CLASS ACTIONS IN ITALY: A FAREWELL TO AMERICA

GIORGIO AFFERNI*

1. INTRODUCTION

Class actions became available in Italy beginning in January 1st, 2010.[1]According to the *Osservatorio antitrust* of the University of Trento, so far only forty class actions have been filed. Of these forty class actions, three have been decided by a court on the merits, sixteen have been declared non-admissible (the equivalent of denial of certification), and twenty-one are still pending. Of the twenty-one class actions still pending, nine have been admitted. The other twelve are still in the admissibility stage.[2]

2. THE LIMITED AVAILABILITY OF CLASS ACTIONS

Filing a class action is subject to some limitations. The first limitation is that only consumers have standing. Any consumer may file a class action personally, through a consumers' association or a committee of consumers established expressly to file that class action.[3] In practice, almost all class actions have so far been filed through and financed by consumers' associations. Class actions are not cost effective for consumers.

A notable exception is the *De Zordo vs. Quadrifoglio* class action. In this case, an individual consumer filed a class action personally against a private company charged with cleaning the streets of Florence. The plaintiff complained that the defendant breached its contract with the municipality (and therefore with the citizens of Florence at large) on he occasion of an exceptional and unprecedented snowfall. However, Mrs. De Zordo was not a common consumer. She was a member of the city council, who was obviously more interested in the political return of her judicial initiative than in recovering non-pecuniary damages caused by the snowfall.[4]

The second limitation to the availability of class actions is that they may be filed only for certain infringements: infringements of contractual rights, product liability, unfair commercial practices, and infringements of antitrust law. Recently, class actions have also been made available in cases of liability

* J.D. (Genoa State University '00); LL.M. (Harvard '02); S.J.D. (Pisa State University '06); Lecturer in Private Law and European Private Law at the University of Genoa; Attorney, Studio Legale Afferni Crispo & C. - Genoa and Milan.

1. *See* Italian Consumers Code, Par. 5, Art. 140-bis (amended 23 July 2009). For an overview of the recent developments and case law on Italian class action, see Giorgio Afferni, Recenti sviluppi nell'azione di classe [Recent Developments in the Class Action], 29 Contratto e impresa 1275-1292 (2013).

2. *See* Azioni Di Classe Incardinate Nei Tribunali Italiani [Class Actions filed in Italian Courts], Osservatorio ARC (Last Visited Mar. 25, 2015), http://www.osservatorioantitrust.eu/it/azioni-di-classe-incardinate-nei-tribunali-italiani/. All orders and decisions of Italian courts on class actions cited in this article are available in the database of the Osservatorio.

3. CODICE DEL CONSUMO [Consumers Code], par. 5, art. 140-*bis* sec. 1 (It.).

4. *See* Trib. Florence, 15 Luglio 2011, Foro. It. 2012, V, 137 (It.) (the decision of the Tribunal not to admit this class action was confirmed by order of the Court of Appeal of Florence, 27 Dec. 2011).

of providers of services.[1] For all other infringements, class actions are not available. For example, class actions may not be filed in case of environmental liability. It is disputed as to what extent class actions may be filed in case of fraud on financial markets.[2]

The third limitation is that class actions may be filed only for claiming restitutions or damages.[3] In case law, it was unsettled as to whether class actions could be filed to establish infringement only, leaving the issue of restitutions or damages to later individual judgments (so-called bifurcation). In the case *Codacons vs. Unicredit*, the Tribunal of Rome held that, similarly to individual actions, class actions could be filed to establish infringement only.[4]

In the case *Codacons vs. Intesa San Paolo*, on the contrary, the Court of Appeal of Turin held that class actions to merely establish infringement are not admissible.[5] The Court of Appeal of Turin argued that, because consumers that opt-in a class action loose the right to file separate individual actions for the same infringement, should merely declaratory class actions be admitted, consumers opting-in would have no opportunity to collect damages at a later stage by filing individual actions for restitutions or damages.

Finally, the legislator confirmed that bifurcation is not admissible by amending Article 140-*bis* of the Italian Consumer Code specifying that "*class actions deal with the establishment of the infringement and the condemnation to damages and restitutions in favor of consumers*" (emphasis added).[6]

As far as damages are concerned, it is disputed as to whether class actions may be admitted only to recover pecuniary damages or to recover non-pecuniary damages as well. Contrary to French law, Italian law does not take an explicit position against the availability of class actions for non-pecuniary damages.[7] However, it is well established in Italian case law that courts must take into due consideration all relevant individual issues when evaluating the amount of non-pecuniary damages to be recovered (the so-called "personalization" of non-pecuniary damages).[8]

On the other hand, as we will see, class actions in Italian law may be admitted only if the Tribunal has established that all relevant issues are common to the class so that no individual issues will need to be tried. Therefore, it could be argued that class actions for non-pecuniary damages should never be admitted, because they always involve the trial of issues that are individual to each class member.

