

**Italian “Class Action” Suits in the Field of Consumer Protection: 2016  
Update (\*)**

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(\*) This Article is a revised and updated version of *R. Caponi*, “Collective Redress in Europe: Current Developments of ‘Class Action’ Suits in Italy”, in *Zeitschrift für Zivilprozess International (ZZPInt)*, 16 (2011), p. 61-77.

## 1. Introduction

The Italian class action suit (*azione di classe*) in the field of consumer protection is provided by the Art. 140-*bis* Consumer Code (*codice del consumo*).<sup>1</sup> Following the first draft in 2007 and the substantial changes in 2009, the text of Art. 140-*bis* has once again been amended by the Law no. 27 of 2012, on the “liberalizations”,<sup>2</sup> aimed at “improving the efficiency” of the new remedy. In the meantime, a body of case law has grown up on the *ammissibilità* (a sort of “certification”) of the class action suits which had been brought to the courts.<sup>3</sup> On 13 March 2012 the *Tribunale* of Milan issued the first decision on the merits, rejecting the claim<sup>4</sup>. On 18 February 2013 the *Tribunale* of Neaples issued the first decision favourable to the plaintiff, claiming damages for ruined holidays.<sup>5</sup>

The current text of art. 140-*bis* Consumer Code is the result of quite tortuous developments. Several legislative drafts on group actions for damages had been submitted to the Italian Parliament in the last decade. Partly because of the wide differences between the proposals, they were doomed to failure. Nevertheless, as a result of an unexpected and fortuitous turn in the parliamentary debate a new legal provision was passed, through the Law no. 244 of 2007. Thus, a new remedy, called *azione collettiva risarcitoria*, i.e. collective action for damages, was introduced into the field of consumer protection (Art. 140-*bis* Consumer Code). The original version of Art. 140-*bis* was supposed to come into effect in 2008. However, mounting political and economic opposition to the new remedy led to an initial postponement of its entry into force. Big firms, banks and insurance companies were particularly worried about the consequences that this procedure could have on their business.<sup>6</sup> In the end, the first version of the Art. 140-*bis* did not come into effect at all.<sup>7</sup> Under a new Government, a much revised version of Art. 140-*bis* was drafted and introduced by the Law no. 99 of 2009, on the

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<sup>1</sup> *Decreto legislativo* no. 206 of 2005. Cf. A.D. De Santis, *La tutela giurisdizionale collettiva. Contributo allo studio della legittimazione ad agire e delle tecniche inibitorie e risarcitorie*, Napoli, 2013. (This is the most recent and extensive work on the Italian class action).

<sup>2</sup> In *Gazzetta Ufficiale*, 24 March 2012, no. 71, Suppl. Ordinario no. 53.

<sup>3</sup> Cf. among the last decisions at the second instance: *Corte d'appello* of Turin, 17 November 2015, in *Foro it.*, 2016, I, 1017. At the first instance: *Tribunale* of Venezia, 12 January 2016, *ibidem*.

<sup>4</sup> *Tribunale* of Milan, 13 March 2012, in *Foro it.*, 2012, I, 1909, case notes by Palmieri, De Santis.

<sup>5</sup> *Tribunale* of Neaples, 18 February 2013, *Foro it.*, 2013, I, 1719. The second decision favourable to the claimant is App. Milano 26 August 2013, in *Foro it.*, 2013, I, 3326: repayment of 14,50 Euro to a single consumer, represented by a consumer association!

<sup>6</sup> So M. A. Lupoi, *Recent Developments in Italian Civil Procedure Law*, in *Civil Procedure Law*, 2012, p. 25 ff., p. 47, at [www.civilprocedurereview.com](http://www.civilprocedurereview.com)

<sup>7</sup> On the first text of Art. 140-*bis* cod. cons. see R. Caponi, *The Collective Redress Action in the Italian Legal System*, in *Zeitschrift für Zivilprozeß International*, 13 (2008), p. 13 ff.

“development and internationalisation of enterprises”.<sup>8</sup> The new legal provision, which represented a substantial improvement on the previous version, came into force on 1 January 2010. The “collective action for damages” has been renamed as a “class action”. In fact, it might have been more appropriate to maintain the old name, which belongs to the Italian and European tradition and better explains the content of Art. 140-*bis*. The social and cultural context in which this new remedy has been introduced differs profoundly from that of the U.S. class action, which owes its success not only to the sophisticated regulation of Rule 23 of the Federal Rules of Civil Procedure, but also to the attitudes and work practices of the lawyers and judges who apply them and the norms governing the funding of litigation costs (“contingency fees”).

