

Class Actions, Italian Style

Contributed by Veronica Pinotti and Anteo Picello, McDermott Will & Emery Studio Legale Associato

Italians, even the lawyers amongst them, watch American legal dramas such as *North Country*, starring Charlize Theron, or *Class Action*, starring Gene Hackman, without truly understanding or being able to relate exactly to what is going on. The situation is changing quickly, however, as a new law is due to enter into force on January 1, 2009.

Class action laws have an impact on almost every legal issue worldwide and Italy is no exception. This is even truer when dealing with a proposal that has yet to be approved by Parliament, especially within a legal framework such as that found in Italy. This article aims to shed some light on the impact of class actions on unfair competition, antitrust, and consumer protection cases.

The national antitrust authority, Autorità Garante della Concorrenza e del Mercato (AGCM), recently highlighted the need for some form of class action in the Italian legal system. In its Annual Report, released on June 24, 2008, AGCM openly called for Parliament to further legislate in the field of competition and consumer protection in the telecommunications industry, specifically mentioning the need for a class action law.

In certain past cases, the Italian legal system found a way to reach similar results to that which would be achieved by a class action. A good example of this is the famous Marlboro Lights case,¹ where, as a consequence of an antitrust decision, consumers gained a substantial right to sue for damages. Reaching a *substantial* result, however, without the aid of a formal route, is surely not something in which to take pride or satisfaction in a G7 economy.

The Italian Parliament has been working on this issue for several months now, as this has obvious political weight, postponing the passing of a law, instead concentrating on amendments to other laws. The main body of the only text with official status comes from article 2 of the Financial Law 2008 (the Proposal).²

Shortly before the proposal was due to be approved, the Senate added an article which, in the space of five paragraphs, detailed all of the rules for an Italian class action (in Italian, *azione collettiva risarcitoria a tutela dei consumatori*). This new text was heavily criticized by professionals and academics alike, resulting in the law's entry into force being postponed until January 1, 2009. Such a wider window in time was meant to allow the legislative body to change the law (by way of amendments or with a new law) in the same direction suggested by academics and professionals.

Due to the Italian Constitutional architecture, the Government always has a parliamentary majority. As a consequence, in the Italian legislative process, both Parliament and the Government can propose amendments to each other's drafts. The Ministry for Industrial Activities (Ministero delle Attività Produttive) took the lead, making substantial changes that warrant a closer look.

Firstly, the new law will apply both to B2B (business to business) and B2C (business to consumer) relationships.³ The effect on B2B will be, in effect, a new way of enforcing unfair competition principles, as it will be based on "unfair commercial practices" and "anticompetitive behavior."

Secondly, the law will not apply to behavior or events which took place before January 1, 2008. While it is accepted that a limit on retroactivity must be imposed in order to prevent the new law becoming a judicial tornado, the fact that this timeframe is so short has been criticized by the media as it will result in the law's being inapplicable to the infamous financial crisis of Parmalat and Cirio. See *generally* Sarah Gay Forden, Parmalat Can Seek Compensation at Trial, Judge Rules, Bloomberg News (June 18, 2008); Forden, Parmalat Investors to File Lawsuit Seeking Damages, Bloomberg News (June 16, 2008); Sheyam Ghieth, Italy to Pay Back Investors Out of Dormant Accounts, Bloomberg News (June 6, 2007)

Thirdly – and this is a significant change to the previous draft – individuals will now also be allowed to bring a class action. The previous text only allowed consumer associations to bring a case to court. With the new law, individuals will have the option of taking their case to court by themselves or by mandate to associations (not necessarily consumer associations, although this is more likely).

Lastly, the competence to hear the case and the jurisdiction to rule will be in the capital of the Region where the respondent has its legal seat.⁴

From a procedural point of view, things are not yet as clear. The assigned judge will give a first order (*ordinanza*) *prima facie*, determining whether to admit or dismiss the case. The parameters for this evaluation will include potential conflicts of interest, the identity of the rights sought to be vindicated, and the capacity of the claimant to represent the class.

If the case is admitted, the judge will establish terms and procedures to make it public and allow individuals of the same class to join.

Two elements deserve special attention. First, the judge's final ruling will establish the amount of damages to be awarded to all the individuals who belong to that class. Second, new class actions based on the same grounds and against the same company will not be allowed. Once again, these may seem obvious elements of a class action law, but are unprecedented concepts in the Italian legal system (and culture).

Some form of "class action awareness" would surely benefit the whole business community, since there are likely to be direct and substantial consequences affecting their way of doing business. Companies involved in the Italian market, whether Italian, foreign, or multinational, should consider what they can do at this stage and monitor the legislative process.

If the current version of the text circulating in Parliament is approved, companies will have to consider the need for *ad hoc* insurance in case of a class action (insurance companies are best positioned to discuss this issue). They will also have to consider whether they want to restructure their corporate governance in order to be safeguarded, and whether they should set a specific budget aside to cover potential class action damages. This is obviously a preliminary list and each of these issues will warrant a closer look once the law has been passed.

Finally, all of the above is theoretical. At the time of writing, the Ministry for Industrial Activities' proposal is not yet official, and the original draft is still with the Senate. Either a new law will be ready before the end of the year, or Parliament will add an amendment in order to postpone its entry into force (which sounds more like *procrastinating*).

Veronica Pinotti is a Partner in the law firm of McDermott Will & Emery Studio Legale Associato. She is head of the Italian Competition group, where her practice focuses on advising Italian and international clients on a wide range of legal issues relating to competition. Veronica lectures at the "Master in Antitrust e Regolazione dei Mercati – Economia della Concorrenza e Regolazione

delle Public Utilities” at the University of Rome Tor Vergata. She is admitted to the Italian Bar (2004), The Law Society of England and Wales (2000) and Belgium Bar (1997).

Anteo Picello is a trainee in the law firm of McDermott Will & Emery Studio Legale Associato where he is a member of the Italian Competition group. Anteo graduated from the University of Siena and has an LL.M. in International Economics and Business Law from the University of Groningen, he also studied at BPP Law School London. He is a member of the Goodenough College, London and an alumni of the Willem C. Vis International Commercial Arbitration Moot, Vienna. He is a member of the Italian Bar.

¹ Provvedimento n.11204 of 12 September 2002, “Sigarette Marlboro Lights”, PI3741, also available at http://www.agcm.it/agcm_ita/DSAP/Dsap_pi.nsf/a0d111d6626f957fc125652a00315873/762b98e2780ba6ffc1256c42003df155?OpenDocument (last visited 11/24/08).

² Article 2, paragraph 445, law n. 244 of 24/12/2007, published in Gazzetta Ufficiale n. 300 del 28 dicembre 2007 - Supplemento ordinario n. 285, also available at <http://www.parlamento.it/parlam/leggi/07244l.pdf> (last visited 11/24/08).

³ On a parallel, another law is proceeding that will affect the relationship between citizens and the Public Administration, the final goal being a possible class action against the Public Administration: the so-called “law against idlers.” Law 133/2008, also available at <http://www.camera.it/parlam/leggi/08133l.htm> (last visited 11/24/08).

⁴ With nine exceptions: Val d’Aosta will be under the jurisdiction of Turin; Friuli and Trentino under Venice; Marche, Abruzzo, Umbria, and Molise under Rome; and Calabria and Basilicata under Naples.