

# The First Birthday of the New Italian Class Action Rules

May 19, 2022

One year ago today the new Italian class action rules (“**New Class Action Rules**” or “**New Rules**”) entered into force.

With a view to improving the overall effectiveness of the system, the New Class Action Rules have largely reshaped the legal framework applicable to class actions in Italy, including by: (i) dedicating a brand new section of the Italian Code of Civil Procedure to class actions; (ii) attributing jurisdiction over class actions to perhaps the most efficient chambers of the Italian Courts (*i.e.*, the Chambers specialized in corporate matters); (iii) broadening the objective and subjective scope of class actions; (iv) simplifying the mechanisms for filing a case; (v) widening the timeframe within which the members of a class can adhere to the action; and (vi) significantly reforming the applicable procedure.

The New Rules apply to unlawful conduct occurring after May 19, 2021. Unlawful conduct that occurred before May 19, 2021 remains subject to the pre-existing rules set forth in Article 140-*bis* of the Italian Consumer Code, which entered into force on January 1, 2010.

On the day of the New Rules’ first birthday, this memorandum provides: (i) a brief overview of the main innovations that came along with the new class action system; and (ii) a preliminary assessment of whether the New Rules have so far lived up to expectations.

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## I. Overview of the New Class Action Rules

Class actions made their appearance in the Italian legal system on January 1, 2010, when Article 140-*bis* of the Italian Consumer Code came into force,<sup>1</sup> following a number of postponements and amendments.<sup>2</sup>

Despite the initial hype surrounding the innovation, Article 140-*bis* of the Consumer Code<sup>3</sup> has had a limited application. In over ten years, the majority of class actions appear to have been declared inadmissible or rejected, and only a handful of them have led to the awarding of damages (and mostly for modest amounts).<sup>4</sup>

Including for these reasons, the New Class Action Rules were explicitly designed to encourage the use of class actions by an increasing number of stakeholders, and to make the overall system more user-friendly and efficient.

Sub-paragraphs (1) through (6) below briefly outline the main innovations set forth in the New Rules.

### 1. The “deconsumerization” of the New Class Action Rules

Even after the implementation of the New Class Action Rules, conduct pre-dating May 19, 2021 remains subject to the pre-existing rules set forth in Article 140-*bis* of the Consumer Code. The New Rules are instead contained in a brand new section of the Italian Code of Civil Procedure (“CCP”) titled “collective

proceedings” (*i.e.*, Book IV, Title VII-*bis*, Articles from 840-*bis* through 840-*sexiesdecies*, of the CCP).

The new location is not merely a cosmetic change. In fact, moving the rules on class actions from the Consumer Code to the CCP entails a “deconsumerization” of the matter,<sup>5</sup> and is notably accompanied by a deletion of any references to “consumers” and “consumer interest” in the wording of the New Rules. Unlike the provisions set forth in the Consumer Code, the New Rules are therefore designed to work as a “general remedy,” and not as a consumer-only tool.<sup>6</sup>

### 2. Competent Courts

Under the pre-existing rules set forth in Article 140-*bis* of the Consumer Code, class actions must be presented before the ordinary Civil Court of the capital of the Region where the defendant is based (with the exception of nine less populated Regions, where class actions must be lodged with the ordinary Civil Court of the capital of the nearest larger Region).<sup>7</sup>

The New Class Action Rules provide that class actions must be adjudicated by the chambers specialized in corporate matters within the ordinary Civil Court (which are typically in the capital of each Region).<sup>8</sup> The chambers specialized in corporate matters enjoy the reputation of being particularly efficient and sensitive to complex and delicate matters, which may improve the effectiveness of this procedural tool.

<sup>1</sup> See Law No. 244 of December 23, 2007, Article 2, paragraphs 445 to 449.

<sup>2</sup> See, *e.g.*, Law No. 9 of July 23, 2007, Article 2.

<sup>3</sup> Decree-Law No. 206 of September 6, 2005.

<sup>4</sup> The class action brought against the Italian train transport company Trenord concerning certain inconveniences and delays caused by the company in 2012 is exemplary: after five years of proceedings, only 3,000 of the initial 700,000 class members received a compensation ranging from between EUR 100 and EUR 200.

<sup>5</sup> A. CARRATTA, *I nuovi procedimenti collettivi: considerazioni a prima lettura*, in *Giur. it.*, 2019, p.

2297 and E. MINERVINI, *La tutela collettiva dei consumatori e la l. 12 aprile 2019, n. 31*, *Le nuove leggi civili commentate*, Volume 43, Fasc. 2, 2020, p. 347.

