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Erin Brockovich turns European : is there an interest for class actions?

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INTRODUCTION

Class actions are often related and associated to the American legal culture, as it is illustrated by several movies including the famous “Erin Brockovich” picture.

However, the class actions or collective redress actions exist also in other jurisdictions, notably in Europe.

Precisely, the European Commission has recently given an accurate definition of collective redress and of its aim in its communication named “Towards a European Horizontal Framework for Collective Redress”¹, accompanying its “Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law”²:

“Collective redress is a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action. Collective redress facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law.”

Although collective redress and class actions exist in several jurisdictions in the world, there are some differences arising from different legal and procedural cultures, notably between the Common Law and the Civil Law legal systems.

Thus, the purpose of this questionnaire is to identify such differences as well as the common points between the collective redress and class actions in various jurisdictions.

There is also a particular focus on class actions in the anti-trust field, which is one of the main areas for such actions, as shown by the recent proposal for an EU “Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union”³.

¹ COM(2013) 401/2

² C(2013) 3539/3

³ COM(2013) 404 final

1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

Under Italian law, class actions in general are ruled by a single provision: Article 140-bis of the Legislative Decree 6th September 2005 no. 206 (so called “*Italian Consumers Code*”).

Article 140-bis was first introduced in the Italian Consumers Code at the end of the year 2007: since then, the provision has been amended many times and it stably came into force on 1st January 2010. It now consists of 15 lengthy paragraphs – unfortunately none of which gives a clearcut definition of “class action”. Due to the very complex legislative process, Article 140-bis’ interpretation appears to be still quite knotty. For this reasons some scholars deem that Article 140-bis is likely to undergo some further modifications in the future.

For clarity’s sake, it must be pointed out that another Italian law provides for a sort of “public” class action: we refer to the Legislative Decree dating 20th December 2009 no. 198, in application of Law 4th March 2009 no. 15 (the last one is known as “*Legge Brunetta*”). Under Legislative Decree no. 198/2009, in case of inefficient provision of services a collective redress action can be brought by the users against any Public Administration entity or against private entities which provide public services.

Moreover, another provision of the Italian Consumers Code – namely Article 140 – provides for a special inhibitory proceedings to be brought by the consumers association to safeguard the interests of consumers and users set by the same Consumers Code and by other Italian laws. This injunctive relief action should not be confused with the class action provided for by Article 140-bis, because in this last case the action has a representative nature, since it is brought by an individual (“*class representative*”), even though he/she may be assisted by a consumers association.

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law...)?

The scope of application of Article 140-bis of the Italian Consumers Code is defined both *rationae personae* (a) and *ratione materiae* (b).

a) From a subjective perspective (*rationae personae*), it applies to legal actions to be brought by *consumers* or *users*. Article 3 of the same Consumers Code specifies that a “*consumer or user*” is any individual who acts for purposes not related to any entrepreneurial, commercial, artisanal or professional activities.

b) As to the *ratione materiae* perspective, paragraph 2 of Article 140-bis effectively specifies that a class action can be brought to safeguard:

a) the contractual rights of a group of consumers which find themselves “in the same homogeneous situation” towards a certain business entity;

- b) the “homogeneous rights” of the consumers of a given product/service towards the relevant producer/supplier, notwithstanding the existence of a direct contractual relationship between the parties (so called “*product liability*” cases, also ruled by the Consumers Code);
- c) the “homogeneous rights” of consumers deriving from unlawful business practices or by anticompetitive conducts (so called, “*private enforcement*”).

In a nutshell, under Article 140-bis Italian class actions’ scope is limited to consumer law (including product liability issues) and to some aspects of anticompetition law.

Last but not least, if we take into consideration also the collective redress action provided for by Legislative Decree no. 198/2009 in application of *Legge Brunetta*, we could say that to some extent class action applies also to administrative law.

Anyway, from now on in this Report we will refer solely to “general” class actions as ruled by Article 140-bis of the Italian Consumers Code.

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

In theory, under Italian law nothing would prevent a class action claimant (*i.e.*, a class representative) from bringing the action on the basis of the provisions set forth by different statutes. For instance, by using the procedural tool provided for by Article 140-bis, a claimant might seek protection for his/her rights by asking the Court to ascertain both the defendant’s product liability (ruled by certain provisions of the Italian Consumers Code) and unlawful business practices (ruled by the Italian competition law).

