

THE NEW RULES ON CLASS ACTIONS IN ITALY

On April 18, 2019 Law 12 April 2019 No. 31 was published in the Italian Official Gazette (“**Law 31/2019**”) and sets out the new rules on class action proceedings. Law 31/2019 repeals the preceding rules provided for by the Consumers’ Code (i.e. by Legislative Decree No. 206 of 2005) and introduces a new Section VIII-bis in the Fourth Book of the Italian Code of Civil Procedure, made up of 15 articles. The new rules will become effective on **April 19, 2020** so that the IT platform managing all Italian litigation may be upgraded to accommodate the unique needs of the new class action.

The Italian class action adopts a similar structure to the US model, although there are differences which are quite noteworthy. In both jurisdictions, this action aims at resolving - **in a unique and homogenous way** - legal issues relating to a class of individuals. In such cases, the assertion of the rights held by each individual is based on the decision of one or more common disputed factual and/or legal issues, which have to be homogenous; **a uniform decision for all class members** (who have homogenous individual rights) **is thus possible through the class action**.

Law 31/2019 significantly amended the previous rules laid down by the Consumers’ Code: the class action is no longer available exclusively to the consumers’ associations and instead will be started

by any person having an homogenous individual right; **the procedure is intended to be fast** and each class member may opt-in during the procedure, even after the decision on the merits of the case; **the distribution of compensation or damages awarded to each class member will be an autonomous phase in the procedure**, managed by a designated judge and by a common representative of the class

1. The class action will no longer be limited to “consumers”

The new class action will apply in a more extensive way than the previous one regulated by the Consumers’ Code. The barrier - under which only consumers’ associations are allowed to file a class action - will no longer exist, as under Law 31/2019 **anyone who intends to assert “individual homogenous rights” may submit the action**.

The new class action may be filed **by an individual petitioner** (who intends from the outset to include other participants) **or by a non-profit organization**, provided that this organization (i) is officially aimed at protecting the violated rights and (ii) is enrolled onto a specific register held by the Ministry of Justice. Thus, **the class action will no longer be the exclusive preserve of consumers’ associations as in the past**.

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Becoming a general legal remedy, the class action may be brought **against enterprises or entities carrying out public services or public utilities**, which contravene the homogenous individual rights of the class through their conduct. In Italy (as in the US), **the access key will be homogeneity**, in order to separate the class members from other individuals who do not have a homogenous legal right. From a litigation perspective, defendants will certainly challenge the merits of the case, but are likely to make strenuous efforts to "break the class" as well, in order to reduce the number of potential counterparties.

Both compensatory and restitution remedies may be granted by the relevant Tribunal. For example, the action may be started by classes of individuals affected by specific events or by dangerous activities, by the shareholders or by the holders of listed or non-listed financial instruments (who were excluded by the Consumers' Code in the past) vis-à-vis the issuing company, by classes of suppliers vis-à-vis their common client, by groups of distributors vis-à-vis the manufacturing company and the like. However, the availability of a class action will not prevent the filing of an individual action through ordinary means.

The new procedure includes 3 phases:

1. The admissibility threshold of the class action;
2. The decision on the merits of the case;
3. The distribution of the amounts due to the class members.

2. The first phase: whether the class action crosses the admissibility threshold

Law 31/2019 states that the **Corporate Specialized Division** of the Tribunal where the defendant is located shall decide the merits of the class action. The action shall be submitted through a petition.

The expedited procedure rules set forth by Article 702-bis of the Italian Code of Civil Procedure will apply and the judge will not be allowed to change the procedure into an ordinary litigation action.

The class action **will be published on a specific website of the Ministry of Justice**, with free access granted to anyone, in order to facilitate the participation by other holders of the same homogenous rights as the petitioner.

In the first phase, the Judge will assess whether the class action meets admissibility criteria, within 30 days calculated from the first hearing. The class action will not be admitted if: (i) it is patently groundless; (ii) it is not homogenous; (iii) the petitioner is in a position of conflict of interests; (iv) the petitioner appears to be unable to carefully safeguard the rights of the class.

Should the class action be admitted, **the Tribunal will fix a first deadline for opting-in** (i.e. to allow third parties - holding homogenous individual rights - to join the class action).

3. The second phase: the decision on the merits of the dispute

The Tribunal will investigate the matter and deliver its **decision on the merits** of the case, where the liability of the defendant is upheld and **indicating the features of the affected homogenous rights** held by the class members: these criteria will be used to select who may join the class.

A specific regulation on the discovery of documents is added: on the one hand, the Judge may impose specific measures to protect the confidentiality of the information; on the other hand, a sanction ranging from Euro 10.000,00 to Euro 100.000,00 is established for those parties not complying with the ordered disclosure of documents/information without reasons.

Should the claims of the petitioner be upheld, the decision shall: (i) fix a deadline from 60 to 150 days to join the class action; (ii) fix the advance on the expense to be paid by any class member; (iii) **appoint a specific judge to manage the remaining phases of the procedure;** (iv) **appoint a common representative of the class** who shall prepare a draft distribution plan to distribute the compensation or other amounts awarded to each class member. The decision may be appealed before the Court of Appeal within six months from its publication.

It is worth mentioning that **any third party may join** the class action at either of two different phases: **immediately after the filing of the petition** (provided that the class action passes the admissibility hurdle) **and after that the decision on the merits has been published**. It will be possible to join **through a completely electronic procedure**, managed by the centralized services of the Ministry of Justice, which will make it possible to be joined to the class action (with the same effects as a formal petition), without the assistance of a lawyer.

4. The third phase: the distribution of the amounts awarded among the class members

The distribution phase is managed by a specific Judge and by **the common representative of the class**, who were appointed through the decision of the Tribunal.

The **common representative** of the class will be a public officer and shall submit a draft distribution plan containing the amounts due to each member of the class; anyone will be allowed to file written observations on this plan.

The Judge will decide on each request to join and **will order the defendant to pay each class member the amount due as compensation/restitution**. This Judge's decree will be immediately enforceable.

The lawyers of each class member will have their legal fees paid in the amount to be determined by a decree of the Ministry of Justice. In addition, in order to incentivize the adoption of the class action, **the Judge may order the defendant to pay an additional premium to the lawyer of the petitioner**.

The fees due to the common representative will be calculated through a sliding scale of decreasing percentages based on the increasing number of class members.

5. Settlement proposals will be open to class members and a new class injunction shall be available

Law 31/2019 also regulates the possibility of settling the class action, based on a proposal that the Judge may submit prior to the final determination of the case or based on a settlement scheme prepared by the common representative of the class after the publication of the decision. **In both cases, the proposal will be open to the acceptance by each class member acting individually.**

Finally, new rules on **class injunctions** are established. This form of injunction may be requested by any interested party against any enterprise or entity carrying out public services or public utilities, in order to halt their behaviour or to impose a temporary prohibition on specific conduct. The decision on the injunction will be within the remit of the Specialized Corporate Division of the Tribunal.

Litigation Department

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