

**TRANSNATIONAL TRAINING
WORKSHOP ON EFFECTIVE
CONSUMER PROTECTION**

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ROUNDTABLE 2

INDIVIDUAL V. COLLECTIVE

ACTION REDRESS

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Subject and method

The subject of my talk is «individual vs. collective action redress», from the point of view of the Italian jurisdiction.

The method is the case law approach

Italian Legislation: Consumer Code, implementing EU directives and Law 31/2019, not yet in force, setting up new provisions for collective action;

EU Legislation: directive 2161/2019 and the proposal of a new directive on collective action

Subject and method

I will describe a collective action for injunction, held by my Chamber, at the Tribunal of Milan, and will try to highlight the decision taken, some critical points arisen and also some questions and problems not yet solved.

Then, I will try to use the criticalities **highlighted** as clues, in order to assess whether the new legislation, both the EU and the Italian ones, may offer, or not, a more effective protection of the consumers right, in accordance with art. 47 of the Charter.

An Appendix follows about the relevant, actual and future Union and National legislation.

The case: the fact

In 2015 in Italy, a telecommunication company started to insert a contractual clause, stating that the pricing period was 28 days, instead of 30 days.

The clause, granting the telco a 13[^] period of payment every year, which means a price increase of 8,6% on yearly basis, gradually spread all over: from new contracts to existing ones, from mobile to landlines, from B2B contracts to B2C ones, from one telco to another. By March 2017, the five top mayor telecommunications companies, detaning overall 90% of the market, applied this clause (20 million of contracts).

The case:the telecommunications Authority

On March 2017, AGCOM (Italian telecommunications Authority) issued an injunctive relief, banning the clause and stating that it infringed the telecommunications provisions (imposing contractual transparency of the pricing).

The 5 telcos lodged an appeal against this administrative act in front of the administrative Court and went on applying the clause.

The case: the Law

On October 2017, the Italian Legislator issued a Law, stating that -in any telecommunications contract- the price period had to be of one month or multiple, starting from 5.04.2018 on.

On December 2017, an association of consumers, qualified under Consumer code to bring collective actions, filed a summary proceeding in front of the Tribunal of Milan, requesting an injunctive order to cease the insertion in contracts and the use of the clause.

The case: the first instance Court

The telcos said that the AGCOM order was not a final decision, pending appeal, and in any case they were already removing the clause from their contracts, because of the law, so the action was to be dismissed.

On March 2018, the Tribunal of Milan issued a provisional decision, prohibiting any application of the clause in any contract (not only contracts B2C), declaring the clause null and void for violation of the AGCOM injunction.

The five telcos appealed this provisional decision.

The case: the NCA

On March 2018, NCA issued a preliminary order, stating that had found grounds for a possible cartel among the five telcos (because all of them had simultaneously announced their clients the return to price calculated on a monthly basis and a price increase of 8,6% on yearly basis), ordering the undertakings to diversify their offers.

The case: the second instance Court

On June 2018, the Tribunal of Milan, as second instance judge of the summary proceedings, issued a provisional decision: we decided the case applying the «Consumer code», a legislation implementing all the EU directives issued regarding consumer protection, so, in particular, we considered provisions deriving, as substantive law, from the directive 93/13/CE on unfair terms, 2005/29/EC on unfair commercial practices, 2011/83/EC on harmonized protection, and, as procedural law, the provisions deriving from directive 22/2009 on injunctions.

The case: the decision of the second instance Court

The Court prohibited the use of the clause for the future, only with regard to consumers contracts, with retroactive effect, not because of the violation of AGCOM decision, but because using this clause was an unfair commercial practice.

In particular, the Court pointed out that it was a misleading practice, harming consumers rights but not necessarily null, as the validity of the clause must be evaluated under general contract rules

The case: no judicial statement on damages and restitutions

The Tribunal of Milan did **NOT** stated the «appropriate measures» for removing harmful effects of the mischievous conduct, because the plaintiff had not asked them (principle of the demand).

So far, neither a consumer association nor a single consumer has ever filed a collective or individual action for damages and/or restitutions.

The case: restitutions

On 2018 AGCOM ordered the companies concerned to give back automatically the money to the users: the obliged challenged the decisions before administrative court, that rejected the appeal.

The telcos are still now using various means to avoid or delay complying, pretending the consumer has to ask the money back through special procedures, in order to discourage requesting.

AGCOM started a new infringement proceeding against the telcos for not complying with its order of restitution.

The case: NCA

On 30.01.2020, NCA imposed a € 228 millions fine on the telcos concerned for the ascertained cartel.

It's deemed that this unfair practice involved 20 millions of contract for at least one year in violation of consumers rights and competition law.

If we consider an average monthly price of € 25,00 for contract, it means that € 500 millions have been unlawfully cashed.

