

Representative Consumer Protection Actions Make Their Way Into the Italian Legal System

May 8, 2023

On March 23, 2023, Italian Legislative Decree No. 28 (the “**Decree**”) was published in the Official Journal. The provisions of the Decree entered into force on April 7, 2023, and will apply from June 25, 2023.

The Decree transposed into Italian law Directive (EU) 2020/1828 of the European Parliament and of the Council of November 25, 2020 on representative actions for the protection of the collective interests of consumers (the “**Directive**”).

The Directive aims to boost consumer confidence in the internal market by ensuring effective protection of the rights granted to them by certain provisions of European Union law. To this end, it allows entities acting to protect the collective interests of consumers to bring representative actions, both national and cross-border, aimed at obtaining injunctive and redress measures against any traders who violate these provisions.

For any questions related to the issues discussed in this note, you may contact any of our firm’s attorneys with whom you are usually in contact or the authors below.

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1. Introduction

The Decree inserts twelve new articles (from 140-*ter* to 140-*quaterdecies*) into the Consumer Code.¹ The legislature considered the Italian Consumer Code to be the most appropriate place for the provisions regulating the new representative actions, which are actions for the protection of the collective interests of consumers brought by a qualified entity as a plaintiff on behalf of consumers.²

Unlike the class action introduced by Law No. 31/2019, which is aimed at protecting the homogeneous individual rights of the members of a class, the new instrument is aimed at protecting the **collective interests of consumers**, in a wide range of matters expressly listed in the Annex to the Decree, which is also transposed into the Consumer Code as Annex II-*septies*. The list includes product liability, unfair terms in consumer contracts, air carrier liability, consumer pricing, e-commerce, product safety, electronic communications, personal data protection, distance financial services, consumer credit, unfair commercial practices, misleading advertising, package tours, electricity, electronic money, and insurance.

In addition, unlike the 2019 class action (which also provides each class member with the right to bring an action), representative actions can only be brought by **qualified entities**, and can be brought even without a mandate from individual consumers.

The Decree allows representative actions to be brought against **any trader**, defined as any natural or legal person, public or private, acting, including through another entity, for purposes relating to their trade, business, craft, or

profession. This is a particularly broad notion, which encompasses any business, public or private, including entities managing public services or utilities.

2. Legal standing before national courts

The qualified entities, namely:

- nationally representative consumer and user associations (included in the special list established by the Ministry of Enterprises and Made in Italy),
- independent public bodies designated as responsible for the enforcement of EU rules on the protection of consumer interests,
- public and private entities representing the interests of consumers in another Member State (included in the special list drafted and published by the European Commission),

are assigned standing to bring representative actions before the Italian courts on behalf of consumers in order to obtain injunctive or redress measures against traders who violate the abovementioned provisions of EU consumer protection law.³

3. Standing to bring cross-border representative actions

Representative actions may also be brought in a Member State other than the one in which the entity bringing the action has been designated as a qualified entity (so-called cross-border representative actions). This implies that, where an alleged infringement harms or is likely to harm consumers in more than one Member State, several qualified entities designated in different Member States will be able to act jointly, by

¹ Legislative Decree No. 206, September 6, 2005.

² See Consumer Code, Article 140-*ter*, first paragraph, letter *e*.

³ See Consumer Code, Article 140-*quater*.

bringing a representative action before the court or administrative authority of a Member State.

The goal is to make the protection of the collective interests of consumers more effective by enabling qualified entities from different Member States to join forces in a single representative action in a single forum.

The Decree stipulates that, in order to be qualified to bring cross-border representative actions, entities must meet specific requirements of experience, financial soundness, independence and transparency. Entities qualified to bring cross-border representative actions must also have obtained registration in a special section of the list established at the Ministry of Enterprises and Made in Italy. Independent public bodies responsible for the enforcement of EU consumer protection law which apply to receive qualification are also entitled to bring cross-border representative actions.⁴

4. Representative actions

Representative actions may be brought by the qualified entities **even without a mandate from the consumers concerned**,⁵ who will thus retain independent standing. Indeed, the individual consumer's right to individual action remains unaffected.⁶

As mentioned, the range of persons against whom qualified entities may act is particularly broad. The **notion of 'trader'** referred to in the Decree includes, in fact, any natural or legal person, public or private, acting for purposes related to

their trade, business, craft or professional activity.⁷

Representative actions must be brought before the chamber of the civil court specialized in business matters of the place where the trader that allegedly engaged in the harmful conduct is located.⁸

In its application to the Court, the qualified entity must set out the elements necessary to determine the group of consumers affected by the representative action, the existence of jurisdiction, the applicable law, and the funding of the litigation, received or promised by third parties.⁹

The Court will rule, in a decision to be published in the public section of the Telematic Services Portal of the Ministry of Justice,¹⁰ on the admissibility of the application within thirty days of its submission. Admissibility is subject to compliance with the following cumulative conditions: (i) the entity bringing the action has *locus standi* (see sections 2 and 3 above); (ii) the action is not brought in a conflict of interests, (which exists where the party funding the litigation is a competitor of or dependent on the defendant); (iii) the application contains the elements necessary to identify the group of consumers concerned by the representative action; (iv) there is homogeneity of the individual rights in respect of which redress measures are

⁴ See Consumer Code, Article 140-*quinquies*.

