

FOCUS ON COLLECTIVE REDRESS. WHAT NOW, WHAT NEXT? ITALIAN CLASS ACTION. A LOST OPPORTUNITY.

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1. LEGISLATIVE PATH. THE FINAL TEXT OF THE LAW. DOUBTS REGARDING APPROVED TEXT.

1.1 LEGISLATIVE PATH AND LAW'S COMING INTO EFFECT

From 01/01/10 even in Italy it's possible to file class action, introduced by consumers' code clause 140 *bis*.

Before reviewing some aspects of the law it's useful to give some hints to its troubled approbation started in 2004.

During these last years many bills that we can briefly classify in two groups were proposed: the first group is based on the north-American model, from which it took both opt out tool and foresight of punitive (or extra-compensative) damages, the second one totally denied the first one.

Unfortunately this last approach prevailed and, as we will see, Italian legislator introduced a class action that seems to be structured not to bother too much big companies.

Seen from this angle, before reviewing clause 140 *bis* Consumers' Code text in force, it's convenient to underline that a first "oddity" regarding this law is in its provided (by clause 49, par. 2, L. 99/09) not applicability to torts committed before law 99/2009 came into effect (that means before 16/08/09). This regulation stands perfectly alone among other trial regulations inside the system, as it gives a substantial power to trial principle *tempus regit actum*, in accordance with which, in order to find out the trial instrument applicable, what matters is the moment when action is forwarded and not the moment when the tort was committed.

On the other hand Court of Turin (27/05/10) clarified that the nature of clause 140 *bis* is merely procedural, and still this is very clear, when stating that law "does not create new rights, but only regulates a new procedural mean for consumer's

protection”. Hence, if law had not defined it, class action could be issued also to protect consumers’ rights violated before 16 august 2009.

In this respect, legislator’s choice seems to be groundless, unless you consider it as specifically aimed to protect big companies that during the last years had regularly and significantly violated consumers’ rights (such as banks, Parmalat, Cirio, but also Enel during the blackout in 2003).

1.2. REGULATORY TEXT AND CRITICAL ASPECTS

If a good beginning bodes well, we only can wait for things to go worse and worse for current law leaves us puzzled even from other point of view, related from one side to the types of claim that can be brought and related to the other side to possible Court pronouncements.

As for the first problem it’s useful to state beforehand that clause 140 bis, par. 1 e 2, consumers’ code gives the right to file to each consumer-member of the class for claiming redress or restitution, regarding:

- a) contractual rights for different consumers and users who have the identical situation towards the same company, including rights related to contracts entered in according to civil code clauses 1341 and 1342;
- b) identical rights due to final consumers of a given product towards its producer, even regardless to a direct contractual relationship;
- c) identical rights to redress deriving for consumers and users from unlawful business procedures or anti-competitive behaviors.

1.2.1 IDENTITY OF LAW AND SITUATION.

Once established categories of rights that can be protected, we may ask why legislator wanted to limit the range of instrument’s efficiency only to “identical situations” and “identical rights” and, before coming to an end, we have to ask what is the requirement of “identical situation” or “identical right”.

We can give two meanings, the first one has a narrow meaning, the second one broad.

If you get the first one, you can only note that class action is potentially useless, due to the fact that it's difficult to find two rights completely identical, both regarding who is entitled to these rights, and regarding the source of the right (that most likely derives from different scenarios occurring in different time occasions), and regarding patrimonial entity (homogenous juridical scenarios, such as signing the same type of contract, can contain distinguishing elements merely related to the price of goods or services).

So it's better to give a broader meaning to the concept of "identical right (or situation)", which is consistent with overall law text, and then which refers to identity from the different perspective of the "act" or "fact" (contractual or non-contractual) that led to the rise of right.

On the other hand, such interpretation is the only one who has consistency with subsequent clause 140 *bis*, paragraph 12, where it's provided that the Court can, when accepting the claim, liquidate amounts due or establish the homogeneous criterion to calculate them.

It's clear that such provision wouldn't make sense if rights that can be protected with collective class action should be closely identical, for in this perspective, once evidence of the right has been stated, Court should not establish homogeneous criteria for the charging of the losing party, but should only liquidate the damage equally for all subjects issuing the class action.

Once the meaning of "identical right" is clear, it's useful to review the three categories of rights that can be executable.