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1. Article 6 of the Law Decree, 24 January 2012, no. 1, converted with amendments into Law, 24 March 2012, no. 27. *See* Remo Caponi, *Azione di Classe: il Punto, la Linea e la Discontinuità [Class Action: The Point, The Line, and The Discontinuity*], 137 FORO ITALIANO V-149 (2012); CLAUDIO CONSOLO & BEATRICE ZUFFI, L'AZIONE DI CLASSE EX ART. 140-BIS COD. CONS. [THE CLASS ACTION EX ART. 140 BIS OF THE CONSUMER CODE], (2012).
2. *See* Giorgio Afferni, *Recent Development on Prospectus Liability in Italian Law*, EUROPEAN BANKING & FINANCIAL LAW REVIEW, 476 ff. (2011).
3. CODICE DEL CONSUMO [Consumers Code], par. 5, art. 140-*bis* sec. 1 (It.).
4. Trib. Rome, 25 Marzo 2011, Foro it., 2011, V, 50497 (It.). This view was also supported by Remo Caponi, *Il Nuovo Volto Della Class Action [The New Face of Class Action]*, 134 FORO ITALIANO V-383 f. (2009).
5. App. Torino, 27 Ottobre 2010, Foro it. 2011, V (It.). This view was also supported by Mario Libertini & Maria Rosaria Maugeri, *Ancora sul Giudizio di Ammissibilità dell'Azione di Classe [Once More on the Admissability of Class Action]*, 27 NUOVA GIURISPRUDENZA CIVILE COMMENTATA I-522 (2011).
6. *See* CODICE DEL CONSUMO [Consumer Code], par. 5, art. 140-bis (It.) (amended 24 March 2012).
7. *See* CODE DE COMMERCE [C.COM.][Commercial Code] art. L423-1 (Fr.).
8. *See* Cass., sez. un., 11 Novembre 2008, n. 26972, Giust. Civ. 2009, II (It.).

However, this extreme view has been rejected by Italian courts that have admitted several class actions were non-pecuniary damages were claimed.[9] A more balanced view is to distinguish according to the kind of non-pecuniary damages that are claimed. If the lead plaintiff seeks recovery of non-pecuniary damages that are common to all class members, the class action should be admitted. If, on the other hand, the lead plaintiff seeks compensation of non-pecuniary damages that are individual to each member of the class, the class action should not be admitted.[10]

For example, in the case *Altroconsumo vs. Trenord*, train commuters of the Milan area filed a class action against a local railway undertaking because of an exceptional and unprecedented chain of delays and cancellations due to a software failure. Lead plaintiffs claimed reimbursement of part of the price paid for the travel pass and compensation of non-pecuniary damages typically suffered by all member of the class, such as the common discomfort caused by recurring delays and cancellations. They did not seek compensation of individual non-pecuniary damages, such as the sorrow for not having been able to attend a wedding party because of the delay of the train. In this case, the decision of the Court of Appeal of Milan to admit the class action is convincing.[11]

A class action should not be admitted if the lead plaintiff seeks compensation of non-pecuniary damages that are too diversified and are not necessarily common to all members of the class. For example, a product liability class action should not be admitted if the plaintiff seeks compensation of pain and suffering and the defect of the product has caused different kinds of harm to different members of the class. In this respect, the class action *Codacons vs. Policlinico Gemelli* may be mentioned.[12] In this case, a group of mothers that gave birth in a public hospital in Rome at a time when it was established that an obstetrician had an infective disease (tuberculosis) filed a class action against the hospital claiming compensation of non-pecuniary damages. The Tribunal of Rome admitted the class action defining the class to include all mothers that gave birth and infants that were born in that hospital during the period affected by the risk of tuberculosis. The class included both mothers and infants that were infected by tuberculosis and mothers and infants that were not infected by this disease, but simply feared for a certain time that they were infected. The decision of the Tribunal of Rome to admit the class action with such definition of the class is not convincing. It is clear that in this case the issue of damages (as the issue of causation) is not common to all members of the class.

As a consequence of its decision to admit this class action, the Tribunal of Rome will need to run separate trials for each members of the class (lead plaintiffs and consumers opting-in). However, it could be noted that in this case the potential class was very small. Therefore, it is possible that the Tribunal of Rome considered the class action manageable even if the issues of damages and causation were not common to all members of the class.

9. *See* Trib. Naples, 18 Febbraio 2013, Foro. It. 2013, I, 1719, 138 (It.).
10. *See* Gianroberto Villa, *Il Danno Risarcibile nell'Azione Collettiva [Recoverable Damages in the Collective Action*, DANNO E RESPONSABILITÀ 11,15 (2009).
11. App. Milan, 3 Marzo 2014, Foro it. 2014, I, 1624, 139 (It.).
12. Trib. Rome, 27 Aprile 2012, Foro it. 2012, V, 1243 (It.).

