

CHAMBER OF DEPUTIES – JUSTICE COMMITTEE

**Examination of draft laws introducing class action lawsuits for the protection of consumers.**

Rome, 4 April 2007

Hearing of the President of the Italian Banking Association ('Associazione Bancaria Italiana', or 'ABI')  
Avv. Corrado Faissola

## **Examination of draft laws introducing class action lawsuits for the protection of consumers.**

*Hearing of the President of the Italian Banking Association ('Associazione Bancaria Italiana', or 'ABI') Avv. Corrado Faissola*

*Mr. President, Honourable Deputies,*

1. The Italian Banking Association (ABI) would like to thank for the opportunity it has been granted to illustrate, in the proper institutional seat, its opinion on a particularly relevant legal institute, one that is capable of substantially altering the methods by which the rights of individuals are afforded protection, as well as producing serious consequences for the system of companies.

The banking system is anything but convinced that recourse to class action, in the forms provided by draft laws presently passing through Parliament, is truly in line with the objectives that inspired its introduction: consumer protection, swifter proceedings, and simpler access to justice for parties damaged by so-called "poly-offensive" unlawful conducts, while also presiding the integrity of the system of companies.

This view is supported, beyond the analysis of various draft laws presented to Parliament in recent months, primarily by the experience of major foreign regulations which, as exemplified by the USA, revealed critical aspects which negatively affected the development of financial markets, where transactions were displaced to foreign marketplaces such as the one in London.

Furthermore, we cannot help but take into account initiatives that have been either adopted or announced by the European Commission. These initiatives concern class actions ascribable to decisions taken by antitrust authorities, i.e. private enforcement, as well as the wider and more generic topic of consumer protection, on which the competent Commissioner has recently announced the opening of an in-depth study.

In appreciating the opportunity that has been offered to us by the Justice Committee of the Chamber of Deputies, I will outline a number of considerations which aim, on the one hand, to emphasise the role of alternative procedures for the settlement of disputes intended to offer a swift and effective system for the management of consumer driven disputes, and on the other hand indicate a number of highly critical issues, which may be evinced from the regulatory framework at hand, which call for

a careful and well meditated review, while suggesting certain evolutionary paths at the same time.

2. Now seems the best time to immediately point out that if class actions are considered as one of the possible instruments for the protection of diffused and collective rights, the same results can also be achieved by a number of different and simpler procedural mechanisms which do not carry the same critical aspects and contraindications that are found today in class actions, as currently envisaged.

3. In particular, I would like to point out that it is some time now that the banking sector has acknowledged the need to equip customers with swift and cheap instruments to settle disputes which, for their individual low value, ideally should not be managed by ordinary courts.

In fact, it is since 1993 that the interbank agreement introduced a banking ombudsman and a complaints office [*, through which, on one side, adherent banks undertake to set up an internal office where customers may file their complaints on contracts and financial and banking operations carried out by their bank and, on the other side, customers may, in the event of an insufficient reply by the office, call on the banking ombudsman that will adopt its own decision. This decision is binding for the bank and for the adherent intermediary, but it allows the customer to bring the case to court. In its present version the procedure is made available to all customers (whether strictly a customer or otherwise) and the banking ombudsman board will decide on disputes which do not exceed the value of 50,000 euro; the entire proceeding is free for the customer and it must be brought to completion (both as concerns the complaints office and the ombudsman) within a brief period of time (at most, 180 days for the two stages)*].

The degree of flexibility and efficiency afforded by the mechanism provided by the Agreement justifies its growing success: in 2005 the offices collected approximately 203,000 complaints; the complaints submitted to the banking ombudsman were more than 4,200; those decide were more than 4,300. Furthermore, continuity in time has allowed for the identification of a “jurisprudence” that is consolidating on certain positions which offer some guidance to operational choices made by the banking industry in the context of a process that is increasingly moving towards best practice principles.

4. In 2006, in the wake of what was provided by Article 38 of legislative decree no. 5 of 2003, which amended the procedural law in corporate disputes, ABI prompted the establishment of an association named “II Conciliatore Bancario” (i.e. “The Banking Conciliator”) that was entrusted

with managing conciliation procedures that concerned banking, financial and corporate matters.