Anyway, practically speaking, it must be stressed that Article 140-bis of the Italian Consumers Code expressly requires that the consumers’ alleged rights have to be “*homogeneous*” (in the very first version of the provision the rights were required to be “*identical*”). Moreover, when the Court admits the class action, it also firmly sets the “perimeter” of the consumers’ rights at stake, thus restricting in a certain way the area of the Court’s analysis (paragraph 9 of Article 140-bis). As a consequence, we deem that an interplay between different statutes would often lead to practical difficulties such as the exclusion of several potential class members.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

Article 140-bis of the Italian Consumers Code does not rule this aspect. Unfortunately, for the time being we also lack published decisions there upon.

Nevertheless, Italian most authoritative scholars believe that summary proceedings could be allowed, even though with some practical limitations. For instance, a claimant could not easily request – before trial - a precautionary seizure of the defendant funds or goods: since at this stage the number of the class members is still undefined, it is self-evident that the amount of the global damages (*i.e.*, of the money, movables or immovables to be seized) is still

uncomputable. In other words, the claimant would need to ground its pre-trial claim on a simple statistical forecast, which would likely be rejected by the Court.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors (“injunctive relief actions”) and/or to claim compensation for damage suffered (“compensatory relief actions”)?

As already pointed out in 1.1 above, Article 140 of the Italian Consumers Code provides for an injunctive relief action to be brought by the consumers association to safeguard the interests of consumers and users by asking for the cessation of unlawful conducts.

Said inhibitory proceedings under Article 140 is quite different from the class action provided for by the following Article 140-bis. Under Article 140-bis, paragraph 1 and 2, class action proceedings aim at ascertaining the business entity’s liability and at condemning the defendant to pay the relevant damages to the class members. Accordingly, paragraph 12 of Article 140-bis establishes that, if the Court issues its decision in favour of the class, it also orders the business entity to pay damages to the class members.

In the light of the above, Italian class action ruled by Article 140-bis can be considered as a compensatory relief action.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

The type of damage that can be claimed depends on the legal ground of the class action, pursuant to paragraph 2 of Article 140-bis (see above at 1.2).

In case of damages claimed because of the breach of some contractual obligations or in private enforcement cases, only material damages can be claimed and compensated.

In product liability cases, pursuant to Article 123 of the Consumers Code the class can claim for the following damages:

- death or bodily injuries;
- the destruction or the deterioration of material properties (excluded the defective product itself), when the relevant value exceeds EUR 387.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

In Italy, the compensation awarded to the class members collectively cannot exceed the compensation that would have been awarded through individual actions.

From a practical point of view, bringing an individual action could lead to receive a slightly higher amount. As a matter of fact, quite a peculiar provision is established by paragraph 12 of Article 140-bis: at the end of a class action proceedings, the favourable Court’s decision becomes enforceable solely after 180 days and during this 6-month period legal interests don’t accrue. On the contrary, a favourable Court’s decision issued at the end of an individual

action is immediately enforceable and the winning party is entitled to receive also the accruing legal interests. The provision set forth by paragraph 12 of Article 140-bis entails an evident inequality and is therefore much criticized by the doctrine.

Generally speaking, under Italian law punitive damages are not allowed. The Italian legal system is firmly based on the “*compensative principle*”, according to which the amount of the awarded damages must strictly correspond to the prejudice effectively suffered by the victim. Because of this principle, Italian Courts traditionally tend to reject the recognition of foreign punitive damages awards, grounding the denial on *ordre public* reasons.

That being generally said, we must also stress that in the past decades the possible introduction of punitive damages in the Italian legal system has become a more and more debated topic (*e.g.*, according to some scholars some Italian provisions about the environmental damages calculation appear to have a punitive or exemplary intention).

- 1.8 More particularly in the anti-trust field, how does the ‘passing on’ defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

Article 140-bis of the Italian Consumers Code does not rule this aspect.

More generally, the passing on defence is not ruled by Italian legislation and is seldom observed in case law. Once again, Italian Courts (*esp.* in antitrust cases) tend to apply the compensative principle, by also analysing the possible factual contribution of the victim to the occurrence of the damage.

2. Standing and admissibility to bring class actions/collective redress actions

- 2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement (“collective actions”), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice (“representative actions”)?

Under Italian law, the class action may be brought by a single individual (*i.e.*, the “class representative”), to be necessarily assisted by his/her lawyer(s) and facultatively by a consumers association. The class representative acts in his/her own name and on his/her own behalf, by bearing all the relevant costs and expense.