3. "EMPTY CLASSES": THE BURDEN OF OPTING-IN

Italian class action is an opt-in class action. The decision of the court is binding only for consumers that are members of the class opt-in.[13] When the claim of each individual consumer is small, the key question is how many consumers will take the burden of opting-in. In this respect, the Italian experience so far confirms the skepticism of American legal literature on opt-in class action.[14] The number of consumers opting-in is very small, almost insignificant. An extreme (but instructive) case is *Codacons vs. Voden Medical Instruments*. In this case, the Tribunal of Milan admitted a class action brought by one individual against the distributor of a flu shot because of an alleged unfair commercial practice. [15] After the class action was admitted the plaintiff gave due notice thereof inviting all consumers that bought the same flu shot to opt-in. Only one consumer opted-in!

Finally, the Tribunal of Milan dismissed the case because the defendant proved at trial that the plaintiff, who was a lawyer of a consumers' association, did not buy the product for consumption purposes. It was proven that she bought the flu shot just a few hours before she went to the notary to give the power of attorney to the consumers' association to file the class action.[16] The peculiar part of the story is that even the only other individual that opted-in was not a consumer, but was also a lawyer, who wanted to "have a look" to this new procedural instrument.

The number of consumers opting-in is negatively affected also by the administrative difficulties of doing so. The law specifies that consumers may opt-in without the assistance of a lawyer and also by fax or certified email.[17] However, in the case *Altroconsumo vs. Banca Intesa*, the Tribunal of Turin held that in order to be valid the declaration of opting-in must be notarized.[18] In this case, a consumers' association filed a class action on behalf of three consumers against Banca Intesa for unfair overdraft commissions. After the class action was admitted 104 consumers opted-in: ninety-eight consumers opted-in through Altroconsumo; six opted-in directly in court bypassing the consumers' association. The Tribunal of Turin held that the declaration of the ninety-eight consumers opting-in through Altroconsumo was not valid because their request was not duly notarized. Of the other six declarations of consumers that opted-in directly in court, only three were admitted because of other formal reasons. Ultimately, the class action was decided in favour of the plaintiffs and Banca Intesa was required to compensate the three lead plaintiffs and the three consumers that opted-in total damages for about $1.500.

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13. CODICE DEL CONSUMO [Consumer Code], par. 5, art. 140-bis para. 14 (It.).
14. *Cf.* Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 203 (2009).
15. *See* Trib. Milan, 20 Dicembre 2010, Foro. It. 2011, I, 617, 136 (It.); Confirmed App. Milan, 3 Maggio 2011, Foro. It. 2011, I, 3423, 136 (It.).
(2011).
16. *See* Trib. Milan, 13 Marzo 2012, Foro. It. 2012, I, 1909, 137 (It.); *See* App. Milan, 26 Agosto 2013, Foro. It. 201, I, 617, 136 (It.).
17. CODICE DEL CONSUMO [Consumer Code], par. 5, art. 140-bis para. 3 (It.) (emended 24 January 2012).
18. Trib. Turin, 28 Marzo 2014, Foro it. 2014, V (It.).

4. "CONSUMPTION" OF THE CLASS ACTIONS: MANDATORY JOINDER AND PRECLUSION

Italian law provides that only one class action may be decided for every single infringement. All class actions that have been filed for the same infringement must be joined and decided by the Tribunal in front of which proceedings were started first. After the term for opting-in has expired, no new class action may be filed for the same facts (so-called "consumption" of the class action).[19] Therefore, before expiration of this term, any consumer that claims to have been harmed by the same infringement may choose to opt-in the class action that has already been filed by another consumer (typically through a consumers' association) or to file an autonomous class action that will be joined with the class action that has already been started. After this term has expired this consumer may only bring a separate and autonomous individual action, being no longer able to opt-in or to file an autonomous class action for the same facts.

As a consequence, there is at least in theory some space for competition among consumers or consumers' association, in the sense that if consumers are not confident about the ability of the lead plaintiff or of the consumers' association that is acting on his behalf to adequately represent the interest of the class, each consumer may file an autonomous class action. In this respect, the *Trenord* case may be mentioned. It will be recalled that, in this case, consumers were complaining about an extraordinary and unprecedented chain of delays and cancellations against a railway undertaking. For these same facts, three consumers' association filed separate class actions: *Altroconsumo*, *Codacons*, and *Codici*. Of these three class actions only two have been admitted (those filed by *Altroconsumo* and *Codici*).[20] The two surviving class actions are still pending in front of the Tribunal of Milan. They have not been joined yet, but according to the law should be joined in the near future.

