 15 August 2009. Pursuant to this early formulation of this provision, class actions were admissible only if they sought to uphold rights which were consistent (or "identical") for all the members of the class.

Article 140-bis was further amended by Article 6 of the Law Decree No. 1/2012, which lowered the admissibility bar for class actions, allowing claims aimed at affirming "homogenous" rights of the affected consumer class.

In spite of the attempts made by the government to improve their effectiveness, at the time of writing, class actions are not widely employed in Italy, and very few (about 50) have been commenced so far. Moreover, those that were commenced have often been rejected for falling foul of the admissibility requirements. At the time of writing, there have only been three or four cases where a court has ruled on the merits of a class action.

Current trends

Class actions are not widely employed in Italy. After the entry into force of Article 140-bis of the Consumer Code, the strict admissibility requirements represented the most daunting obstacle for claimants.

On 13 April 2011 the Court of Rome rejected a class action brought against a tobacco company for damage caused to the health of consumers on the grounds that the claimants were trying to enforce rights that could not be considered "identical" for all members of the class. The inadmissibility was subsequently confirmed on appeal.

On 18 February 2013, the Court of Naples rejected the claims brought by some of the claimants for the same reason (that is, because there were different kinds of interests actioned). In this case, the claimants had purchased holiday packages from the defendant and claimed damages for breach of contract.

A few class actions concerning overdraft fees applied by banks have also been considered admissible by Italian courts. In particular, on 30 June 2016, the Court of Appeal of Turin upheld the admissibility of the class action brought by a consumers' association on behalf of several account holders and confirmed the damages awarded to some of the claimants by the court of first instance.

In all these cases, however, the courts applied the provision in force before 2012, so the latest formulation should make it easier for claimants to fulfil the admissibility requirements. Since the entry into force of the new admissibility bar, about a dozen class actions have been declared admissible.

On 17 November 2015, the Court of Appeal of Turin overturned the ruling of a lower court and declared the admissibility of the class action brought by a representative entity against FCA Italy for unfair commercial practices (namely, the lead claimants claimed that the defendant had provided incorrect information as to effective consumption and CO2 emissions of its vehicles).

On 16 June 2016, the Court of Appeal of Venice recognised that the rights actioned by the claimants were "homogeneous" and admitted a similar class action brought by a consumers' association against Volkswagen.

The cases are currently pending and it remains to be seen whether the claimants will manage to obtain adequate monetary compensation.

REGULATORY FRAMEWORK

2. What are the principal sources of law and regulations relating to class/collective actions? What are the different mechanisms for bringing a class/collective action?

Principal sources of law

The main source of law is Article 140-bis of the Italian Consumer Code (Legislative Decree No. 206 of 6 September 2005).

Principal institutions

Class actions are heard by civil courts. Pursuant to Article 140-bis, section 4 of the Consumer Code, class actions must be brought before the main regional court where the defendant has its registered office. Exemptions are made for smaller regions (in particular, the Court of Turin also has jurisdiction over Valle d'Aosta, the Court of Venice over Trentino-Alto Adige and Friuli-Venezia Giulia, the Court of Rome over Marche, Umbria, Abruzzo and Molise, and the Court of Naples over Basilicata and Calabria). Class actions are heard by a panel of three judges.



Different mechanisms

Class actions proceedings largely follow the ordinary rules of civil procedure, but they do present significant peculiarities.

The lead claimant must serve a writ of summons on the defendant at least 90 days before the date set for the first hearing. The writ of summons must be filed before the competent court within ten days of the service. A unique feature of the class action under Article 140-bis of the Consumer Code is that the writ of summons must also be served on the public prosecutor, who may express its opinion on the admissibility of the action.

After the first hearing, the court rules on the admissibility of the class action or suspends the proceedings (if there are other proceedings concerning the same issues already pending before an administrative agency or an administrative court).

The class action may be rejected at this preliminary stage if:

- It is patently unfounded.
- There is a conflict of interests.
- The rights which the lead claimant seeks to uphold are not homogeneous to the entire class.
- It appears that the lead claimant cannot adequately protect the interests of the class.

