



Studio Legale Amorese

BERGAMO | LONDON

ITALY'S NEW CLASS ACTIONS REGIME

**Client Newsletter
(August 2008)**

Business Law Advisors in Italy



I. SUMMARY

Italy is poised to become **one of the first European jurisdictions to allow class actions for damages**. With the recent adoption of arguably the most comprehensive and far-reaching class actions regime in Europe, Italy has created a **strong enforcement tool for consumers to deter corporate misconduct**. At the same time, Italy has seemingly avoided some of the excesses of the American model by retaining many **safeguards** against the development of a class actions “industry” (*e.g.*, limited discovery rights, loser-pay costs rules, no punitive damages, no civil jury trials, *etc.*). However, as the new regime has several gaps and uncertainties, **many questions remain** for practitioners and the judiciary to interpret on a case-by-case basis. This area should thus bear careful watching by those with an interest in the Italian market.

II. SNAPSHOT OF THE NEW REGIME

Entry Into Force:	1 January 2009
Who Can Bring A Claim:	Certain national consumer groups recognized by the Ministry of Economic Development; any other organization determined by the trial judge to be “sufficiently representative” of the collective consumer interest at stake.
Plaintiff Class Members:	Unlike the United States, Italy has adopted an opt-in model. Individual affected consumers may join the plaintiff class at any time before the final dispositive hearing in the case.
Gatekeeper Role:	The plaintiffs must convince the judge at an Initial Hearing that the claim is not without merit, that there is no conflict of interest in the bringing of the claim, and that there is a collective consumer interest worthy of protection.
Remedies:	Plaintiffs can seek restitution and/or damages (behavioural orders and injunctive relief are the only remedies in the current regime).
Calculating Damages:	If the plaintiffs’ claim is successful on the merits, the court does not determine the amount of damages owing and issue a judgement in that amount, but instead issues a declaratory judgement setting out the criteria to be used in calculating damages. The parties are left then to determine the exact quantum of damages themselves, with the assistance of a conciliation procedure if they cannot agree.

III. BACKGROUND

After several years of delay and debate, class actions for damages have finally come to Italy. On 14 December 2007 the Italian government’s 2007 Budget Law (*Legge Finanziaria*) announced the amendment of the Italian Consumer Code (*Codice dei Consumatori*) to create a statutory right for certain categories of plaintiffs to bring a “collective damages action” (*azione collettiva risarcitoria*) to obtain restitution and damages for certain contractual or tortious claims, or in respect of unfair commercial or anti-competitive practices. While the Budget Law proclaimed that the class action

amendments would come into force on 30 June 2008, at the last moment the new Berlusconi government announced that the launch would be delayed to 1 January 2009.¹ Businesses operating in Italy thus have an additional six months to prepare for these significant changes.

IV. HOW THE SYSTEM WORKS

A class action for damages can be pursued in respect of a wide range of conduct, but may only be initiated by a limited pool of representative plaintiffs who must satisfy the court at an Initial Hearing (*Prima Udienza*) that the claim meets certain basic admissibility thresholds. If successful at the Initial Hearing, the claim will remain open for all affected consumers to opt-in at any time before the final dispositive hearing.

(a) Conduct Affected

A class action claim may lie wherever the “collective interests” of consumers are harmed by a defendant’s tortious acts (“*atti illeciti extracontrattuali*”), unfair commercial practices (“*pratiche commerciali scorrette*”), anti-competitive conduct (“*comportamenti anticoncorrenziali*”), or through the use of standard-form contracts where the purchaser does not negotiate the terms and conditions. By refraining from enumerating specific acts, and instead using extremely broad statutory language, it is likely that the new regime will cast a wide net over many forms of corporate conduct.

(b) Who Can Initiate a Claim

The pool of potential representative plaintiffs, although considerably expanded over the *status quo*, remains limited to the following groups:

- ❖ National consumer groups registered in a list maintained by the Ministry of Economic Development; and
- ❖ Any other organisations which are “sufficiently representative” (“*adeguatamente rappresentativi*”) of the collective consumer interests at stake.

The latter category remains otherwise undefined in the amendments, and thus something of a mystery. Potential plaintiffs may be able to avoid the lengthy qualification process required for registration with the Ministry of Economic Development² and simply attempt to persuade the court, on a case-by-case basis, of their “sufficiently representative” status. It remains an open question whether the adoption of such a vague standing threshold will support the emergence of a US-style entrepreneurial plaintiffs’ class actions bar in Italy.

