

ITALIAN CLASS ACTIONS. AN UPDATE

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CLASS ACTIONS

During 2009 and 2010, the Italian Legislature increased the protection of individual consumers by introducing two sets of rules: Art. 140 *bis* of the Italian Consumer code, and Legislative Decree 198 of 2009 on the efficiency of public administration. The former set of rules allows consumers to file a class action against private parties, i.e. corporations. The latter grants consumers and users the right to collectively protect their interests against misconducts perpetrated by public agencies or private corporations providing public services. The literature refers these proceedings as “private” and “public” class actions, respectively.

Although this type of action is relatively new, in the past few months there were significant developments in Italian courts.² In this paper I will describe how Law n. 27/2012 on “Urgent Dispositions for Facilities Development, and Competitiveness” partially modified the original provisions of Art. 140 *bis*.³ Then, I will provide a brief analysis of some significant cases decided before March 30th 2012, including the first merits judgment in the history of class actions in Italy.⁴

BRIEF OVERVIEW OF ART 140 *BIS* AS MODIFIED BY LAW 27/2012

Causes of Action

The current version of Art. 140 *bis* establishes that consumers with homogenous interests have the right to file a class action against a private corporation in three different cases: breach of contract, unfair or anticompetitive commercial practice, and product or service liability. It is important to note that before Law 27/2012 came into force, Art.140 *bis* was only applicable to “product liability”, indicating that consumers could file an action in pursuant to this rule only when the product did not match the description of it. Now in 2012, the new law broadens the scope of

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² This article is based on information updated to March 30th, 2012.

³ On January 24th the current Government of the Prime Minister Mario Monti had enacted a Legislative Decree named “*Urgent regulation for the competition, development and efficiency of the infrastructure*” (decree 1/2012) to stimulate the Italian economic growth and its competitiveness. The decree was converted in law on March 23rd, 2012 (Law 27/2012).

⁴ *Codacons v. Voden Medical Instruments*, Tribunal of Milan, March 13th, 2012 rg 98/2010.

causes of actions and indicates that even a company providing services that does not meet the proper qualities can be sued.

Proceedings

Consumers may act individually or through associations to which they give a mandate. In order to initiate an action, the plaintiff must file a complaint with the civil trial court in the capital of the respective Region, where the corporation's headquarter resides.⁵ Once the pleading is filed, both the defendant and the public prosecutor must be notified. The public prosecutor will then be able to participate in the first stage of the proceedings and advise (ask is not specific enough here, maybe suggest/advice) the court to admit or deny the class action.

Admissibility Stage

During the first hearing, the court will evaluate if the filing consumer has an actual interest in the class.⁶ After verifying the plaintiff's right of standing, the judges will focus on the admissibility of the action (this step is similar in the content and scope of the class certification under US law). The court will then evaluate the merits of the case, and establish if there is a conflict of interest⁷, if the main plaintiff can adequately represent the interests of the class⁸, and if the rights of the proposed class members are homogenous. Law 27/2009 replaced the "identity" requirement in the original version of Art. 140 *bis* with "homogeneity."⁹ Therefore, if consumers want to file a class action they do not need to have identical interests; homogenous rights would suffice.¹⁰

At the end of this first stage of the proceedings, if the action is considered inadmissible, the court will decide the legal costs of the lawsuit that the losing party will have to bear (unless the judge decides to allocate the expenses among the parties.) On the other hand, if the action is declared admissible, the court will specify the requirements that every consumer should fulfill to be

⁵ The Trial Civil Court will sit in chambers. At first, Legislative Decree 1/2012 stated that those sections of the court that were specialized in intellectual property should specialize in corporate matters and handle class actions cases. However, when the Legislator converted in Law 27/2012 the decree, he deleted every reference to this provision.

⁶ This first hearing is different from the one disciplined by Art.183 of the Italian code of civil procedure that applies only to regular civil proceedings.

⁷ In the class action cases filed so far, judges have tried to define the situations in which a conflict of interest may arise. Accordingly, there could be a conflict between the plaintiff and his lawyer, or between the members of the class, or between the plaintiff and the defendant, as in the case of a consumer working for a company that competes with the defendant.