Description of the first category, contractual damages, is clearly flowery when stating enforceability of "contractual rights", including those rights reserved to contract signed according to civil code clauses 1341 and 1342, that is contracts signed via standard forms. It's like saying "I love women, even good-looking ones!".

Yet the danger of text extent is much more different, for such a type of provision can lead the Courts to the mentioned narrow meaning of the concept for “identical rights”, for conditions established by civil code clauses 1341 and 1342 in the field of contracts often describe closely identical positions. Such interpretation would highly reduce the extent of class action application on contracts, limiting it only to contracts provided by civil code clauses 1341 and 1342.

Nor you can balance this limitation by claiming that in any case the same rights could be applied according to other two categories (damages caused by defective products or by unlawful and anticompetitive business procedures), for in this case you shall meet serious evidentiary issues.

In fact when consumers’ class acts claiming a contractual responsibility to the company, complaining non-fulfillment, can benefit from “principle of proximity of the right” (according to this, it’s the defendant who has to prove that its duties has been fulfilled); instead if the class acts in non-contractual domain, it’s the same class who has to prove each fact submitted that is the ground to the right of compensation.

1.2.2. ATTEMPTABLE PRONOUNCEMENTS.

As for the second problem related to attemptable pronouncements, we must underline that clause 140 *bis*, par. 12, provides that, if the Court finds the defendant liable, Court can condemn him to redress or restitution or can specify an uniformly applicable criterion to calculate each individual redress.

The law then excludes “extra-compensation damages” whose absence will necessarily affect Italian class action’s appeal.

Some experts say that legislator followed the path of our juridical culture by excluding “extra-compensation damages”, and in fact Court always did exclude admissibility of “extra-compensation damages” in Italy and yet this does not mean that legislator still can’t introduce this, but not preventing any constitutional law.

Actually a foresight of “extra-compensation damage” was shyly introduced in our system with code of civil procedure clause 96, par. 3, when providing that, in case of abuse of the defense right, Court can sentence the losing party to pay an amount equitably assessed.

It seems to me that, even if this issue is a taboo for our doctrines, internal (and European) system is evolving taking into account broader protection means related to the “weak” contracting party. This evolution has been inspired by a modern interpretation of clause 2 of our Constitution and of the principle of social solidarity provided by it, among which “extra-compensation damages” could fall.

In prospect then, even facing difficulties in application above all when assessing the amount of the extra-compensation damage (unless you subscribe to theory of multiple), it seems that there aren’t any prescriptive barriers to introduce “extra-compensation damage” into clause 140 *bis* consumers’ code. But this is a choice that has to be taken by legislator.

At last we must underline how, even acting in the domain of effective law, Courts could sentence the company to an additional damage compensation different from economic loss, by itself linked to financial loss or failure of profit suffered, for (if you consider a broader meaning of “identical right or situation”) the law does not prevent consumers to claim for compensation “not material” damage (to be considered as a suffering linked to contract not fulfilled or illegal fact).

2. THE MAIN DIFFERENCES WITH THE AMERICAN CLASS ACTION. THE PRE TRIAL STEP. THE OPT IN MODEL.

The Italian class action seems to be a complex mixture of regulations drawn from diverse European experiences, more than an organic body of laws aimed at the consumers’ rights protection. However, it’s quite well known that the Italian parliament has followed the American model, and that’s why we need to compare the two systems in order to understand their similarities and differences.

As you know, the first main difference between the two is their specific origins. In actual facts, in the USA the various aspects of the collective action are drafted by the magistrates, whereas these aspects are of political competence.

This has created – as a consequence – a system which is ineffective and rusty.

2.1. WHO MAY FILE.

In the American model, any physical or juridical subject, whose interest has the same characteristics as other individuals' and therefore can be identified as “a representative of the class”, has the right to file without any limitations (apart from the personal and economic ability to represent the class).

From this initial point of view, the Italian legislation that amended the previous text in which the active right to sue was attributed only to the consumers associations, is similar to the American one, because the action can be filed by any individual who is part of a consumer class, as long as he can take care and protect the class interest properly. The only element required by the Italian law is that the plaintiff be a consumer (a physical subject who doesn't act for professional aim).

