



New “Representative Actions” in Italy for the Protection of Collective Consumer Interests: Legislative Decree March 10, 2023, No. 28, implementing Directive 2020/1828 (EU).

(by Fabio De Dominicis)

1) INTRODUCTION. CRITICISMS OF THE “DUAL TRACK”.

On March 23, 2023, Legislative Decree No. 28 of March 10, 2023, was published in the Official Gazette, aimed at implementing Directive 2020/1828 (EU). The choice of the Italian legislator was to establish a dual track of collective protection: rather than surgically intervene in the provisions of Law No. 31/2019 (the so-called “Bonafede Rule”) to make it compliant with the Directive, the legislator preferred to introduce a new class action (more precisely, representative action), again confined to the Consumer Code, from Articles 140 *ter* to 140 *quaterdecies*.

Before exploring some brief reflections on the implementation in question, the first and most evident point of criticism is noted: in Italy, at least until May 19, 2031, unless interrupted by prescription, there will be the coexistence of three different disciplines of collective protection, between class actions and representative actions:

a) the first, dictated by Article 140 *bis* of the Consumer Code, which will continue to apply to all unlawful conduct committed until May 19, 2021, the date of entry into force of Law No. 31/2019;

b) the general one, inserted into the procedural code by the Bonafede Rule, Law No. 31/2019, applicable to unlawful conduct committed from May 19, 2021;

c) the one provided for in Articles 140 *ter* et seq., Consumer Code, by virtue of the implementation of Directive 2020/1828 (EU), which applies, according to Article 4, paragraph 1, from June 25, 2023 (paragraph 2 specifies that Article 140 *duodecies* of the Consumer Code – concerning the interruption of prescription and the prevention of forfeiture – applies to actions seeking compensatory measures for violations occurring from June 25, 2023 onwards).

Some academics (in this regard, R. Donzelli, informal hearing before the Joint Committees II and X held on January 11, 2023) have already pointed out that the preferable solution would have been to operate on the provisions in the Code of Civil Procedure, through targeted interventions aimed at making our general provisions consistent with the dictates of the Directive. Other academics (G. De Cristofaro, informal hearing before the Joint Committees II and X held on January 11, 2023) have argued that the absence of specific implementation criteria in the European delegation law (Law No. 127 of 2022) has allowed the government only to adhere in a plain and pedantic manner to the text of the Directive, incorporating the regulations into the Consumer Code (without modifying the Code of Civil Procedure to avoid illegitimacy due to excessive delegation subject to review by the Constitutional Court).

Also, from a general perspective, the legislator, in an attempt to avoid coordination and coexistence problems between the two distinct collective procedures, has established in Article 140 *ter*, paragraph 2, second paragraph, Consumer Code, that, in the face of conduct by professionals harmful to the collective interests of consumers (in one of the matters listed in the new Annex II *septies* of the Consumer Code), the authorized entities (think, for example, of consumer associations) cannot act with the class action provided for in the Code of Civil Procedure, with contractual and extra-contractual remedies remaining applicable to consumers.

Therefore, while consumer associations can only use the newly adopted special collective procedure, individual consumers will have the option to avail themselves of the class action contemplated by the procedural code.

Briefly delving into detailed aspects, the following is noted.

The newly introduced institution (“representative action”) differs from the “class action” (under the Bonafede Rule) on multiple levels, while maintaining a minimum common denominator (indeed, Article 140 *novies* of the Consumer Code refers to Articles 840 *quater* to 840 *terdecies* and Article 840 *quinquiesdecies* of the Civil Procedure Code, as compatible).

2) *STANDING.*

Regarding the legal standing to act, the reception decree excludes the legal standing of individual consumers, even if aggregated in specially constituted

committees, in favor of institutional and preventive legal standing vested in particularly qualified entities. According to Article 140 *quater* of the Consumer Code, these entities are:

a) Consumer and user associations listed in Article 137 of the Consumer Code; b) National independent public bodies referred to in Article 3, No. 6 of Regulation 2017/2394 (EU); c) Entities designated in another Member State and included in the list published by the European Commission.

Entities and consumer associations with the necessary requirements for inclusion in the special section of the list under Article 137 of the Consumer Code are authorized to bring cross-border representative actions.

