

CLIMATE CHANGE LITIGATION IN ITALY: THE DAWN OF A NEW ERA?

Italy had seemed to be one step behind other countries where climate change litigation is concerned, with no climate-related litigation having been commenced in Italy in the past years. However, things may be about to change.

We cover in this briefing two recent developments in Italy that relate to climate change litigation. First, on 5 June 2021, the first climate case against the Italian Government was filed before national courts. Secondly, from 19 May 2021, investors, shareholders, stakeholders and consumers have new procedural tools available to them to bring climate change cases before Italian courts.

"THE LAST JUDGEMENT": THE FIRST ITALIAN CLIMATE CASE

While the level of climate change litigation is increasing quickly, including within the EU (see, for instance, the Dutch Court's judgment in *Milieudefensie et al. v. Royal Dutch Shell plc* (see our blog entitled [Climate Change, Human Rights and Corporate Duties – Dutch Court Issues Landmark Decision](#))), Italy is just getting started.

On Saturday 5 June 2021, more than 200 plaintiffs, including 162 adults, 17 minors (represented in court by their parents) and 24 NGOs filed the first ever lawsuit against the Italian Government, called "*The Last Judgement*", along the same lines as the *Urgenda* case (see our briefing entitled [Climate Change litigation – Dutch Supreme Court confirms state obligation to reduce greenhouse gasses by the end of 2020](#)).

The aim of the lawsuit is to sue the State for "climate inaction", *i.e.* for insufficient commitment to promote adequate greenhouse gas ("GHG") emission reductions policies, resulting in the violation of numerous fundamental rights recognised by the Italian State, including:

- International climate agreements, including the 1992 United Nations Framework Convention on Climate Change and the 2015 Paris Agreement;
- International and regional human rights laws, including European Convention on Human Rights, Articles 2 and 8;
- European Union law, including TFEU Article. 191 and EU Regulation No. 2018/1999;
- The Italian Constitution, including Articles 2 and 32;
- Other national provisions, including Civil Code, Articles 2043 and 2051.

The claimants are seeking a ruling ordering the State to achieve a reduction of 92% in GHG emissions by 2030, in order to meet the long-term temperature goal of the Paris Agreement (aiming at limiting global warming to 1.5°C).

We would expect that the case would now progress to an initial procedural hearing in about three months and it is unlikely that the matter would come to trial before the end of 2021. The first instance decision may be expected in two years' time, depending on how long the evidentiary phase will take.

THE NEW CLASS ACTION AND THE EXTENDED COLLECTIVE INJUNCTIVE RELIEF

On 19 May 2021 (after two postponements) the new rules governing collective redress and collective relief in Italy entered into force, with the explicit aim to expand and encourage the use of class actions.

With Law no. 31 of 12 April 2019 (the "**Reform**"), the Italian Parliament introduced a comprehensive reform, completely re-shaping the existing class action regime and, most of all, generalising the categories of potential claimants and the types of conduct which can be subject to scrutiny.

The Reform significantly widens the scope of application of the current rules, providing that whoever holds "*individual homogeneous rights*" can bring a class action to seek collective redress or restitution against any enterprise (including single professionals) or provider of public services. In practice, the new regime has opened the class action system up to all potentially aggrieved parties, not just consumers, provided that all the members in a class action have "*homogenous*" rights. Moreover, associations listed on an official database will also have the right to pursue collective redress on behalf of the class. As a consequence of the general applicability of the class action, the Reform moves the relevant provisions from the Italian Consumer Code to a brand-new section of the Civil Procedure Code, incorporating class actions into that Code (see, Arts. 840 *bis et seq.*).

Defendants can be both Italian and international corporations, with jurisdiction being determined in accordance with EU Regulation no. 1215/2012 and Arts. 18-30 bis of the Code of Civil Procedure and with rules on Law no. 218/1995 for non-European defendants.

The State seems to be excluded from the list of potential defendants, because it does not exercise a corporate activity and it is generally subject to a special regime, the so-called "public" class action, introduced by Legislative Decree no. 198/2009. This regime is designed to protect identical material interests of consumers and users and/or their representative associations against the wrongdoings of the Italian Public Administration, including government entities or other public or private bodies providing public service.

A class action can now be brought to protect any contractual or non-contractual rights, provided they have in common the fact that the claimants have been damaged (1) by multi-offence conducts (*i.e.*, a single conduct that affects a number of parties); or (2) by a number of similar repeated instances of single-offence conduct. The provided protection goes beyond consumer protection, and could include, for instance, the protection of rights in the fields of financial services, data misuse, GDPR violations, human rights and climate change issues.

There are now three separate phases for class action cases. The first one is for the evaluation of the admissibility of the action (where the court needs, *inter alia*, to establish whether the rights are "*homogeneous*"); the second is

for the ascertainment of the liability of the defendant and the third one for the quantification of damages.

Though definitely broadened, the Italian class action remains an opt-in system, but with two opt-in windows: one after the decision on the admissibility of the action and the other after the court's favourable decision on the merits, just before the quantification phase.

