

## The New Italian Class Actions

### ***New law aims to expand the currently limited application of class actions in Italy.***

The Italian Parliament has introduced a comprehensive reform of the rules governing class actions that will:

- Significantly widen the scope of application of the current rules
- Provide specific incentives for claimants to bring class actions
- Introduce substantive changes to the court competence and procedural rules applicable to class actions
- Encourage settlement agreements

On 18 April 2019, Law No. 31 of 12 April 2019 (the Reform) was published in the Official Journal of the Republic of Italy (*Gazzetta Ufficiale*).

The Reform will become effective on 19 April 2020, 12 months after its official publication. It will exclusively apply to unlawful conducts carried out after the effective date. As such, the provisions currently in force shall continue to apply to conducts carried out beforehand.

This *Client Alert* provides an overview of the Reform, highlighting the most innovative aspects and some points of concern.

### **Breaking Down the Reform's Key Aspects**

- 1) *Extended scope*: The Reform significantly widens the scope of application of the current rules, providing that whoever holds "individual homogeneous rights" (not only consumers and users) can bring a class action to seek collective redress or restitution against all companies or providers of public services.
- 2) *Incentives for claimants*: The Reform provides incentives for claimants to bring class actions by granting:
  - (i) All eligible class members with the ability to join a class action even after the court's favorable decision on the merits (hence, not only after the decision on the admissibility of the action)

- (ii) Enhanced courts' powers in the field of evidence
  - (iii) Contingency fees in favor of the common representative of the class members and of the lead claimant's lawyer
- 3) *New procedural rules*: Although the Reform maintains the traditional opt-in system, it also introduces substantive changes to the court competence and procedural rules applicable to class actions. For instance, the Reform adds an entirely new procedural phase after the favorable decision on the merits. In essence, the current two-phase procedure has been replaced by a procedure in which the first two phases relating to the ascertainment on the admissibility of the claim and the decision on the merits are followed by a third phase for the definitive formation of the class and adjudication on *quantum*.
- 4) *New settlement options*: The Reform encourages settlement agreements by enabling the competent courts and common representative of the class members to take the initiative and submit settlement proposals to all parties and applicants.

### **Who is entitled to bring a class action?**

The Reform significantly broadens the scope of application of class actions by granting the right to bring a class action to whoever holds "individual homogeneous rights", rather than to consumers and users only.

As such, the new class actions can be instrumental to protect a wide range of contractual or non-contractual rights that goes beyond mere consumers' protection and that can also include, for instance, the protection of rights in the field of environmental law and financial services.

Moreover, under the new regime, class actions may be commenced by each and every class member, as well as nonprofits or associations whose statutory purposes include the protection of individual homogeneous rights, as long as those associations or organizations are duly enrolled in a public registry held by the Italian Ministry of Justice.

### **Against whom can a class action be brought?**

The new class actions can be brought against all companies, providers of public services, or entities managing services of public utility in relation to conducts carried out in the course of their business to seek redress and/or restitution for any type of contractual or tort infringement, without any limitations.

### **Where can the new class action rules be found?**

Consistent with the legislator's aim to extend the scope of application beyond mere consumer protection, the Reform repeals the provisions currently included in the Italian Consumer Code and introduces the new provisions on class actions in an entirely new section of the Italian Code of Civil Procedure (Book IV, Title VIII-*bis*, articles 840-*bis* and following).

### **Which are the competent courts?**

The Specialized Business Division (*Tribunale delle Imprese*) of the court where a given defendant has its registered offices shall be exclusively competent for the new class actions.

To this extent, the Reform tends to ensure an increased level of specialization and uniformity of decisions, in contrast with the current rules, which allow class actions to be heard by all main ordinary judges spread out in the national territory.

## What are the main procedural rules?

From a procedural standpoint, the Reform prescribes that class actions shall be governed by the rules on the summary proceedings (*rito sommario di cognizione*) set forth in articles 702-*bis* and following the Italian Code of Civil Procedure, with some exceptions.