⁸ Art. 140 *bis* does not specify what "adequacy" means. Therefore, as we will see in the following paragraph, courts have interpreted this element and held that a promoter can represent the interest of the class if he shows to possess two requisites. First, he must have the economic and organizational means necessary to bear the publication's costs of the ordinance admitting the action. Secondly he must be able to face the expenses of a possible merits stage.

⁹ This element recalls the "commonality" required by Art. 23 of the US Federal Rules of Civil Procedure.

¹⁰ However, the Legislator does not explain what homogeneity is or on which basis courts should evaluate it.

part of the class and set the rules for preliminary investigation. Most importantly, it will order the publication of the ordinance at the expenses of the plaintiff, and will establish a term within which every consumer interested in the action may opt-in.¹¹ Parties will be able to appeal the court's decision within 30 days of notification. The appellate body will then re-evaluate the claim and issue a judgment within 40 days. If the appellate court does not overturn the decision of the lower court, the merits stage will begin.

The Opt-In Mechanism

The opt-in mechanism of the Italian class action system is very different from the opting-out process of FRCP Rule 23. According to Art. 140 *bis* if a consumer wants to be bound by the court's decision, he must join the class and file his documentation, listing the elements of fact and law on which his claim is based. Nonetheless, joining the class does not imply that the party will directly participate in the proceedings, and, for this reason, he will join the class without the representation of a lawyer. A consumer may also decide not to opt-in. In this case he will be able to file a separate individual action. Furthermore, if he joins the class and then the lead plaintiff decides to bargain a settlement with the defendant, he can refuse to be bound by it and regain his individual power to sue.

The Merits Stage

During this stage the trial court analyzes in detail the merits of the proceedings. Hence, if the judges find the defendant liable, they will decide the amount of compensatory damages that each consumer deserves, otherwise they will establish a general uniform criterion. According to Law 27/2012, the parties will have ninety days to reach an agreement, and if they could not, the judges will establish the amounts due. At the end of this stage the court will also decide the action legal expenses that the losing party should bear.¹² The decision can be challenged in the Court of Appeal and subsequently in the Court of Cassazione¹³, otherwise it will become enforceable after 180 days from its publication.

Number of Class Action Cases

¹¹ When a consumer decides to take part to the class, he is renouncing to act individually against the same defendant for the same facts at issue. In addition, after the term established by the court, no further class action involving the same parties and concerning the same facts may be filed.

¹² This is the general principle of "who loses bears the costs" stated under Art. 91 of the general rules of Civil Procedure.

¹³ The Court of Cassazione may be compared to the Supreme Court of the American system, and it constitutes the last appellate body of our legal system. Its scope is to ensure a uniform interpretation of the law and does not decide on the merits of the cases.

It is difficult to determine the number of class action cases filed to date, because there is no official registry for these lawsuits.¹⁴ However, I estimate that approximately fifteen actions were filed, and thirteen of them were decided at the admissibility stage.¹⁵ Among them, only four actions were declared admissible and just one case was decided at the merits stage.¹⁶

A GLIMPSE TO THE CASE LAW

Since 2010 several class actions were filed in civil courts.¹⁷ Here I present a general overview of some of the cases that reached the admissibility stage, and the only case decided at the merits stage. The majority of these types of lawsuits are concerned with unfair commercial practice allegedly committed by Italian banks against consumers: the banks allegedly charged fees that were declared unlawful by Law 2/2009.¹⁸ I will also focus on some cases involving breach of contract,

¹⁴ On this regard it might be useful to look through this web page <http://www.registroclassaction.it/>. Here are listed some of the ongoing lawsuits or the class actions that have been announced. For example, the action that Siti, an association aimed to protect consumers' capital expenditures, would like to file against Bank of Ireland for unfair commercial practice. Also, the class action that Codacons announced against the Hospital Policlinico Gemelli where some newborns contracted the tuberculosis. It is also interesting to look at the official web sites of the major consumer associations in order to follow updates and news on the actions they promote.

