International Association of Judges
2nd Study Commission
Civil Law and Procedure

Replies of the Italian Delegation to the Questionnaire for the 2016 meeting (Mexico City – Mexico, 15-21 October, 2016)

CLASS ACTIONS

Introduction – Class Actions in the Italian Legal System.

Class actions became available in Italy beginning on January 1st, 2010, pursuant the 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)). More precisely, 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.

The current version of said 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. In 2012, Law no. 27/2012 broadened the scope of causes of actions and indicated that even a company providing services that do not meet the proper qualities can be sued.

As far as the proceedings are concerned, 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. Once the application 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 advice the court to admit or deny the class action.

During the first hearing, the court will evaluate if the applicant consumer has an actual interest in the class. After verifying the plaintiff's right of standing, the court 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 establish if there is a conflict of interest, if the main plaintiff can adequately represent the interests of the class, 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." Therefore, if consumers want to file a class action they do not need to have identical interests; homogenous rights would suffice.

Summing up, in order to be admitted, a 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.

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 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.

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 evidence common to all members of the class of all requirements of defendant's liability, namely evidence of infringement, causation, and damages.

As it has been explained, 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. 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. 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.

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. 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.

At the end of the first stage (admissibility) of the proceedings, if the action is considered inadmissible, the court will decide the legal costs of the lawsuit that the loosing 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 fulfil to be 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. Parties will be able to appeal the court's decision within 30 days of notification. The appellate court will then re-evaluate the claim and issue a judgment within 40 days. It the appellate court does not overturn the decision of the lower court, the merits stage will begin.

As stated, 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.

The opt-in mechanism of the Italian class action system is very different from the opting-out process of (*e.g.*) USA Federal Rules of Civil Procedure 23. According to Art. 140-*bis* if a consumer wants to be bound by the court's decision, he/she 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/she will join the class without the representation of a lawyer. A consumer may also decide not to opt-in. In this case he/she will be able to file a separate individual action. Furthermore, if he/she joins the class and then the lead plaintiff decides to bargain a settlement with the defendant, he/she can refuse to be bound by it and regain his individual power to sue.

Once the admissibility stage is over and the application has been admitted, during the merits 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 loosing party should bear. The decision is liable to be challenged in the Court of Appeal and subsequently in the Cassation Court; otherwise it will became enforceable after 180 days from its publication.

We may add at this point that 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 (Commission Regulation 2013/396, preamble. 9, 2013 O.J. (L 201) 60 (EU)). 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) may be filed only after the decision of the public authority has become final. This rule may also be found in the French law on class actions. If it is introduced also in Italian law, it will certainly have the effect of reducing further the number of consumers opting-in.

1. Do you have class proceedings in your jurisdiction? If so, what is the nature of those class proceedings?

See the precedent chapter.

As far as the concrete number of litigations in this field is concerned, according to the *Osservatorio antitrust* of the University of Trento (*see* http://www.osservatorioantitrust.eu/it/azioni-di-classe-incardinate-nei-tribunali-italiani/), so far only fifty-eight class actions have been filed. Of these fifty-eight class actions, only three have been decided by a court on the merits, eighteen have been declared non-admissible (the equivalent of denial of certification), and forty are still pending. Of the forty class actions still pending, ten have been admitted. The other thirty are still in the admissibility stage.

Of the few class actions that have been admitted only three have been decided. Now, it is not clear why only ten 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.

Actually, 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.

2. What are the advantages or disadvantages to class action proceedings in your jurisdiction?

The Italian class action system needs further legislative interventions. So far, only a few class actions have been declared admissible and the only cases decided on the merit stage have 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, that courts tend to allocate the litigation expenses between the parties or to apply the general principle of "who loses bears 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.

Beside this, 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.

Would it 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, we must think that, 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. 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. The way forward is shown by the English proposal on antitrust private enforcement (*See* Dept. for Bus. Innovation & Skills, *Private actions in competition law: A consultation on options for reform – government response*, 23-46 (2013): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf): an opt-out class action at the discretion of a specialized court, no juries and no punitive damages.

3. Is there an access to justice component to class action proceedings in your jurisdiction?

The Italian Law on class actions does not provide for any specific provisions on the funding of the action. As it 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. 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. 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.

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 million 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.