Italy has not adopted the US "opt-out" model (a choice which according to some commentators may account for the lack of success which class actions have met in Italy), therefore, if the class action is deemed to be admissible, the court orders the defendant to publish a notice at its own expense, so as to allow other members of the class to opt-in.

With the same preliminary ruling, the court sets a deadline (which cannot exceed 120 days from the publication of the class action notice) for the opt-in of other members of the class.

3. Are class/collective actions permitted/used in all areas of law, or only in specific areas?

Pursuant to Article 140-bis of the Consumer Code, class actions can be brought to seek redress for the violation of the following rights, which must be "homogenous" for the entire class:

- Contractual rights of a class of consumers towards the same trader. These rights may also arise from standard terms and conditions and mass contracts.
- Rights arising from product liability, even in the absence of a direct contractual relationship with the producer.
- Rights to compensation for the damage suffered due to unfair commercial practices or anti-competitive behaviour.

Product liability

Product liability is explicitly mentioned under Article 140-bis of the Consumer Code as an admissible ground for a class action, even in the absence of a direct contractual relationship with the producer.

Environmental law

There is no case law on the matter, but since the new formulation of Article 140-bis of the Consumer Code does not mention tortious liability, scholars tend to exclude the admissibility of class actions for environmental damage.

Competition law

Anti-competitive behaviour is explicitly mentioned under Article 140-bis as an admissible ground for a class action.

Pensions disputes

Class actions concerning pension disputes fall within the scope of Article 140-bis and can therefore be considered admissible.

Financial services: consumer redress

Rights arising from financial services contracts fall well within the scope of application of Article 140-bis of the Consumer Code and therefore represent admissible grounds for a class action. Class actions concerning overdraft fees applied by banks have been considered admissible by Italian courts.

Other areas of law/policy

Class action proceedings must be stayed if the same facts are also investigated by agencies or administrative courts. The decision of an agency which ascertains a violation of competition law or an unfair commercial practice can be used as evidence in a class action.

LIMITATION

4. What are the key limitation periods for class/collective actions?

The limitation periods are those applicable to the actioned rights. In general, the limitation period for actions based on breach of contract is ten years. However shorter limitation periods apply to the actions and rights arising from specific types of contracts (for example, transport and insurance contracts) while a three year limitation period applies to product liability claims.

The limitation period for actions based on tort is five years from the moment when the event occurred or the claimant should have reasonably become aware of the damage.

Pursuant to Article 140-bis of the Consumer Code, the limitation periods are suspended by the service of the writ of summons (for the leading claimant) and by the filing of the opt-in application (for other members of the class). Consequently, the filing of a class action does not toll the limitations period for other potential claimants who did not opt-in.

Moreover, consumers are barred from commencing a separate class action for the same conduct after the expiry of the deadline to opt-in. If a separate class action is commenced before the expiry of this deadline, the proceedings are joined.

As a general rule, limitation periods can be suspended by sending a claim letter to the defendant.

STANDING AND PROCEDURAL FRAMEWORK FOR BRINGING AN ACTION

Standing

5. What are the rules for bringing a claim in a class/collective action?

Definition of class

The class includes all consumers and users who can claim homogenous rights towards the same trader. However, the Italian Consumer Code does not explicitly provide a definition of the notion of "class".

Potential claimant

The legal basis for standing in a class action is set out by Article 140-bis of the Consumer Code. The subjects entitled to bring the claim are the individual users or consumers which have suffered damage due to the conduct of the defendant, provided they can claim "homogenous" rights.

National consumer associations, committees and representative entities have locus standi only if they have received a specific mandate from members of the class.

Finally, for the class action to be admissible the lead claimants must be able to adequately protect the rights of the class.

Claimants outside the jurisdiction

The relevant provisions do not expressly address the possibility of the opt-in of foreign consumers or of class actions brought against foreign companies. National, international and EU provisions on conflict of laws apply.

In principle, there is nothing in the provisions governing class actions which would prevent a foreign consumer from opting into a class action filed before an Italian court.

Professional claimants

The assignment of consumer claims is generally considered to be admissible (provided that the claim is not of a strictly personal nature) and over the last few years the role of professional claimants has grown significantly, especially in the field of motor insurance and air passengers' rights. There is however no specific reference to professional claimants in the provisions governing class actions.

