

## Italian Supreme Court Upholds Class Action Ruling on Misleading Advertising

### IN SHORT

**The Situation:** On January 31, 2018, the Italian Supreme Court ruled on the first Italian product-related class action promoted by a consumers' association.

**The Result:** The Court upheld the consumer's class action claim regarding the unlawful advertising of a medical device.

**Looking Ahead:** The decision might cause Italian courts to further enhance the consumers' position in class action procedures while legislative reform is pending, which would broaden and simplify the use of class actions.

Following the alarming spread of the swine flu in 2009, Voden Medical Instruments S.p.A. ("Voden") marketed a medical device ("Ego Test Flu") that, according to promotional advertising and an illustration leaflet, enabled patients to diagnose the disease with close to 100 percent accuracy. After the first applications, the product did not seem to meet the expected results.

In 2010 the Italian Consumers' Association ("Codacons"), on behalf of a single consumer, filed a legal suit before the Court of Milan against Voden, seeking the refund of the cost for the Ego Test Flu, claiming that the medical device had been purchased on the basis of misleading advertising.

In the first instance judgement on procedure, the Court of Milan declared the class action admissible. This was a first in Italy. However, in the decision on the merits the claim was rejected because the claimant failed to prove the material impact of the misleading advertising on his choice to buy the medical device.



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This decision was overturned in 2013 by the Court of Appeal of Milan, which ordered Voden to reimburse the cost of the Ego Test Flu (EUR 14.50) to the only consumer who opted into the class action, on the ground that the advertising and the illustration leaflet were certainly suitable to create false expectations of the consumer as to the accuracy of the Ego Test Flu.

Voden appealed to the Italian Supreme Court. In its decision, the Supreme Court confirmed the reasoning of the Court of Appeal of Milan by stating that, in matters of class actions, to the extent the advertising might effectively mislead and thereby influence the consumer's behaviour, then such conduct is unlawful regardless of the individual reasons behind the consumers' choice. Under this approach, the potential to influence the consumer choice is sufficient, actual causation or even predominant causation is not required.

#### Legal Framework

Article 140-*bis* of the Italian Consumer Code sets forth the legal framework for Italian class actions: multiple parties damaged by the same wrongful act are allowed to bring their respective claims for damages or restitution through a single action against a common defendant.

The Italian Consumer Code sets no minimum or maximum number of persons for bringing a class action, which can be filed only by consumers or users. Having said that, a plaintiff may empower a consumer association or committee to file the suit on his or her behalf, even if he or she is not a member of the association. Defendants can only be business entities, such as professionals, corporations, or other legal entities acting within the scope of their businesses.

Italian private class actions have three main stages: (i) the admissibility stage; (ii) the organization of the procedure; and (iii) the assessment of the merits. If the class action is admissible, the judge determines the requirements that each member must fulfil to be part of the class. The admissibility order must set out the characteristics of the rights that may obtain protection through the class action and the 120-day term to opt in.

Unlike class actions in the United States, Italy has adopted an opt-in model, according to which the final judgment is effective and binding only and exclusively upon the damaged parties who joined the class action. A consumer may decide not to opt in. In that case, he or she will not enjoy the effects of the favorable judgment, but will still be able to file a separate individual action. The final judgment has *res judicata* effects for all those who have joined the class action, but the individuals who failed to opt in do

not directly benefit from the decision.

Class actions in Italy are not yet a widespread phenomenon. This is because Italian civil law principles traditionally required plaintiffs to individually protect their own rights before courts, and some critical procedural aspects of Article 140-*bis* of the Italian Consumer Code may delay the proceedings.

Product-related class actions are available in Europe also in Belgium, France, the Netherlands, Spain, and the UK, among others, though the procedures vary from jurisdiction to jurisdiction. The new German coalition is proposing to introduce such class actions based on an opt-in model in 2018.

### THREE KEY TAKEAWAYS

1. Among the rights enforceable under Article 140-*bis* are the rights of consumers and users to damages deriving from unfair commercial practices or from anticompetitive conduct, which also include misleading advertising.
2. In its decision, the Italian Supreme Court upheld the consumer's class action claim regarding the unlawful advertising of a medical device. The dispute has been one of the first cases of class actions brought before the Italian courts and the first one that passed the admissibility test provided by the law.
3. As liability is confirmed already on the abstract basis of the potential to mislead, without requiring actual causation, this decision might cause Italian courts to further enhance the consumers' position in class actions procedures, while a legislative reform is pending, which would broaden and simplify the use of class actions.

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