At the moment, **only few thousands users have received their money back.**

Relationship between administrative ban and judicial decision

Violation of transparency of prices: consequences

It is possible or not for the civil Court to declare a clause null and void, because in violation of a decision issued by an Administrative authority, that has been challenged in front of an administrative court?

What is **the legal value** for the Court of an administrative decision, not even final?

What is the new and oncoming EU legislation stating on these points?

The EU proposal of a directive on collective judicial actions

Article 2: “(the directive) *not affects rules establishing contractual and non contractual remedies under UE or national law*”

The EU proposal of a directive on collective judicial actions

*“MS shall ensure that a **final decision** of a court or an administrative authority of any Member State establishing an infringement harming collective interests of consumers established in a final decision of an administrative authority or a court...can be used as irrefutably establishing evidence of the existence of that infringement for the purposes of any other actions seeking redress before their national courts or administrative authorities against the same trader for the same infringement, in accordance with national law on **evaluation of evidence**” (art. 10).*

The relation between the violation and the supervened legislation

The Tribunal of Milan held that, notwithstanding the removal of the clause, the claim still had to be accepted to cease the use of the clause in the future: in other words the undertakings were prohibited to invoke the clause in order to avoid restitutions.

Article 5a proposal *“definitive measure to cease or, where appropriate, to prohibit a practice that constitutes an infringement»*

The relationship between injunction and damages

So far, very few consumers got their money back, because it is too small an amount to file an individual claim and no consumer association has filed a class action for repairs and damages.

Would have it been possible, under your national jurisdiction, to use the principle of effectiveness, stated by Article 47, to overrule the principle of the demand and state «appropriate measures»?

Which would have been the risks?

What are the «appropriate measures»?

What is the new EU legislation stating on these points?

The directive 2161/2019

Article 3 inserts article 11A in the directive 2005/20/EC, named «Redress», stating: *«Consumers harmed by unfair practices shall have access to proportionate and effective remedies, including compensation for damages suffered by the consumer and, where relevant, a price reduction or a termination of the contract....»*

The EU proposal of a directive on collective judicial actions

Article 4: *«The action is brought by a qualified entity (also a public body designed by the MS), even designed ad hoc»*

Article 5b *«A redress measure shall oblige the trader to provide consumers concerned with remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law»*

Individual and collective redress

What if a qualified entity will file a redress measure or if an individual will file a claim asking for restitution of the money and damages?

What would be the legal value of the provisional decision of the Tribunal of Milan under new and oncoming EU legislation?

And under new Italian law on class action?

The EU proposal of a directive on collective judicial actions

Article 5b: the qualified entity may bring a redress measure without *“condition of the prior establishment of an infringement by a court or an administrative authority through separate proceedings”*

Article 5b: The redress measure is *“without prejudice to any additional remedies available to consumers under Union or national law, which were not subject to that representative action”*.

Article 13: *«Disclosure of evidence»*

Italian judicial collective redress in the future: law 12.04.2019 n. 31

Effective from 19.10.2020

Key elements

- 1) Collective action is for any kind of homogeneous individual rights, not only those of consumers (from Consumer Code to Civil procedural Code)
- 2) Any individual or legal entity may bring the action
- 3) Against undertakings or any legal entity that provides public services;

Conclusions

Under ancient Rome's law a «right» was «*a claim that, if not voluntarily complied with by the obliged person, could be compulsorily enforced*»; in less words, a right is «a claim with a judicial remedy»; for the same reason, without a judicial remedy there is no right.

In the fields of consumers protection this is particularly evident in particular when the consumer right affected concerns small amount, causing small danger to million persons, so that causing a big danger at the principle of lawfulness and at macro-economic level.

So, specially for these «small» rights, it is very important to assure adequate and effective remedies.

Appendix: Italian judicial collective redress in the future: law 31/2019

- It's not allowed intervention of a third party;
- Special Tribunal (Tribunale delle Imprese);
- Prior admissibility check: decision can be appealed;
- If admitted, the Tribunal gives terms to opt in (only by telematic means) ;
- The Tribunal can use as evidence: statistical informations, rebuttable presumptions and technical expert opinions (at expenses of the defendant);
- The law rules also for disclosure of evidence and related penalty;

Italian judicial collective redress in the future: law 12.04.2019 n. 31

- Decision: if accepted, the judgment states that there has been an infringement, describes the violated homogeneous rights, the required documents, gives new terms to opt in (only by telematic means), appoints the «delegated judge» and the «representative» of the people participating to the collective action, fix a fee to be paid to opt in for the expenses of the procedure;
- After exchanging acts, the defendant is to produce a «project of the individual homogeneous rights», that can be amended by the «representative»

Italian judicial collective redress in the future: law 12.04.2019 n. 31

- The delegate Judge with a decree accepts or reject the request of the person opting in, stating the amount to be paid to any single person, to the representative and to the lawyer advising the plaintiff;
- The judgment can be appealed and the decree can be opposed;
- OPT OUT: the person who opted in may bring individual action on the condition that revoked the option before the decree became definitive;
- Special rules for the compulsory execution