2.2. THE CERTIFICATION OF THE CLASS. THE PRONOUNCEMENT OF ADMISSIBILITY.

In the North American system, the Court must ascertain the existence of the class and verify if it is appropriate to proceed with the collective action as a class action. Then it sets up its own trial schedule to manage it and carries out a jurisdictional check on any transactions in order to prevent any damages to the class participants and identifies the most suitable lawyer (the most experienced and better organised) to represent the interest of the whole class.

From this point of view, the type of preventative control by the Court in Italy is a bit more formal, since it has the duty, as a preliminary phase, to evaluate the type of rights, if the requests have grounds, that there is no conflict of interests, and if the lead plaintiff is suitable to take care of the class interests in an appropriate manner. Subsequently it also has the duty to identify ways of implementing procedures, in

respect of the right to defend oneself. However, the Italian Court of law cannot have control over any transactions.

2.3. THE OPT IN AND THE OPT OUT MODELS. THE PUNITIVE DAMAGES.

In my opinion though, what makes the American system very effective are some aspects that are totally absent from the Italian system, namely the opt out and extra damage compensation (or punitive) instruments. Such instruments, especially the second one, have not been adopted by the Italian legislation for reasons related to the Italian legal tradition.

In Italy, the path to join in is completely the opposite of the one in the USA, because the class members must state clearly they want to join the action. As a result, in Italy the sentence reached in a class action trial is applicable only to those who have chosen the alternative to “opt in”.

As we pointed out earlier, the aspect which makes the American system very effective, is the provision of punitive damages.

The opportunity for the victim to benefit from punitive damage is – in my opinion – the element that enhances the effectiveness of the American class action: on one hand, it stimulates legal firms to invest in this sector and by doing so they can guarantee a better protection of individual rights. On the other hand, it represents a strong deterrent for actions which are clearly unlawful by the big companies.

The solution chosen by the Italian legislator who has not foreseen any potential punitive damage is different. It has produced a compensation system that is unclear. The sentence in fact doesn't necessarily condemn the defendant to pay since it can just indicate the criterion to be used to calculate individual damages.

Therefore you must ask: what could be the key element that will influence the judge and will lead him towards one or the other type of pronouncement?

It is obvious that if there is a large number of participants and each one of them has a slightly different claim to the others, although they might be of the same nature,

the Court typically would choose the second solution, and will establish only the criterion to calculate individual damages, to be applied for with a separate trial.

Instead, if the class action (but as I said this is an extreme case) were brought by subjects who claim that identical rights have been violated, the tribunal should condemn the defendant immediately to redress the damages.

2.4. THE ACTION AGAINST PROVIDERS OF PUBLIC SERVICES.

As regards to quantifying the damage, an alarming new element has been introduced to the previous text referring to the controversy arisen towards providers of public services or services that are publicly used. In actual facts, when they establish the amount of the compensation to be paid by the above providers, the Court must take into account of what has been agreed in favour of end users and consumers of the respective service charters. The issue is that the service charters, devised by the one side only – the company – they never agree the whole damage, but only the simple “indemnity”, which by definition, since it is totally disconnected from the damage, is of symbolic nature and is normally very low.

The uncertainty determined by the law on this point where it’s evident it mixes up the indemnity with the damage compensation, will not be able to avoid creating damaging effects in terms of ability to quantify the damage or effectiveness of the collective compensation tool.

3. COURT ORDERS OF INADMISSIBILITY (TURIN 27/05/10 AND 28/04/11) AND ADMISSIBILITY (MILAN 20/12/10). THE VODEN CASE.

Till now, one year and a half after clause 140 *bis* of consumers’ code coming into effect, more or less ten class actions were issued, some of them with similar contents.

None of these actions, except the one referring to EGO TEST FLU (product marketed in Italy by Voden Medical Instruments) was declared admissible.

Of the class actions issued and not assessed as eligible, one concerned damages caused by smoking addiction, some others bank unlawful charges, another class action was referred to the violation of the information right.

We will consider only three of them, two cases of inadmissibility and one of admissibility.

Before starting the examination of the three pronouncements, I have to point out that, due to high costs (most of them are ad costs) paid by the lead plaintiff at the moment of issuing a class action, CODACONS lawyers were the first lead plaintiffs, in order to make other consumers join in through opt in mechanism.

3.1. COURT OF TURIN 27/05/10.

First action was personally issued by Carlo Rienzi, Codacons president, represented in Court by the same association. He sued Intesa Sanpaolo Bank, claiming nullity of clauses containing the “overdraft commission fee”.