¹⁵ Besides the four actions declared admissible at the first stage of the proceeding, all the other lawsuits have been denied and dismissed. Among them there are the actions filed by Altroconsumo for breach of contract and unfair commercial practice against the RAI, the Italian public television provider and against Trenitalia, the company providing most of the train transportation in Italy. The Tribunal of Rome refused to certify both actions therefore the association has appealed the ordinances in front of the Court of Appeal of Rome and we are still awaiting a decision. See also <http://www.altroconsumo.it/soldi/conti-correnti/speciali/le-class-action-di-altroconsumo>. The Tribunal of Milan instead, on October 20th has issued a judgment in the case *Aduc v. Microsoft srl* in which a consumer gave a mandate to an association to file an action for breach of contract and unfair commercial practice against Microsoft. The court held that Microsoft was not part of the contract stipulated by the plaintiff, thus the action was inadmissible. What is particularly important about this judgment is that the Court recognized, under art. 140 *bis*, the possibility of a mandatory intervention of a third party in the proceedings. Therefore, according to the Tribunal of Milan, whenever the judge thinks it is necessary, he can impose to a third person to take part to the case, but no third party may intervene voluntarily, not even those consumers who decided to adhere to the class.

¹⁶ The four cases are: *Codacons v. Voden Medical Instruments* decided by the Tribunal of Milan (only case decided also in the merits), *Altroconsumo v. BancaIntesa San Paolo* decided by the Tribunal of Turin, and *Assoconsum v. Banca della Campania* and *Unione Nazionale Consumatori v. Wecantour* both decided by the Tribunal of Naples. In the following paragraphs I will analyze in detail the first three cases mentioned above, that I deemed particularly interesting. As far as the last case is concerned, it is important to mention that Unione Nazionale Consumatori received a mandate by a group of tourists in order to file a class action against the company Wecantour for selling misleading travel packages. In October 1st, 2011 the Tribunal of Naples has issued its judgment declaring the action admissible. Now the proceedings on the merit will begin.

¹⁷ See note 14.

¹⁸ Law 2/2009 providing "urgent measures for the society support" is based on the anti-crisis decree 185/2008 enacted by the Government during the economic crisis of 2008, and it establishes that all the contract provisions through which the bank applies a fee to banking accounts for overdrafts with duration inferior to 30 days are null and void. It is also considered void and null any banking fee charged for immediate availability of cash advances.

and on the only case of Italian tobacco class action. Finally, I will present the first and only case that has been decided at the merits stage.

Codacons v. Banca Intesa San Paolo.

The consumer association Codacons¹⁹ received a mandate by the president of the association to file an action against the Banca Intesa San Paolo on his behalf and as the representative of every consumer with a checking account of the bank.²⁰ The action was based on the assumption that the bank charged accounts with and without line of credit some fees that were held unlawful by Law 2/2009.²¹ The lead plaintiff sought economic reimbursement and asked the court to declare void those contractual provisions imposing the charges at dispute.

The defendant argued that the plaintiff could not act as the representative of the class because he only possessed one of the two accounts on which the claim was based. Agreeing with the Bank's argument, the Court explained that the lead plaintiff needs to possess all of the rights on which the lawsuit was based.²² Furthermore, in case of a class action his interest must be identical to those of the class because he is the only person who actively participate the proceedings while the consumers who will join the class will not possess such procedural power. Consequently, the Court held that the president of Codacons could only represent those consumers holding the same type of account as his account. Besides the lack of standing under Art. 140 *bis*, the plaintiff also lacked a general interest to file the claim under Art. 100 of the Italian Code of Civil Procedure because the fees at dispute did not apply to his account, therefore he did not suffer any damage. Since the plaintiff had no interest in filing the claim and had no grounds to do that, the Tribunal of Turin held the action inadmissible, allocated the expenses among the parties, and ordered the plaintiff to publicize the decision on the newspaper.²³

Codacons challenged the ordinance in the Court of Appeal of Turin. The appellate court upheld the decision of the trial court and explained that a declaratory remedy, like the nullity of contractual provisions, can never be obtained through a class action proceeding, whose sole aim is to ensure economic compensation.²⁴

¹⁹ Codacons, "Coordination of Associations for the Defense of the Environment and the Right of Consumers" is one of the largest consumers associations in Italy. It was born in 1986 and it boasts a large number of members.

²⁰ Tribunal of Turin, I Section, *Codacons v. BancaIntesa San Paolo*, rg 29/2010.