5. REQUIREMENTS FOR THE ADMISSION OF CLASS ACTIONS

In order to be admitted the class action must satisfy the following requirements: (a) it must not be manifestly ungrounded; (b) the rights claimed by individual consumers must be homogeneous; (c) there must be no conflict of interests between the lead plaintiffs and other members of the class; (d) the lead plaintiffs must seem capable of adequately representing the interests of the class.[21]

Differently from US class action, the Italian class action foresees a preliminary assessment on the merits of the claim. A class action will not be admitted if the claim of the lead plaintiffs is deemed manifestly ungrounded at the preliminary hearing. It is generally held that this preliminary assessment

19. CODICE DEL CONSUMO [Consumer Code], par. 5, art. 140-bis para. 14 (It.).
20. *See* Trib. Milan, 15 Ottobre 2013, Foro it. 2014, V (It.); Trib. Milan, 7 Maggio 2014, Foro it, V (It.) App. Milan, 26 Agosto 2013, Foro it., I, 617, 136 (It.); Trib. Milan, 8 Novembre 2013, Giur it. 2014, II, 605 (It.) (The class action filed by Altroconsumo was declared non admissible); Andrea Giussani, *Intorno alla Tutelabilità con l'azione di Classe dei soli Diritti Omogenei* [*Around the Protectability thorugh the Class Action of Homogeneous Rights Only]* GIURIS. IT. 605 (2014) (This decision was criticized); App. Milan, 3 Marzo 2014, Foro it. 2014, I, 1624, 139 (It.). (The class action of Altroconsumo was finally admitted by order of the Court of Appeal of Milan).
21. CODICE DEL CONSUMO [Consumer Code], par. 5 art. 140-bis para. 6 (It.).

must be made on the base of the maxim *si vera sunt exposita*, which implies that the Tribunal must assume, only for the purpose of admission, that what is alleged by the plaintiff is true.

In this respect, an interesting case is *Codacons vs. British American Tobacco*. In this case, a consumers' association (*Codacons*) filed a class action on behalf of some consumers against a producer of cigarettes claiming compensation of damages to health caused by smoking. The Tribunal of Rome refused to admit the class action because, among other reasons, the claim was manifestly without merit. The Tribunal argued that from a certain time onward it has become common knowledge that smoking is harmful to health. Therefore, since all lead plaintiffs started to smoke after this time, they manifestly had no right to compensation for damages caused by smoking, because they acted at their own risk.[22]

Among all these requirements of admissibility, by far the most difficult to meet is the requirement of homogeneity of the rights of individual members of the class. Since it is not entirely clear what homogeneity of rights really means, Tribunals have taken a functional approach. The rights of individual class members are homogeneous when the Tribunal is satisfied at the preliminary hearing that it will not be necessary to conduct separate trials for different members of the class, but, rather one single trial common to all members of the class. To this end, lead plaintiffs must show in the complaint or at the preliminary hearing that it will be possible to provide proof common to all members of the class of all requirements of defendant's liability, namely proof of infringement, causation, and damages.[23]

In this respect, it may be noted that proof of infringement is normally common to all members of the class, assuming that the class has been defined to include only victims of the same infringement. Common proof of damages does not require that all members of the class have suffered the same and identical harm. It is sufficient that the Tribunal will be able to establish a formula to calculate damages, which is common to all members of the class. For example, in the case *Altroconsumo and Casa del consumatore vs. Moby et al.*, the consumers' associations *Altroconsumo* and *Casa del consumatore* filed a class action against some shipping companies for an alleged price-fixing cartel on the ferry lines to/from Sardinia.[24] Defendants objected that the rights of the individual members of the class were not homogeneous because different members of the class paid different prices for different services (some travelled with a car, others with a motorbike; some slept in a cabin, others on the deck; some travelled on the weekends, others during the week; and so on). Lead plaintiffs counter objected that irrespective of all these differences it was possible for the Tribunal to find a formula to calculate damages common to all members of the class (*e.g.* a certain percentage of the price paid), because the cartel has caused prices paid by each individual consumer to raise of the same or of a similar percentage. According to lead plaintiffs it is also possible to form different subclasses to take into account any major differences between different subgroups of consumers (for example, a subclass of consumers that travelled with

22. *See* Trib. Rome, 11 Aprile 2011, Foro it. 2011, I, 3424, 136 (It.); App. Rome, 27 Gennaio 2012, Foro. It. 2012, V, 1908, 137 (It.) (This decision was confirmed).

23. *See* Trib. Rome, 11 Aprile 2011, Foro it. 2011, V, 3424, 136 (It.); App. Rome, 27 Gennaio 2012, Foro it. 2012, V, 1908, 137 (It.) (This decision was confirmed); *See also* Sergio Menchini & Alessandro Motto, *L'azione di Classe* [*The Class Action*] 1419 (2010); Mario Libertini, *L'azione di classe e le pratiche commerciali scorrette [The Class Action and Unfair Commercial Practices]*, DIRITTO INDUSTRIALE I-150 (2011); Giorgio Afferni, *Azione di classe e danno antitrust [Class Action and Antitrust Damages]*, MERCATO CONCORRENZA E REGOLE 506 (2010).