Reflections on the legal standing configured by the new regulation.

a) *Active standing restricted to authorized entities.*

Firstly, assuming (without conceding) that restricting the legal standing exclusively to particularly qualified entities ensures a balance between avoiding abuse of litigation on one hand and enhancing the protection of collective consumer interests on the other, it remains a fact that excluding individual and committee legal standing ultimately lowers the level of consumer protection. This contradicts the proclaimed purpose of Article 1 of Directive 2020/1828 (EU) to aim to “*improve consumers’ access to justice*”. Therefore, it is not clear why the Italian legislator has rooted out individual and committee legal standing, despite the combined provisions of Considerations 11 and 28 and Article 4, paragraph 6 of the Directive, which provided for the possibility of designating specifically authorized entities (entity on an ad hoc basis) for specific national representative actions. Furthermore, this solution does not take into account the practical experience of Italian class actions from 2010 to the present, where just over 20% of the overall litigation has been initiated by individual consumers and committees, mostly in disputes related to local offenses, for which national associations are unlikely to exercise action.

It is true that, for consistency and systematic harmony, it is right for consumers, faced with the inaction of authorized entities, to still have standing to act through the general action (Bonafede Rule) provided by the procedural code. However, this creates an unreasonable disparity in treatment since the two actions do not have entirely overlapping regulations; consider, for example, the different regulations regarding prescription, which will be discussed shortly.

b) *Reference to different registers and requirements.*

Furthermore, in reference to active standing, an analysis of the representative action and class action regulations reveals different access conditions to the judicial process:

- For domestic representative actions, we must look at the criteria in Article 137 of the Consumer Code, as established by Article 140 *quater* of the Consumer Code, and the corresponding register is kept at the Ministry of Enterprises and Made in Italy.
- For cross-border representative actions, we must refer to the criteria provided by Article 140 *quinquies*, and the corresponding list (contained within the special section provided by Article 137 of the Consumer Code) is kept at the Ministry of Enterprises and Made in Italy.
- For class actions under the procedural code, there are additional criteria outlined in Ministerial Decree No. 27 of February 17, 2022, referred to by the coordinated provisions of Articles 840 *bis*, 840 *sexiesdecies*, 196 *ter disp. att. c.p.c.*, and the corresponding register is kept at the Ministry of Justice.

The comparative analysis of the criteria in these three different regulations leads to the paradox that much stricter criteria are required for domestic actions than for cross-border actions (which would likely require greater credibility and expertise). This results in the implausible outcome of making access to domestic representative actions more difficult for Italian associations compared to their foreign counterparts.

c) Authorities (Independent Public Bodies).

Finally, it should be noted how granting standing to act to national independent public authorities under Article 3, No. 6) of Regulation (EU) 2017/2394, upon their request, seems to be a dubious choice in terms of constitutional legitimacy. These entities hold autonomous public sanctioning powers against the professional party. Consequently, a scenario could arise in which an authority tasked with overseeing, with a pronounced degree of neutrality, compliance with rules and the proper functioning of the market within its specific sector of competence first imposes an administrative pecuniary sanction on a company deemed responsible for a violation of the rules of that specific sector, and then exercises a follow-on representative action based on the same imposed sanction. What has just been noted seems to conflict with the principle of equality of arms and equality of the parties before an impartial third-party judge as provided by Article 111 of the Constitution.

3) PASSIVE STANDING.

Regarding passive standing, the representative action can be brought against professionals, defined as *“any natural or legal person who, regardless of whether it is a public or private entity, acts, including through another party acting on its behalf or for its account, for purposes relating to its commercial, entrepreneurial, artisanal, or professional activity”*.

4) SCOPE.

Turning to the objective scope of application, unlike the class action, the representative action is limited to protecting the collective interests of consumers against violations of the provisions contained in the sixtyeight Union-derived matters listed in the new Annex II *septies* to the Consumer Code. The domestic legislator did not avail itself of the option provided by Consideration No. 18 of the Directive, which states that *“Member States should remain competent to make provisions of this Directive applicable to areas additional to those falling within its scope.”* It would have been more reasonable to extend the regulation to all violations of the collective interests of consumers under Article 2 of the Consumer Code, as has been done in the past in the transposition of other Directives, without imposing inappropriate objective limitations. This would have made the practical application of the institution easier for both judges and lawyers and relieved the legislator of the burdensome task of continuously updating the regulations contained in the aforementioned Annex II *septies*. On the other hand, it would have avoided yet another risk of a constitutionally questionable disparity in treatment, frankly lacking justification, given that violations of the collective interests of consumers relating to Union-derived regulations (contained in Annex II *septies* of the Consumer Code) find collective protection through representative actions, while violations of the collective interests of consumers under purely domestic law find protection through the class action tool provided by the procedural code.

5) THE PROCEDURE.

Regarding procedural aspects, the following must be noted.