²¹ These fees are: the overdraft fee applied to accounts without line of credit, the annual fee charged for withdrew sums, and the trimestral fee applied for the immediate availability of cash advances.

²² Tribunal of Turin, I Section, *Codacons v. BancaIntesa San Paolo*, rg 29/2010, page 30.

²³ The decision was issued on May 27th, 2010.

²⁴ Codacons has appealed this ordinance in front of the Court of Cassazione.

Codacons v. Banca Unicredit.

Codacons filed an action against the Banca Unicredit on behalf of its president who wanted to represent every consumer holding a checking account without line of credit.²⁵ The lead plaintiff sought compensation for the fees paid as consequence of an allegedly unfair commercial practice perpetrated by the bank. For the same reason, he asked the Regional Tribunal of Rome to declare null and void the contractual provisions imposing the charges at dispute. Codacons, at the same time, filed a motion for the consolidation of this action with a similar lawsuit previously filed against Unicredit on behalf of its president.²⁶ In the latter case, however, the plaintiff's claim was based on the possession of an account with line of credit on which the bank allegedly applied unlawful fees for immediate availability of cash advances.²⁷ The Court decided that the two proceedings could not be consolidated because they were based on different sets of facts. More specifically, the actions were related to different types of accounts and the plaintiff claimed the application of two different fees in one case and in the other.²⁸

When explaining the meaning of the "identity" requirement in the original version of Art. 140 *bis*, the Court held that the facts and the type of remedy sought in the lawsuit should be the same for every member of the class. Thus, whenever the *causa petendi* and the *peitutm* (specifically the remedy sought, not its amount) are the same, the rights of the class will be homogenous. Accordingly, the Court declared that the rights of the lead plaintiff were homogenous to those of the class. Nonetheless, not all the fees at dispute applied to the plaintiff's accounts, consequently, the lawsuit was partially groundless. Finally, since the fees were written into the contract before Art.140 *bis* came into force, the judges declared the actions inadmissible and split the legal expense among the parties.²⁹

Altronconsumo v. Banca Intesa San Paolo.

This case³⁰ was filed against the Banca Intesa San Paolo by three consumers on their own and through the association Altronconsumo.³¹ The plaintiffs claimed that the defendant applied to

²⁵ Tribunal of Rome, VIII Section, *Codacons v. UnicreditBanca*, rg 50497/2010.

²⁶ Tribunal of Rome *Codacons v. UnicreditBanca*, rg 11/2010.

²⁷ Once again, Codacons claimed that the fees should be considered unlawful not only because Art. 2 of Decree 185/2008 had revoked their application, but also because they were unilaterally introduced in the contract by the bank's will.

²⁸ Therefore the "*causa petendi*" of the claims was not the same.

²⁹ The court applied art. 92 of the Italian Code of Civil Procedure to allocate the expenses among the parties. Accordingly, every party will pay the legal fees to its own lawyer. The decision was issued in March 3rd, 2011.

³⁰ Tribunal of Turin, I Section, *Altronconsumo v. BancaIntesa San Paolo*, rg 31190/2010.

³¹ Altroconsumo is one of the biggest Italian consumers association with more than 345.000 members aimed to inform and protect consumers rights.

their banking accounts some unlawful fees and asked the court to declare void the contractual provisions imposing the charges. The Tribunal of Turin decided the case and declared that, under the general rules of civil procedure, the association Altroconsumo and the consumers who gave the mandate could not simultaneously participate in the proceedings.

Additionally, since there were only three plaintiffs, the court concluded that they could not adequately represent the interests of the class. More specifically, the judges held that such an exiguous number of consumers could not possess the economic and organizational means necessary to bear the publication's costs of an ordinance admitting the action as well as the expenses of a possible merits stage. Consequently, the Tribunal of Turin declared the action inadmissible.³²

Altroconsumo challenged the decision and the Court of Appeal. The appellate court reversed it on several grounds. Examining all the elements needed to admit the class, the Court stated that Altroconsumo and the plaintiffs had the power to file the lawsuit jointly and that the association did possess economic means to represent the class. On this regard, the fact that Altroconsumo was registered in the directory kept by the Ministry of Productive Actions³³ had a great influence on the Court. Consequently, the appellate judges declared the action admissible for the actions occurred after Art. 140 *bis* came into force, and ordered the proceeding of the case in the trial court for the merits stage.³⁴ The defendant was asked to pay for the legal expenses.³⁵

Assoconsum v. Banca della Campania.