24. *Cf.* Giorgio Afferni, *Class action e danno antitrust: il caso Traghetti [Class Actions and Antitrust Damages: The Ferries case]*, CONSUMATORI DIRITTI E MERCATO 118 (2012).

shipping company A and a subclass of consumers that travelled with shipping company B; or a subclass of consumers that have travelled with shipping company A on the ferry line *y* and a subclass of consumers that have travelled with shipping company A on the ferry line *x*; and so on). The case is still pending in front of the Tribunal of Genoa that has not decided yet on its admissibility.

As far as common proof of causation is concerned, it may be mentioned that lead plaintiffs should be allowed to rely on presumptions. For example, it is generally held that price-fixing cartels must be presumed to have increased prices actually paid by all consumers who purchased the cartelized product or service directly from the firm that took part to the cartel.[25] It is also generally held that one must presume that all investors purchasing a security have relied on the integrity of the market and that therefore in case of fraud-on-the-market investors would not have purchased the security had they been aware of the fraud.[26] While these presumptions have been held in respect of individual actions, there is no reason to exclude that they could also be used by lead plaintiffs within class actions to provide common proof of causation, *e.g.* that the cartel caused harm to all members of the class or that all members of the class relied on the misrepresentation while purchasing the securities affected by fraud.

Finally, before admitting a class action the Tribunal must verify that there is no conflict of interests between the lead plaintiff and other members of the class and that the lead plaintiff appears to be able to adequately represent the interests of the class. As far as adequacy of representation is concerned, so far Italian case law has dealt only with the issue of lead plaintiffs' financial adequacy. Consumers' associations that are listed in the public registry of consumers' associations are generally presumed to be able to adequately represent the interests of the class.

On the other hand, individual consumers that file class actions without the support of a consumers' association may fail adequacy of representation. For example, in the *Altroconsumo vs. Banca Intesa* case, the Tribunal of Turin held at the admission stage that the power of attorney given by lead plaintiffs to the consumers' association was not valid. Lead plaintiffs were considered to be in front of the Tribunal without the assistance of a consumers' association. As it will be recalled, the lead plaintiffs in this case complained about the payment of an unfair overdraft commission. Therefore, the balance of their bank account was below zero.

On the basis of this consideration, the Tribunal found the lead plaintiffs to be inadequate to represent the interests of the class because they had no resources to finance the class action.[27] The Court of appeal of Turin overturned this decision and admitted the class action, stating that the power of attorney given to *Altroconsumo* was valid and that this consumers' association could adequately represent the interests of the class.[28]

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25. *See* Cass., sez.un. 2 Febbraio 2007, n. 2305, Foro it. 2007, I, 764 (It.) . *Cf.* Giorgio Afferni, *Il Risarcimento del Danno per Violazione del Diritto Antitrust Italiano: Nesso di Causalità e Prova del Danno [Compensation for Damages for Breach of Italian Antitrust Law: Causation and Proof of Damage]*, DANNO E RESPONSABILITÀ 764 (2007).
26. *See* Cass., sez.un., 11 Giugno 2010, n. 14056, Foro it. 2011, I, 625 (It.). *Cf.* Giorgio Afferni, *Responsabilità da Prospetto: Natura, Danno Risarcibile e Nesso di Causalità [Prospectus Liability: Nature, Recoverable Damages and Causation]*, DANNO E RESPONSABILITÀ 625 (2011).
27 Trib. Turin, 28 Aprile 2011, Foro it. 2011, V, 1888, 136 (It.); See also Trib. Turin, 7 Aprile 2011, Foro it. 2012, V, 367 (It.).
28. *See* App. Turin, 23 Settembre 2011, Foro it. 2011, V, 3422, 1236 (It.).

All admissibility requirements of the class action must be verified by the Tribunal by its own motion. This rule is not explicitly stated in the law. However, it follows from the fact that there is a public interest in verifying that such requirements are met before the class action is admitted. This view is coherent with the Recommendation of the European Commission on collective redress.[29] It is also confirmed by the fact that in the Italian law the lead plaintiff of a class action must serve his complaint also to the public attorney that may choose to participate in the preliminary hearing on the admissibility of the class action.[30]

6. PROCEDURAL RULES AT THE ADMISSION STAGE

The preliminary decision of the Tribunal on the admissibility of the class action is subject to immediate appeal. The party that is not satisfied with this preliminary decision does not need to wait until the final decision of the Tribunal on the merit of the case before he can challenge the decision on the admissibility. To keep the class action from slowing down, the law specifies that the appeal of the defendant against the decision to admit the class action does not stay the proceedings in front of the Tribunal.[31]

The *Corte di Cassazione* in the first and so far only decision of the Italian Supreme Court on class actions held that the decision of the Court of appeal, which denies admission of the class action (confirming or reforming the decision of the Tribunal) is not subject to further appeal in front of the Supreme Court. The reason given is that the decision of the Court of appeal does not prevent the lead plaintiff from filing a new class action against the same defendants for the same facts.[32]

If the class action is not admitted the plaintiff must reimburse the legal expenses incurred by the defendant (the so-called looser pays or English rule). In addition, he must give adequate publicity to the decision of the Tribunal (*e.g.* through publication on newspapers). Therefore, bringing a class action is not only expensive (for the reasons that we will see below), but also risky.