Firstly, it is observed that representative actions can be initiated to request, even cumulatively, both compensatory relief (to obtain a measure aimed at compensating the harm suffered by the consumer, including through the payment of a sum of money, repair, replacement, price reduction, contract resolution, or refund of the paid price) and the adoption of injunctive measures (to obtain an order to cease or prohibit the unlawful conduct of the professional and the publication of the decision, in full or in part, in one or more nationally or locally circulated newspapers, or the publication of a correction). The procedure is regulated by the simplified

process provided for in the second book, title I, chapter III *quater* of the Italian Civil Procedure Code introduced by the “Cartabia reform”, with jurisdiction assigned to the specialized section in matters of business competent for the place where the resisting party is based, in the case of a legal person defendant. If the defendant is a natural person, jurisdiction follows Article 18 of the Italian Civil Procedure Code.

6) (SUPERFLUOUS) PRELIMINARY HEARING OF ADMISSIBILITY FOR THE REPRESENTATIVE ACTION.

Article 140 *septies* of the Consumer Code provides for the admissibility filter for both compensatory and injunctive representative actions. The scrutiny regarding the admissibility of the action now involves the six requirements instead of the four requirements provided for class actions under the Bonafede Reform.

In particular, according to Article 140 *septies*, paragraph 8, of the Consumer Code:

“The claim is inadmissible:

a) when it is manifestly unfounded; b) if it lacks the necessary elements to identify the group of consumers affected by the representative action; c) if the court does not recognize the homogeneity of individual rights for which the compensatory measures provided for in Article 140-novies are required; d) if, even following the defendant's contestation, it is found that the plaintiff entity lacks the necessary requirements for standing in the action; e) when the action is brought in a conflict of interests, particularly if it appears that the entity funding the action is a competitor of the defendant or depends on the latter. In this case, the judge also raises the issue ex officio and assigns the plaintiff entity a deadline within which to reject or modify the funding; f) if the corporate purpose of the authorized entity that filed the claim does not justify the exercise of the action.”

Given the above, it is observed that the need to provide for an admissibility judgment does not arise concerning injunctive actions. Indeed, since the latter do not require consumer participation in the proceeding, a preliminary filter will likely have the sole (and detrimental) effect of delaying a judgment characterized by the need for expediency, as it is aimed at preventing the commission or continuation of illicit behavior.

Upon closer examination, one might assert that similar conclusions could also apply to compensatory representative actions. In fact, considering, on the one hand, that standing is reserved for particularly qualified entities and, on the other hand, within the “three-phase” structure of the proceeding, there will likely be no pre-judgment adhesions (combined with the fact that the introductory act interrupts

the statute of limitations for the entire potential class of adherents), it becomes apparent that the very function (as a filter) of the admissibility judgment is undermined. Faced with an action that, by law, already has an extremely restricted access scope, the legislator would have done well to eliminate any filter for representative actions in accordance with the principles of economy and proportionality in the use of judicial resources, which should inform any trial in light of the amended Article 111 of the Constitution.

7) THIRD PARTY FUNDING.

The crucial issue of litigation financing by third parties is exclusively addressed in Article 140 *septies* of the Consumer Code. In accordance with the transparency principle, the display of received or promised funding from third parties is required in the introductory petition. This is deemed a cause for inadmissibility if the funder is a competitor of the defendant or dependent on the latter. In such cases, the judge, even *ex officio*, assigns a deadline for the plaintiff entity to reject or modify the funding, under penalty of the action's inadmissibility.

It is undoubtedly a missed opportunity for the Italian legislator, which, in my opinion, could have taken the chance to regulate a fundamental point for the implementation of any collective action. Instead, certain aspects of third-party funding, much debated, such as the obligation to disclose the litigation funding contract (service agreement or assignment agreement) to allow the judge to review its clauses, were omitted.

8) ADDITIONAL PROCEDURAL ASPECTS.

a) Three-phase procedure. Regarding the procedure, Article 140 *novies* of the Consumer Code, as mentioned earlier, refers to Articles 840 *quater* to 840 *terdecies* and Article 840 *quinquiesdecies* of the Civil Procedure Code (CPC). The procedure remains three-phase, the mechanism of adhesion remains unchanged, and the provision for premium compensation is retained. On this point, it is noteworthy that there is a lack of correspondence between the provisions of Directive 2020/1828 (EU) and the Italian implementing rules.

Particularly, Article 7, paragraph 6, of Directive 2020/1828 (EU) stipulates that “*Member States shall ensure that consumers’ interests in representative actions are represented by qualified entities and that those qualified entities have the rights and obligations of a claimant party in the proceedings.*” However, the Italian class action procedure includes a third phase in which the plaintiff entity (i.e., the entity authorized in the representative

action) exits, and the protection in terms of ascertainment, liquidation of the rights of adherents, as well as transactive and executive protection, is entrusted to the common representative appointed with the judgment when the court accepts the action among those who have the curator requirements.