More specifically, class action proceedings shall be introduced with the filing before the competent court of an ad hoc application (*ricorso*) — as opposed to a summons to be served to the defendant(s) — which is then followed by a court decree scheduling a hearing for the appearance of the parties. Class action proceedings differ from the generality of the summary proceedings in that the law prevents, for instance, any possible switch from summary proceedings into ordinary proceedings regardless of the complexity of the case and the evidence to be taken.

With the aim to ensure public disclosure of relevant information, the claimant's application and the court decree scheduling the first hearing are published, within 10 days after the issuance of the court's decree, in the public area of the website for telematic services (*portale dei servizi telematici*) managed by the Ministry of Justice. All proceedings commenced within 60 days after this publication and relating to class actions brought against the same defendant and based on the same facts shall be consolidated into the first proceedings, whilst the others shall be cancelled from the docket.

Under the new regime, class action proceedings can be structured in the following three consecutive phases:

- Phase 1: Ascertainment on the admissibility of the claim
- Phase 2: Decision on the merits
- Phase 3: Definitive formation of the class and adjudication on *quantum*

### (1) Admissibility of the claim

Within 30 days after the first hearing, the court shall ascertain the admissibility of the claim by issuing a specific order.

The claim is declared not admissible if: (a) it is manifestly unfounded; (b) the court assesses the lack of homogeneity of the individual rights; (c) the claimant has a conflict of interest with the defendant; and (d) the claimant does not seem to adequately represent the holders of the relevant individual homogeneous rights.

When the court declares the admissibility of the claim, it schedules a hearing for discussion and also assigns a peremptory time limit, ranging from a minimum of 60 days to a maximum of 150 days after the publication of the order at issue (*see below*), for all class members (*i.e.*, whoever holds individual homogeneous rights) to join the action.

The court order shall be published, within 15 days after its issuance, on the public area of the website for telematic services (*portale dei servizi telematici*) managed by the Ministry of Justice and can be challenged before the Court of Appeal within 30 days after its communication or notification.

*(2) Decision on the merits*

Without being bound by formalities not essential for the contradictory, the court may use its discretion to decide on the taking of evidence and, more generally, on the further developments of the proceedings.

Notably, the Reform grants the courts with enhanced powers in the field of evidence, by providing, for instance, that the courts may:

- (i) Appoint a technical expert (*consulente tecnico d'ufficio*) ordering the defendant to anticipate the relevant costs and a down payment of the fees
- (ii) Avail, for the purpose of establishing the defendant's liability, of statistical data or rebuttable presumptions
- (iii) Order the defendant to disclose relevant pieces of evidence, or categories of evidence, in its possession
- (iv) Fine the parties not complying with said disclosure orders in the absence of justified reasons, or whoever destroys relevant evidence, with the payment of administrative sanctions ranging from €10,000 to €100,000
- (v) Consider irrefutably established the facts that would have been proven by evidence not disclosed in violation of a specific disclosure order and in the absence of a justified reason, or otherwise destroyed on purpose

Upon the conclusion of the activities relating to the taking of evidence, the court upholds or rejects the claim on the merits by issuing a decision that shall be published within the following 15 days, on the public area of the already mentioned website managed by the Ministry of Justice.

When the claim is upheld, the court:

- (i) Rules on the request for compensation or restitution, unless the action has been brought by an organization or association
- (ii) Sets out the peculiar features of the relevant individual homogeneous rights, defining the requirements necessary for the class members to be included in the relevant class
- (iii) Adjudicates a peremptory time limit, ranging from a minimum of 60 days to a maximum of 150 days, for all class members to join the action or to supplement their filings
- (iv) Appoints a delegated judge to oversee and manage the adhesion procedure
- (v) Appoints a common representative of the class members
- (vi) Determines, if necessary, the amount that each class member adhering to the action shall pay to constitute a fund for the procedural expenses

The court's decision can be appealed before the competent Court of Appeal within 30 days after its communication or notification.

