

## Legal (re)action: Italian class action procedures and how to insulate against them



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### What are the key legal provisions governing class action lawsuits in Italy?

Following the most recent regulatory reforms, there are now three types of class action under the Italian legal system:

- a) the class action governed by section 140-*bis* of the Consumer Code (the Collective Redress Action) (which is accompanied by the action for an injunction provided under section 140): this is a general procedure, introduced by Law 244, 24 December 2007 (subsequently rewritten in 2009) following the collapse of Cirio and Parmalat; it affords protection, in the context of a single procedure, for the individual rights in common (homogenous rights) of consumers and users (and their collective interests) which have been injured by the same offence (for example: banking, financial and insurance dealings, unfair business practices, anti-competitive conduct, liability for tour packages). In practice, the action has had limited use (also because it is restricted to consumers) and it was repealed in 2019; it can now only be brought in case of infringements preceding 19 May 2021 (the effective date of the General Class Action described below);
- b) the general class action, introduced by Law 31, 12 April 2019 and governed by the Italian Code of Civil Procedure (sections 840-*bis* and ff.) (the General Class Action): this action concerns the protection of individual rights in common, not only for 'consumers' but also – and this represents the change with respect to

the Collective Redress Action – for all those persons whose rights have been injured, both in a contractual and non-contractual context (for example: dealings concerning the supply of electricity, payment services, the protection of savings); it applies to infringements committed commencing from 19 May 2021; to date, it has also had limited practical application; and

- c) the (new) 'representative' action (the Representative Action), governed by sections 140-*ter* and ff. of the Consumer Code, introduced by Legislative Decree 28, 10 March 2023: it affords protection to consumers in respect of matters detailed below (including, but not limited to, abusive clauses in agreements with consumers, defective product liability, etc) and it applies to infringements committed commencing from 25 June 2023.

The Representative Action is currently the action of greatest interest; in fact, as will be demonstrated, on the one hand it represents a complete novelty in the Italian legal system and, on the other hand, it can have extremely significant practical implications for companies.

### Can you provide an overview of the procedural requirements for initiating and managing a class action case in the Italian legal system?

It is worth focusing attention primarily on the new Representative Action, effective from 25 June 2023 which, as mentioned, is the action of greatest interest. It involves the following developments:

**Any public or private body, individual or legal entity that has injured the rights of consumers in the course of their professional or business activity can be sued.**

- a) it can only be brought on own behalf by consumer associations registered in a specific register held by the Ministry of Economic Development (now the Ministry of Enterprise and Made in Italy) (in order to register it is necessary to demonstrate fulfilment of certain requirements regarding representativeness and transparency) and by certain public bodies – without the need for a mandate from the individuals afforded protection by the law; and
- b) associations established in other EU countries may also act before Italian jurisdiction, where entitled under local legislation to take representative actions in a European context.

Rules governing standing to bring an action distinguish between the new Representative Action and the other two types of action: in fact, the latter can be brought by both representative organisations and by any person belonging to the class.

By way of a Representative Action, any public or private body, individual or legal entity that has injured the rights of consumers in the course of their professional or business activity can be sued. The General Class Action on the other hand is more restricted in scope: in fact it can only be brought against companies, or against bodies managing public services or public utilities.

The Representative Action proceedings are conducted in accordance with a simplified procedure. In particular:

- a) the action must be commenced by way of a claim before the commercial court for the area in which the defendant has its registered office;
- b) the court will verify whether the action is admissible (the action is inadmissible if, for example, the consumer rights enforced are not 'homogenous' or if the organisation that has brought the action is in conflict of interest, since it has received financing from companies in competition with the defendant);
- c) the claim and any measures are publicised on the website of the Ministry of Justice and of the claimant association; and
- d) moreover, the procedure is governed by rules for a General Class Action and, to the extent relevant here, provides for concessions in favour of the claimant with respect to probative matters and evidence that are extremely pervasive for defendant companies (for example: discovery orders).