Importantly, the new rules provide for a special contingency fee for lawyers representing the class, under which the defendant will have to pay a specific sum towards legal fees if the claim is successful. The contingency will be calculated as a percentage of the total amount awarded and on the number of class members. This will clearly be a huge incentive for Italian firms to represent those bringing class actions, as well as a relevant factor for NGOs in considering where to bring cases.

The new regime applies only to unlawful conduct carried out after 19 May 2021, and the old regime will continue to apply to conduct that took place before the Reform went into effect.

The Reform also modifies the existing collective injunctive relief, allowing the same claimants who can bring a class action (i.e. single components of the class and NGOs) to file a separate claim seeking to stop and/or prevent the same defendants who can be targeted by a class action (i.e. enterprises and providers of public services) from continuing the allegedly harmful actions.

Along with enlarging the number of potential claimants, the Reform permits claimants, whilst still being able to request collective injunctive relief, to ask the court to order the defendant to "*adopt all necessary measures to eliminate or reduce the prejudicial effects as a consequence of the ascertained violations*" (such measures must differ from the remedies of damages or restitution, which can be obtained solely with the class action). Moreover, upon the claimants' request, the court can adopt indirect coercive measures against the defendant, such as the *astreinte*. The collective injunctive relief proceedings follow a different and faster procedure, which remains separate from the class action proceedings.

In short, the Reform creates more effective procedural tools (at least, on paper), allowing all potential victims to claim damages occasioned by unlawful conduct of national and international corporations and public bodies and to obtain collective injunctive relief. By taking the scope of collective redress beyond consumer protection and rights, the Italian legislator is encouraging the use of this collective mechanism against all contractual and tort violations, including ECHR and business and human rights violations in general.

COULD THE NEW ITALIAN COLLECTIVE REDRESS REGIME BE USED TO TACKLE CLIMATE CHANGE-RELATED ISSUES?

Considering the broader scope given by the Reform, the new class action for damages under Articles 840 *bis et seq* of the Civil Procedure Code and the extended collective injunctive relief under Article 840 *sexiesdecies* can be two new procedural weapons in the hands of Italian investors, shareholders, stakeholders and consumers, which could tackle climate-related issues on a larger and more effective scale.

As the Reform applies only to conduct occurring after May 2021, typical climate change-related litigation, such as claims for loss or damage caused by climate change-related harm to heavy emitters are alleged to have directly contributed over the years (see, *City of New York v. BP plc et al. or Rhode*

Island v. Chevron Corp or Lliuya v. RWE AG), will remain out of the reach of the Reform.

Moreover, because the aim of a class action is the award of damages, a physical injury or an economic loss must have already materialised to found a claim. This excludes the application of the new procedural tool to those claims seeking to enforce (as opposed to merely incentivise) policy change (such as, the *Urgenda* case or *Milieudefensie et al. v. Royal Dutch Shell plc* in the Netherlands), as no material damage has occurred yet. However, in such cases, claimants could potentially use the collective proceedings for injunctive relief, also reshaped by the Reform (see, Article 840 *sexiesdecies* of the Italian Civil Procedure Code), seeking an order to stop or prevent the illicit conduct from continuing. It would need to be tested whether courts could also order the defendant to adopt positive measures preventing the prejudicial effects from arising (for example, directly imposing measures to reduce GHG emissions).

Having said the above, we think that several other potential climate change-related claims can benefit from the new collective redress regime.

Firstly, the new class action legislation could be available for disclosure-based claims. These claims are generally brought by investors and shareholders and include allegations for failure to disclose climate change-related risks, creating 'stock drop' scenarios where share prices fall for climate risk-related reasons. Indeed, the inclusion of climate change and sustainability matters in company reporting (see, Directive 2014/95/EU implemented in Italy by Legislative Decree no. 254/2016 or Regulation (EU) 2019/2088) creates a legal background and may prompt disputes in Italy also under the new class action regime.

A second group of potential claims relates to greenwashing, covering actions linked to misleading green advertising claims (such as carbon neutrality or offsetting of emissions) and anti-competitive conduct. What can be contested here is not the failure to disclose itself, but rather a misrepresentation in the disclosures. Such claims could potentially be brought by consumers, customers, investors and shareholders who were persuaded to buy or invest in green financial or non-financial products by the misleading information provided by the business marketing that product (an example of such action is the *Dieselgate* case). In this case, the new procedural tool could boost such actions, as it lists professionals and corporates as potential claimants.

Thirdly, the new regime may be used by shareholders and stakeholders claiming violation of directors' fiduciary duties and alleging failure to have accurately considered the impact of climate change on a company's operations, or to have adopted adequate emissions-reduction strategies, all determining climate-damaging investment decisions causing investment losses. Again, the new class action regime could be utilised for such claims, provided that an "*homogenous*" right is at stake and that "directors" could fall within the meaning of "*enterprise/professionals*" as the term has been broadened under the old regime.

CONCLUSIONS

The Last Judgment case demonstrates that the active use of the courts by Civil Society in pressing for action on climate change has arrived in Italy. Further, although not used in this case, the new collective redress regime will likely increase the attractiveness of the Italian Courts as a forum for climate change cases, and indeed other environmental and human rights-based claims.

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