4. How is case management achieved in class proceedings in your jurisdiction?

As the number of cases referring to the Italian class actions is very limited, no special problems of case management arose so far. However, in some of the case management programs, which the heads of Italian courts have to draft every year and to submit to the High Council for the Judiciary, notice is given about the need to reserve a sort of "fast track" to such kind of proceedings. Just to give an example, in the Case Management Programme of the Turin first instance court for the year 2014 (*see* http://www.tribunale.torino.giustizia.it/FileTribunali/70/Sito/Trasparenza%20e%20Comunicazione/Relazione%20programma%20civile%202014.doc), we may read (at page 33) that a "special, privileged treatment—compared to the rest of the litigations—will be reserved to the class actions lodged with the court according to Article 140-bis of the Consumer Code, taking into account their economic and social relevance."

5. If you do not have class action proceedings, how are the cases involving a large quantity of victims or involving a group of individuals with a collective interest dealt with?

As explained above, this is no longer the case for Italy.

Before class actions were introduced in my country, Italy had no general rules allowing group litigation, but only a limited number of collective actions related to well-defined and specific types of claims. The paradigm of Italian collective actions were the action consumers associations could bring for the protection of specific consumers' rights and interests. The previous version of this action was governed by the Consumers' Code of 2005, but its first appearance in the Italian legal system dated back to the Nineties, when new rules on consumer contracts were added to the Civil Code by statutes enacted in order to comply with Directive 93/13/EEC and later with Directive 98/27/EC. According to the original version of our Consumers' Code, consumers associations were entitled to: - bring suits against sellers and suppliers with a view to being granted an injunction forbidding the defendants to insert unfair terms in their standard contracts (article 37); - act as plaintiffs in actions "intended to protect and enforce collective rights belonging to consumers." However, such actions could be only for injunctive relief. In addition, the court could order the defendant to take all measures that appear to be necessary to mitigate or eliminate the effects of previous violations.

Beside this, in the last few decades a variety of statutes have been enacted to address the issue of discrimination based on gender, race, ethnic background, religion, personal beliefs, disability, age, or sexual orientation. Most statutes were adopted under the pressure of the time limits set by the EU for the enforcement of a panoply of directives intended to advance the principle of non-discrimination. Special public bodies, associations, and unions are entrusted with rights of action in case of collective discrimination. For instance, if the discrimination is gender-based and

occurs in the field of a labour relationship, the employer can be sued by the so-called *consigliere di parità* (the equal opportunity advisor), a public official whose function is to advance the cause of equal opportunity between men and women.

As a rule, if an injunction is granted, the court will order the defendant to take all the measures that are necessary in order to remove the discrimination: procedurally, this is a convoluted step, since the defendant is supposed to design and submit a "project" for the implementation of the criteria the court has set as mandatory steps in the enforcement of its order. Failure to comply with court orders is sanctioned in several ways. The defendant can be ordered to pay a fine for each day of non-compliance: the proceeds are paid to a special fund supporting the activities of the *consigliere di parità*. If the defendant had received from the government some kind of subsidy (investment grants, for instance), these can be revoked. Finally, the defendant may be subject to criminal penalties.

Other forms of collective actions can be found here and there in Italian law.

For instance, Statutory instrument no. 231 of 2002 was enacted to implement Directive 2000/35/CE on combating late payment in commercial transactions. Article 8 provides for the "protection of collective interests," and enables associations representing small and medium-sized businesses (and accredited to the National Council of economy and labour) to bring an action against undertakings or public authorities with a view to being granted an injunction enjoining the use of contractual terms that are grossly unfair with regard to the date for payment or the consequences of late payments. In support of the injunction, the court may order all the measures necessary to eliminate or mitigate the effects of previous violations, including the publication of the injunction in local or national newspapers. In case of urgency, an interim remedy may be granted. In any event, failure to comply with court orders exposes the defendant to a fine to be paid for each day of non-compliance. The amount of the fine can range from € 500 to € 1,100 and is determined by the court on a case-by-case basis.

In 1970, when the Workers' Charter of Rights was enacted, the provisions laid down by article 28 heralded a Copernican revolution in the field of the judicial enforcement of the workers' freedom to form and join a trade union, a freedom granted by article 39 of the Italian Constitution. As a matter of fact, article 28 of the Charter provided for collective actions trade unions could bring against employers whose behaviour was intended to prevent workers from exercising their rights as members of trade unions or their right to strike. The rule (which is still in force) had a tremendous impact on Italian society and sparked the debate on group actions. At present, though, the appeal of the special proceeding devised to uphold the rights of unionized workers has faded: after all, it is the legacy of a political and social season that is long gone.

Turin, 5th May 2016.

Giacomo Oberto
Judge – Court of Turin (Italy)
Secretary-General of the IAJ