



ICLG

The International Comparative Legal Guide to:

Class & Group Actions 2017

9th Edition

A practical cross-border insight into class and group actions work

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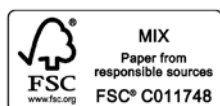
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Italy

Munari Cavani

avv. Raffaele Cavani



avv. Bruna Alessandra Fossati



1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

The Italian legal system provides for different procedures which vary according to the kind of relationships (the so-called Connection) that exist between the claims. In particular, claims can be subjectively or objectively connected depending upon whether they have, respectively, the same parties or objects.

Nevertheless, the above-mentioned identity relationships between the claims are not sufficient in themselves to give rise to what is normally understood by “group action”. Reference has to be made to Cumulative Actions, through which multiple victims seek protection for their individual interests by combining their claims in a single claim. However, every plaintiff remains the only person who has the right of initiative and who must provide an individual Power of Attorney.

On the other hand, the legal instrument for the protection of collective interests is Group Action. These are representative proceedings brought by a representative organisation on behalf of its members. A typical example is laid down under Article 140 of the Consumer Code. According to the aforesaid Article, consumers associations are allowed to bring claims on behalf of their members asking for the cessation of unlawful conduct and the removal of the relevant effects. Therefore, the injunctive relief is the only collective judicial protection available. Other examples are: Article 2601 of the Italian Civil Code, which relates to the suppression of unfair practices; Article 18 of the Workers Statute, which regulates the protection of employee rights; and Article 18 of the Law No 349/1986, which deals with protection from environmental damage.

Finally, the action aimed at protecting “homogeneous individual interests” is “Class Action” (“*Azione di Classe*”) introduced by Article 140bis of the Consumer Code by Law No. 244 of 24th December 2007, and subsequently amended by Law No. 99 of 23rd July 2009, and Law No. 27 of 24th March 2012. The “Class Action” mechanism allows class members and/or consumers to join the proceedings already brought by the principal plaintiff in order to obtain either compensation for damage or restitution for undue payments.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

Cumulative Actions have very broad applicability, covering all areas of law.

Representative Actions, rather, are available only in certain sectors, where they are specifically provided, *inter alia*: competition law; labour law; and consumer law.

On the other hand, Class Actions protect those rights laid down under Article 140bis of the Consumer Code:

- “a) *The contractual rights of a number of consumers and users who find themselves in the same situation vis-à-vis the same company, including the rights related to contracts underwritten through standard form and conditions;*
- b) *Identical rights of final consumers of a given product in relation to its manufacturer, even in the absence of a direct contractual relationship (i.e. product liability);*
- c) *Identical rights of consumers and users to the payment of damages deriving from unfair trade practices or anti-competitive behaviour.”*

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

The determination of one claim leads to the determination of the class only in the case of Class Actions. Indeed, all the plaintiffs who have joined the proceedings are bound by the final outcome.

1.4 Is the procedure ‘opt-in’ or ‘opt-out’?

Italian Class Actions are based upon an “opt-in” mechanism and there is no right to opt-out. The main legislature’s main purpose was, indeed, to minimise legal costs which represent the major threat to the exercise of the right of defence in all cases where consumers find themselves *vis-à-vis* companies.

From a procedural point of view, the admissibility order establishes the deadline by which consumers and users belonging to the class are requested to opt-in.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

Article 140bis does not mention any minimum threshold relating to consumer claims. However, the volume of individual claims/plaintiffs does constitute a factor which the Court takes into account when assessing a claim’s admissibility.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

In Article 140bis, the legislature refers to similarity between claims by using, interchangeably, the expression “*homogeneous individual rights*” and “*identical rights owed to consumers*”.

The generic requirement of “*homogeneity*” is based upon the factual assimilation of the various claims in respect of the rights injured by conduct that has mass-effect. Therefore, it shall arise both in the cases of a single act or repetitive similar acts and in cases where their judicial determination requires the solution of similar or identical factual or legal issues.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

Those entitled to bring Class Actions are: i) individual consumers or users belonging to the same class; and ii) associations and committees, but only if specifically empowered to do so by their members.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Article 140bis Paragraph 9 reads as follow: “*the Court sets the terms and methods of the most appropriate form of public notice in the order with which it admits the action, so that those belonging to the class can join promptly*”. Furthermore, compliance with such public notification is a precondition for the prosecution of the claim.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

Since 1st January 2010, the date on which Law No. 99 of 23rd July 2009 came into force, an average of 10 Class Actions per year has been brought and admitted by Italian courts. These procedures have been mostly used in the fields of Consumer Fraud and Securities/Financial Services.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

The remedy available in Representative Actions is injunctive relief; typically, a court decision ordering a party or parties to cease the unlawful behaviour complained of or to prohibit the application of and/or to modify contractual terms.

Class Actions, in contrast, allow multiple parties to obtain monetary compensation from a common defendant.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

As set out under Article 140, consumer and users’ associations can petition the Court to: “*i) stop or prevent unlawful acts or behaviour damaging the collective interests of members; ii) correct or remove the harmful effects of the above conduct; iii) order the publication of the decision*”.