This action was filed in the Court of Naples by the consumer association Assoconsum³⁶ on behalf of two consumers who gave it a mandate to act against the Banca della Campania.³⁷ Assoconsum claimed that the lead plaintiffs held a bank account without line of credit on which the bank applied an overdraft fee that should be considered void under Law 2/2009. The association also asked the court to rule these charges unlawful because imposed unilaterally in the contract by the defendant. Accordingly, the plaintiffs sought economic reimbursement and damages.

³² Decision issued on April 24th, 2011.

³³ In the directory kept by the Ministry of Productive Actions are listed all the associations having the power to represent consumers "nationally", i.e. all over Italy.

³⁴ Decision issued on September 23rd, 2011.

³⁵ The case is now in front of the Tribunal of Turin for the merits stage. On the first hearing held on March 16th 2012, the judges have decided to adjourn the case to April 19th, awaiting to see how Law 27/2012 would modify Art. 140 *bis*. See also <http://www.altroconsumo.it/soldi/conti-correnti/speciali/le-class-action-di-altroconsumo>.

³⁶ Assoconsum is a non-profit organization founded in 2002 with the scope to protect consumers' interests and improve their rights. It counts more than 40.000 members.

³⁷ Tribunal of Naples, II Section, *Assoconsum v. Banca della Campania*, rg. 9002/2011.

The Court evaluated all the elements of admissibility of the action starting from the homogeneity requirement. The judges held that the class was homogenous not only because the consumers possessed the same type of accounts but also because the fees at dispute applied to all of them. The Court considered the different amount of damages sought by each member of the class and held that this difference is irrelevant. With regard to the adequacy of the plaintiff, the Court asserted that Assoconsum could adequately represent the class since it was listed in the directory kept by the Ministry of Productive Actions as one of those associations having the power to represent consumers all over the country. Finally, since the defendant failed to prove the existence of any conflict of interest, the Tribunal of Naples admitted the action.³⁸

Adoc v. Banca Popolare di Novara.

Adoc³⁹, one of the biggest Italian consumer associations, filed an action on behalf of its own members and of a consumer who gave it a mandate against the Banca Popolare di Novara.⁴⁰ The association claimed that the defendant unlawfully applied on the plaintiffs' checking accounts without line of credit, an overdraft fee that was declared invalid by Law 2/2009.⁴¹ At the first hearing, the Tribunal of Turin explained that Adoc could not autonomously decide to file a class action on behalf of its members but it could still represent the consumer who gave it the mandate.⁴² However, according to the Court, the plaintiff did not meet the "adequacy" standard imposed by Art. 140 *bis* since he failed to show he could bear the proceedings' expenses and the publicity costs of a possible favorable ordinance. Consequently, the judges denied the actions' admission and dismissed the case.⁴³

Adoc v. GruppoTorineseTrasporti

This case⁴⁴ involves a private train company the Gruppo Torinese Trasporti. Two consumers using its transportation services filed a class action individually and through the consumer association Adoc. The plaintiffs claimed that the defendant breached the contract because the trains were not arriving and departing on time, and their coaches did not possess the

³⁸ Decision issued on November 16th, 2011. Any consumer interested to participate to this class action will be able to adhere to the lawsuit within June 9th, 2012.

³⁹ ADOC is a non-profit consumer association founded in 1988 and with more than 65.000 members.

⁴⁰ Tribunal of Turin, *ADOC v. Banca di Novara*, rg 21733/2010.

⁴¹ Adoc claimed that these fees were applied even in if the account was overdrawn for a short period of time and for a small amount of money.

⁴² The Court held that Art. 140 *bis* recognizes association the power to act on behalf of the consumers if they give it a specific mandate to do so. Therefore, the rule does not give consumer association the autonomous and substantial right to file a class action to protect its own interests or the one of its members.

⁴³ Decision issued on March 4rd, 2011.

