

# Class Actions

*Contributing editors*

Joel S Feldman and Joshua E Anderson



2016

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# Class Actions 2016

*Contributing editors*

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# Italy

Michela Turra and Alessandra Chimienti

Gianni, Origoni, Grippo, Cappelli & Partners

## 1 Outline the organisation of your court system as it relates to collective actions. In which courts may class actions be brought?

In Italy there are three levels of courts:

- first-instance courts (justices of the peace and tribunals). The justice of the peace courts have jurisdiction over claims up to €5,000; claims for damages caused by marine or vehicular traffic up to €20,000; and some other specific subject matters;
- second-instance courts. This is the court of appeal for judgments given by tribunals and tribunals for judgments given by the justices of the peace. The court of appeal also has first-instance jurisdiction over some specific matters; and
- the Court of Cassation (Supreme Court). The Court of Cassation is at the top of the hierarchy. The Court of Cassation's review is limited to issues regarding the interpretation and correct application of the law; the Court does not review any finding of the facts by the judge in the trial.

A class action can only be brought before the tribunal and must be initiated before the tribunal of the capital of the region where the defendant has its registered office. A class action will be heard by a panel of three judges.

An order from the tribunal declaring a class action admissible (certification of the class action) or inadmissible can be challenged before the court of appeal within 30 days from communication or service of the order by the clerk office on the parties. Class action proceedings before the tribunal are not stayed if the order declaring the action to be admissible is challenged before the court of appeal. The Supreme Court has recently found that an appeal decision of the court of appeal on the admissibility of a class action cannot be further challenged before it.

A decision of the tribunal ruling on the merits of a class action can be challenged before the court of appeal. In turn, the decision of the court of appeal ruling on the merits of the same class action can be appealed (on the limited grounds set out above) before the Supreme Court. See question 16.

## 2 How common are class actions in your jurisdiction? What has been the recent attitude of lawmakers and the judiciary to class actions?

Class actions are not common in Italy. The procedure to bring a class action was introduced in Italy in 2010. Since then, less than 100 class action proceedings have been initiated. Only a few of these proceedings have been declared admissible; moreover, in almost all of these cases the relevant claims have been rejected on their merits.

On 3 June 2015, a bill of law for the reform of class action procedure was passed by the Chamber of Deputies of the Parliament. The bill is now under discussion before the Senate. The bill proposes some modifications to the present procedural framework with the aim of promoting class actions as an effective tool for consumers to recover damages in product liability claims. For example, the reforms would enlarge the number of cases in which the class action procedure is available, reduce costs for the plaintiffs in starting and carrying on class action procedures and provide economic advantages for lawyers representing and defending parties in class action procedures.

## 3 What is the legal basis for class actions? Is it derived from statute or case law?

The Italian legal system is a civil law system based on statute.

Class actions are governed by article 140-bis of Legislative Decree No. 206 of 2005, the Consumer Code.

Article 140-bis of the Consumer Code was introduced by Law No. 244 of 24 December 2007; its provisions were subsequently replaced by Law No. 99 of 23 July 2009. Article 140-bis of the Consumer Code has been in effect since 1 January 2010. Class actions can be brought for any claim for damages that has arisen since 15 August 2009.

## 4 What types of claims may be filed as class actions?

As expressly provided for by the law, a class action can be brought to protect:

- the contractual rights of multiple consumers and users who find themselves in the same situation in relation to a company, including rights arising out of standard form terms and conditions;
- the rights that multiple end users of a product have against a manufacturer, even if there is no direct contractual relationship (ie, product liability); and
- the rights to compensation for the prejudice suffered by the consumers and users as a consequence of unfair business practices or unfair competition.

Only consumers and users, personally or through associations, are entitled to bring a class action.

## 5 What relief may be sought in class proceedings?

Consumers or users who bring a class action can only seek monetary damages or the restitution of payments made as a consequence of the unlawful conduct of the defendant.

If a tribunal accepts a class action claim on its merits, it will also set out in its decision how much the defendant company must pay to the class members or how the amount to be paid to the class members is to be calculated. This may also be on the basis of an equitable evaluation.

If consumers or users want to obtain injunctive relief, such as a 'cease-and-desist order' or the modification of standard contractual terms, they have to start a 'representative action'. This action is governed by article 140 of the Consumer Code.

## 6 Is there a process for consolidating multiple class action filings?

In principle, only one class action may be brought by each class of consumers or users.

When a tribunal certifies a class action, it sets out a deadline for the class members to opt-in. Once this deadline has expired, consumers or users may not bring a new class action against the same defendant, in relation to the same facts and making the same claim. All the class actions that have been initiated in the meantime before the same tribunal are consolidated. The tribunal that has precedence is the tribunal that is first seized with the action. If class actions have been initiated before other tribunals, those tribunals will 'cancel' the case and grant the parties a mandatory term to restart the case before the first tribunal is seized.

There is no official register of class actions that have been initiated in Italy. However, a section of the website of the Ministry for Economic Development sets out a list of the class actions that have been certified.