⁵ See Consumer Code, Article 140-*septies*, first paragraph.

⁶ See Consumer Code, Article 140-*septies*, seventh paragraph.

⁷ See Consumer Code, Article 140-*ter*, first paragraph, letter *b*.

⁸ See Consumer Code, Article 140-*septies*, fourth paragraph.

⁹ See Consumer Code, Article 140-*septies*, fifth paragraph.

¹⁰ The Telematic Services Portal is a web portal provided by the Ministry of Justice. Through its public section, individual citizens and associations can access information and documents relating to ongoing proceedings.

sought; and (v) the claim is not manifestly unfounded.¹¹

The Court may decide to stay the case when an investigation before an independent authority (e.g., the Antitrust Authority) or an adjudication before an Administrative Court is pending on the facts relevant to its resolution.¹²

5. Injunctive and redress measures

In order to protect the collective interests of consumers, qualified entities may request, even cumulatively, both injunctive and redress measures.¹³

Injunctive measures are those by which “*the Court orders the cessation or prohibits the repetition of the unlawful conduct (by act or omission) and orders the publication of the measure, in its entirety or in excerpts, in one or more national or local newspapers or the publication of a correction statement*”.¹⁴

In order to obtain an injunction, the qualified entity does not need to prove intent or negligence of the trader, nor the actual losses or damages suffered by the individual consumers concerned.¹⁵

In addition, if there are **justifiable grounds of urgency**, qualified entities may request an **interim injunction** aimed at stopping the allegedly unlawful conduct.¹⁶ Injunctions, including interim injunctions, may be supplemented by periodic penalties. In this case, the judge may set a time limit for the trader to comply with the injunction, ordering that, in the case of non-compliance, the trader shall be

required to pay a sum of €1,000 to €5,000 for each violation of the injunction, or for each day of delay in compliance.¹⁷

Redress measures consist of measures to “*remedy the injury suffered by the consumer, including through the payment of a sum of money, repair, replacement, price reduction, termination of the contract, or refund of the price paid, as provided for in the [relevant] provisions.*”

The easing of the burden of proof for the qualified entity that facilitates the application for injunctive relief, does not apply to redress measures.

The same procedure as the one for class actions applies to the application for redress measures. In the judgment granting redress measures, the judge will also appoint a different judge (called ‘delegated judge’) tasked with appraising the requests from individual consumers to join the representative action. Consumers may join the action brought by a qualified entity after the decision on the admissibility of the action or after the judgment granting the application for redress measures. In either case, consumers must join within the time limit set by the Court, between 60 and 150 days from the publication of the order or judgment.

The delegated judge examines the application of each consumer who wants to join the representative action. The decision by which the delegated judge grants the consumer’s application orders the trader to implement the redress measures due to the consumer, and has binding nature: if the trader fails to implement the

¹¹ See Consumer Code, Article 140-*septies*, eighth paragraph, letters *a-f*.

¹² See Consumer Code, Article 140-*septies*, seventh paragraph.

¹³ See Consumer Code, Articles 140-*octies* and 140-*novies*.

¹⁴ See Consumer Code, Article 140-*ter*, first paragraph, letter *i*.

¹⁵ See Consumer Code, Article 140-*octies*, fourth paragraph, letter *i*.

¹⁶ See Consumer Code, Article 140-*octies*, fifth paragraph.

¹⁷ See Consumer Code, Article 140-*terdecies*.

redress measures ordered by the court, the qualified entity may proceed to enforcement.

6. Settlement agreements and information on current representative actions

The qualified entity and the trader may, either voluntarily or at the invitation of the Court and until the hearing of the case, reach a settlement agreement. The consumers concerned will remain free not to accept such an agreement.¹⁸

The settlement agreement, to be published in the Telematic Services Portal, will be effective only with respect to consumers who have joined the representative action after the declaration of admissibility and who decide to join the settlement agreement by means of a declaration to be included in the case file.¹⁹

Qualified entities will have to indicate on their website the applications for representative actions they filed, as well as their respective status and outcomes. They also have to communicate that information to the Ministry of Enterprises and Made in Italy, which will publish it on its institutional website.²⁰

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¹⁸ See Consumer Code, Article 140-*decies*.

¹⁹ See to that effect Article. 140-*decies*, fifth paragraph, Consumer Code, which refers to the rules on class actions.

²⁰ See Consumer Code, Article 140-*undecies*.