Qualification, joinder and test cases

6. What are the key procedural elements for maintaining a case as a class action?

Certification/qualification

There are no specific certification/qualification rules. However Article 140-bis provides for an admissibility test.

Accordingly, a class action is inadmissible if:

- It is patently unfounded.
- There is a conflict of interests.
- The rights which the claimants seek to defend are not homogeneous for the whole class.
- It appears that the lead claimant cannot adequately protect the interests of the class.

The competent court rules on the admissibility of the class action after the first hearing. If the class action is deemed to be admissible, the court also sets out the opt-in criteria for other claimants.

If the case is declared inadmissible, consumers may commence individual proceedings against the defendant.

Minimum/maximum number of claimants

Article 140-bis of the Consumer Code does not provide for a minimum number of claimants required to bring a class action.

Joining other claimants

To start the proceedings, the lead claimant must serve a writ of summons on the competent public prosecutor and the defendant at least 90 days before the date set for the first hearing. The writ of summons must be lodged with the competent court within ten days of the service.

After the first hearing, the court rules on the admissibility of the class action or orders a stay if there are proceedings concerning the same issues pending before an administrative agency or an administrative court.

Italy has adopted the "opt-in" model, therefore, if the class action is deemed to be admissible, the court orders the defendant to publish a ruling notice at its own expense, to allow other members

of the class to opt-in. The judge has considerable autonomy as to the form which the advertisement of the class action should take.

One of the procedural objections raised by the defendant in a class action concerning bank overdraft fees currently pending before the Court of Turin was the non-compliance with the order to advertise the action. However, on 30 June 2016 the Court of Appeal of Turin rejected the appeal filed by the defendant and confirmed the admissibility of the class action.

With the preliminary ruling, the court also sets an opt-in deadline (which cannot exceed 120 days from the publication of the class action).

Potential claimants may opt-in without the assistance of a lawyer. By opting-in they relinquish the right to sue the defendant separately.

Test cases

The relevant provisions did not introduce the possibility to file "test cases".

Timetabling

7. What is the usual procedural timetable for a case?

Pursuant to the general rules on civil procedure, at least 90 days must elapse between the service of the writ of summons and the first hearing (the time limit is 150 days if the service has to take place abroad).

If the court rules that the class action is admissible, it sets a deadline for the publication of the order and a further deadline (which must not exceed 120 days from the publication) for the opt-in of other members of the class.

After this preliminary stage, the competent court sets the procedural timetable, which will likely vary on the basis of the complexity of the evidentiary phase.

The final ruling on the merits of the case becomes enforceable 180 days after its publication.

Effect of the area of law on the procedural system

8. Does the applicable procedural system vary depending on the relevant area of law in which the class/collective action is brought?

The applicable procedural system does not vary on the basis of the area of law in which the class action is brought.

FUNDING AND COSTS

Funding

9. What are the rules governing lawyers' fees in class/collective actions?

Fee agreements may vary as for any other claim. Under Italian law, however, success fees calculated as a fraction of the award are prohibited.

10. Is third party funding of class/collective actions permitted?

While in principle there is nothing to prevent a third party from funding litigation, direct third party funding of litigation is not common in Italy and there is very little case law on this subject.

Third party funding of litigation in the form of the assignment of rights to professional claimants is however increasingly common, especially with regard to air passengers' claims.

11. Is financial support available from any government or other public body for class/collective action litigation?

Financial support from the Italian Government is available for claimants whose annual income falls below a threshold set by the law (the current threshold is EUR11,528.41 per year). The potential claimant who fulfils the income requirements must file an application before the local Bar Association.

12. Are other funding options available to claimants in class/collective actions?

No specific funding opportunities are available to claimants in class actions. In principle, after-the-event insurance would be admissible under Italian law.

Costs

13. What are the key rules for costs/fees in class/collective action litigation?

Costs are assessed by the court at the end of the proceedings. Under Italian law there is a general "loser pays" principle which generally allows for the recovery of some lawyers' fees and expenses.

However, costs and fees can generally be recovered only at the end of the proceedings and in the case of a favourable outcome.

The court assesses whether the lawyers' fees are reasonable and whether they should be reimbursed in full or only in part. Ministerial Decree No. 55/2014 sets, in very broad terms, the parameters which the court should follow in this assessment.