## 7 How is a class action initiated?

A claim is started by a writ of summons. The relevant deed is served on both the defendant and the public prosecutor. In this way, the public prosecutor is aware that the class action has been brought before the tribunal. The public prosecutor can only intervene in the proceedings in the certification phase. In other words, when the tribunal is deciding on the admissibility of the class action.

Within 10 days of the service of the writ, the claim is entered into the roll of the tribunal. The writ indicates the date of the first hearing. There must be at least 90 days between the service of the writ and the first hearing.

There is no notice to pay or to cure as a preliminary condition for the filing of a class action.

## 8 What are the standing requirements for a class action?

A class action can only be initiated by a consumer or a user who has the same rights to claim as the other members of the class of consumers or users. The consumer or user can bring the class action personally or through a consumer association or a representative body that he or she belongs to. See question 4.

During the proceedings, the lead plaintiff must prove the existence of a class with the same rights, and that these rights have been breached. The breach cannot be hypothetical.

## 9 Do members of a class have to opt in or opt out of the action? Are class members notified that an action has been commenced on their behalf and, if so, how?

Members of a class have to opt in to the relevant class action.

In the certification order, the tribunal sets out:

- the rights that are the subject matter of the class action and specific criteria for admission to the class for consumers or users;
- the dates and method for advertising the certification order, to enable the members of the class to opt in in time. The advertising of the certification order is a condition for the continuation of the class action proceedings. The advertising may also mean the publication of the certification order in national newspapers; and
- a term by which consumers or users, through the leading plaintiff, must file their request to opt in before the tribunal. This term is mandatory and cannot exceed 120 days from the completion of the relevant advertising procedure.

The tribunal submits a copy of the certification order to the Ministry for Economic Development, which in turn further advertises it, and publishes it on its official website.

Third parties cannot intervene in class action proceedings.

## 10 What are the requirements for a case to be filed as a class action?

The law does not set out any minimum number of plaintiffs for the filing of a class action. Even a sole consumer or user can file a class action. When a tribunal certifies the class action it is not, at that time, possible to make an accurate assessment of the likely number of consumers or users who are going to opt in to the class action. Nonetheless, the tribunal will take the number of potential plaintiffs into consideration when deciding on the admissibility of the class action. The tribunal is likely to reject the request to certify the class action if, for example, it considers that:

- the basis of the relevant claims are not homogeneous, and will therefore potentially involve a very large number of consumers or users; or
- the leading plaintiff is unable to adequately take care of the interest of the entire class from an economic perspective. This evaluation has to take into account the potential extension of the class, and therefore the damages which may be finally awarded to the entire class.

## 11 How does a court determine whether the case qualifies for a collective or class action?

At the first hearing, the leading plaintiff and the defendant discuss the case before the tribunal. Subsequently, the tribunal decides whether to admit (certify) the class action and issues a written order of its decision.

There is no time limit for the conclusion of the certification phase. On average this may take five to six months from service of the writ on the defendant.

The tribunal will reject the request for the class action if:

- the claim is manifestly unfounded;

- there is a conflict of interest;
- the rights which are the basis of the claim are not the same; and
- the leading plaintiff is unable to adequately take care of the interests of the entire class from an economic perspective.

The leading plaintiff has to provide evidence that shows the tribunal that the conditions for the admission of the claim have been met.

## 12 How does discovery work in class actions?

In Italy, the law does not provide any procedure for discovery.

The Tribunal may order any of the parties or third parties to exhibit certain documents which may be relevant to the case.

## 13 Describe the process and requirements for approval of a class action settlement.

The rights of the consumers or users who have joined the class are not affected by parties who withdraw from the claim or who entered into out-of-court settlement agreements, unless they expressly consented to the withdrawal or settlement agreements.

However, the law does not set out any criteria or procedure for a class action settlement.

## 14 May class members object to a settlement? How?

See question 13.

Consumers or users who joined the class and who do not want to settle are entitled to continue the class action proceedings.

## 15 What is the preclusive effect of a final judgment in a class action?

A final judgment is only binding on the parties to the proceedings. Consumers or users who did not join the class action can still bring an individual action against the same defendant, in relation to the same facts and on the same basis. However, no further class action proceedings can be initiated or carried on after a certification order has been issued.

## 16 What type of appellate review is available with respect to class action decisions?

The decision of a tribunal on the merits in a class action can be challenged before the court of appeal. The court of appeal will review the case on the merits and can either confirm or overrule the first instance decision. The parties cannot raise new claims or objections before the court of appeal. In addition, parties can only file new documents or requests for the admission of new evidence in the proceedings if they prove that they could have not filed the documents or submitted those requests during the first instance proceedings for reasons that were beyond their control. An appeal to the court of appeal must be made within six months of the date of publication of the decision. This term is shortened to 30 days when one of the parties serves a copy of the decision on the other party.

A decision of the court of appeal can be challenged before the Supreme Court. As noted above, the Supreme Court does not consider the facts of the case but reviews the second instance decision from a legal standpoint, and checks that the court of appeal properly applied the law when it ruled on the case. The appeal of a second instance decision must be made to the Supreme Court within six months of the date of publication of the decision. This term is shortened to 60 days when one of the parties serves a copy of the relevant decision on the other party.

