

The class action reform

On April 3, 2019 Italian Parliament approved Bill of law no. A.S. 844 for the reform of the rules governing collective redress and class action, thus replacing Article 140-bis of the Consumer Code, which was introduced by Law no. 244 of December 24, 2007.

The Bill of law essentially mirrored, with some changes, the contents of a previous Bill of law presented in 2015, the first signatory of which was Hon. Alfonso Bonafede - at that time a Member of the Chamber of Deputies and now the Italian Minister of Justice. The project remained blocked within the Senate for some time, until it lapsed with the end of the previous Parliamentary term.

On June 26, 2018 the new Bill of law was presented before the Chamber of Deputies, where it was approved with amendments on October 3, 2018. On April 2, 2019 the Bill of law was presented to the Senate's Assembly, before being definitively passed the following day in the same version as that presented by the Chamber of Deputies.

The reform law was published in the Official Gazette on April 18, 2019 and will enter into force 12 months from that date. The "new" class action will apply only to unlawful conduct carried out subsequent to its coming into force.

The reformed law introduces several new aspects of considerable importance, all of which are essentially aimed at facilitating the use of this procedural tool:

- **Scope of application.** Class action provisions are moved from the Consumer Code by repeal of the current Article 140-bis, to the Code of Civil Procedure with the introduction in Book IV of Title VIII-bis "Collective Redress" including 15 articles, from Article 840-bis to Article 840-sexiesdecies. Class action thus becomes a general procedural remedy, available not only to consumers and users, but to everyone claiming compensation for the violation of "homogeneous individual rights". This means that a class action may also be initiated by a business entity against another business entity.
- **Proceedings and venue.** The class action will consist of summary proceedings pursuant to Articles 702-bis et seq. of the Code of Civil Procedure, with a "switch" to ordinary proceedings being precluded. The venue to rule over class actions will be the Section Specialized in business matters of the Court of the place where the respondent has its legal seat.
- **Stages of the proceedings.** The new class action will be split into three stages: the first for assessment of the admissibility of the action; the second dedicated to the decision on the merits of the case; the third - newly established by the reform - for evaluation of the requests for opting in and the quantification of the sums due to the members of the class. This last phase will be managed by a Delegated Judge.
- **Evidence-gathering profiles – Presumptions and "Discovery".** The Court shall use statistical data and simple presumptions to ascertain the liability of the respondent. Upon reasoned request by the petitioner, the Judge may order the resistant (only) to produce relevant evidence and documents within its possession. This order may also cover 'categories of evidence', identified by the common features of the evidence falling within their scopes (e.g. the time at which the evidence was formed, the subject matter and contents of the evidence requested to be produced). If the resistant refuses or fails, without good reason, to comply with the relevant order to produce evidence, it may be sentenced to a fine of between € 10,000.00 and € 100,000.00, thus introducing for the first time a procedural tool similar to the US discovery to the Italian legal system.

- **Opt - in.** It will now be possible to join the class action not only after the publication of the order ruling on the admissibility of the action (as currently prescribed), but also after publication of the decision ruling on the case and establishment of the liability of the resistant. This is without doubt one of the most controversial points of the reform, sparking concern particularly amongst the business community about the practical consequences of this provision, which essentially allows one of the parties - the class members - to avoid the risk of losing the case (as participants will only opt-in in the event of a positive outcome of the proceedings), and puts the other party - the resistant - in a position where it is unable to assess the possible economic impact of the case during the proceedings.
- **Common representative.** By means of the decision ruling on the merits of the case, the Court will appoint a common representative of the class members, who will be charged with the task of preparing and submitting a distribution project for the class members to the Delegate Judge, taking a position on each individual request. This is a new subject, borrowed from bankruptcy law. The common representative will in fact be a third party, similar in some respects to a bankruptcy trustee and selected from a pool of individuals qualified to perform the role of bankruptcy trustee. The common representative will have to carry out an initial assessment of the applications for membership; in carrying out these activities, he/she will be a public officer.
- **“Reward fee”.** The reform introduces the obligation for the unsuccessful respondent to pay the common representative and the plaintiff’s attorney a “reward fee”, set as a percentage of the total amount due to the members as compensation. This is also one of the most highly debated points of the reform; in fact the business community is concerned that the “reward fee” may result in a punitive damage and that the high amounts involved may render class action - as it is in the US - a relevant money-making business.

Overall, the law reform can be considered to be somewhat biased towards the parties to the proceedings. The law reform will certainly increase recourse to class action as procedural tool, but may also lead to abuse similar to that reported by US authors.

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