After the starting of the legal action, all the other individuals who find themselves in the same “homogeneous” situation of the class representative may apply to be inserted in the class (opt-in system). The legal assistance is not required for the joining members and they may apply also by certified e-mail or by telefax.

In short, under Italian law class action is a sort of “representative action”.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

See above at 2.1.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements...), and can the representative entities be sanctioned if they do not comply with such requirements?

Pursuant to Article 140-bis of the Italian Consumers Code, there aren't any special requirements to be met nor by the class representative, nor by the consumers association. Nevertheless, according to some scholars, the assisting association should be listed in the Registry of the "Consumers and Users Association most representative at a national level", provided for by Article 137 of the same Consumers Code. Said Registry is held by the competent Ministry (*Ministero delle attività produttive*).

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

The admissibility of the class action is examined at an early stage of the proceedings, during the first hearings: the Court issues an admissibility/inadmissibility order, which however may be opposed (Article 140-bis, paragraph 6).

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

Under Italian law, third parties are prevented from entering the class actions proceedings (Article 140-bis, paragraph 10).

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

Bearing in mind the peculiar structure of the Italian class action (see above at 2.1), multiple plaintiffs cannot file a complaint jointly. The action is brought by a single individual, who becomes the class representative.

2.7 More generally, what procedural defences are available for defendants short of trial and therefore before the national court decides on the merits of a collective action?

The consumers and users who do not opt-in in the class action may start any other individual legal action against the wrongdoer, in accordance with the Italian Code of Civil Procedure.

3. "Opt-in" vs "Opt-out" systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed ("opt-in" principle), or is

it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group (“opt-out” principle)?

Article 140-bis of the Italian Consumers Code provide clearly for an opt-in system.

3.2 What are the effects of the judgment on the victims in the “opt-in” or “opt-out” system chosen in your jurisdiction?

The judgment is effective for all the class members, *i.e.* for all the consumers that have filed their complaint and thus have joined the class (Article 140-bis, paragraph 14). On the contrary, the judgment is ineffective towards all the individuals that have decided not to join the class.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

Article 140-bis of the Italian Consumers Code doesn’t contain any express provision there upon. Anyway, since Article 140-bis establishes that joining the class implies the waiving of any further individual action by each class member (paragraph 3), we could infer that leaving the class is not allowed. The future case law will hopefully shed light on this aspect.

To this purpose, it must also be stressed that any settlement between the class representative and the defendant must be expressly accepted by each class member; in the negative, the settlement is ineffective towards said class members.

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

Article 140-bis provides that, if the Court declares the class action as admissible, it orders the parties to carry out the appropriate advertising activities and it also establishes a deadline for the filing of class members’ applications. Said deadline may not exceed 120 days after the conclusion of the advertising activities.

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

The defendant may ask in the Clerk’s Office to be informed about the class composition.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

As already pointed out at 3.4, Article 140-bis provides that, if the Court declares the class action as admissible, it orders to carry out the appropriate advertising activities, but there aren’t any more specific provisions. The Court may order what it deems more useful, at its

sole discretion: for instance, the Court could order to publish the decision on the main newspapers, on some websites, and so on.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

In Italy there isn't any official registry of class actions. Anyway, the website of the *Ministero dello sviluppo economico* contains a list of the major class actions brought in Italy (see at <http://www.sviluppoeconomico.gov.it>).

Some consumers associations also try to monitor and list the ongoing class actions on their websites; anyway, this information may be inaccurate or not updated.

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law (“follow-on actions”) or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

Under Article 140-bis of the Italian Consumers Code, a class action may be brought to safeguard the “homogeneous rights” of consumers or users deriving from unlawful business practices or by anticompetitive conducts (so called, “*private enforcement*”; see above at 1.2). So, it is possible to start a stand-alone action.

That being said, it must also be stressed that Article 140-bis expressly takes into account the possible “overlapping” between a class action and one or more public enforcement procedures. In such cases, the District Court may suspend the class action proceedings until the conclusion of the public enforcement procedure (or until the conclusion of a single procedural phase, as the case may be: *e.g.*, the District Court may stay the class action until the competent Authority ends the gathering of evidence).

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

The stand-alone actions are available for bilateral and unilateral anticompetitive conducts.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

See above at 4.1. The District Court may stay the class action until the competent Authority ends the gathering of evidence: this is a discretionary power. Moreover, the District Court has the power to “rule the investigation as it deems more appropriate” (Article 140-bis, paragraph 11).

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

No, potential claimants may bring a class action whenever they prefer. Anyway, the Court may stay the class action until the competent Authority issues its final decision. See above at 4.1.