If for the same infringement a judgment is pending in front of an administrative authority (such as the *Autorità Garante per la Concorrenza e il Mercato* - AGCM, the Italian competition public authority) or in front of an administrative court, the Tribunal may stay proceedings until the decision of the administrative authority or court is final. For example, in the first and so far only antitrust class action filed in Italy (*Altroconsumo and Casa del consumatore vs. Moby and others*), which was started in November 2011 as a reaction to an extraordinary and unprecedented increase in the prices applied by all ferry companies on the lines to/from Sardinia, the case is still pending at the admissibility stage because the Tribunal staid proceeding until the decision of the AGCM becomes final. This decision, which is pending in front of the *Consiglio di Stato* (the highest Italian administrative court), is expected to become final by the end of 2015. It is not clear how many consumers will still be interested at that point in opting-in to recover an overcharge of a couple of hundreds USD paid in 2011 (assuming that they have kept the ferry ticket to prove their right!).

29. Commission Regulation 2013/396, prembl. 9, 2013 O.J. (L 201) 60 (EU).
30. CODICE DEL CONSUMO [Consumer Code], par. 5 art. 140-bis para. 5 (It.).
31. *Id.* at para. 7.
32. Cass., sez.un, 14 Giugno 2012, 137 Foro it. 2012, I, 2304, 137 (It.).

Finally, it may be recalled that, in case of an infringement of EU antitrust law, if a decision of the European Commission is pending, the Tribunal must stay proceedings until the decision is final, because it may not decide a case contrary to what is established by the European Commission or Courts.[33]

7. NOTICE OF ADMISSION: "CLASS ACTIONS CEMETERY"

If the class action is admitted the Tribunal must order the most appropriate public notice so that all consumers that are part of the class are informed of the action and the opportunity to opt-in. Typically the Tribunal will order publication on one or two national newspapers. Newspapers typically apply special tariffs for such publications, which are significantly higher than regular tariffs. Public notice of the admission of a class action may cost as much as $50,000 or even $100,000.

If the class action is finally admitted, these costs will be reimbursed by the defendant. However, until the case is decided, the lead plaintiff (or the consumers' association the filed the action on his behalf) must pay these expenses ahead of time, which of course will not be reimbursed if the case is finally lost. If the lead plaintiff (or the consumers' association acting on his behalf) does not give public notice of the Tribunal's decision to admit the class action, the action shall not be allowed to proceed.[34]

As stated at the very beginning of this survey, according to the *Osservatorio* on competition law of the University of Trento, forty class actions has been filed so far, of which nine have been admitted and sixteen have been declared inadmissible. Of the nine class actions that have been admitted only three have been decided. Now, it is not clear why only twenty five of the forty class actions that have been filed have been decided on the admissibility and why only three of the nine class actions that have been admitted have been decided on the merits. One explanation is of course that Italian civil proceedings are too long. Another explanation is that the parties have settled the cases before or after the class action was admitted. Neither of these explanations is convincing (certainly not the explanation that cases have been settled, for the reasons I will discuss below).

In my opinion, especially after the class action is admitted and the Tribunal has ordered public notice of the admission, lead plaintiffs realize how high the costs of bringing forward a class action are with respect to the value of their claims or even to the aggregate value of the claims of all consumers that are likely to opt-in. Therefore, it may be expected that only national class actions that are filed by big consumers association (e.g. *Altroconsumo vs. Banca Intesa*) or local class action that have lower costs for public notice (e.g. *Maggi vs. Wecan Tour di Goa*, were the class was made of about twenty/twenty five consumers that bought a travel package to Zanzibar from a Neapolitan tour operator) are litigated until the decision on the merit. The remaining class actions, even after they are admitted, are abandoned and left to die until they are declared extinguished.

