

Reform of the rules on Class Actions

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Freshfields Bruckhaus Deringer

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(Law 12 April 2019, no. 31, ‘Provisions on Class Actions’)

The Italian parliament has approved Law 12 April 2019 no. 31, “Provisions on class actions” (published in Official Journal no. 92 of 18 April 2019), which has profoundly reformed the institution of the class action, previously regulated by article 140-bis of Legislative Decree no. 206 of 6 September 2005, (the Consumer Code), with a view to strengthening the instrument by extending its scope of application.

The main changes introduced by the reform are as follows:

1. Extension of the scope of application of the action.

Following the reform, class actions are no longer limited to the protection of the “*common individual rights of consumers and users (...) as well as of collective interests*” pursuant to the Consumer Code, but have become an instrument with a wider application.

In fact, the new class action may be brought to protect “*common individual rights*” held **not only by consumers or users**, but by any class of persons that intends to sue to establish liability and obtain compensation for damage and restitution from undertakings or public service operators or utilities providers that have harmed such rights.

Therefore, the rules on class actions have been removed from the Consumer Code and inserted in the new Title VIII-bis, Book IV of the Code of Civil Procedure, which is dedicated to special proceedings.

2. Extension of standing to bring the action.

Under the previous rules, the action could be brought by any class member, including through associations to which he/she gave a mandate or committees in which he/she was involved.

Following the reform, it is no longer possible to give a mandate to a consumer association as the action may now be brought:

- (a) by each class member; or
- (b) by non-profit organisations or associations whose purpose is to protect infringed rights and which are registered on a public list at the Ministry of Justice. Therefore, these associations and organisations now have standing to bring class actions **directly**, and no longer as a result of being instructed by a class member.

3. Assignment of the jurisdiction to the Specialised Business Sections

The reform assigns exclusive jurisdiction for class actions to the Specialised Business Section of the court where the defendant has its registered office, thereby changing the previous rules of the Consumer Code which envisaged that class actions had to be brought before the main regional court where the defendant had its registered office.

4. The proceedings are regulated by the rules on summary procedures and are divided into three separate phases.

The previous two-phase structure of the proceedings, which were divided into (i) admissibility procedure and (ii) procedure on the merits, has been replaced by the following three-phase structure:

- (i) **Admissibility of the action:** as with the previous rules, the court issues an order which may be challenged before the Court of Appeal and declares the claim to be inadmissible:
 - (a) when it is manifestly unfounded;
 - (b) when it finds that the individual rights are not common to the entire class;
 - (c) when the claimant has a conflict of interests with the defendant; or
 - (d) when the claimant is unable to adequately protect the rights enforced in the proceedings.
- (ii) **Merits of the case:** once the action has been declared admissible, the court follows the summary procedure and decides on the merits by issuing a judgement within thirty days of the verbal discussion of the case. In order to establish the defendant’s liability, the court may use **statistical data and rebuttable presumptions**. In the judgement that upholds the claim, the court, *inter alia*, establishes the defendant’s liability,

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defines the characteristics of the common individual rights and appoints (i) a delegated judge to manage the opt-in procedure and to rule on damages and reimbursements; (ii) a common representative of the class members. The judgement may be challenged before the competent court of appeal; it may also be challenged through an application for revision (*revocazione*) where inter alia it is the result of collusion between the parties.

- (iii) **Award of the sums owed to the class members:** the common representative of the class members prepares a schedule of the common individual rights and the delegated judge issues a reasoned order stating which opt-in requests have been partially or fully accepted and orders the defendant to pay the sums owed to each class member. The order may be challenged by filing an application with the court clerk's office within 30 days of the issue of the order exclusively for reasons relating to fees and costs awarded by the court.

5. Opt-in of the class members.

The reform has also profoundly changed the rules on opting into the action, which, under the previous legislation, could only take place after the order admitting the action, but not after the judgement on the merits. Instead, under the new rules, class members may opt-in at two separate times:

- (a) **immediately after the order of admissibility.** In the order of admissibility, the court sets a deadline for the opt-in (not less than 60 days and no more than 150 days from the publication of the order) and defines the characteristics of the common individual rights that allow membership of the class. Whether or not the members have a right to opt into the class action is only verified after the judgement on the merits;
- (b) **after the judgement that decides the case.** When the court upholds the action, it sets a deadline for the opt-in (not less than 60 days and no more than 150 days from the publication of the order). Therefore, the class members may also opt-in after the class action has been upheld on its merits by the court.

6. Contingency fee.

The new rules envisage that, following the order issued by the delegated judge, the defendant must pay the common representative of the class members and the lead claimant's attorney a sum in addition to the sum that will have to be paid to each class member as compensation. Such sum is determined as a percentage of the total sum which the defendant will be ordered to pay, calculated on the basis of the number of class members in inverse proportion based on seven levels.

7. Collective enforcement and settlement agreements.

The reform has introduced a collective enforcement procedure which may be initiated exclusively by the common representative of the class members against the defendant in order to recover the sums owed to the class members.

The reform also envisages that the parties may settle the dispute during the proceedings on the merits until the final hearing of the verbal discussion or even after the judgement has been handed down by starting a negotiating procedure between the defendant and the common representative of the class members aimed at providing the class members with a draft settlement agreement to be approved and which will only become binding on them if they do not formally reject it and if it is ratified by the delegated judge appointed by the court.

8. Non-retroactivity of the rules in relation to pending proceedings.

The law will come into force twelve months from its publication in the Official Journal, which occurred on 18 April 2019.

The new rules introduced by the reform of class action proceedings do not apply retroactively to ongoing proceedings or to unlawful conducts which occurred before the law came into force.

Indeed, paragraph 2 of article 7 of the law provides that the provisions of article 140-bis of the Consumer Code will continue to apply to proceedings pending when the law comes into force.

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