⁴⁴ Court of Turin, I Section, *Adoc v. GruppoTorineseTrasporti*, rg 6078/11.

qualitative standards described in the company's chart of services. In addition, the claimants considered both the schedule and the chart misleading. Consequently, they sought monetary compensation for the trains' passes and non-monetary damages for breach of contract and unfair commercial practice.⁴⁵

First, the Tribunal of Turin analyzed the plaintiffs' standing to sue and concluded that the lawsuit could not be filed simultaneously by the consumers and by Adoc. Therefore, following the directions of the judge, the claimants decided not to take directly part to the proceeding and surrendered all their procedural powers to the association. Subsequently, the Court emphasized that the facts of the lawsuit were not homogenous since each consumer complained about damaged suffered in different trips. Also, since a part of the alleged damages were non-economic and personal, according to the judges' reasoning, they needed to be evaluated on an individual basis. The plaintiffs tried to reply to these findings but the Court did not allowed them to do so, worrying about the possible negative impact of a reply on the trial speed.

Finally, the judges found the action groundless because, even if the service provided by the defendant did not possess the proper qualities, the Gruppo Torinese Trasporti nonetheless complied with his obligation by transporting the passengers to their destinations. Since there was no breach of contract nor unfair commercial practice⁴⁶, the Tribunal of Turin declared the action inadmissible and condemned Adoc to bear the expenses of the proceedings and the costs of the decisions publication.⁴⁷

Adoc challenged the ordinance, but The Court of Appeal of Turin upheld the judgment, expressing, nonetheless, a partial disagreement with the trial court's reasoning.⁴⁸ First, the appellate body clarified that the rules of Art. 140 *bis* overrides the general rules of civil procedure with regard to parties' representation powers. In fact, the association receiving a mandate has a role of technical auxiliary of the consumer and does not interfere with the right at issue. Therefore, both the plaintiffs and Adoc should be recognized the right to participate in the proceedings. Second, the judges explained that the element of homogeneity should be evaluated on the sole basis of the commonality of the facts of the action, not on the remedy sought with the lawsuit.

Cittadini di Firenze v. Quadrifoglio.

⁴⁵ In particular euros 53,50 for the monthly pass, euros 14,90 for the weekly pass, and euros 482,00 for the annual pass.

⁴⁶ On this regard, the Court of Appeal of Turin held that a chart of services integrates the contractual obligations of the public provider but does not substitute the content of the contract itself.

⁴⁷ Decision issued on October 31st, 2011.

⁴⁸ Court of Appeal of Turin, *Adoc v. Gruppo Torinese Trasporti*, rg. 2246/2011. Decision issued on January 11th, 2012.

This case was filed after an unusual snowstorm in the city of Florence, which caused serious problems to the city viability (pedestrians and automobiles) for several hours.⁴⁹ A citizen filed a class action on his interest and as representative of all the consumers damaged by the storm, against the cleaning company Quadrifoglio. Even if there was no direct contractual relationship, the plaintiff claimed that the defendant breached its contract, hence sought reimbursement for the tax paid to Quadrifoglio for its services, and compensatory damages for moral distress. The company replied by stating that the interests of the class were not homogenous since they were claiming personal and non-economic damages; however, the Tribunal of Florence explained that the type and amount of remedies sought by the plaintiff were irrelevant. The Court declared the action inadmissible because the claims were groundless.⁵⁰ The tax at issue, in fact, had not yet been collected at the time of the filing. Moreover, there was no direct contract between the consumers and the defendant, and so the lawsuit lacked any factual basis.

Codacons challenged the ordinance but the Court of Appeal of Florence⁵¹ upheld the decision, explaining that the plaintiffs' obligations towards Quadrifoglio did not depend from a voluntary contract bargained with it, but from the law itself. The plaintiff was asked to bear the payment of the appeal expenses, and the legal expenses associated with the trial proceedings was apportioned between the parties.

Codacons v. British American Tobacco Italia.