Italian judicial collective redress in the future: law 12.04.2019 n. 31

- Settlements are possible, binding only people who accepted them expressly
- It is possible to dismiss the action if the patrimony of the Defendant is incapable

Italian judicial collective injunction in the future: law 12.04.2019 n. 31

- 1) Any person or any no-profit association concerned with the protection of the harmed persons, may start an action to stop acts or practices harming many individuals or entities, in order to obtain an injunctive relief or prohibition to repeat such misconducts:
- 2) Tribunale delle Imprese
- 3) Evidence: same than for class action
- 4) Tribunal may adopt «appropriate measures», if requested by the plaintiff
- 5) If the injunction is requested together with collective redress, Tribunal separates the claims (WHY????)
- 6) No prejudice for special provisions.

Judicial collective redress: the EU model

the proposal adjourned at 28.11.2019: key points

1. Declared objective: *“the better functioning of the internal market taking as a base the achievement of a high level of consumer protection”* (art. 1 , par. 1)
2. partial harmonization (*«at least one representative action mechanism complies with this Directive”*, art. 1, par. 2);

Judicial collective redress: the EU model

3. *“not affects rules establishing contractual and non contractual remedies under UE or national law” (art. 2);*
4. Any MS is to rule if the final decision is up to Court or administrative Authority (art. 3).
5. The action is brought by a qualified entity, that can be a public body even designed ad hoc (art. 4);
6. Cross border representative actions (art. 4a);

Judicial collective redress: the EU model

- Object: *“Qualified entity must provide information on the consumers concerned by the action”* and can ask: *“injunction; redress”* plus *“MS may ensure that qualified entities are able to seek..appropriate measures”* (art. 5);
- Only qualified entities are parties but consumers may benefit; they can bear costs in exceptional circumstances, in any case modest fees (art. 5);

Judicial collective redress: the EU model

- Injunction measures to cease or to prohibit a practice which is an infringement: provisional and definitive; to publish the decision (art. 5a);
- Qualified entity does not need to prove actual loss or damage of the consumers (art. 5a);

Judicial collective redress: the EU model

- Redress measure: «*A redress measure shall oblige the trader to provide consumers concerned with remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law*” (art. 5b);
- Time limit for consumers to opt in (expressly or implicitly): in such case, they cannot bring an action with the same cause of action and against the same trader (art. 5b);
- The redress measure shall specify individual consumers or the “group of consumers” that can benefit;

Judicial collective redress: the EU model

- the consumers shall seek recovery of the damages without the need to bring a separate action
- “without prejudice to any additional remedies available to consumers under Union or national law, which were not subject to that representative action”
- NO “condition of the prior establishment of an infringement by a court or an administrative authority through separate proceedings” (art. 5b)

Judicial collective redress: the EU model

- Settlement: under control of court or the administrative authority (art. 8)
- Information on the representative actions (art. 9)
- *“MS shall ensure that a final decision of a court or an administrative authority of any Member State establishing an infringement harming collective interests of consumers established in a final decision of an administrative authority or a court...can be used as irrefutably establishing evidence of the existence of that infringement for the purposes of any other actions seeking redress before their national courts or administrative authorities against the same trader for the same infringement, in accordance with national law on evaluation of evidence”* (art. 10)

Judicial collective redress: the EU model

- Suspension of limitation period for consumers (art. 11)
- Expediency and summary procedure (art. 12);
- Disclosure of evidence (art. 13)
- Penalties: effective, proportionate and dissuasive (art. 14)

Actual Italian judicial collective action art. 140 Consumer code: injunction

Action can be brought only by a qualified entity, with the aim to stop acts or practices harming collective interests of consumers and to adopt appropriate measures to eliminate harmful effects and publication of the decision;

Tribunal

If necessary, summary procedures

Any consumer may bring individual action

Actual Italian judicial collective action

art. 140bis Consumer code: redress

- Object: statement of liability and recognition of damages and restitutions for consumers, whose individual rights or collective interests are homogeneous: contractual rights in case of unfair terms, non contractual rights against the producer, rights deriving from unfair commercial practices or violating competition rules;
- The action can be brought by one or more consumer, also through a qualified consumer association;
- Admissibility check, can be appealed;

Actual Italian judicial collective action

art. 140bis Consumer code: redress

- If the class action is deemed admissible, Tribunal issues a interinal decision containing: description of homogeneous rights, perentory times to opt in, evidence required by the consumers opting in; the decision is published;
- The Tribunal decides on the plaintiff's request: if accepting the request, orders the defendant to pay damage and restitutions;
- Settlements are possible and are effective only among consumers that subscribed the settlement;
- The judgment is effective for all the consumers that opted in, whereas who did not opt in may bring individual action