(c) The Court’s Gatekeeper Role

At the Initial Hearing, the court must determine whether the claim is admissible. This is a very low threshold for the plaintiff to meet, since the claim will only be considered inadmissible if:

¹ D.L. 112/2008 (25 June 2008).

² Article 137 of the Consumer Code sets out several requirements for registration in the Ministry’s list, including that the organization have carried out “continuous” consumer protection activities for at least three years. This requirement alone would appear to prevent opportunistic plaintiffs (and counsel) from creating organizations to bring claims under the first category of standing.

- ❖ The claim is clearly without foundation (“*manifestamente infondata*”);
- ❖ There is a conflict of interest in bringing the claim; or
- ❖ The court determines that there is no collective consumer interest worthy of protection.

If successful at the Initial Hearing, the representative plaintiff is then required to publish details of the claim in the Italian media in order to inform consumers and potential class members of their right to opt-in to the class.

(d) Opting-In

For what appear to have been largely political reasons, Italy has adopted an opt-in model unlike, for example, the United States. Consumers are free to join the class at any time up to the final dispositive hearing. No particular form of opting-in is prescribed by the Consumer Code — individual consumers must simply notify the representative plaintiff in writing that they are joining the class. While the Italian business community apparently lobbied for an opt-in model, the present regime may nonetheless create substantial unquantifiable risks for defendant companies since consumers can refrain from joining the class up until the final dispositive hearing. Defendants considering a settlement and weighing their options will be unable to assess the “bandwagon-jumping” risk of a flood of consumers joining the plaintiff class at any moment (a risk that may also fluctuate based on the media coverage of the case).

V. ASSESSING LIABILITY

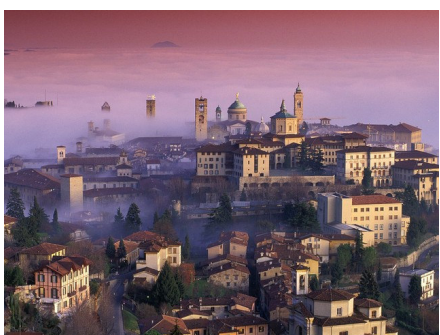
Curiously, despite having heard both sides present their arguments and reached a decision as to liability, the trial judge does not assess damages and issue an order in the appropriate amount. Instead, the judge is required to provide a declaratory judgement in which he or she sets out the criteria for calculating damages and, if possible, the minimum sum to be paid to each class member. Within sixty days of notification of the judgement, the defendant must serve a compensation proposal upon the plaintiffs. Where the defendant fails to make a proposal within the sixty-day period, or the plaintiffs do not accept the proposal, the parties enter into a conciliation procedure (“*camera di conciliazione*”), whereby a panel of three lawyers (one appointed by the plaintiffs, one by the defendant, and one by the President of the court having jurisdiction over the matter) determine a final and binding damages figure. Both this outcome and the defendant’s compensation proposal, if accepted by the plaintiffs, are treated as legally-enforceable court orders.

Although the intention behind the damages process was to minimize the burden on Italy’s busy judiciary, the process seems unnecessarily complicated and inefficient. As the trial judge has already heard all of the evidence and determined liability, it seems inefficient to have the issue of damages effectively re-litigated before the conciliation panel. As defendants have a financial incentive to delay paying damages as long as possible, it seems unlikely that any compelling compensation proposal will be made in the sixty-day period. Further, as the class action amendments provide no rules for the conciliation procedure, there would appear to be ample opportunities for tactical delay.

Although gaps and questions remain in the new class actions regime, these uncertainties will no doubt be resolved as the initial cases unfold. The effect of these major reforms should be monitored by all companies and individuals with an interest in the Italian market.

This newsletter has been prepared for reference purposes only, and does not constitute legal advice or establish an attorney-client relationship between the reader and the authors. For more information or advice concerning the issues discussed herein, or on any other aspect of doing business in Italy, please contact us directly:

BERGAMO



Via Zelasco, 18
24122 Bergamo, Italy
Tel +39 035 212 175
Fax +39 035 271 110

Contact: Dr. Marco Amorese, Partner
marco.amorese@amorese.it

LONDON



10 Ironmonger Lane
London, EC2V 8EY, United Kingdom
Tel +44 207 778 0710
Fax +44 871 221 4574

Contact: Mr. Casey Halladay, Partner
casey.halladay@amorese.it

www.amorese.it

Studio Legale Amorese are business law advisors admitted to practice in Italy, the United States (New York), and Canada (Ontario).