<sup>6</sup> A. CARRATTA, *I nuovi procedimenti collettivi: considerazioni a prima lettura*, in *Giur. it.*, 2019, p. 2297 and E. MINERVINI, *La tutela collettiva dei consumatori e la l. 12 aprile 2019, n. 31*, *Le nuove leggi civili commentate*, Volume 43, Fasc. 2, 2020, p. 347.

<sup>7</sup> Article 140-*bis*, paragraph four, of the Consumer Code.

<sup>8</sup> Article 840-*ter*, paragraph one, of the CCP.

### 3. The subjective and objective scope of class actions

The New Class Action Rules have significantly increased the range of rights that can be exercised through “collective proceedings” (*i.e.*, the objective scope of class actions) as well as the groups of people who can institute class actions and entities that may be sued (*i.e.*, the subjective scope of class actions).

#### *The objective scope of class actions: protected rights*

The rules applicable to conduct pre-dating May 19, 2021 limit the rights for which a class action can be instituted to those originating from: (i) “contracts with a number of consumers or users that are in a homogeneous situation vis-à-vis the same enterprise,” including general terms and conditions and contracts concluded through templates or forms; (ii) torts in the context of the circulation of consumer goods; and (iii) unfair commercial practices or anti-competitive behavior.<sup>9</sup>

The New Class Action Rules have removed these limitations, providing that a class action may be instituted whenever “homogeneous individual rights” have been violated.<sup>10</sup> The change is momentous as it opens the doors to the use of class actions in areas of law that were previously beyond their scope (*e.g.*, environmental law).

#### *The subjective scope of class actions: the standing to sue and be sued*

Under the rules applicable to conduct pre-dating May 19, 2021, class actions can be instituted only by “consumers” and “users.”<sup>11</sup> The New Class Action Rules endow with the necessary standing: (i) *any* individual who claims to hold a homogeneous right; and (ii) no-profit organizations and associations protecting such rights.<sup>12</sup> Under the New Rules, the legal nature of the plaintiff has significant consequences:<sup>13</sup> if the class action is instituted by an individual, the Court may issue a payment order for compensatory or restitutionary damages; otherwise (*i.e.*, if the class action is promoted by an association or organization), the Court may only ascertain the defendant’s liability, without issuing a payment order.

The New Class Action Rules have also widened the number of entities that may be called as defendants. Under the pre-existing rules, “consumers” or “users” may summon only “companies” alleged to have caused damages to a homogeneous right through their own conduct. Under the New Rules, “entities managing public services or utilities” can also be sued in a class action.

### 4. Joining a class action

Under the rules applicable to conduct pre-dating May 19, 2021, an individual can join a class action only by filing a request for joinder within 120 days from the date on which the Court declared the class action admissible.<sup>14</sup>

<sup>9</sup> Article 140-*bis*, paragraph two, of the Consumer Code.

<sup>10</sup> Article 840-*bis*, paragraph one, of the CCP. The Italian Supreme Court has defined homogeneity as “the characteristic feature of individual claims which, claimed by a group of consumers or users, are united by characteristics so as to justify a serial appreciation and a joint procedural management.” See Italian Supreme Court, Decision No. 14886 of May 31, 2019.

<sup>11</sup> Either directly or through associations to which they gave a mandate, or committees in which they participated. See Article 140-*bis* of the Consumer Code.

<sup>12</sup> Pursuant to Articles 840-*bis*, paragraph two, and 840-*ter*, paragraph four, of the CCP, in order to file a class

action, organizations and associations must meet three requirements: (a) they must be non-profit and include among their statutory objectives the protection of homogeneous individual rights, (b) they must be registered in a special public list established at the Ministry of Justice, and (c) they must be effectively able “to adequately care for the homogeneous individual rights asserted in court.”

<sup>13</sup> On this, the new Article 840-*bis* of the CCP contains a provision similar to that set forth in Article 140-*bis* of the Consumer Code.

<sup>14</sup> Article 140-*bis*, paragraphs three and nine, letter (b), of the Consumer Code.

Under the New Class Action Rules, holders of homogeneous rights can now request to join the class action — and therefore be added to the class — either (i) within the timeframe set out in the Court order declaring the class action admissible (*i.e.*, from 60 to 150 days from the date the order is published; Article 840-*quinquies* CCP) or (ii) within the timeframe set out in the judgement on the merits upholding the class action (*i.e.*, from 60 to 150 days from the date the judgement is published; Article 840-*sexies* CCP).

As is apparent, by requesting to join the class action within the timeframe under (i), rights holders bet on the success of the action, choosing to bind themselves to the outcome of the proceedings. Instead, if rights holders elect to wait until the class action is adjudicated as set out under (ii), they avoid any risk and procedural uncertainty, joining the class only if and when they know the class action has been successful and they will actually be compensated.