## 2. *Scope of Application: Homogeneous Individual Interests*

To understand the scope of application of the Art. 140-*bis*, it is worth recalling that the notion of collective interests can be understood in two main ways.

Firstly, as “diffuse” interests without any specific connection to named individuals (one could call them “super-individual” interests), such as an interest in a healthy environment, in fair business practices or in the safe marketing of products.

Secondly, as a bundle of individual interests of an identical or equivalent nature (“homogeneous” individual interests), such as interests in monetary compensation for harm caused to a number of consumers by unfair contract terms, unfair business practices, anti-competitive conducts or unsafe products. Diffuse/super-individual interests are usually brought to court as claims for injunctive relief. Homogeneous individual interests are usually brought to court as claims for monetary compensation. A judicial action may well include both kinds of remedies, such as in the field of consumer protection.

In the original version of Art. 140-*bis*, para. 1 “homogeneous individual rights” (of consumers and users) were mentioned as rights protected by the new remedy. Art. 6, para. 1 of the abovementioned Law no. 27 of 2012 added: “as well as collective interests”. However, this addition does not significantly extend the scope of application of the class action suit as determined by Art. 140-*bis*, para. 2. The text of this provision reads as follows:

“The class action aims at a declaratory relief as to liability [of the sued enterprise] and money compensation for damages and repayments to consumers and users. This remedy aims to protect (a) the contractual rights of a number of consumers and users who find themselves in a “homogeneous” situation *vis-à-vis* the same enterprise, including claims arising out of mass contracts or contracts based on standard terms and conditions (Arts. 1341 and 1342 Civil Code); (b) homogeneous

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<sup>8</sup> See Art. 49 Law no. 99 of 2009.

claims arising from the purchase of a product, *vis-à-vis* the producer, even when no direct contractual relation between the consumers and the producer exists; (c) identical rights to payment of damages due to these consumers and users and arising from unfair commercial practices or anti-competitive behaviour”.<sup>9</sup>

To sum up, of the two main types of remedy falling within the category of collective redress (injunctive relief, compensatory relief), Art. 140-*bis* only deals with the aggregate claims of monetary compensation in the field of consumer protection<sup>10</sup>.

### 3. *Financing Collective Redress Actions: an Unresolved Issue*

Neither Art. 140-*bis* nor other Italian legal provisions provide for specific rules aimed to facilitate the financing of collective redress actions. Although funding is a key issue in this matter, the debate on this point is still at an early stage in Italy. Costs and professional fees in the field of collective redress action are fully governed by the general rules.<sup>11</sup> However, the protection of “homogeneous” individual rights in civil proceedings necessarily calls for a redefinition of the role of the legal profession. The effectiveness of the judicial remedies aimed at protecting such ‘homogeneous’ individual rights depends not only on the appropriate design of a procedural regime, but also on the organisational skills of those law firms able to extend their practice to this new area of activity. Additionally the ability of the judge to assess, at the admissibility stage of the proceedings, the seriousness of the collective action also plays a central role.

### 4. *Standing*

The first draft of Art. 140-*bis* gave standing (to aggregate claims for damages against professionals on behalf of the consumers allegedly injured) to consumer associations, included in a special registry held by the Government,<sup>12</sup> and committees, provided they were ‘adequately representative’ of collective interests in a single case. According to this provision, even *ad hoc* committees, i.e. small associations set up for the sole purpose of initiating proceedings, had standing to aggregate claims and bring the action before the courts.

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<sup>9</sup> Translations in English of Art. 140-*bis* Consumer Code are partially drawn from [www.classaction.it](http://www.classaction.it)

<sup>10</sup> Accordingly, the collective actions for injunctive relief are not addressed by this report. In this field the Italian legislation closely follows the European experience, particularly as regards the consumer protection. See Art. 37, Art. 139 ff. Consumer Code.

<sup>11</sup> See Art. 13 Law no. 247 of 2012.

<sup>12</sup> These associations are also entitled to bring collective actions for injunctive relief: see Art. 137 Consumer Code.