The “overdraft commission fee”, a typical Italian case which I believe it is difficult to find in other European countries, is a charging that bank applies to the account holder in a percentage of the amount of line of credit, different from “interests payable”. For example if I use one thousand euro from my line of credit even if only for one day, and the very next day I am paying in to the one thousand euro, bank is charging me as well with overdraft commission fee on that amount for a three months period and not for one day!

This charging has been stated many times as unlawful by Courts, and yet banks keep on applying it (even if they change its name).

The actor, account holder with a line of credit up to € 15.000.00, claimed that in this specific case two of the three types of rights contained in clause 140 bis were infringed, for the bank had prejudiced his rights derived from the contract and had adopted faulty business procedures and anti-competitive behaviors, due to the fact that all major banks had the same misbehavior violating consumers’ rights.

The Bank objected the inadmissibility of the claim for many reasons: some of them were procedural some other substantive issues.

Intesa Sanpaolo claimed that the actor, using the account for mixed aims, both business and private, could not be considered as a consumer under the clause 3 of consumers' code, for the law requires that the goods or the services must not be involved in any professional activity.

The bank also claimed that the law on the class action field was not applicable for this case, for the clauses actors claimed to be against the law had been fixed before 16/08/09.

Finally the bank claimed that it was not possible for the actor simply to claim the nullity of the fee, for class action could only filed to claim redress or restitution.

Court of Turin, with Court order issued on 27/05/10, stated inadmissibility of class action for the following reasons.

Preliminarily Court considered consistency of "consumer" status, for the clause 140 *bis* gives the right to sue only to the consumers.

Judges started from definition contained in clause 3 of the consumers' code, yet giving to this definition a broad significance, not merely that emerging from text.

The Court, even accepting the mixed use of the bank account, stated also that this condition is not decisive, and the concept of "consumer" is applicable whenever a professional use of the good or service is marginal, like in this very case. In this respect Court of Turin followed the concept of "consumer" adopted by European Court of Justice (Court of Justice CE, 20/01/05, case C - 464/01, Gruber).

Once stated that the actor was a "consumer", Court took into consideration the second point linked to the admissibility of the request, comparing this case to regulations contained in clause 140 *bis*, paragraph 6.

The Court, after verifying that bank did not apply to actor's account clauses that the actor wanted to be cancelled, stated inadmissibility of class action based on the fact that actor had not the right to sue for he was not damaged by the bank's conduct.

This decision is a little bit puzzling because its articulation seems to deny admissibility of evaluation request, contrasting lots of case law happened in the past.

In fact Court of Appeal of Turin, involved in this first Court order, modified the grounds for the decision (yet confirmed inadmissibility of the class action), adding that the request was not acceptable not because the actor had no right to sue (for it was clear that request for assessment was acceptable), but because this kind of request did not fall into categories of pronouncements according to clause 140 *bis* of consumers' code.

Then I can conclude that class action is admissible only to claim pronouncements of redress or restitution.

3.2 COURT OF TURIN 28/04/11

The above mentioned Court order was recently issued by Court of Turin in another case similar to the previous one.

The subject of class action in this case was to establish nullity of line of credit charging clauses regarding contracts for accounts without line of credit.

The Court discussed the interesting trial issue about nature of mandate given by the actor promoting class action to consumers association according to clause 140 *bis*, par. 1.

The issue arose due to the fact that class action was promoted both by three actors and a consumers association (Altroconsumo) who had a mandate only for legal representation.

Court established that the institution of the trial through associations or committees, provided by clause 140 *bis*, falls rightfully in the case like provided by clause 77 code of civil procedure, regulating solicitor's legal representation, both substantial and in the trial, and all related consequences such as impossibility to grant power only for the trial and not substantial.

Hence, as actors had granted to Altroconsumo only legal representation, judges established that this was not enough to validate the presence of the association in the trial.

But the Court went beyond and claimed that in any case, even if a substantial mandate and for the trial is correctly granted, simultaneous and direct presence of the consumers and association was not admitted.

Due to this first consideration, the Court established that class action was correctly issued only by three consumers, without the presence of Altroconsumo association excluded from the trial.

Then the Court, facing three consumers with always negative debit balance and without line of credit, judged the three not eligible to act in the interests of class, and declared the action inadmissible.