8. DECISION ON THE MERIT AND SETTLEMENT

33. Council Regulation 1/2003, art. 16, 2002 O.J. (L 1) 13 (EC).

34. CODICE DEL CONSUMO [Consumer Code], par. 5 art. 140-bis para. 9 (It.).

With the order admitting the class action, the Tribunal must: (a) define the class, establishing the conditions that consumers must satisfy to be able to opt-in; (b) set a deadline for giving public notice of admission; and (c) set an additional deadline - not exceeding 120 days from the expiration of the deadline public notice - for consumers to opt-in. Moreover, with the same or with a subsequent order, which may be modified at any time, the Tribunal may establish the course of the proceedings.[35]

The decision of the Tribunal is binding on all consumers that filed the class action (lead plaintiffs) and on all consumers that opted-in. Consumers that did not opt-in may file an individual action for the same infringement. As mentioned, after expiration of the deadline for opting-in, no other class action for the same infringement may be filed. Pending the deadline for opting-in, any consumer may freely choose to opt-in the class action already filed or to file an autonomous class action, which will be joined with the first class action filed for the same infringement. Only in the latter case, does the consumer become a true party of the proceedings. As such, he is entitled to appoint its own lawyer and to appeal against the unfavorable decision of the Tribunal. On the other hand, as also mentioned, the consumer that filed a separate class action may be required to reimburse legal expenses incurred by the defendant if the class action is finally rejected. Consumers that only opted-in may not be required to reimburse the legal expenses incurred by the defendant.[36]

Typically, consumers filing or opting-in a class action seek compensation for damages. The law specifies that the Tribunal may award damages on an *ex aequo et bono* basis, as is generally the case in Italian Law when it is certain that some damages have been suffered, but uncertain exactly how much.[37] It is noteworthy that punitive damages are not allowed under Italian law.[38] Therefore, consumers filing or opting-in a class action will only be allowed to recover compensatory damages for harm that they actually suffered.

Class actions may be settled. The right to settle belongs only to lead plaintiffs that, having filed the class action, are a true parties to the proceedings. Consumers that merely opted-in the class action may only choose to opt-in the settlement. Class action settlements are binding only on consumers that, after having opted-in the class action, opt-in in the settlement (they must opt-in twice!).[39] On the other hand, settlements must not be authorized by the Tribunal. There are no available data on the number of class actions that have been settled so far. It would not be surprising if this number turns out to be zero. Under the present law, there is very little or no incentive for the defendant to settle a class action even after it has been admitted. On the one hand, for low value claims (*e.g.* antitrust claims by consumers) the risk posed by the class action to the defendant is very limited because the number of consumers opting-in is very small.

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35. *Id.*
36. Trib. Milan, 13 Marzo 2012, Foro it. 2012, V, 1909, 137 (It.) (held the only consumer that opted-in jointly liable with the lead plaintiff to reimburse the legal expenses incurred by the defendant.). App. Milan, 26 Agosto 2013, Foro it., V, 617, 136 (It.) (This court reversed the previous decision).
37. C.Con, *supra* note 10 at art. 140-*bis*, par. 12; Codice Civile C.c. [Civil Code] art. 1226 (It.).
38. *See* Cass., 8 Febbraio 2012, n. 1781, CORRIERE GIURIDICO 1070 (2012); Cass.,19 Gennaio 2007, no. 1183, DANNO E RESPONSABILITÀ, 1126 (2007). (In both cases the Italian Supreme Court denied the *exequatur* to U.S. courts' decisions granting punitive damages against Italian defendants.).
39. C.Con, *supra* note 10 at art. 140-*bis*, para. 15.

On the other hand, for high value claims (*e.g.* security class actions to the extent that they are admissible), the attractiveness of settlement is very limited because it will only bind consumers that opted-in the settlement. Consumers that opted-in the class action, but did not opt-in the settlement, regain the right to file separate individual actions for the same infringement.[40]

9. FINANCING THE CLASS ACTION

The Italian Law on class actions does not provide for any specific provisions on the funding of the action. As is well known, consumers typically do not have an interest in funding a class action, because the costs of such actions are much higher than their expected benefits. More generally, self-interested consumers would always prefer individual actions to class actions, because they can reach the same result by investing less money and taking a lower risk.

Actually, in some cases, most notably those involving non-pecuniary damages, by filing a class action, instead of filing an individual action, consumers give up the opportunity to claim the full amount of the damage suffered, because the may only claim the part of damage that is common to all members of the class. Therefore, it cannot be expected that class actions will be funded by consumers.

It may also not be expected that class actions will be financed by law firms. Firstly, in Italy, as in most other European states, the "loser pays" rule applies. Therefore, law firms, in addition to anticipating costs, should also bear the risk of having to reimburse the legal expenses incurred by the defendant. Secondly, in Italy, as in many other European states, contingencies fees are not allowed.[41] Therefore, law firms may not legitimately agree with consumers filing or opting-in the class action that whatever recovered on the base of a court decision or settlement will be shared according to a certain formula.