On the other hand, Class Actions are usually started by physical persons. However, each consumer is allowed to give mandate to consumers’ associations to start the claim, irrespective of whether the particular consumer is a member or not thereof.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

In order to bring Representative Claims, consumers’ associations have to be registered at the Ministry of the Economic Development. The registration is subject to compliance with the conditions laid down under Paragraph 2 of Article 137 of the Consumer Code.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

Pursuant to Article 140 Paragraph 1, Representative Actions may be brought to:

- “*a) stop or prevent unlawful acts or behaviour damaging the collective interests of members;*
- b) implement measures aimed at correcting or removing the harmful effects of the above conduct;*
- c) seek the publication of the decision in a national or local newspaper.”*

Furthermore, the plaintiff may ask the Court to remove from standard contracts those unfair terms and conditions which result in a significant imbalance in the parties’ rights and obligations.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

The only remedy available in Representative Actions is injunctive relief.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

Representative Claims are tried and decided by a single judge.

Class Actions are, in contrast, tried and decided by a Panel composed of three judges.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

With regard to Representative Claims, there is no provision relating to the appointment of specialist judges.

The same applies to Class Actions, in respect of which Article 140*bis* establishes the jurisdiction of the Court as being that of the regional capital where the defendant has its registered offices.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

As far as Representative Claims are concerned, associations define the group-class by specifying the collective interests that have been harmed.

With regard to Class Actions, the class and, therefore, all the potential members that might opt-in, they are defined by the Court's admissibility order. Furthermore, the order sets out a peremptory time limit – not exceeding 120 days from the deadline for public notification – by which the adhesion contracts shall be lodged at the registry. A copy of the order is then sent by the registry to the Ministry of Economic Development which is in charge of further publication thereof, including on its website.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Since previous Court decisions are not binding under Italian law, Italian Courts do not make use of test cases, nor of model cases.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

There are no specific management procedures in the context of class actions.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

Both in the case of Representative Actions and Class Actions, the Court can appoint an expert and question the latter about specific technical issues. In such a case, the parties are also allowed to appoint an expert who assists the Court-appointed one in performing his tasks.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Under the Italian Civil Procedural law, testimony *stricto sensu* is a source of evidence consisting of a statement exclusively relating to facts. As a consequence, expert testimony on technical issues

is not admissible. Moreover, there is neither pre-trial exchange of depositions or of witness statements.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

No documentary pre-trial discovery is provided by the Italian Civil Procedural Code.

3.9 How long does it normally take to get to trial?

In order to ensure that the right to a defence is respected absolutely, provision is made for a time period of 90 days – or 150 days in the case of cross-border disputes – between the time when the defendant has been served and the date of the first hearing.

In the case of Representative Claims only, a 15-day term has to be given to the potential defendant who can avoid trial by ceasing the conduct complained of.

3.10 What appeal options are available?

The admissibility order is subject to a challenge before the Court of Appeal within the peremptory time limit of 30 days from either its disclosure or notification, whichever occurs first. The Court of Appeal shall decide on the claim by order in a closed session within 40 days from when the appeal is lodged.

According to general rules, in both Representative Actions and Class Actions, final decisions shall be challenged before the Court of Appeal within six months from their publication and/or within 30 days from their service. The Court of Appeal's judgment can be challenged before the Court of Cassation.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Under the Italian Civil Code, any right lapses in accordance with a statute of limitation, which may be suspended by giving notice of the complaint.

Once the claim is initiated, the period for the action can be prolonged without limitation.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

The period under the statute of limitation for bringing a claim is:

- 10 years in the case of breach of contract, unless the law prescribes otherwise; or
- five years from the commission of the unlawful act, in the case of tortious claims.

In any event, if the unlawful conduct is also considered to be a criminal offence and a longer statute of limitation period is provided, the latter must also be applied to the civil claim.

In no case does the Court have any discretion to disregard time limits. Neither age, nor the personal circumstances of the claimant normally affect the calculation of the time limits.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Concealment or fraud has the effect of preventing the above-mentioned time limits from beginning to run. Indeed, if the plaintiff's knowledge is affected by concealment or fraud, the latter cannot be said to be aware of the facts constituting the cause of action for the purposes of Article 2935 of the Italian Civil Code.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

The following are types of recoverable damage or loss:

- economic loss, including, both pecuniary loss and loss of profit which are direct consequences of the damage;
- physical damage, which affects the psychological and physical integrity;
- moral damage, including pain and suffering damages; and
- the so-called "existential damage" which negatively impacts on the existence of person, in a consistent or permanent manner.

The last two kinds of damage can be recovered only in those circumstances, provided by the law.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

Since the recoverable damage must be actual and effective, the mere cost of medical monitoring cannot be regarded as recoverable damage.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

The Italian legal system is based upon the "mere compensation principle".