*[The mentioned association, which will eventually absorb the banking ombudsman with untouched autonomy and operational methods, will operate coordinating the activities of those conciliators spread across all regions of the country which meet currently applicable legal requirements].*

*[This is a procedure that conceptually represents an alternative to the banking ombudsman insofar as the proposal of calling on the conciliator is subject to acceptance by the other Party (whereas the bank cannot avoid judgement by the ombudsman when the latter is called on by the customer); that it is not a decision, but rather assistance to the parties in finding a compromise solution, in absence of which both parties are free to protect their interests in the way they deem best; conciliation is not free to customers because regulations provide that expenses be paid by users, but such costs are relatively cheap when compared to set fees for conciliators who work for bodies promoted by public entities].*

*[Both procedures allow the customer to assert his rights and to receive compensation for damages in a in a short period of time following simple methods that cost little, if anything at all. Of course we are dealing with personal actions, but it is equally obvious that the development of the illustrated procedures can lead to an amplification of the juridical resonance of the decision].*

**5.** *[Both of the solutions proposed by the banking industry to favour customer access to dispute resolution procedures that represent an alternative to the ordinary court system and, consequently, to improve customer relations, are good examples of self regulation. This confirms the effectiveness of initiatives directly promoted by operators who move in the open spaces left by the legislator or in the context of options made available by the same, in order to improve the overall legal frame of reference].*

*[Therefore it is surprising to run into legal provisions or initiatives that will further narrow margins granted to self regulation: special reference is made Article 128(bis) of the consolidated banking act inserted by Article 29 of law no. 262 of 2005 which, once that the required implementation rules have been issued, will force banks to adhere to alternative out of court dispute settlement systems with consumers (only), systems whose operation will be governed by a resolution issued by the Credit and Saving Interdepartmental Committee].*

*[Initiatives that do not ask sector authorities to set general principles, but see them actively involved in the management of alternative dispute settlements, result in system clashes (such authorities would*

*simultaneously set the rules, interpret the rules, monitor observance of the rules, and settle disputes that derive from application or non-application of the rules), restrict the scope of self regulation (often appreciated by authorities, which would like to see them used with greater frequency), and hamper the success of proceedings that customers evidently approve].*

## **II. Comparative analysis of draft laws presented in Parliament**

6. The contents of the debated draft laws can be traced back to two different types. The first type (which includes the Bersani, Benvenuto, Maran, Buemi, and Crapolicchio drafts) provides for actions to be promoted by consumer associations, or by other specifically entitled parties, and is structured in two stages: one results in a generic conviction, while the other results in the reimbursement of damages suffered by the individual. The second type (which includes the Fabris, Poretti, Pedica, and Grillini drafts) grants the right to promote the action to anyone who may be so interested, allows for the presence of a class representative acting as “promoter”, adopts the mechanism of “class” certification by the judge and provides a single level of trial, which must result in the repayment of damages suffered by the individual.

*[In practice, whereas the first alternative depicts a legal path that tends to attach itself as smoothly as possible to the principles of our legal system and applicable civil law procedures, the second alternative is more reminiscent of the American system. In effects it is not by chance that one alternative substantially “innovates” the consumer code, while the other provides an ‘ad hoc’ or tailor made law].*

*[A detailed analysis of the drafts points towards an extremely varied range of solutions and layouts which cannot be summarised, but only mentioned by topic: scope of application; entitlement to promote class actions; requests for admission; mandatory pre-emptive settlement attempts; identification of parties entitled to benefit from class actions; mechanisms for joining in collective actions, structure of the action].*

## **III. General principles of the legal system and foreign experiences**

7. Despite the structured diversity of contents of submitted draft laws, all of them apparently hope to introduce into the national legal system a legal institute which, in light of its function, objectives and nature, carries elements that are foreign to a number of the basic principles of our legal system.

A reputable doctrine deems that class actions for compensation breach Article 24 of the Constitution which sanctions the non-renounceable right to

act in a court of law, a right which it grants to each and every citizen in order to safeguard their individual rights. Class actions result in the (full or partial) elimination of cross-examination and, consequently, the elimination of defence activities that can be carried out by individuals that belong to the class represented in court, something which is incompatible with the existing system whenever the trial concerns interests that touch upon the individual asset of the titleholder of the disputed right, as is the case for the compensation of damages.

From this point of view, the 'two-stage' structure (generic conviction trial, followed by a quantification of damages suffered by the individual), rather than the 'single-stage' one (where there is a single trial and determination damage compensation), could help to overcome the abovementioned constitutional doubt. In fact, the result of the second stage apparently complies with Article 24 of the Constitution by contemplating a decision, whether in court or not, affecting the individual user or consumer, without prejudice to the prerogatives of parties of a court proceeding.