In fact such a broad standing to sue was not so far removed from granting standing to each injured consumer. Indeed, it would not have been difficult for injured consumers to establish a committee to act as a plaintiff. Granting standing to *ad hoc* committees has to be regarded as an intermediate step to give standing to each (allegedly) injured consumer. This was the correct choice for two main reasons. Firstly, illegal conduct which infringes ‘homogeneous’ individual rights (e.g., product liability, unfair contract terms signed by a multitude of consumers, etc.) fell under the scope of application of the *azione collettiva risarcitoria*. Accordingly each injured consumer can bring an individual action for damages.<sup>13</sup> Likewise he can set up a committee to act as plaintiff on his and other consumers’ behalf. Secondly, granting standing to *ad hoc* committees, supported by law firms, might promote competition in pursuing the interests of the consumers, so that the consumer associations recognized by the government are given an incentive to improve their activities.

The current provision of the Art. 140-*bis*, para. 1 reads as follows:

“The homogeneous, individual rights of consumers and users, as set forth in paragraph 2, as well as collective interests can also be enforced through class action as provided for by this article. To this end, each class member can individually, or through associations to which they grant power or committees in which they participate, institute a judicial proceedings to assess liability and claim an order to pay damages and repayments”.

It goes without saying that this provision could be better drafted. First of all, Art. 140-*bis*, para. 1 grants standing to promote a class action suit only to each (allegedly) injured consumer (or user). However, in practice consumer associations still play a major role in supporting the initiative of consumers and will retain such a role in the near future. As the body of cases shows, consumers wishing to promote a class action normally confer a proxy status on a closely connected consumer association to act as a representative in the proceedings. They are required neither to assign their individual claim to the association, nor to confer upon the association the power to agree to a settlement of the dispute (nor to confer “substantive” representative powers).<sup>14</sup>

##### 5. ‘Certification’ Stage (Ammissibilità)

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<sup>13</sup> On the other hand, as far as only “diffuse interests” are concerned, it is reasonable to grant standing only to consumer associations, according to the German model of *Verbandsklage*, i.e., ‘interest-group complaints’, because these interests have solely a collective dimension: e.g., if the professional makes use of unfair terms in his general conditions of contract, he does not infringe the rights of individuals yet.

<sup>14</sup> So, among others, *Tribunale of Venice*, 12 January 2016, above.

After the class action suit has been brought by filing an application to the court having jurisdiction in the case,<sup>15</sup> the “certification” phase takes place.

At the first hearing, the *Tribunale* is called upon to decide on the issue of the admissibility of the class action. The elements to be checked by the court are the following: (a) whether the claim is manifestly unfounded; (b) whether there is a conflict of interests between the plaintiff and the class; (c) whether the individual claims are homogeneous or not; (d) whether the plaintiff is in the position to adequately protect the interest of the class.<sup>16</sup> The case is to be dismissed if at least one out of these four elements is found to be present.<sup>17</sup>

An appeal to the *Corte d'appello* can be lodged against a decision on the admissibility of the claim.<sup>18</sup>

As has been already mentioned, a body of case law has grown on the admissibility of the class action suits which have been brought to the courts. One to the most interesting decisions is likely to be that of the *Corte d'appello* of Turin, 23 September 2011.<sup>19</sup> On 17 November 2010, the Consumer Association *Altroconsumo*, acting on its own and on behalf of three account holders, sued *Intesa Sanpaolo* Bank under art. 140-*bis*. The claim was twofold: first, that the application of overdraft charges and a new fee for overdrawn accounts without

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<sup>15</sup> For the courts having jurisdiction over class actions suits, s. Art. 140-*bis*, para. 4: “The claim is submitted to the Court located in the capital of the Region in which the company is based; however, the court of Turin has jurisdiction over the Region of Valle d’Aosta, the Court of Venice over the Regions of Trentino-Alto Adige and Friuli-Venezia Giulia, the Court of Rome over the Marche, Umbria, Abruzzo and Molise, and the Court of Naples over Basilicata and Calabria. The court shall handle the lawsuit sitting as a panel of three judges”.

The act instituting the proceedings is a *citazione*, which must be served not only on the defendant, but also on the public prosecutor (*pubblico ministero*), who may intervene in the preliminary phase of the proceedings, until the court decides upon the admissibility of the class action (s. Art. 140-*bis*, para. 5).