Therefore, plaintiffs are compensated only within the limits of the damage they actually suffered. No punitive damages are recoverable.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

In general terms, there is no limit on the damages recoverable from one defendant.

However, with regard to liability in contract, only the foreseeable damage is recoverable.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

The Court can alternatively: i) quantify the damages directly; or ii) establish the criteria for calculating the amounts. The amounts are liquidated per each class member.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

The settlement agreement is binding only upon those class members who expressly adhere to it. The Court's approval is only required if the criteria for the calculation of the damages is established by the parties' agreement.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

Article 140*bis* does not provide for the refund of the successful party's legal fees. As a consequence, the loser party shall pay the Court fees, the amount thereof being based upon the value of the proceedings.

The Court, in its final decision, shall order the losing party to refund the winning party the legal costs and fees unless the circumstances provided by Article 92 of the Civil Procedural Code apply. The recovery only includes the costs and fees relating to activities before the Court, quantified on the basis of the Ministerial Decree No. 140 of 22nd July 2012.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

Both in the Class Action and in the Representative Action, the leading plaintiff bears all the litigation costs relating to them. However, the promoting entity can ask for "joining fees" from all the intervening parties.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

According to Articles 306 and 310 of the Civil Procedural Code, the discontinuation of the action by a party normally requires the consent of the other party. The party who discontinues the claim must pay the litigation costs to the other party unless otherwise agreed between the parties.

There are no costs consequences for the intervening parties in the class action.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

The Courts define the amount of litigation costs in the final judgment. Article 92 of the Civil Procedure Code allows the Court to limit, in whole or in part, the recoverable costs.

In particular, this rule applies: i) in cases where all parties lose; ii) if the subject matter of the proceedings is completely new; and iii) if the juridical opinion has changed in relation to the claim's matter.

7 Funding

7.1 Is public funding e.g. legal aid, available?

The provision set out by Article 74 of the DPR No. 115 of 30th May 2002 regulates the legal aid in the criminal, civil, administrative and tax proceedings.

7.2 If so, are there any restrictions on the availability of public funding?

As far as the civil proceedings are concerned, public funding is available – when there are good reasons – to those citizens with a low taxable income. According to Article 78 of the DPR No. 115 of 30th May 2002, the party may submit a claim for legal aid, at any stage of the proceedings.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Under Italian law, there are no specific provisions on conditional or contingency fees. However, it seems reasonable to expect that to a certain extent the principle of parties' autonomy applies, allowing parties to provide for them.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

The arrangement between a third party (usually specialist funding company) and the main plaintiff whereby the former agrees to finance a client's legal fees in exchange for a share of the 'case proceeds' (usually the recovered damages) is possible but not frequent.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

Usually, consumers start proceedings individually, and consumer associations intervene in support of them. Each consumer is, indeed, allowed to give mandate to consumer associations to start the claim. In such a case, consumer associations are regarded as "promoters".

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

Within the Italian legal framework, professional claimants are allowed to purchase rights to individual claims in order to obtain a share of the recovered damages.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

Although damaged parties are entitled to join civil action individually to ongoing criminal proceedings in order to recover individual damages, neither Class Actions nor Representative Actions for injunctive relief can be brought in criminal proceedings.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

Conciliation is the only ADR method available to parties in this type of disputes. Pursuant to Article 140 of the Consumer Code, consumer and user associations are entitled to promote a conciliation procedure prior to commencing a Representative Action.

As far as Class Actions are concerned, there is no expressed provision relating to conciliation procedures. However, in accordance with procedural general principles, parties can petition the judge in order to attempt conciliation at any stage of the proceedings. Article 15 of Decree No. 28/2010 provides that conciliation shall be binding only for those consumers who expressly adhered to it ("opt-in mechanism").

8.5 Are statutory compensation schemes available e.g. for small claims?

The Italian legal system does not provide for collective compensation schemes and there are no specific provisions regulating Class Actions for small claims.

However, under the European law, Regulation No. 861/2007 introduced a European Small Claims Procedure with a view to simplifying and speeding up the small claims relating to civil and commercial matters. The regulation shall apply to all European members (except for Denmark) for claims whose value does not exceed Euro 2,000.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

The available remedies are monetary compensation or a voluntary discontinuance of the particular conduct complained of. Injunctive relief is excluded.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

No provision of the Consumer Code has been specifically dedicated to cross-border claims. The jurisdiction of Italian Courts is established according to the common criteria laid down under both national and European private international law rules. Therefore, the risk of forum shopping has not been specifically avoided in this field.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

Currently, there are no changes in the law proposed to promote Class Actions.

However, there is a law proposal that was released on 3rd June 2015, pending its definitive entry into force. This new law introduced important changes:

- first of all, the Class Action regulation was inserted into the Civil Procedural Code (it is actually governed only by the Consumer Code);
- secondly, each injured person – whether consumer or not – is entitled to promote a Class Action; and
- thirdly, monetary incentives would be provided for the purpose of the Class Action's promotion.

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