

## Potential impact of reforming the current class action regime in Italy

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**Dispute Resolution analysis: Antonio Distefano, counsel in the litigation and trial department of Latham & Watkins' Milan office and member of the firm's complex commercial litigation practice, predicts that comprehensive reform to the current class action regime will result in a substantive increase of class actions in Italy, but warns that the new rules could also lead to potential distortions of the system, as it could encourage opportunistic behaviour and make the management of cases potentially more difficult.**

### When were class actions introduced in Italy?

Class actions were first introduced into the Italian legal system with Law No 244 of 24 December 2007, which added certain new provisions to the Italian Consumer Code (ie Article 139 and thereafter, effective as of 1 January 2010).

These provisions have recently been repealed by the newly enacted Law No 31 of 12 April 2019, published in the Official Gazette of the Republic of Italy on 18 April 2019, which introduced a comprehensive reform of class actions by adding an entirely new section to the Italian Code of Civil Procedure (Book IV, Title VIII-bis, Articles 840-bis and thereafter)—the reforms.

### Why is there a need to change the current regime?

Contrary to initial expectations, the success of class actions in Italy has been very limited to date, taking into account the extremely low number of cases (a few tens of cases in total) that have passed the admissibility test and resulted in damages compensation since the introduction of the rules on class actions.

This was mainly due to the limited scope of application, both from the subjective and the objective standpoint, of the current regime (recently repealed by the reforms), as well as the strict approach followed to date by the Italian courts in respect of the admissibility test. In fact, it's worth noting that, according to the current regime, only 'consumers and users' whose 'homogeneous rights' have been breached by the conduct of a business entity could bring class actions to seek protection of their rights.

Moreover, from an objective standpoint, class actions can only be brought to protect a limited number of homogeneous rights, namely:

- contractual rights of consumers and users towards the same defendant(s), including rights stemming from agreements entered into through standard terms and conditions
- rights arising from product liability, even in the absence of a direct contractual relationship with the producer/manufacturer
- rights to compensation for the damage suffered as a consequence of unfair business practice or anti-competitive conduct

### When will the reforms come into force?

The reforms will become effective on 19 April 2020, ie 12 months after their official publication. They will apply exclusively to unlawful conduct carried out after the effective date. As such, the provisions of the Consumer Code will continue to apply to conduct carried out prior to 19 April 2020.

### What is the aim of the reforms?

The reforms aim to boost the currently limited application of class actions in Italy by introducing new rules that can significantly expand the scope of the existing rules on class actions, also providing material incentives to claimants.

## What are the key changes made by the reforms?

Although the reforms have maintained the traditional opt-in system (as opposed to the opt-out system adopted in most common law jurisdictions), they have introduced substantive changes to the court competence and procedural rules applicable to class actions.

More specifically:

- the reforms have significantly widened 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
- class actions will be exclusively decided by specialised judges, ie the specialised business division (Tribunale delle Imprese) of the court where the defendant has its registered offices
- all eligible class members will have the ability to join a class action, even after the court’s favourable decision on the merits (hence not only after the decision on the admissibility of the action, as per the current regime)—to this extent, the traditional two-phase procedure (admissibility phase and decision on the merits) will be supplemented by a new third phase for the definitive formation of the class and the adjudication on quantum
- judges will have enhanced powers in the field of evidence, also being vested with the authority to issue specific disclosure orders against defendants and apply sanctions in cases of non-compliance with said orders
- upholding the claims, the court can liquidate contingency fees in favour of the common representative of the class members and of the lead claimant’s lawyer
- the court and/or the common representative of the class members can take the initiative to submit settlement proposals to all parties and applicants

## What is the anticipated impact of the reforms—will they result in an increase in class actions?

It is expected that the reforms will result in a substantive increase of class actions in Italy. However, the new rules could also lead to potential distortions of the system, as they could encourage opportunistic behaviour and make the management of cases potentially more difficult.

Defendants could face particular risks under the reforms, considering the extended scope of application of the new rules and the actual possibility for class members to join a class action even after its favourable decision on the merits. In particular, defendants could be prevented from knowing until the end of the proceedings the actual perimeter of the class and hence the potential liabilities deriving from the relevant action. To this extent, the reforms have introduced an element of material uncertainty for defendants, which is likely to affect their defence strategy as well as their accounting and risk assessment abilities.

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