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

In Italy the case law is still lacking, but we deem that the decision of the national competition authority would create a strong presumption of proof in the class actions proceedings before the District Court.

As to class actions based on cartel damages, again we lack sufficient case law. In general we can underline that, by applying the *Masterfoods* principle, a recent decision by the Italian Supreme Court (*Corte di cassazione*, decision dating 11th May 2012, no. 7319) has held that a decision by the European Commission – when undisputed by the Member State or by the party directly affected (by means of an action to be brought before the Court of First Instance within the time limit of 2 months, as set forth by Article 263 of the EU Treaty) – becomes binding for the national Court, which cannot substitute its evaluation to the Commission's one.

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

As already repeatedly pointed out, under Italian law class representatives are individuals and they may facultatively be assisted by a consumers association. This means that, formally, class representatives should bear alone all the relevant costs and expense. It must also be stressed that the Court may declare the class action as inadmissible when the class representative “*appears to be unable to adequately take care of the class interests*” (Article 140-bis, paragraph 6).

Practically speaking, the consumers associations may play a role in helping the class representatives as to the financing of the advertising campaign ordered by the Judge or in paying the consultants' fees.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

No, he/she isn't.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

No, it can't.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

No, they don't.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

During the recent years, the Italian lawyers fee calculation system has undergone a deep innovation and the forensic reform is still in progress.

Traditionally, lawyers fees had to be calculated according with national Tariffs and contingency fees (*patto di quota lite*) were absolutely not allowed. The Tariff system and the prohibition of contingency fees have recently been abolished (even though some limits are still to be observed). Despite the reform, contingency fees are seldom used in Italy. Success fees (as a percentage of the recovered credit) are allowed and more frequently used.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

Under Italian law, the winning party has the right to be reimbursed by the losing party with all the costs and fees paid ("loser pays principle").

It must however be noticed that, at its discretion, the Court may order that each party pays shall pay own costs and consultants ("*compensazione delle spese*"); this normally happens in quite complex cases, where the interpretation of the rule of law to be applied is quite unclear or debated.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

No, there aren't any specific rules there upon.

5.8 Are the parties to an action able to insure against the cost risks?

The parties can take out an insurance policy for the costs relating to legal proceedings, including the fees and costs related to a class action (see the decision of the European Court of Justice dating 10th September 2009, in case C-199/08, *Esching vs UNIQA*).

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

No, he/she/it isn't.

5.10 Are there (other) ethical or Bar rules in your country relevant with respect to class actions?

No, there aren't.

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

In Italy there aren't any specific international private law rules on class actions. As a result, the general international private law rules apply to such proceedings, both as to the identification of the Court having jurisdiction over the case and as to the applicable law.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

No, there aren't. The Italian law provisions foster the concentration in a single forum of all the possible class actions against a given defendant. Talking about the territorial venue, paragraph 4 of Article 140-bis provides that the class action must be brought exclusively before the District Court (*Tribunale*) of the region where the company has its "seat", even though it is not specified if the word "seat" means solely "registered office" or if it could mean also "operational headquarters" (lacking any stable case law there upon, for the time being a restrictive interpretation would be advisable). There are some exceptions, since some District Courts are competent for more than one region.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

Nothing prevents a foreign class representative from bringing a class action in Italy, provided that he/she is a consumer or a user and the Italian Courts have jurisdiction on the case.

Apart from that, pursuant to Article 140-bis of the Italian Consumers Code, there aren't any special "subjective" requirements to be met nor by the class representative, nor by the consumers association. Anyway, according to some scholars, the assisting association should be listed in the Registry of the "Consumers and Users' Association most representative at a national level", held by the competent Ministry (*Ministero delle attività produttive*) (see above at 2.3).

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

Article 140-bis of the Italian Consumers Code provides for the criterion to identify the competent District Court (as a matter of venue), but – from a transnational perspective – it does not contain any express rule about the jurisdictional criteria to be observed.

Therefore, in case of foreign defendants, the general rules provided for by EC Regulation no. 44/2001 would apply. As a result, if the defendant is a foreign company, he/she/it could be sued in Italy:

- in contractual cases, if Italy is the *forum destinatae solutionis* according to Article 5, paragraph 1, no. 3, of the EC Regulation 44/2001 (e.g., in sale and purchase agreements, if the delivery of the goods took place in Italy);
- in product liability cases, if Italy is the *forum commissi delicti* pursuant to Article 5, paragraph 1, no. 3, of the EC Regulation 44/2001;
- when it is possible to rely on the application of Articles 15-17 of the EC Regulation 44/2001 (jurisdiction over consumers contracts).