The Italian business community has strongly criticized these new provisions on joinder, highlighting that the New Rules improperly put the risk intrinsic to any litigation solely on the shoulders of the defendant, largely because the New Rules: (i) make it practically impossible for the defendant to know in advance the size of the class and, as a result, adopt any appropriate measures (including for the purposes of their financial statements); and (ii) turn the class action into a sort of “cash cow,”<sup>15</sup> thereby encouraging the institution of reckless lawsuits that have the potential of paralyzing the activities of a company.<sup>16</sup>

## 5. The procedure

The New Class Action Rules have significantly reformed the procedure applicable to class actions, which can be divided into the following five phases.

### *i. The filing of a class action*

Under the rules applicable to conduct pre-dating May 19, 2021, class actions must be instituted by means of a writ of summons (*atto di citazione*) to be served on both the defendant and the competent Public Prosecutor.<sup>17</sup> Under the New Rules, class actions are instituted by means of a complaint (*ricorso*) filed with the competent Court.<sup>18</sup>

Within ten days of the filing, the complaint is published on a telematic platform managed by the Ministry of Justice (the “**Telematic Platform**”), together with the decree scheduling the first hearing.<sup>19</sup> Pursuant to new Article 840-*quater* of the CCP, after 60 days from the date on which the complaint is published on the Telematic Platform, no further class action complaints may be filed based on the same facts and against the same entity.

### *ii. The admissibility order*

Once the competent Court receives the complaint, it is required to decide whether the class action is admissible and accordingly issue an admissibility or inadmissibility order.

Under the New Rules, a class action must be declared inadmissible if: (i) it is manifestly meritless; (ii) the asserted individual right lacks homogeneity; (iii) there is a conflict of interest between the plaintiff(s) and the defendant(s); and (iv) the entity or association instituting the class action is not capable of properly protecting the rights of the individuals at stake.<sup>20</sup>

If the Court admits the class action, the relevant order will, among other things: (i) define the characteristics of the individual rights constituting the subject matter of the class action; (ii) establish the modalities for providing public information on the class action, and (iii) set a deadline for putative class members to file a

<sup>15</sup> See V. MAGLIONE, *Class action, destino incerto per l'entrata in vigore della riforma*, Norme&Tributi Plus Diritto, May 12, 2021, p. 2.

<sup>16</sup> A. FICO, *Lotta di class action*, Movimento Consumatori.it, 2019, p. 3.

<sup>17</sup> Article 140-*bis*, paragraph five, of the Consumer Code.

<sup>18</sup> Article 840-*ter*, paragraph one, of the CCP.

<sup>19</sup> Article 840-*ter*, paragraph two, of the CCP.

<sup>20</sup> Article 840-*ter*, paragraph four, of the CCP.

request to join the class action (as discussed at paragraph [I.4] above).<sup>21</sup>

### *iii. The applicable procedure*

Under the rules applicable to conduct pre-dating May 19, 2021, class actions are subject to the fully-fledged procedure ordinarily applicable to civil and commercial claims.

Under the New Rules, class actions must instead be adjudicated through the summary procedure set forth in Articles 702-*bis et seq.* of the CCP.<sup>22</sup> This summary procedure is less formal and much more flexible, especially when it comes to the taking of evidence. In keeping with the foregoing, new Article 840-*quinquies*, paragraph two, of the CCP, establishes that Courts adjudicating class actions must omit “any formality that is not essential to the adversarial principle” and proceed in the way they deem “most appropriate with the evidentiary acts that are relevant to the subject matter of the proceedings.”<sup>23</sup>

Moreover, the New Rules make it easier for plaintiffs to prove the facts of the case. Specifically, pursuant to Article 840-*quinquies*, paragraph four, of the CCP, Courts can use statistical data and simple presumptions to establish the defendant’s liability.<sup>24</sup>

### *iv. The judgment*

The summary procedure applicable under the New Rules ends with a judgment upholding or dismissing the class action.

Pursuant to new Article 840-*sexies*, paragraph one, of the CCP, judgments upholding class actions are required to: (i) clarify the “characteristics” of the homogeneous individual rights which the holders of those rights who wish to join the class after the judgment must show; (ii) appoint a joint representative of the rights holders who joined the class among the individuals who are eligible for an appointment as bankruptcy trustee; and (iii) fix

the preemptory timeframe within which each potential class member may request to join the class after the publication of the judgment (as discussed at paragraph [I.4] above).<sup>25</sup>

### *v. The post-judgment phase*

Following the judgment upholding the class action, the Court will issue a decree that: (i) admits or rejects each request for joinder; (ii) quantifies the sums due to each class member; and (iii) orders the defendant(s) to pay the quantified sums. The decree is communicated to the defendant(s), the members of the class, the attorneys representing the parties and the joint representative of the rights holders,<sup>26</sup> and becomes final within 30 days of its communication.<sup>27</sup>

The defendant(s), the joint representative of the rights holders and the plaintiff(s)’ lawyer(s) may challenge the decree within 30 days, by filing an appeal.<sup>28</sup>

Additionally, any rights holder who joined the class action and is not satisfied with the Court’s decision may withdraw its request for joinder before the decree becomes final and file an individual claim.<sup>29</sup> Needless to say, this optionality further reduces the litigation risk for the class members, at the expense of the defendant(s).