When dealing with vexatious litigation and patently unfounded claims the court has the power to significantly increase the costs awarded to the winner.

With regard to class actions, the costs of the publication of the action notice are borne by the defendant, but the relevant provisions grant considerable autonomy to the court in the assessment of the other costs of the proceedings.

Generally, if the case is settled out of court, the court will not rule on costs.

Key effects of the costs/funding regime

14. What are the key effects of the current costs/funding regime?

The difficulty of obtaining legal aid from the government (due to the particularly low income threshold) or from third parties, and the risk of having to bear lawyers' fees and even some of the defendant's costs if the class action is declared inadmissible, or if the claim is rejected, may have had a discouraging effect on possible claimants.

Moreover, even if the outcome of the action is successful, claimants will have to await the final judgment for the (often only partial) reimbursement of the legal costs.

Most practitioners would agree that the current regime as regards costs and funding may be one of the main causes of the lack of success of class actions in Italy.

DISCLOSURE AND PRIVILEGE

15. What is the procedure for disclosure of documents in a class/collective action?

There are no specific rules concerning the disclosure of documents in class actions.

Pursuant to the general rules on the disclosure of documents in civil proceedings, any party may request the judge to order the disclosure of documents held by any other party to the proceedings or even by third parties and agencies. The failure to comply with the disclosure order may be taken into account by the judge in its final decision on the merits of the case.

No party can be ordered to disclose documents covered by legal or professional privilege or in breach of the rules on professional secrecy.

Moreover, both criminal law and professional ethics prohibit the disclosure by lawyers of documents covered by professional secrecy.

16. Are there special considerations for privilege in relation to class/collective actions?

There are no special considerations for privilege where class actions are concerned.

EVIDENCE

17. What is the procedure for filing factual and expert witness evidence in class/collective actions?

There are no specific rules as regards the filing of factual and expert witness evidence in class actions.

There are also no specific requirements as regards pre-trial witness statements and there are no particular restrictions on the evidence that can be filed, provided it is relevant to the case at issue.

Witnesses can only answer the questions put to them by the court. The party which requested that a witness be heard proposes the questions to the court, which rules on their admissibility.

If the case involves particularly complex or technical issues, the judge can appoint a court expert and set out the questions that must be submitted to the expert. The parties are also able to appoint their own experts who will assist the court expert and take part in the proceedings.

DEFENCE

18. Can one defendant apply to join other possible defendants in a class/collective action?

Joining other defendants

Nothing prevents a defendant from applying to summon other possible defendants to join the class action, provided it has an interest in doing so. For example, a defendant may apply to summon other parties responsible for the alleged damage in order to be held (partially or totally) harmless by said parties. The application must be made in the first written submission filed before the court.

It is not however possible for other parties to voluntarily join the proceedings as either co-defendants or claimants. Potential claimants can therefore join the proceedings only through the opt-in, and within the timeframe set by the court.

Rights of multiple defendants

In principle, nothing prevents multiple defendants from sharing confidential information and co-ordinating their defensive strategies.

Moreover, multiple defendants are free to instruct the same lawyers or joint experts, provided there are no conflicts of interest.

DAMAGES AND RELIEF

19. What is the measure of damages under national law in the field of class/collective actions?

Damages

According to the established case law of the Italian Supreme Court (*Corte di Cassazione*), exemplary or punitive damages are not admissible under Italian law.

There is no cap on the quantum that can be recovered, either from a single defendant or overall, and money damages are apportioned between the claimants by the court on the basis of the damage suffered by each of them. However, if the breach of contract did not entail wilful misconduct the claimant can only claim compensation for the damage which was foreseeable when he entered into the contract.

In determining the damages the court can take into account moral damage, actual economic losses and lost profits.

Recovering damages

Any defendant may recover damages paid in a class action from other subjects which may be responsible for the alleged conduct. To this end, the defendant can request the court's authorisation to summon these subjects to join the proceedings.

Interest on damages

The interest accrued on the damages is calculated on the basis of the legal interest rate set by the Ministry of Finance. A higher interest rate is applicable starting from the moment when the action is brought.