Talking about the application of Articles 15-17 EC Reg. 44/2001 (former Articles 13-15 of the Brussels Convention), it must be stressed that a well-known decision by the European Court of Justice (decision dating 18th October 2002, in case C-167/00, *Henkel*) has established that “a legal person which acts as assignee of the rights of a private final consumer, without itself being party to a contract between a professional and a private individual, cannot be regarded as a consumer within the meaning of the Brussels Convention and therefore cannot invoke Articles 13 to 15 of that convention. That interpretation must also apply in respect of a consumer protection organisation such as the VKI which has brought an action as an association on behalf of consumers” (point 33). This is quite irrelevant for Italian class actions: in Italy, consumers associations are simply *assisting* the class representative, but they cannot be held as parties of the class action proceedings. In a nutshell, the *Henkel* principle cannot be applied to Italian class actions and the class representative can surely bring his/her action in Italy by applying also Articles 15-17 EC Reg. 44/2001.

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trial and are the implications for refusing?

In Italy there isn't any specific mechanism of collective alternative dispute resolution for the settlement of class actions.

That being said, it must be pointed out that the Italian legislator has shown its favour for settlements to be reached between the parties *after the proceedings*, esp. with reference to the damages calculation. This can be inferred by analysing paragraph 12 of Article 140-bis: if the Court ascertains the right of the class action members to receive damages, the *Tribunale* may alternatively determine the relevant amount or it may fix a deadline for the parties (not exceeding 90 days) for reaching a settlement on the calculation of the due amount. If the parties do not reach an amiable solution within the fixed deadline, the Court determines the amounts to be awarded to the class members.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

Article 140-bis came stably into force on 1st January 2010. In these last few years, very few class actions proceedings have been brought so far and most of them are still ongoing. So, we lack sufficient case law.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

If, during the class action proceedings, the parties try to reach a settlement, there isn't any formal suspension of the procedure; nevertheless, practically speaking, the parties may ask the Court to grant an adequate postponement of the hearings, in order to slow down the proceedings and thus have enough time to conduct the negotiations.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

With reference to individual actions brought by consumers on contractual grounds, the existence of a valid arbitration clause in the agreement may prevent the District Court to examine the case.

With reference to a class action, it is doubtful if the existence of an arbitration clause – to be raised by the defendant (*exceptio compromissi*) - would have such an effect. For instance, some Italian authors deem that the existence of an arbitration clause would prevent the class members to join the class action already brought by the class representative, thus blocking the entry of new applicants. Other scholars deem that Article 140-bis provides for the exclusive jurisdiction of the ordinary Courts, therefore any *exceptio compromissi* by the defendant should be dismissed.

8. Enforcement of the court decision

- 8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

Article 140-bis of the Italian Consumers Code does not provide for the information to be given to the potential victims. Anyway, paragraph 11 establishes that the Court may order the parties to take care of the advertising activities which are held necessary to protect the class members: apparently this provision refers to the activities to be carried out during the proceedings (*e.g.*, to the gathering of evidence, and so on), but nothing prevents the Court to apply it also for the decision.

- 8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

As already pointed out above (see 1.7), paragraph 12 of Article 140-bis provides that, if the Court's decision is favourable, it becomes enforceable solely after 180 days and during this 6-month period legal interests cannot accrue on the due sums.

If the defendant does not pay the due damages, the claimant can start an enforcement procedure.

- 8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

We must make a clear distinction between class actions pursuant to Article 140-bis of the Italian Consumers Code and injunctive relief actions pursuant to Article 140.

a) With reference to class actions, there aren't any provisions about the effective compliance by the losing defendant. On the contrary, paragraph 13 of Article 140-bis provides for quite a peculiar rule: if the decision is opposed before the Court of appeals and the losing defendant asks for the suspension of the decision's effects, the Court of appeals must take into consideration the amount of money to be paid, the number of creditors, the difficulties of being paid back if the decision is reversed. This provision has been construed as a sort of "hidden invitation" to Courts of appeals to easily suspend the decision's effects, when requested to do so. To counterbalance it, the last part of paragraph 13 of Article 140-bis provides that, when the Court of appeals suspends the decision's effects, it may order the losing defendant to pay the corresponding sum as a deposit; in such a case, the sum is blocked until the Court of appeals' decision becomes final.