This is the first and only case of tobacco class action in Italy.⁵² The lawsuit was filed by Codacons, one of the biggest Italian consumer associations, on its own name and as the representative of several consumers who claimed that the nicotine contained in the cigarettes sold by the American British Tobacco Italia (BAT) was at such high level to cause addiction. Accordingly, the plaintiffs sought compensation for the costs of the cigarettes purchased under this dependence and for the health damages caused by the nicotine. However, the defendant replied that the alleged facts occurred before Art. 140 *bis* came into force, thus no class action could be filed, and that in any case, the rights at issue were not homogeneous. The Tribunal of Rome partially agreed with BAT and held that the lawsuit was valid only for those misconducts occurred after Art. 140 *bis* became enforceable. Then, it examined the grounds of the case in order to discover if there was sufficient legal basis to assume that the plaintiff's right existed.

⁴⁹ Tribunal of Florence, II Section, *Cittadini di Firenze v. Quadrifoglio*. See also <http://www.neldiritto.it/appgiurisprudenza.asp?id=6773>.

⁵⁰ Decision issued on May 30th, 2011.

⁵¹ Court of Appeal of Florence, II Section, *Cittadini di Firenze v. Quadrifoglio*. Decision issued on December 14th 2011. See also <http://www.neldiritto.it/appgiurisprudenza.asp?id=7380>

⁵² Tribunal of Rome, XIII Section, *Codacons v. British American Tobacco Italia*.

However, the Court believed that the action was groundless because every smoker was fully aware of the risks connected to the consumption of cigarettes, and the damages were consequences of their free will, not of the addiction to nicotine. Moreover, the judges explained that Codacons did not have the power to file the action on its own initiative under Art. 140 *bis*.

Finally, the Court declared that a collective protection could be granted whenever the judge's evaluation could focus on the solution of the same questions of law and facts, thus on homogenous rights. Nonetheless, since every consumer had his own smoking "history" and has been differently affected by the nicotine, the Tribunal of Rome held that the class was not homogenous. Accordingly, the class was declared inadmissible.⁵³

Codacons challenged the ordinance in the Court of Appeal of Rome. The appellate court accepted the reasoning of the trial court and affirmed the decision.⁵⁴

Codacons v. Voden Medical Instruments.

Swine Flue caused several deaths throughout Europe during the time when the controversy arises for this case. The lead plaintiff bought a test flue distributed by Voden Medical Instruments company. The product's illustrative paper claimed that it could reveal with almost no margin of errors the presence of any type of A flue.⁵⁵ Relying on this information, the plaintiff purchased the test, but after reading a press release published on the Voden web site, he discovered that the test could lead to false negatives. Consequently, he gave mandate to Codacons to file a class action against Voden and to seek reimbursement and damages compensation.⁵⁶

At first the consumer claimed that this was a product liability case, but later on, in an amended complaint, he specified that the misleading content of the paper represented an unfair commercial practice. Art. 140 *bis* is silent on this regard, however the Tribunal of Milan decided to admit the amended complaint presented by the plaintiff in order to have a better understanding of the grounds of the case. Accordingly, the court admitted the action on the basis of the amended complaint and ordered Codacons to publicize the decision on three of the biggest Italian newspaper.⁵⁷

The defendant appealed the decision claiming lack of homogeneity between the interests of the plaintiff and those of the members of the class. Nonetheless, the Court of Appeal of Milan held that the interests at issue were homogenous because they required a same solution of the same

⁵³ Decision issued on April 1st, 2011.

⁵⁴ Decision issued in January 27th, 2012.

⁵⁵ Both swine and the aviary flues are "A" flue types and the Ego Test Flu was a kit designed to determine if the person had a flue of this type.

⁵⁶ Tribunal of Milan, VIII Section, *Codacons v. Voden Medical Instruments*, rg 98/2010.

⁵⁷ Decision issued December 20th, 2010.

questions of fact and law.⁵⁸ In particular, the consumers had concluded the same contract with the defendant, purchasing the test. In addition they were all damaged by the same misconduct, since they were misled by the information contained in the illustrative paper of the product.⁵⁹

As far as the other admissibility elements are concerned, the appellate body concluded that since Codacons was one of the biggest Italian consumer associations, it possesses adequate economical and organizational means to represent the class. Also there is no proof of conflict of interests between plaintiff and defendant⁶⁰ the case was admitted and remanded to the trial court to decide the merits of the case.⁶¹