## 17 What role do regulators play in connection with class actions?

There are no rules governing the role of regulators in class actions.

The tribunal can stay the class action proceedings during the certification phase if it considers that relevant facts which are already being considered by an independent regulatory authority or before an administrative court may affect the decision on the admissibility of the class action.

Documents relating to proceedings pending before independent regulatory authorities are not available to the public although the decisions issued at the conclusion of these proceedings are published. Often, class action cases arise out of rulings by independent regulatory authorities, and in these cases the leading plaintiffs base their claims on the findings in the relevant rulings.

Out-of-court settlements are only binding on the parties to the proceedings which expressly consented to them. It is unlikely that that settlements would have an effect on pending or future regulatory action.

**Update and trends**

In Italy, class actions are a relatively new way of providing legal protection for consumers. They became available to consumers only five years ago, on 1 January 2010. Since then, recourse to class actions has been limited – fewer than 100 class action procedures have been started. Out of these, only a very few have passed the preliminary certification evaluation of the court. There are even fewer class actions that have been decided on the merits in favour of the plaintiffs or class members.

A reform of the present class action procedure is now underway. The purpose of this reform is to encourage the use of the class action procedure.

On 3 June 2015, a bill for the reform of class action procedure was approved by the Chamber of Deputies at first reading. On 5 June 2015, this bill was submitted to the Senate. The timetable for discussion of this bill in the Senate has not yet been finalised.

The bill proposes a new legal framework for class actions that will (i) widen the scope of application of the institution both in subjective and objective terms; (ii) allow class actions to be initiated anywhere in the country before specialist courts (commercial courts) and not only, as currently, before the court where the defendant company has its registered office; (iii) make it possible to bring a class action in Italy against a foreign company (this is not possible at the moment); (iv) modify the structure of the proceedings, so that opting in will also be allowed after the decision on the merits of the case is issued; and (v) provide various incentives to bring an action, including considerable rewards for the plaintiffs' lawyers and for the representative of the class members.

After discussion, the Senate will then decide which, if any, of these changes will be implemented.

**18 What role does arbitration play in class actions? Can arbitration clauses lawfully contain class-action waivers?**

The law does not provide for arbitration in the case of class actions. No case law is available on the issue. A minority of commentators think that it would, in principle, be possible to initiate a class action before an arbitration court, should this be provided for in a relevant arbitration clause or be expressly agreed between the parties.

An arbitration clause containing a class action waiver between a professional on the one hand and a consumer or a user on the other, may be considered to be unlawful and declared as null and void, unless it has been expressly negotiated by the parties and this can be evidenced.

**19 What are the rules regarding contingency fee agreements for plaintiffs' lawyers in a class action?**

Contingency and conditional fees only became admissible in Italy a few years ago. The law does not provide for any specific rule regarding

contingency fee agreements in class actions. The general principle, which also applies to class actions, is that legal fees can be agreed as a percentage of the amount awarded to a party. The relevant agreement has to be in writing. Any kind of assignment of receivables by the party to its lawyer is prohibited.

**20 What are the rules regarding a losing party's obligation to pay the prevailing party's attorneys' fees and litigation costs in a class action?**

In relation to legal fees in class action proceedings, the loser pays.

In cases where the class action is not certified by the tribunal, in the order declaring the class action inadmissible, the tribunal will also rule on legal fees and costs, usually ordering the losing party to pay the costs of the winning party. In contrast, where the class action is certified, the tribunal makes its decision with regard to legal fees and costs of the proceedings in the decision on the merits of the case. Again, costs will usually be awarded to the winning party.

The decisions of the tribunal on legal fees and costs may be overturned in appeal proceedings.

Legal fees awarded by these decisions are calculated on the basis of certain parameters provided by the law, taking into account the value of the case and the activities carried out by lawyers. These legal fees will not cover the actual legal fees payable by the winning party to its lawyer, and are, in effect, only a contribution to them.

**21 Is third-party funding of class actions permitted?**

Third-party funding is possible but not frequently used. The law does not set out specific rules on third-party funding in class actions.

**22 Can plaintiffs sell their claim to another party?**

The plaintiffs or class members cannot sell their claim to another party. If plaintiffs or class members obtain a favourable decision on the merits of the case, the court may order the defendant to compensate the plaintiffs or class members. The plaintiffs or class members may then become creditors of the defendant. In this case, they may assign their debt to third parties.

**23 If distribution of compensation to class members is problematic, what happens to the award?**

When the plaintiffs or class members are successful on the merits, the court will order the defendant to pay a certain amount to each plaintiff or class member as damages, or sets out criteria to quantify the amount that the defendant has to pay to each plaintiff or class member as damages.

There is no provision in the law for cases where the distribution of compensation to class members is problematic. Based on the above provision, only plaintiffs and not the state, charities or consumer groups will benefit from the relevant award.



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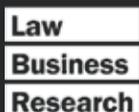
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