Yet the Court order stated something that goes beyond this specific case and whose importance is practical and effective. In fact when considering the three consumers not eligible to act in the interests of the class, the Court pointed out also that the criterion to which the judge had to relate to, regarding to this point, had mainly structural and economic connotation considering that collective action is more burdensome and onerous than individual action.

And the Court then pointed out that, due to this consideration, legislator has specifically planned the possibility to grant a mandate to consumers associations, for these have more suitable structures and resources than individual consumers to act properly in the interests of the class.

So at the end of Court order it seems that the Court assumed consumers association would be always able to “properly act in the interests of the class action”. For this reason one of the criterion fixed by clause 140 *bis*, par. 6, in order to assess admissibility of the class action, would appear to be always met (if the trend is confirmed) if the actor issuing class action granted the mandate to associations.

3.3 COURT OF MILAN 20/12/10.

And finally talking about Court's pronouncement of admissibility in Milan, the first and at the moment the only admitted class action, it's convenient to give some hints to the object of the trial.

Even in this case, as previously mentioned, action was issued directly by a lawyer at Rome Codacons bureau, Simona Zacchei, who went to a pharmacy to buy product named Ego Test Flu, marketed in Italy by Voden Medical.

This happened during winter 2009-2010, the peak distress for swine flu, when pharmaceutical companies launched into the market a set of diagnosis test (to be performed at home) whose efficacy for some of them was in doubt..

Even the Board of health had thrown some doubts on Ego Test Flu efficacy and, though experts considered it not reliable, it was promoted with a 99% safety profile test.

The product showed eventually not reliable and the actor issued the class action against Voden claiming the rendering of the cost paid for the product.

In this pronouncement the Court examined an aspect related purely to the trial, that is if the actor has the power to modify the request advanced according to clause 140 *bis*.

Judges in Milan reached a positive end on that point, asserting that legal procedures as ordinary established by c.p.c, must be applied also to the class action, as legislator did not include special regulations to the procedures that can completely waive the ordinary procedure, but provided some specialties that fit together with it.

Therefore in addition to relevant laws for ordinary procedure, special laws established by clause 140 *bis* will be applicable and these laws consist only, in the pre-trial step, of the explicit foresight of Court order in the field of admissibility.

Once stated the concept that ordinary laws for the trial can be applicable, the Court established that, as provided for regular procedures by code of civil procedure, parties has the right to define and modify requests, objections and conclusions already proposed.

Then the Court asked at what step of the trial this right can be exercised by the parties.

Judges remarked in this respect two aspects: first they think that promptness showed in the code of procedure, when right to define and modify the request is limited to first hearing of the trial, is stressed in the proceeding ex clause 140 *bis*, and second they consider examination of admissibility to be conducted taking into account the whole and final structure of the request.

Hence the Court established that the right to define and modify the request must be exercised within the first hearing.

After this step Court approaches the typical issue regarding the status of “consumer” of the actor.

Voden claimed that, in the trial in Milan, Miss Zacchei, being a lawyer at Codacons, had bought the product specifically to issue the class action, that is only for professional aim. According to the company this circumstance would have caused the forfeit of “consumer” status for the plaintiff, but also the subjective element of “bona fides infringed” by unlawful company’s conduct for, in this case, the actor would be aware of this improper conduct and in order to sue the company had bought the product.

Yet the Court dismissed the objection forwarded by Voden claiming that, due to the unambiguous formulation of the request by the actor in terms of fallacy she was actually taken into, elements introduced could not be considered eligible to block the pronouncement of admissibility because they were not proved.

In short, the Court claims that even if it’s the actor who has to prove that he bought the good or the service as a “consumer”, is also true that it’s not him who has to prove that he did not buy it for a professional use, considering also that this evidence, related to a negative event, would be impossible to prove.

It's up to the defendant, if he is questioning the "consumer" status of the actor, to prove that the product had been bought for professional use (usually proving that the invoice was in the name of a person with a Vat No and not individuals).

In conclusion, I must admit that I don't really like Italian class actions and probably Berlusconi government will not go down to history as the best government introducing the best class action, but this is law and we must try to use it the best we can, even if it carries lots of doubts that can be solved, maybe, only within the trials.

In a reformist perspective parliament should improve the law (and this is what consumers associations wish to) providing extra compensation for damages, removing reference to service charters and, but on this point it's better not to kid yourself, reversing the path to join in from opt in to opt out.