The Tribunal of Milan, with the first merits decision in the history of class actions, overruled the ordinances taken at the admissibility stage and held the lawsuit groundless and inadmissible.⁶² The new pool of judges explained that the lead plaintiff failed to prove her consumer status and to show that the decision to purchase the test flue was based on the information it contained. Consequently, the court rejected the claim and asked the lead plaintiff and the only other consumer joining the class, to pay for the legal expenses. In addition, the Tribunal of Milan ordered the plaintiff to pay a compensatory damage to the defendant for “temerarious lawsuit.”⁶³

CONCLUSION

The Italian class action system needs further legislative interventions. Only a few class actions have been declared admissible and the only case decided on the merit stage has been dismissed. Indeed, there are several issues of the provisions of Art. 140 *bis* that need to be addressed. Two of them are closely related and are concerned with the adequacy of the promoter and the costs of the action. One may notice from the cases mentioned above, that courts tend to allocate the litigation expenses between the parties or to apply the general principle of “who loses

⁵⁸ Court of Appeal of Milan, *Codacons v. Voden Medical Instruments*, rg 130/2011.

⁵⁹ The Court explained that whenever two or more contracts “*have the same content or are directed to the regulation or the same right*” and the members of the class “*are damaged by an uniform behavior or by more repeated actions having the same content*” the consumers’ interests are homogeneous.

⁶⁰ See footnote 6.

⁶¹ Decision issued on April 19th, 2011. The case was remanded to the Trial Court that will composed by new judges as opposed to those who had previously issued the judgment on the action admissibility.

⁶² Tribunal of Milan, VIII Section, *Codacons v. Voden Medical Instruments*, rg. 98/2010, decided on March 13th 2012. This decision has raised several perplexities regarding the power of the courts of merit to overrule the decision taken at the admissibility level. It was also surprising the fact that the only third party who adhered to the class, was nonetheless condemned to the payment of the legal expenses of the proceedings.

⁶³ According to Art. 96 of the Italian Code of Civil Procedure, the party who began a “*lite temeraria*”, did that with *mala fidae*, the judge can condemn the plaintiff to the payment of compensatory damages to the defendant.

bear the costs”. Notwithstanding, one of the most significant financial burden of class action litigation is the publication expense of the ordinance admitting the class. Even it is not mentioned in Art. 140 *bis* who should bear this expense, the courts have uniformly imposed it on the plaintiff. Accordingly, in order to comply with the adequacy requirement, a consumer must prove that he possesses enough economic and organizational means to bear the publication of the ordinance and the legal expenses of a possible merits’ stage.

The economic factor was crucial in denying many lawsuits and affected the trend of Italian class actions where most cases are filed by associations receiving an “ad hoc” mandate. These entities, in fact, possess greater organizational and financial resources than a single individual or a small group of consumers.

However, the proceedings expenses and the high standard of representativeness required by the courts might discourage the consumer association when the class members are not many. We must remember, in fact, that through Art. 140 *bis* a consumer may only seek damage compensation and restitutions, and no “punitive damages” are allowed. Thus, given that the costs to publish in a national newspaper is quite high, the association receiving the mandate might find economically worthless to file an action. Moreover, whether the class is big or small, it is not certain that after the action has been declared admissible it will end with a positive judgment. Consequently consumers or associations are likely to bear high publication expenses for no reason. Nonetheless, the publicity is necessary to inform people who want to opt-in. Also, this mechanism has some important effects on the current outcome of class actions proceedings. In fact, besides the plaintiffs, the remaining consumers can become part of the class only after the action has been admitted. Hence, potentially, a class that could involve hundreds of consumers could stop at the admissibility stage if filed by a promoter lacking enough financial means.

Would it then, make sense to introduce the opt-out device into the Italian system? Apart from the constitutionality questions that it may arise, such mechanism would not be successful in our system unless the Legislature recognizes procedural powers also to the parties who join the class action. As a final consideration, the Legislature needs to define the element of “homogeneity” of the class more clearly and specifically. Law 27/2012 made the first step towards the resolution of this issue but still we do not know on which basis the judge should evaluate this requirement (only facts, only remedies or both). Until there will not be a uniform interpretation or definition of the element of homogeneity, there will not be certainty of law, and it would be difficult for consumers to know how to tailor their cases and what rights they really have.