

Class actions changes in Italy create new risks for insurers

New law could have a significant effect on liability insurers



Giorgio Grasso
Batini Traverso Grasso
& Partners

On April 18 the Italian parliament approved new laws to govern class action lawsuits in Italy. The new law will come into force in April 2020. The new rules see substantial widening of the types of class actions that can be brought, as well as changes to their defensibility. The impacts for insurers are substantial, and need urgent consideration, as well as clarification by the courts.

In Italy, class actions previously had to be brought by industry bodies or non-profit associations. However, under the new bill an individual may initiate a class action. Class actions may now also be brought against public service providers or bodies that manage services in the public interest, in relation to any breach committed in the performance of such service.

A class action now has three stages under the new laws: the first and second stages, respectively concerning admissibility and merits, are heard before the court's business division, the Tribunale delle Imprese. The final stage, where damages are assessed, is assigned to a judge who rules definitively and finally.

Under the older system individuals had to join a class action at the start to benefit from it. The new law will allow individuals to decide whether to join in the class action even after liability has been established, a provision that plainly creates great uncertainty as to the scope of corporate liability. In theory, a wholly unknown number of individuals could decide to "back the winner" without having taken part in the liability stage.

Procedures for class action cases have also been modified by adopting a "summary proceeding". This highlights the case-management

role of the judge and should make proceedings move more quickly. Class actions will be assigned to the court chamber specialising in business matters in the region where the defending entity is registered and need preliminary authorisation by the court.

Once the action is declared admissible the second stage begins: determining liability. Here the judge has wide discretion as to the form of the proceedings and the rules of evidence are more relaxed.

Government encouragement

The bill appears to reflect government encouragement of the use of class actions, in particular via provisions permitting participation by multiple holders of similar rights. The first "opportunity" for others to join the actions is at the admissibility stage, but the most significant (and also the most debatable) change is the option for claimants to join in after a decision on liability (that is, at the stage where compensation is about to be set for damages in favour of the applicants).

Under the new rules, as well as any organisation and association involved, an individual with a valid interest may ask the judge to order the relevant body to stop any detrimental conduct against multiple individuals or entities or not to repeat it.

The new Italian opt-in system makes it difficult to identify in advance what might prove to be a large number of participants. It differs greatly from the US opt-out system, where class actions automatically include a large number (the whole class, except those who opt out). This might offer leverage as regards the defendant business entity, but at least the scope of the claim is known and the defendant and its insurers can plan and make provision accordingly.

On the flip side, there is no possibility of punitive damages in Italy, another factor making class actions less appealing. While the

Italy's parliament building, the Palazzo Montecitorio, in Rome

cge2010/Shutterstock.com



The new law will allow individuals to decide whether to join in the class action even after liability has been established, a provision that plainly creates great uncertainty as to the scope of corporate liability

opt-in system means the court's decision will bind those who do, the new provisions will allow people to opt in late on.

This will create major uncertainty, as many claimants might decide to opt in only if the action succeeds at the first stage, setting up a critical chain reaction. This will obviously make it very difficult to set a suitable contingency in a company's balance sheet.

The likely future framework of class actions prompts reflection on the possible effects of the changes on businesses and the management of such actions, from a preventive and also a defensive standpoint.

The most difficult issues are the

wider range of subject matter and rights presented by the new rules; and the evidential rules favouring claimants – including what may amount to reversal of the burden of proof, to the obvious disadvantage of a defendant, which may also be subject to a very strict time limit for filing a defence.

Risk assessment

There could also be problems with assessing the risks, in terms of claim size and timescale, as claimants progressively decide whether or not to join in, with (in many cases) no obligation to waive their rights at or by a particular time; and there is a risk of possible abuse of interim

injunctions, perhaps especially in view of wider rights and more possible claimants.

Insurers, risk managers and their advisers are studying the potential impact and are trying to plan the liability insurance market's response.

It is very likely higher limits on liability will be needed, at obviously increased cost, in response to what will be a broader and larger risk. In our view, the new provisions at present lack the clear guidance that is necessary for transparency and predictability and present a number of flaws, so it is far from clear whether they are an effective provision for consumers or a disincentive for business.

Clarification, either from lawmakers or the courts, is urgently needed to avoid a negative effect on relevant businesses and to cut down the possible duration of proceedings, which (even with no kind of appeal) might take between two and four years. ■

Giorgio Grasso is a partner at Batini Traverso Grasso & Partners, a member of the GILC network