**What types of claims are typically eligible for class action status in Italy?**

The Representative Action concerns the protection of consumers in respect of specific

matters listed in Schedule II-*septies* of the Consumer Code. These are 68 regulatory sources, mainly European and consumer regulations, including – to mention the most important – those relating to liability for damages caused by defective products, abusive clauses in agreements entered into with consumers, the liability of an airline with reference to the transport of passengers and their baggage, the protection of consumers in relation to an indication of the price of products offered to consumers, e-commerce, food safety, unfair business practices and the protection of personal data. Infringements of the right to competition are excluded.

Action against the infringements listed in Schedule II-*septies* can be taken by the qualified organisations exclusively by way of a Representative Action and not a General Class Action; the latter however remains accessible to individual consumers, also with regard to the abovementioned matters.

By way of a Representative Action the court can be asked:

- a) to issue injunctions whereby the court orders the defendant to cease with or prohibit the reiteration of harmful conduct, and/or for the publication in national newspapers of certain information or declarations (for example: an order for the removal from the defendant's forms and standard form contracts of any clauses deemed abusive and the adaptation of all existing

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agreements; an order to publish in national newspapers; the fixing of daily penalties in case of failure to comply with the order); and/or

- b) compensatory measures, ie redress, to remedy the harm incurred by the consumer, also by way of the payment of a sum of cash, repair, replacement, a price reduction, termination of the agreement or reimbursement of the price paid.

Unlike the Representative Action, the General Class Action can be brought in relation to the breach of any type of individual rights in common, including non-consumer rights, such as, for example, the right to health, understood in the general sense.

With regard to the Collective Redress Action, as mentioned it has now been repealed but it can be brought in relation to infringements preceding 19 May 2021 which are of collective interest to consumers and in particular in relation to an infringement of contractual rights in common and rights against a manufacturer, irrespective of a direct contractual relationship, rights for compensation deriving from unfair business practices or anti-competitive conduct.

### How does the Italian legal system define the class or group of individuals who can participate in a class action lawsuit?

With regard to the Representative Action, considering that it was introduced extremely recently, there is no consolidated case law on the notion of a class. On the basis of the law, it can be stated that a class is defined as all consumers associated by the fact that they have rights in common which have been or

could be damaged by an infringement of provisions under Schedule II-*septies*.

The claimant organisation must, upon penalty of inadmissibility, indicate all those elements necessary to identify the group of consumers concerned by the action and describe the characteristics according to which the individual rights under the claim are homogenous.

The requirement of homogenous rights is satisfied in case of individual rights that originate from the same infringement of provisions under Schedule II-*septies*, which have resulted in a single type of damage, irrespective of the differences between the positions of individual members of the class (it is not therefore necessary for the individual subjective positions to be identical; uniformity is sufficient).

In case of the General Class Action however, the class is made up of persons who may also be non-consumers, linked by the fact that they have title to rights in common, harmed by any type of infringement, provided that it is unitary, committed by a company or by an entity managing public services or public utilities, in the course of their business. As compared to the Representative Action therefore, the classes that can receive compensation can be defined by the claimants with greater freedom (which can be more insidious for defendant companies).

In case of a Collective Redress Action, the notion of class is analogous to the class under a Representative Action, but the type of infringement in respect of which action can be taken is different. In general, it is more limited in scope than the Representative Action and, as mentioned, it is now residual in any event: it can in fact only be used for an infringement pre-dating 19 May 2001.

### What are the potential disadvantages and advantages for companies facing class action litigation in Italy?

The main disadvantage for a company facing a class action lies in the procedural complexity of the action and in the need to organise a defence that is not based on individual cases. This requires a timely and adequate internal investigation in order to effectively manage the action. In fact, it should be noted that the time-scale for a defence on the part of the defendant company is extremely restricted. With particular regard to the Representative Action, the fact that an organisation can act on its own behalf and without a mandate facilitates the possibility of bringing that action and therefore increases the risk of litigation for companies. There are also many benefits. If managed effectively and if the outcome is favourable, a measure dismissing the claim, despite being limited to the specific action brought, can be of general application for a wider user base, acting as a precedent which, in principle, recognises the lack of grounds for the claim. This can contribute to strongly attenuating one of the typical problems (perceived by companies) raised by individual actions brought on a serial basis and perhaps before different courts, ie the proliferation of decisions which contain conflicting conclusions and/or arguments.