Therefore, it must be concluded that the Italian implementing legislation is not compatible with the Directive concerning the provision allowing the authorized entity to bring and conduct the ascertainment and condemnation phase against the representative plaintiff and then delegate to a different entity, the common representative, for subsequent protection and representation of all adhering consumers.

b) Class information. Another misalignment between the provisions of the Directive and the Italian implementing rules concerns the issue of information on representative actions, which plays a central role in collective protection. It allows informing the class about the filing of a representative action, its admissibility, the contents of an injunctive or compensatory measure, as well as the deadline and method for exercising opt-in or opt-out (depending on the choice made by that specific legal system between the two different class aggregation methods).

Article 13, paragraph 3, of Directive 2020/1828 (EU) imposes a disclosure obligation on the professional, and at their expense, to inform the consumers concerned by the representative action about final decisions and approved transactions. This should be done through means appropriate to the circumstances and within predetermined time limits, including, if necessary, individual communication to all interested consumers. In contrast, Italian domestic regulations do not impose any information obligation on the professional. Instead, it resolves the information activity by merely publishing, by the registry, the order of admissibility and the injunctive or condemnatory measure on the portal of the Ministry of Justice's telematic services. It also includes the publication of the actions brought, their progress status, and the respective outcomes on the websites of the involved authorized entities and the Ministry of Industry and Made in Italy.

c) Limitation periods. Article 140 *duodecies* of the Consumer Code incorporates Article 16 of Directive 2020/1828 (EU) and provides that the filing of the introductory petition interrupts the prescription and prevents the forfeiture of the rights of all consumers potentially protectable by a compensatory representative action.

d) Indirect coercion measures. Finally, Article 140 *terdecies* of the Consumer Code introduces a tool for indirect coercion to promote compliance with injunctive measures prescribed by the judiciary. It stipulates that the judge, in case of non-compliance or simple delay in execution, orders the payment of an amount from €1,000 to €5,000 in favor of the State. This amount will be reassigned to the Ministry of Justice for the enhancement of services and offices and to the Ministry of Industry and Made in Italy for the activity of keeping the special section of the list provided for in Article 137 of the Consumer Code.

9) FINAL CONSIDERATION:

Having outlined the legal framework, some concluding considerations come to the forefront. The legislator has redefined the contents and features of both inhibitory and compensatory collective protection. This was achieved through the mandatory or discretionary introduction of a new collective remedy confined within the Consumer Code, alongside the general instrument outlined in Law No. 31/2019.

The path taken represented an opportunity, somewhat missed, to create an authentically effective and efficient remedy to safeguard the quintessential vulnerable party: the consumer. This aimed to improve, as much as possible, the evolutionary path embarked upon with the Bonafede Rule. However, it seems that what was lacking, beyond a bit of courage, was the element that should inform every legislative reform: a comprehensive overview.

The legislator, therefore, appears not to have distanced itself sufficiently from the previous legislative reform to fully grasp its spirit and include all its features in the line of sight. This neglects the empirical findings of the first thirteen years of the class action's existence. For instance, in Italy, the time was not deemed ripe to introduce a pure opt-out system or, at the very least, a hybrid mechanism coexisting with opt-in. Despite the contrary trend in Europe, Italy continues with the dual option to join: *early opt-in*, following the admissibility judgment, and *late opt-in*, after the decision issued in favor of consumer.

Furthermore, an opt-out system would have been more consistent, both at the level of general legal theory and systematically, with the choice to grant standing to particularly qualified entities. This would eliminate the standing of the individual consumer, who acts for the protection of the collective interests of that group of consumers, consequently resulting in a legally effective judgment for the entire

group, with the option for those who do not recognize themselves in the group to opt-out.

The conclusive outcome is rather unsatisfactory. On one hand, businesses, workers, and, sporadically, consumers can avail themselves of a straightforward tool, as elaborated by Law No. 31/2019 (Bonafede Rule), free from the interests of various associations and the constraints of subjective and objective typification. On the other hand, the complex mosaic outlined so far brings forth pressing issues of constitutional legitimacy, arising from the potential disparities in treatment triggered by the new consumer-representative action. Consequently, the novelties will force stakeholders, particularly the judiciary, into a significant hermeneutic effort to provide a comprehensive and coherent reconstruction of the diverse legal framework, aiming to prevent the paradox of depressing, rather than enhancing, the effectiveness of consumer protection.

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