20. What rules apply to declaratory relief and interim awards in class/collective actions?

Declaratory relief

Pursuant to Article 140-bis of the Consumer Code, with the class actions the claimants seek a declaratory judgment as regards the defendant's liability, compensation for the damage suffered and/or the reimbursement of sums unduly paid. There appears to be no legal grounds for declaratory relief.

Interim awards

The court may adopt interim awards to adjudicate on preliminary issues (such as jurisdiction, locus standi, and so on).

SETTLEMENT

21. What rules apply to settlement of class/collective actions?

Settlement rules

Cases can be settled out of court, pursuant to Article 140-bis of the Consumer Code, and waivers and settlements are without

prejudice for the claimants who have not expressly given their consent to the waiver or the settlement.

Pursuant to Article 140-bis of the Consumer Code, the court can either determine the definitive amount which must be paid to each claimant or it can alternatively set out the criteria which should be applied in determining the amount. In the latter case, the court must also set a deadline for the parties to reach an agreement on the amount of the damages. Should the parties fail to reach an agreement, the court will then adjudicate on the damages owed to each claimant.

Separate settlements

In principle, nothing prevents a defendant from settling the claim separately. In this case, the proceedings would continue between the claimants and the remaining claimant(s). However, if any other defendant has requested to be held harmless by the defendant in question, a settlement with the claimants would not allow the latter to extricate itself from the proceedings.

APPEALS

22. Do parties have a right to appeal decisions relating to class actions, such as a decision granting or denying certification of a class action?

The parties have the right to appeal the preliminary decision on the admissibility of the class action before the competent Court of Appeal (so-called "*reclamo*") within 30 days from the publication of the ruling or its service to the interested party. The Court of Appeal must rule within 40 days from the filing of the appeal, however the deadline is not binding.

The final decision on the merits of the case can be appealed before the Court of Appeal (so-called "*appello*") within 30 days of the service of the judgment to the interested party, or within six months of the publication of the decision.

As a general rule, under Italian law the appeal does not automatically suspend the enforceability of judgments. It is however possible to request a suspension to the Court of Appeal.

ALTERNATIVE DISPUTE RESOLUTION

23. Is alternative dispute resolution (ADR) available in class/collective actions?

While there are no specific provisions on alternative dispute resolution where class actions are concerned, the Italian Consumer Code includes provisions on alternative dispute resolution between consumers and professionals or undertakings.

It is possible to activate ADR procedures before litigation and in some cases the parties must try to settle the controversy through a mediation procedure before an action can be brought.

PROPOSALS FOR REFORM

24. Are there any proposals for reform concerning class/collective actions?

A legislative proposal for the reform of the rules on class actions was approved in 2015 by the lower house of the Italian Parliament, but the Senate has yet to examine the text. Under the proposed text, class actions would be admissible regardless of the cause of action and the opt-in would be possible up to a later stage of the proceedings. However, at present, the procedure appears to be stalled and it is not possible to set a timeline for the entry into force of the law.

There are currently no plans to reform the current regime on the funding of litigation and the allocation of the costs.

The implementation of the EU Commission recommendations on common principles for injunctive and compensatory collective redress mechanisms will require the amendment of the current regime.

In particular, the recommendations call for the amendment of the rules concerning the locus standi of representative entities, the exercise of the opt-in by potential claimants (since currently it is not possible for claimants to opt-in "at any time before the judgment" but only within a narrow timeframe), and the financing of litigation by third parties.

ONLINE RESOURCES

Gazzetta Ufficiale

W <http://www.gazzettaufficiale.it/>

Description. It is the official journal of the Italian Republic. It is maintained by the Italian Government and the information it contains is official. All legal acts published on the *Gazzetta Ufficiale* are legally binding. All laws, legislative decrees, law decrees and ministerial decrees are available on the website of the *Gazzetta Ufficiale*.

AIFOS – Associazione Italiana Formatori ed Operatori della Sicurezza sul Lavoro

W <http://aifos.org/>

Description. On this website it is possible to download an unofficial English translation of the Italian Consumer Code (Legislative Decree no. 206/2005).

ClassAction.it

W www.classaction.it/

Description. On this website it is possible to download an unofficial English translation of the provisions governing class actions in Italy. The website also provides information on recent litigation and legislation.

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