As for the assessment decision (the generic conviction) that marks the conclusion of the first stage, the circumstance that what is being assessed is the conduct or the breach enacted by the company distracts from the fact that the individual cannot enforce his interests, which coincide with those of other damaged parties (assessment of responsibility), so that the alleged breach of the principle pursuant to Article 24 of the Constitution is more a matter of form than of substance.

**8.** With reference to the civil and procedural system, we need to ascertain any contrast with the legal principle set by Article 2909 of the civil code which limits the application of court rulings solely to the parties that participate in the trial, with the consequence that a sentence cannot be invoked by those parties who did not participate in the trial that issued the mentioned ruling.

The principle at hand is connected to that of the integrity of cross-examination, detailed in Article 101 of the code of civil procedure, according to which all parties addressed by a sentence must partake in the trial's cross-examination and that the sentence cannot be lawfully issued for or against their persons if they are not placed in a condition to personally appear in court.

In the light of such doubts, which have also been expressed by reputable sector analysts, I believe that further reflection is needed in order to allow class actions to smoothly fit into our constitutional system.

**9.** The objectives pursued by the abovementioned draft laws have already been tackled by the lawmakers of those countries that have already

adopted class actions. Analysis conducted in this context raises a number of interesting issues that should be taken into consideration in the course of debate in Parliament. Recent experiences have shed plenty of light on the critical issues raised by class action regulations in the very country that saw it develop the most, i.e. the United States of America, where the need for a substantial legal amendment of the same is widely called for.

As previously mentioned, the class action system currently in place in the USA, despite regulations being tempered in time, has been identified as a factor that negatively affects the development of financial markets, with effects that tend to displace transactions towards foreign marketplaces, especially the one in London.

**10.** The above brief analysis inevitably indicates that we need greater insight into the matter, we need to look for innovative solutions that will better counterbalance the needs of users and businesses. In doing so we will need to carefully account not only, as mentioned, for the legal evolution of the main systems, but also for the lively debate on the matter that is taking place at Community level.

As for this last aspect in particular, I must remind you that the European Commission is dealing with the issue and intends to achieve the definition of a collective redress system benefiting consumers, one in line with the results of the 2005 Green Paper on compensation actions which derive from the breach of antitrust regulations set by the Community. To this end, and also in consideration of questions raised on the issue by those that joined in the relative consultation procedure, further in-depth studies are being carried out by the EU which aim to ascertain the viability of this and other solutions in order to deliver suitable means of compensation to consumers.

Furthermore, statements by European Commissioner for Consumer Protection Meglena Kuneva (Financial Times interview dated 4 March 2008) and by European Commissioner for Competition Neelie Kroes (*Commission/IBA Joint Conference on EC Competition Policy*, Bruxelles, 7 March 2007), it seems that the European project will nevertheless have to distinctly differentiate itself from the American class action system in order to avoid defects and abuses of the same and, in any event, it will not import a priori models and solutions that exist in certain legal systems.

#### **IV. Conclusions and ideas for a future regulation of the subject**

**11.** Given all the above as premise, I would like to illustrate certain critical aspects that emerge from the draft laws that have been presented which I believe should be taken into account on occasion of future regulation.

**a) Entitled parties** – We do not share the choices made by certain draft laws, including the one presented by the government, as regards the identification of entitled parties. We are against granting entitlement to chambers of commerce because, due to their very nature and composition (since they comprise both businesses and consumers), they would fall into an obvious conflict of interest, much as we are against granting it to professional associations, an ambiguous term that may result in granting the right to promote class actions to lawyers organised in professional associations, with the previously mentioned inherent risk of a lawyer-driven procedure.

On the other hand, we do share the solution of identifying consumer associations as the entitled parties.

This requires a stricter version of currently applicable requisites in order to ensure increasingly greater assurances of professionalism and reliability of the people who promote, assuming full responsibility, actions capable of deeply affecting markets and businesses. *[Without expecting to be exhaustive, prerequisites for granting authorisation to act should be, at the very least, a careful identification, and relative practical verification, of rules of representation for associations registered in the Ministry's list; of their structural characteristics (governance, internal controls and so on), and their financial and economic solidity (or the guarantees that ensure it)].*

**b) Sphere of application of the action** – We do not see the justification behind limits found in certain draft laws as regards the sphere of application of the action which, if deemed acceptable, would lead to discrimination between consumers and between businesses. In particular, the poly-offensive event that gives way to the action must concern behaviours and deeds performed under contractual and under non-contractual conditions, in other words in the presence or in the absence of those contracts written out on forms and modules evoked by some of the draft laws that are being debated.