<sup>16</sup> Art. 140-*bis*, para. 6: “Upon first hearing, the Court shall decide by order on the admissibility of the claim; however, it may suspend judgment when there is an ongoing inquest before an independent Authority on the facts which are relevant to the decision, or a trial before the administrative judge. The claim shall be declared inadmissible if clearly unfounded or there is a conflict of interest, if the judge does not recognise the identity of the individual rights which are enforceable according to paragraph 2, and when the proposing party seems incapable of adequately protecting the class’s interests”.

<sup>17</sup> If the case is dismissed, the court awards costs against the losing plaintiff and may even order its decision to be properly advertised. Cf. Art. 140-*bis*, para. 8: “The judge settles the expenses in the inadmissibility order, also according to Article 96 of the Code of Civil Procedure, and orders the most appropriate form of public notice by and at the expenses of the unsuccessful party”.

<sup>18</sup> Art. 140-*bis*, para. 7: “The order that determines admissibility is subject to appeal before the *Corte d'appello* in the peremptory time limit of thirty days from either its disclosure or notification, whichever occurs first. The *Corte d'appello* decides on the appeal by order in closed session no later than forty days from the lodgement of the appeal. The appeal of the Court order upholding a motion does not suspend the proceeding before the *Tribunale*”.

<sup>19</sup> Published in *Foro it.*, 2011, I, 3422.

credit facilities in place was unlawful; second, that the ‘threshold rate’ set out in Law no. 108 of 1996 (usury) was exceeded. Restitution was claimed for any amounts collected by *Intesa Sanpaolo* in excess of that threshold. At first instance the claim (quantified at the total amount of approximately 456 euro in relation to the three accounts) was declared inadmissible by the *Tribunale* of Turin for two reasons. First, consumers (or users) promoting a class action may not confer the power of proxy upon a consumer association to act as a representative in the proceedings, without also conferring “substantive” representative powers. In other words, in the opinion of the *Tribunale* of Turin, Art. 77 Code of Civil Procedure also applies in class actions proceedings. According to the general rule provided for by Art. 77 a party may confer upon a person the power to represent him in a proceeding (*rappresentanza processuale volontaria*, “voluntary procedural representation”). The procedural representative power may only be conferred upon a person who also has substantive representative powers, i.e. the power to accomplish activities, on behalf of the conferring party, outside of the proceedings.<sup>20</sup> Second, the Court ruled that the three account holders were not in a position to adequately protect the interest of the class as they could not afford the costs of the proceedings, especially as regards the expenses of giving notice to the other members of the class.<sup>21</sup>

At second instance the *Corte d’appello* of Turin completely reversed the judgement of the *Tribunale*. It argued that: (a) Art. 140-*bis* Consumer Code derogates from Art. 77 Code of Civil Procedure,<sup>22</sup> as the plaintiff may confer upon a consumer association a mere procedural representative power (“*rappresentanza processuale mera*”);<sup>23</sup> (b) consequently the plaintiff’s ability to adequately protect the interest of the class must be checked with regard to the representative; *Altroconsumo*, being included in the special registry of the consumer association held by the Government, is in such a position.

If the action is declared admissible, the court shall determine the features of the homogeneous individual rights to be adjudicated. It will also set out the terms and conditions of the most appropriate form of public notice of the proceedings, so that the class members can opt-in in a timely fashion and in any case no later than four months from the time the decision of admissibility was given public notice.<sup>24</sup>

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<sup>20</sup> See *S. Grossi, M. C. Pagni*, Commentary on the Italian Code of Civil Procedure, Oxford, 2010, p. 135.

<sup>21</sup> *Tribunale* of Turin, 28 April 2011, in *Foro it.*, 2011, I, 1888.

<sup>22</sup> For another exception, s. Art. 317 Code of Civil Procedure, on representation before the Justices of the peace.

<sup>23</sup> In *Foro it.*, 2011, I, 3429.