## **6. Professional fees and court appointed experts’ expenses**

As an incentive to file class actions in lieu of separate individual claims, the New Class Action Rules provide that the plaintiff(s)’ attorneys and the joint representative of the class members may be awarded a premium fee, if the Court upholds at least some of the requests for joinder. The amount of the premium fee is calculated as a decreasing percentage “of the total amount [of compensation] due to all [class] members.”<sup>30</sup> The fee may be increased or reduced by the Court taking into account various factors, including

<sup>21</sup> Article 840-*ter* of the CCP.

<sup>22</sup> Article 840-*ter*, paragraph three, of the CCP.

<sup>23</sup> Article 840-*quinquies*, paragraph four, of the CCP.

<sup>24</sup> Article 840-*quinquies*, paragraph four, of the CCP.

<sup>25</sup> Article 840-*sexies*, paragraph one, of the CCP.

<sup>26</sup> Article 840-*octies* of the CCP.

<sup>27</sup> Article 840-*undecies*, paragraph eight, of the CCP.

<sup>28</sup> Article 840-*undecies* of the CCP.

<sup>29</sup> Article 840-*undecies*, paragraph eight, of the CCP.

<sup>30</sup> Article 840-*novies* of the CCP.

the complexity of the case, the use of coadjutors and the number of class members.<sup>31</sup>

Likewise, under the New Rules, the defendant(s) are normally required to pay in advance the fees for any Court-appointed expert. This provision, too, is clearly aimed at encouraging the use of class action by putting the (at least initial) financial burden of instituting the proceedings on the party that is assumed to have deeper pockets.<sup>32</sup>

## II. The first year of the New Class Action Rules: a preliminary assessment

Unlike the information regarding class actions filed pursuant to Article 140-*bis* of the Consumer Code (which continue to apply to conducts pre-dating May 19, 2021), the information on class actions filed pursuant to the New Rules is easily accessible for consultation on the Telematic Platform.

This makes it possible to provide a preliminary assessment of the class actions filed under the New Rules in their first year of application.

### *The class actions filed under the New Rules*

The Telematic Platform indicates that, in the first year of application, only five class actions have been filed under the New Rules.

In spite of the significant simplifications and incentives introduced with the New Rules, the low number of class actions filed so far suggests that the New Rules have yet to express their full potential.

The five class action complaints posted on the Telematic Platform concern: (i) an alleged incident of gender discrimination in a work environment; (ii) the alleged exploitation of certain workers outside their working hours; (iii) an alleged unlawful conduct of a local Land Reclamation Consortium; (iv) the alleged malfunctioning of the trading platform of a cryptocurrency; and (v) allegedly unlawful conduct related to a master's degree program.

Without detracting from the harm that the contested conduct may have caused to the individuals involved, it is apparent that none of these class actions concerns issues sparking a vast social – or, at the very least, media – interest on a national level. Notwithstanding the significant innovations set forth in the New Rules, Italian class actions still appear far from fulfilling any function comparable to the social function that class actions perform, for example, in the United States, where class actions are traditionally perceived and used as a tool for aggregating valuable and innovative claims that often occupy the front page of newspapers.

Moreover, these five class actions have not yet made significant progress: four are still awaiting the outcome of the first hearing, while the fifth has been withdrawn. At this stage, no conclusions can therefore be drawn regarding their possible evolution and outcome.

### Conclusions

The New Class Action Rules have profoundly changed the system of collective proceedings in Italy, including by: (i) broadening the objective and subjective scope of class actions; (ii) simplifying the procedure; and (iii) significantly reducing the costs for class members.

In their first year of legal effect, the New Class Action Rules did not entirely deliver the expected results. The small number of class actions filed as well as the relatively narrow issues brought to the attention of the Courts through class actions show that class actions have not yet spread out in Italy.

However, one year of implementation is too short a period to assess the extent of such a radical change in the system. Despite the slow debut of the New Class Action Rules, the innovations they introduced may, with time, make the Italian class action a truly effective tool on a par with other countries, and show that the reform was not a mere restyling of the previous regime.

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<sup>31</sup> *Ibid.*

<sup>32</sup> Article 840-*quinques*, paragraph three, of the CCP.