More generally, at least for the time being, class actions are not a good business for lawyers. In this respect, it is sufficient to consider the following. If the class action is admitted and finally won, the Tribunal will order the defendant to compensate legal expenses incurred by the plaintiffs. These legal expenses will be calculated by applying legal parameters that vary as a function of the value of the case.[42] In case of class actions, these legal parameters foresee that the value of the case is equal to the sum of the claims of all consumers that filed the class action. The value of the claims of consumers that opted-in does not count. Thereafter, the applicable tariff may be multiplied by three.[43]

Let's take the *Altroconsumo and Casa del consumatore vs. Moby* case as an example, where two consumers' associations filed a class action on behalf of seven individual consumers. The potential class is made of about two millions consumers. The lead plaintiffs are claiming compensation of 50% of the price paid for the purchase of the ferry tickets for a total amount of about $2,000. Should they finally win the case, the Tribunal should order compensation of legal expenses of about $15,000. In these days, at least for small Italian law firms, this is certainly not a negligible amount of money. However, it is certainly not sufficient to create a new market for specialized law firms.

40. *Id.*
41. L. 31 December 2012 n. 247, G.U. 18 January 2013 n.15 (It.).
42. L. 10 March 2014, no. 55 G.U. 2 April 2014 n. 77 (It.)
43. *Id.* at art. 4 par. 10.

10. MEANWHILE IN EUROPE …

In the meanwhile in the European Union other Member States are introducing or planning to introduce class actions with different features. France introduced damages class actions that may be filed only by certain consumers' association on behalf of consumers. As the Italian class action, the French class action may be filed only for certain infringements, including antitrust violations.[44] Also the French class action requires that consumers opt-in. However, while in the Italian class action, consumers may opt-in after the action is admitted and in any event before it is decided on the merits, in the French class action consumers may opt-in only after the decision of the court has become final.[45] There are advantages and disadvantages to the French rule.

On the one side, consumers are encouraged to opt-in because they may do so when the case has already been won. On the other hand, the decision of the court may become final only many years after the infringement took place, with the consequence that consumers may not be any longer in the position to prove they are members of the class or may simply have lost any interest in opting-in especially if the value of their claim is small. Finally, it may be recalled that French class action is not available to recover non-pecuniary damages.

England, on the other hand, is planning to introduce an opt-out class action for antitrust infringements only.[46] More precisely, the court must decide according to the circumstances of the case if the class action may proceed as an opt-out or an opt-in class action. English antitrust class action will be available not only for consumers, but also for businesses. In order to avoid the excesses of U.S. style class actions, it is planned to concentrate all cases in front of a specialized court, to exclude punitive or exemplary damages, and to avoid contingency fees agreement with lawyers.

On the whole, the English proposal seems well balanced and is expected to become the paradigm for European class actions, at least in the antitrust area.

Class actions have also been on top of the European Commission agenda for several years now. Not been able to find sufficient political support for the adoption of a hard law instrument (such as a regulation or a directive), the Commission published a recommendation.[47] Member States are recommended (not obliged) to introduce a damages class action with some of the features of the Italian class action. The main difference is that the recommended EU class action may be brought not only by consumers, but also by businesses.

As in Italian Law, the recommended EU class action should be an opt-in class action. It should foresee a preliminary assessment on the merit. Punitive damages and contingency fees should not be allowed. A significant difference with the Italian class action is that, according to the recommendation, follow-on class actions (*i.e.* class actions that follow the starting of proceedings by a national administrative authority for the establishment of an infringement of EU law, *e.g.* an antitrust violation)

44. C.Com, *supra* note 11 at art. L423-1.
45. *Id.* at art. L423-3.
46. *See* Dept. for Bus. Innovation & Skills, *Private actions in competition law: A consultation on options for reform – government response*, 23-46 (2013).
47. *See* Commission Recommendation on collective redress, supra note 32. *Cf.* Aurora Saija, *La Raccomandazione della Commissione europea sui ricorsi collettivi e l'impatto sull'ordinamento italiano*, 2 ASSONIME NOTES & STUDIES (2014).

may be filed only after the decision of the public authority has become final.[48] This rule may also be found in the French law on class actions.[49] If it is introduced also in Italian law, it will certainly have the effect of reducing further the number of consumers opting-in.

11. CONCLUSIONS: CLASS ACTION IN NAME ONLY

At the time the class action was introduced in Italy it seemed reasonable to state that the Italian legislator had been wise to approach such a powerful instrument with some caution, especially in the light of the perceived abuses in the U.S.A.[50] Today, it has become clear that the Italian class action has been an almost complete failure. It is generally acknowledged that the reason for this failure is the opt-in requirement. As was anticipated by some American observers, opt-in class actions simply do not work with small value claims, where class actions are most desirable.[51] The way forward is shown by the English proposal on antitrust private enforcement. An opt-out class action at the discretion of a specialized court, no juries and no punitive damages. Being a plaintiff lawyer, I leave open the issue of whether contingency fees should be precluded.

48. *Cf.* Commission Recommendation on Collective Redress, *supra* note 32, at 33.
49. C.Com, *supra* note 11 at art. L423-17.
50. *Cf. Azione di classe e danno antitrust*, *supra* note 26, at 525.
51. *Cf.* Issacharoff & Miller, *supra* note 18 at 203.