**c) Procedural passages of the action** – We are against the introduction of class action mechanisms that do not represent an answer to the real objective of lowering the amount of legal disputes in courts. Consequently, we need to avoid the iteration of actions for damages against a class action, both on a collective level, in other words through the proposition of further class actions, as on an individual level.

Ahead of the ascertainment of a poly-offensive event, all damaged parties must be able to benefit from the same by requesting compensation, but any potential further actions of the sort for the same event must be ruled out. In other words, when faced by a conduct deemed damaging for the class,

the collective action must be a single one in order to avoid a rampage of lawsuits until one of them achieves success.

In order to achieve the above, two pre-requisites are necessary: that the class be precisely defined by the judge, and that it be suitably publicised, allowing those who are in need to make use of it. As for the first requirement, the criteria that denote and delimit it must be previously identified by the proceeding judge and then (and this is the second requirement), following the initiative and at the expense of the proceeding association, to make them known to the public at large in the best possible way.

Furthermore, in order to offer a degree of certainty to the businesses that are called to offer compensation in those cases where the abovementioned mechanism cannot be adopted, a deadline must be set from the date of deposit of the generic conviction sentence after which the consumer can no longer intervene to obtain a quantification of damages. The solution adopted by the Spanish legal system, which provides that an individual action cannot be filed when there is an existing class action, should be examined to verify whether it could fit the Italian system.

**d) *Need to avoid dubious actions*** – Recognition of the “deterrent” function carried by the simple proposition of a class action implies acknowledging the significant prejudice that activation of a dubious action can cause to a company when it is destitute of any serious foundation. Exactly because it bears so much prejudice, we must keep in mind that initiation of an action based purely on an excuse can result in a claim for damage compensation against the very association that filed the action, which should add further substance and reason to the need that proceeding associations ought to be financially and economically sound.

**e) *The necessary favour for an out of court settlement of class actions*** - Favouring alternative solutions to court rulings which may settle disputes rapidly and cheaply at a class level means wanting to face the issue of rationalising this sector. In recent times the legislator has faced, albeit occasionally and without a suitable form of coordination, the issue of alternative dispute resolution methods based on an extremely varied array of parameters, methods and models. The latest example is provided by law no. 262 of 2005 on the protection of savings, whose tormented approval process also included the idea of a class action regulation and whose final text prefigures dispute settlement solutions.

In particular, Article 27 delegates the Government to adopt a decree to establish, “as regards investment services”, conciliation and arbitration procedures that would be subjected to cross-examination in front of Consob (the Italian securities and investments board) in relation to disputes

between intermediaries and non-professional investors "as concerns the fulfilment of information, correctness and transparency duties provided by contractual relations with consumers"; Article 29, introducing Article 128(bis) in the consolidated banking act, provides that the Credit and Saving Interdepartmental Committee (CICR) must establish out of court settlement systems for disputes arising between banks and consumers, and that banks must adhere to them. Even from a standpoint of an unwanted invasion of areas left to self regulation, the banking industry has already had the chance to voice its disapproval of such regulatory interventions.

Having emphasised this disapproval based on principle, it is clear that the connection that these two interventions share with the issue of class action, which is often prefigured as the means to resolve mass disputes, especially in the banking and financial sector. But this is certainly not the only field of application, and therefore clarity of law imposes that alternative procedures recalled by draft laws on class actions must be coordinated and in harmony with each other.

Therefore we must eliminate – or at the least substantially review, replacing it with provisions to coordinate and refine conciliation mentioned in Article 38 of legislative decree no. 5 of 2003 – what has been provided by the articles included in the law on savings, which presents itself as a 'special' rule which only addresses certain legal cases and which instead must be reorganised in a general context that must include the drafting of cheap and efficient alternative procedures based on methods that prevent sector authorities from intervening in the management of the same and which may be used by customers acting either individually or as components of a class. To this end, useful inspiration may be drawn from the mentioned interbank procedures.

**f) *Need for a transitory regulation*** – If, for certain aspects (and according to a simplistic interpretation), an argument could be upheld for the merely procedural nature of the legislative amendment, which does nothing more than introduce into the legal system a new means to protect a traditional substantive law (compensation for damages), for other aspects we need to notice how the scope of the class action instrument goes beyond procedural matters given that, once it is implemented, it will lead to a new and different asset of substantive law.

As a consequence of what has been illustrated we deem it reasonable, and timely, that the legislator should provide transitional rules so that the class action instrument - which is so deeply innovative and inevitably marked by an extreme risk of abuse, especially in the initial stages of use – may be applied to disputes descending from poly-offensive events that follow entry into force in order to avoid any actions deriving from past events.