<sup>24</sup> Art. 140-*bis*, para. 9: “The Court sets the terms and methods of the most appropriate form of public notice in the order with which it admits the action, so that those belonging to the class can join promptly. Public notification is a condition for the prosecution of the claim. By the same order the court shall:

The court shall also determine the course of the proceedings thereby ensuring, in accordance with the right to be heard, the fair, effective and prompt handling of the trial. Furthermore the court shall prescribe measures aimed at preventing undue repetitions or complications in taking evidence or bringing arguments. It shall indicate for the parties the form of notice needed to protect the position of the class members. Finally, the court shall regulate the evidentiary stage in the most appropriate way and give instructions on any other procedural issue.<sup>25</sup> Thus, unlike ordinary proceedings (Art. 163 ff. Code of Civil Procedure), the regulation of the evidentiary stage of the class action proceedings is not entrusted to legal provisions. Rather it is entrusted to the discretionary powers of the court, subject to compliance with the constitutional right to be heard, much like the regulation of the new summary proceedings (Art. 702-*bis* ff. Code of Civil Procedure, introduced by the Law no. 69 of 2009).<sup>26</sup>

## 6. Adesione (*Opt in*)

Consumers wishing to avail of the protection under Art. 140-*bis* can join in the class action through an act called *adesione* (adhesion). Representation by legal counsel is not required in order to join the action. The *adesione* can take place also through telefax or authenticated electronic mail. Class members joining the action cannot claim before the court on an individual basis, unless the proceedings terminate without decision on the merits or the class plaintiff reaches a settlement with the defendant and they do not wish to accept it. Class members joining the action do not enjoy procedural powers, nor may they appeal the final decision. However, once they have joined, they are bound by the outcome of the proceedings.

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a) determine the characteristics of the individual rights involved in the judgment, specifying the criteria according to which individuals seeking to join are included in the class or must be regarded as excluded from the lawsuit;

b) establish a peremptory time limit that does not exceed one hundred and twenty days from the deadline for public notification. By this date, the adhesion contracts shall be lodged at the registry, even by the plaintiff. A copy of the order is sent by the registry to the Ministry of Economic Development which is in charge of further publication, including on its website.”

<sup>25</sup> Art. 140-*bis*, para. 11: “The order with which the Court admits the action also determines the course of the procedure. In accordance with the right to be heard, the fair, effective and prompt handling of the trial is thereby ensured. In the same or subsequent order, which can be modified or revoked at any time, the Court shall prescribe measures aimed at preventing undue repetitions or complications in the presentation of evidence or arguments; it burdens the parties with the form of public notification which it considers necessary to protect the members; it regulates the preliminary investigation in the manner that it deems most appropriate and disciplines any other procedural matter, without including in any formality which is not essential to the debate”.

<sup>26</sup> For further remarks s. R. *Caponi*, Italian Civil justice Reform 2009, in *Zeitschrift für Zivilprozeß International*, 14 (2009), p. 143 ff.

Thus, according to Art. 140-*bis*, para. 3 it is up to the class member to decide whether to be bound or not by the final decision in the class action proceedings. In other words, an “opt-in” approach has been chosen, which fits in the European approach, as adopted by the EU Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms.<sup>27</sup> According to the Italian rule, those class members who are unwilling to opt in may bring an individual lawsuit,<sup>28</sup> but they may not intervene in the class action proceedings.<sup>29</sup>

### 7. *Content of the final decision*

The law envisages two possible alternatives for the final decision:<sup>30</sup>

(a) coercive relief, applicable in all cases where the decision on liability of the defendant automatically leads to the determination of the amount to be recovered, or

(b) a declaration that is limited to a finding of liability, where an individualised decision may be needed. The amount of damages is not determined as part of the collective process, but in a collective negotiation or, if no agreement is reached, in further proceedings limited to the *quantum*.<sup>31</sup> The law provides a *spatium deliberandi* in favour of the defendant. The decision is not enforceable until six months after its publication. Payments of amounts due made during this period are exempt from any increase. The clear aim is to encourage voluntary compliance with the decision.

### 8. *Concluding Remarks*

Despite several subsequent amendments of the initial text of art. 140-*bis* Consumer Code, class actions have suits been sparingly promoted and have been a tool of very limited usefulness for consumers in Italy. Indeed, the number of class action proceedings have been significantly below initial expectations. Based

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<sup>27</sup> Cf. Principle no. 21.

<sup>28</sup> Art. 140-*bis*, para. 14: “The Court ruling is also binding upon those individuals who join the collective action. It is made without any prejudice to the single action of those individuals who do not join the collective action. No further class action can be put forward for the same facts and against the same company after the closing date for joining assigned by the judge under paragraph 9 [...]”