### (3) *Definitive formation of the class and adjudication on quantum*

This is the perhaps the main and most controversial novelty of the Reform. Following the decision upholding the claim, the proceedings evolve with the definitive formation of the class and the adjudication on *quantum*. This procedural phase, led by the common representative of the class members and the judge delegated by the court, is structured as follows:

- (i) Within 120 days after the expiry of the time limit assigned by the court to the class members to join the action, the defendant is admitted to file written pleadings on the merit of the applications filed.
- (ii) Within the following 90 days, the common representative of the class members shall submit a project of the individual homogeneous rights of the applicants, displaying reasoned conclusions for each applicant.
- (iii) Within the following 30 days, the applicants and the defendant may file written observations to the aforesaid project and also submit additional documents.
- (iv) Within the following 60 days, the common representative of the class members may amend the project of the individual homogeneous rights of the applicants.

This procedural phase ends with the decision of the delegated judge (in the form of a motivated decree) who upholds or rejects each class action application.

When upholding an application, the delegated judge liquidates the amount due to each class action's members as compensation or restitution, as well as an additional amount for the reimbursement of the legal expenses.

Moreover, with its decision, the delegated judge also sentences the defendant to pay to the common representative of the class action members and to the class action's lead lawyer a contingency fee (which can be rather generous) pursuant to the criteria set out in the Reform.

The delegated judge's decision is immediately enforceable and may be challenged before the court within 30 days after its communication to the parties.

Notably, the Reform provides a special regime of collective enforcement for this decision, establishing that only the common representative of the class action members can bring enforcement proceedings (and related challenges) in the collective interest of all class member applicants.

### **What are the new rules for settlement agreements and injunctive relief?**

With regard to settlement agreements, the Reform provides that the initiative to settle can be taken either by the court in the course of the admissibility phase and until the oral discussion of the case, or by the common representative of the class action members together with the defendant(s) after the court's decision on the merits.

In both cases, the settlement proposals shall be published into the public area of the website for telematic services (*portale dei servizi telematici*) managed by the Ministry of Justice and are open for the adhesion of all parties and class member applicants.

Regarding settlement proposals submitted by the common representative of the class action members together with the defendant(s), absent reasoned objections of the class member applicants within 15 days

from the communication of the settlement proposal, this proposal is deemed to be uncontested and the delegated judge can therefore authorize the common representative of the class action members to finalize the settlement agreement. In this case, the executed settlement agreement represents a valid title to bring enforcement proceedings and to establish judicial mortgages.

Additionally, the Reform extends the scope of application of the collective injunctive relief, granting standing to whoever holds an interest to inhibit and/or avoid reiteration of acts and behaviors detrimental against multiple individuals or entities. With the injunctive order, the competent court (*id est*, the same court competent for class actions) may also order the publication of the injunction, the payment of penalties in case of non-compliance with the order, and possible measures capable to eliminate or mitigate the effects of the ascertained infringements.

## Conclusion

The Reform is poised to provide material incentives that could significantly expand the current (and indeed very limited) application of class actions in Italy. However, the new rules could also lead to potential distortions of the system by encouraging opportunistic behaviors and complicating the management of cases.

Defendants could face particular risks under the Reform's provisions. Not only will claimants be more likely to bring class actions against companies and public service providers, but their ability to join a class action after a favorable decision on the merits represents a serious threat to defendants. Specifically, defendants could be prevented until the end of the proceedings from knowing the actual perimeter of the class and hence the potential liabilities deriving from the relevant action. As such, the Reform introduces an element of material uncertainty for defendants that is likely to impact their defense strategy, as well as their accounting and risk assessment abilities.

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The authors would like to thank Stefania Cirillo for her contribution to this *Client Alert*.

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