

# CLASS ACTIONS IN ITALY: A SECOND WAVE OF REFORM

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Legal Briefings

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We explore widespread criticisms that have been made of the current regime and key aspects of anticipated reforms.

Although a decade has passed since the introduction of class actions in Italy, only a handful of actions have been brought before the Italian courts and even fewer have been successful. There has been much debate as well regarding the very low amount of damages ultimately awarded by the courts to consumers. A drastic change has been called for, and some hope has also been pinned on the new European legislation fostering collective redress.

This has been the driving force behind a comprehensive reform of the Italian class action system, aimed at expanding and encouraging the use of class actions. The implementation of these reforms has however been postponed twice, and it will now be another six months before the new class action rules come into force. Once the rules take effect, businesses should expect to see an increase in the number of collective claims brought against them.

This article considers the widespread criticisms that have been made of the current regime and the key aspects of the anticipated reforms.

## THE EXISTING CLASS ACTION MECHANISM

Class actions were introduced in Italy in 2010 as one of a number of collective consumer protection measures included in the Italian Consumer Code (Legislative Decree 206/2005).

The practical application of the class action mechanism in Italy has been criticised due to the evident restriction of its scope of application. Class actions may only be commenced by an individual consumer or an association they appoint. A judge then assesses if the case is admissible and if it is, then other members can opt in to the action. The process is laborious and the onus is on the one consumer to pursue the action (and take on the cost). Further, the use of class actions is restricted to specific sectors relating to the protection of homogeneous consumer rights, in particular product liability issues, unfair commercial practices and anti-competitive behaviour such as the abuse of a dominant position.

Another important criticism has been the complete absence of any kind of incentive for law firms representing those bringing class actions, given that the class action rules provide for neither a success nor a contingency fee (which, in general, are not a part of the Italian legal system).

## **THE NEW ITALIAN CLASS ACTION SYSTEM**

As noted above, a comprehensive reform of the Italian class action system has been introduced in order to expand and encourage the use of class actions. The new law (Law 31/2019) was due to enter into force in April 2020 but, due to the Covid-19 pandemic, the date was postponed to 19 November. However, just a couple of days before that date, the Italian legislator decided to postpone the date again to allow for the inclusion of a number of technical measures connected to the new class actions structure, such as the online platform via which associations can register and class members may file their application to join an action. It will now be a further six months before the new class action rules come into force. However, it is largely agreed that this reform will be a key tool for bringing actions for collective redress in a wider range of market sectors.

## **KEY ASPECTS OF THE REFORM**

In addition to numerous procedural differences, the first significant change is the broader scope of application. Under the new rules, anyone who has "individual homogeneous rights" is entitled to bring a class action. In practice this has opened the class action system up to all potentially aggrieved parties, not just consumers, provided that all the members in a class action have "homogenous" rights. Moreover, associations listed on an official database will also have the right to pursue collective redress and, again, cases need not necessarily concern consumer protection.

This means that class actions may be used in other areas aside from consumer protection, such as in relation to climate change and other environmental issues, data protection and cyber breaches. It is also envisaged that pharma and financial services companies will highly likely see a sharp increase in class actions against them.

A second key change is the revised opt-in system. In essence, the new rules have lengthened the opt-in system: members can now opt to join proceedings *after* a judgment has been issued in a case. This change alone will no doubt spike an increase in aggrieved parties wishing to pursue collective redress. Previously members were deterred from joining due to uncertainty regarding the chances of success and the costs associated with taking legal action. Now parties can join actions in the full knowledge that they will be entitled to damages.

Importantly, the new rules provide for a special contingency fee for lawyers representing the class, whereby in the event of success, the losing party will have to pay a specific sum towards legal fees. The contingency will be calculated as a percentage of the total amount awarded and on the number of class members. This will clearly be a huge incentive for Italian firms to represent those bringing class actions.

## LIMITS

While the scope of class actions in Italy has expanded significantly, there are still significant differences between the Italian system and the much broader US class action system.

The main difference concerns the US opt-out system, where class members are included in an action unless they opt out. In the Italian opt-in system, the onus is on the members to join proceedings. A further, important distinction is the lack of punitive damages in the Italian system. Italian law does not allow the compensation of damages to have a punitive function against respondents, which has a significant impact on the level of damages awarded (which will never be as comparably high as in the US). National case law has started to see a change, however, with a gradual albeit very slow recognition of punitive damages as endorsed by foreign decisions.

## ENVISAGED EFFECTS

Despite the above-mentioned restrictions, it is nonetheless evident that this reform will bring major changes to the use of class actions in Italy. There will likely be a significant impact for Italian companies or foreign companies investing in Italy, especially because similar rules are in the process of being introduced across all of Europe. For example, in the field of consumer protection in France a new set of rules was presented last September, and in Germany, the highest civil court shaped the boundaries of collective redress just a few weeks ago. The growth of the new rules in a European context will also affect future collective actions at pan-European level, also considering the new proposal regarding the European directive for the protection of the collective interests of consumers within the European market.

By taking the scope of class actions beyond consumer protection, the Italian legislator is encouraging a broader use of this collective mechanism. Together with the extended opt-in system and contingency fees for law firms, companies should expect to see a peak in class actions.

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