<sup>29</sup> Art. 140-*bis*, para. 10: “The intervention of a third party under Article 105 of the Code of Civil Procedure is excluded.”

<sup>30</sup> The issue of determination of recoverable damages is one of the most delicate aspects of class action suits. The problem would require a solution by substantive law, so as to allow mechanisms of collective determination of damages, as happens, for example with the U.S. experience on ‘fluid recovery’.

<sup>31</sup> Art. 140-*bis*, para. 12, second sentence (added by the Law no. 27 of 2012).

on available data, only in two proceedings a final ruling favourable to consumers has been issued and the damages awarded were very low. In order to improve the situation, a new bill on class actions suits is currently pending in Parliament with a view to expanding the scope and impact of this procedural tool.<sup>32</sup> The fortunes of this new legislative proposal is still uncertain. However the main obstacles to the widespread use of class actions in Italy do not depend on the legal framework, but rather on the lack of awareness (or the fear, depending on the different policy approaches) that the class action could achieve a number of key goals.

First, it could fulfil the guarantee of access to justice in the case of small claims. The advantages of this instrument make it preferable not only to a more traditional series of individual actions, but also to individual mediation proceedings. In instances of mass damage (because the injured parties are many and where the individual harm is so small that it is not worth claiming it before the court or even making it on the basis of a mediation proceeding) the aggregation of the homogeneous individual claims by a class representative is set to cut costs. It could therefore constitute the cornerstone of a judicial response aimed at removing the reasons why consumers and users relinquish their right to assert their claims before the courts.

In this case, the new instrument could serve not only the purpose of procedural economy and efficiency, but it could also allow for the emergence of latent disputes that would not otherwise appear before the courts due to the disproportionality between the value of a single case, typically modest, and the costs of the individual plea before the courts or of the mediation proceedings. In this last respect, the class action suit could work a little like a “vacuum cleaner” regarding mediation proceedings, freeing the latter from the “dust” of low-value series of individual controversies and allowing it to concentrate on matters of a larger scale. It could free up resources which can subsequently be put to use in reaching individualised mediation agreements (or for the efforts of a collective mediation after a class action is brought) and thus enhance the professional competence and the work of the mediator. In other words, the introduction of the class action suit is a fundamental element of a strategy to improve the conditions of the civil justice system in the field of consumers’ protection. It is aimed at preventing alternative methods of dispute resolution from turning into a way to provide an (inadequate) response to a demand for justice that is frustrated due to the lack of an efficient alternative to the civil justice system.

In addition to providing individual relief to injured parties, as a second feature, the class action mechanism could deter companies from engaging in harmful illegal acts against a relatively broad range of consumers. This new (regulatory) function of the civil justice system can be placed in a historical perspective and

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<sup>32</sup> Cf. *Atto Senato* n. 1950, *Disposizioni in materia di azione di classe*.

compared with the classical model, according to which the purpose of civil proceedings is the protection of individual rights. The basic structures of civil justice systems in continental Europe, from standing to sue to adjudication, still bear traces of their historical foundation in natural law theory and were aimed at protecting the “new bourgeois individual” and his economic freedom, in a fragmented and individualistic perspective of social relationships. As a consequence of adopting this approach for a long time the State civil justice had significant difficulties in dealing with disputes with collective dimensions.

As an “essentially new turn in legal events” (S. C. Yeazell), the class action mechanism could constitute a collective reaction by consumers against the mass torts of enterprises. They have a deterrent effect on the latter, which would certainly not be achieved by individual actions of consumers before the courts or mediation bodies. In this area, the private judicial initiative of the consumers (private enforcement) could support public efforts to prevent and control the misuse of a company’s economic power. It could be conceived as a sort of counterpower that emerges from society, as opposed to the economic power of the company. In this sense, the Italian civil procedure (like that of other European countries that have introduced collective redress actions) might be enriched with a new function, traditionally entrusted to the state and the public administration in continental Europe: the regulation of business activities that impact not so much on the interests of an isolated individual, but on the interests of a broad number of people. Such a regulatory function should be complementary to the control function of the public administration: private enforcement and public enforcement should go hand and hand.

It goes without saying that the introduction into the legal system of an effective and efficient class action mechanism is powerfully opposed by the currently prevailing neo-liberal market ideology. In the end, this is the real obstacle to the widespread use of class actions in Italy.