### Are there any recent developments or notable precedents in Italian class action law that general counsels should be aware of?

Since these regulations have been recently enacted (for the Representative Action, less than one year), as yet there is no unequivocal case law stance on the various relevant legal issues. It is important to note that there have

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already been some significant injunctive measures issued in favour of consumer associations (also in case of Representative Actions). It should however be noted that the first instance decisions are subject to appeal and (within the narrow limits permitted by Italian procedural rules) review by the Supreme Court and that, in this case also, normally a new law requires a certain number of Supreme Court decisions before it is possible to speak of clear case law.

### What are the potential financial implications for companies involved in class action litigation in Italy, including damages, legal fees, and settlement costs?

Italian class actions can involve significant financial implications for companies, which extend beyond traditional legal fees. The regulatory framework not only provides for injunctive measures, but also compensation or redress, with possible significant financial consequences. Compensation is provided as a remedy for a collective damage and can amount to considerable sums, which reflect the scope of the case. Moreover, legal fees can increase, above all because those fees will escalate in line with the number of claimants represented. All of this demonstrates the importance for companies to diligently manage legal risks and to comply with rigorous standards for conformity with the various rules in order to mitigate potential financial liability. In addition there are indirect costs, such as an increase in insurance premiums, a loss of turnover due to reputational damage and the removal of managerial and financial resources from their normal business operations for the defence of disputes.

### How does the Italian legal system address issues such as jurisdiction, choice of law, and enforcement in cross-border class action cases?

In general it should be emphasised that Italy is a member state of the EU; as such, it conforms with the EU legal system, which provides detailed rules on jurisdiction, choice of law and the enforcement of judgements. With particular regard to representative actions, as mentioned, the new rules also recognise the possibility of a cross-border Representative Action, brought both before the Italian courts by claimants from other EU member states, and before the courts of another member state by Italian or other member state claimants.

### What strategies can companies employ to minimise the risk of facing class action lawsuits in Italy?

Companies can adopt various strategies in order to reduce the risk of facing class action lawsuits. Conformity with all regulations, and particularly sector regulations, is fundamental. Regular audits and risk assessments can help to identify potential areas of vulnerability and/or criticality. Moreover, the creation of clear and effective channels for the purpose of handling customer complaints can resolve problems before they degenerate into lawsuits. Transparency in respect of clients and stakeholders with regard to business practices and problems that emerge can also mitigate the risk of class actions. If, moreover, the company does not have direct contact with the end user since it uses intermediaries, it is advisable to negotiate disclosure obligations for those intermediaries; this would ensure full control of their activities.

### Are there any specific compliance measures or best practices that companies operating in Italy should implement to mitigate the risk of class action litigation?

In general, the introduction and strengthening of the class action in Italy will force companies to rethink their methods for the management of risk linked to certain choices (for example: product quality controls, contentious business practices etc). In the future, some choices which, in the absence of a class action procedure, would result in a limited number of individual disputes, could generate class actions, with a potential greater impact on the management of the company, its financial results and its reputation.

Companies should adopt suitable procedures for the identification – in good time, or rather prior to an action being taken – of potential areas of risk that could lead to a class action, carrying out any necessary and advisable corrective action. In fact, if those measures are not adopted in good time it could primarily be more difficult for companies to defend themselves in an effective manner in a class action; it should further be recalled that the time-scale for a defence is extremely limited: therefore any action intended to manage the risk of a class action will, if such an action is brought, facilitate the necessary subsequent preparation of a defence. In fact, if the risk is managed correctly, the company will in the meantime have retained the documents to prove that this is the case. ■