Comments on New Italian Legislation

The New Italian Class Action: Hope Springs Eternal

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Abstract

This paper analyzes class action for damages and collective action for injunctive and declaratory relief as new collective proceedings introduced in the Code of Civil Procedure. It examines the main questions brought about by the new class action, regulated by a form of simplified proceedings. It is also considered the adhesion proceedings, which aims to state adherents' rights, and that is structured in two phases, the first following the decision of admissibility, the second stemming from the final decision on merits. Rules providing for appeals, class action settlements and collective enforcement of judicial orders are analysed.

I. Introduction

Legge 1 April 2019 no 31 has introduced Title VIII-*bis*, «Dei procedimenti collettivi», in the fourth Chapter of the Code of Civil Procedure and the Title V-*bis*, «Dei procedimenti collettivi», in the annexed rules.[1]

The new Legge has provided for a *vacatio legis* of twelve months after its publication on the *Gazzetta Ufficiale*, recently extended to eighteen.

Fifteen new articles have been added to the Code of Civil Procedure (from Art 840-*bis* to Art 840-*sexiesdecies*), and two in the annexed rules (Arts 196-*bis* and 196-*ter*).

Arts 139, 140 and 140-*bis* of the Consumer Code are going to be repealed, according to the *vacatio legis* term.

At a glance, the system of collective redresses in consumer protection has been dismantled (only Art 37 Consumer Code survives, but with some limitations, as we are going to explain), and has been replaced by two different forms of collective actions – the class action for damages and the collective action for injunctive and declaratory relief – which will apply in a wide range of mass tort cases.

During the last two years, we have observed acceleration towards a radical

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[1] See B. Sassani ed, Class action. *Commento sistematico alla l. 12 aprile 2019, n. 31* (Pisa: Pacini editore, 2019); D. Dalfino et al, 'Le nuove forme di tutela collettiva (l. 12 aprile 2019 n. 31)' *Foro italiano*, V, 321-389 (2019); C. Consolo, 'La terza edizione dell'azione di classe è legge ed entra nel c.p.c. Uno sguardo d'insieme ad un'amplissima disciplina' *Corriere giuridico*, 737-743 (2019); G. Scarselli, 'La nuova azione di classe di cui alla legge 12 aprile 2019, n. 31' *judicium.it*, 7 June 2019, 1-12.

overhaul of the system of collective redresses,[2] motivated by the feeling that in the European common area of justice there are not sufficient conditions to deal with an effective harmonization of the technical procedure tools adopted by national laws.[3]

In any event, it is a fact that the consumer class action for damages, enacted in 2009,[4] has failed to live up to expectations, so that legge no 31/2019 has innovated the procedural *panorama*; a deeper analysis and study would have been more appropriate, keeping in mind the proposals of two new European directives, coming from the European Commission.[5]

II. Class Action for Damages. General Overview

The new class action for damages is ruled by Art 840-*bis* to Art 840-*quinquiesdecies* Code of Civil Procedure.

The representative plaintiff files the suit against the defendant and the trial is held between two parties: any joinder of parties is forbidden as this is the same solution adopted by the next-to-die consumer class action.

The class action is regulated by the rules of simplified proceedings (Arts 702-*bis*, 702-*ter* and 702-*quater* Code of Civil Procedure), with some *sui generis* variations, and it is carried out in three phases:

a) the first one to declare the admissibility of the claim (such as a certification, according to Rule 23 of the US Federal Rules of Civil Procedure) and to define, by judicial order that can be appealed before the Appeal Court, the potential class members rights, as well as to open the first window to join the class through the adhesion;

b) the second one depends on the declaration of admissibility of the claim, is functional to the declaratory judgment on common issues (such as responsibility,

[2] During the current legislature, the bill no 844/XVIII has been presented before the Senate; this bill has been approved, with some modifications, and has become the Legge no 31/2019.

[3] In the European Commission communication to the European Parliament COM (2013) 401 final (available at https://bit.ly/2phAASP (last visited 30 December 2019)) the Commission explains the need to respect different legal systems and legal traditions of Members States, in specific areas, such as civil procedure, that are well-grounded at national level but recent at EU level. The requirement to 'ensure global competitiveness and to create an open, functional market' can be pursued through the harmonization of collective redresses, so that the European Commission has enacted the Communication 11 April 2018 (COM) 2018 183 final, containing two directive proposals 11 April 2018, COM (2018) final and 11 April 2018 COM (2018) 185 final (see A. Palmieri, 'Perdite seriali dei consumatori e tutela collettiva risarcitoria: dove si dirige l'Europa?' *Foro italiano*, V, 205-210 (2018)).

[4] First, Art 140-*bis* Consumer Code has been inserted in the Consumer Code by Art 2, para 446, legge 24 December 2007 no 244, as 'collective action for damages' and, after many delays of its effectiveness, never entered into force and was substituted by the current class action *ex* Art 49, legge 23 July 2009 no 99.

[5] R. Caponi, 'Ultime dall'Europa sull'azione di classe (con sguardo finale sugli Stati uniti e il Dieselgate)' *Foro italiano*, V, 332-339 (2019).

tort causation etc) regarding the plaintiff, class members and potential class members and (in case of a plaintiff suffering economic damages) to the sentence to pay compensation for damages; this second phase of the trial is regulated by innovative rules concerning evidence gathering and Court powers;

c) the third phase is designed to collect all the adhesions of potential class members who have chosen to wait for a favorable decision, instead of gambling on joining the class after the admissibility decision, and it is managed by a judge; he has to verify, through contradictory and written proceedings, the validity of the class members claims; the Court nominates a class representative, which is in charge as a public official, and assists the judge in the determination of the liquidation for each class member.

The legislator's choice of binding the class is grounded on the voluntary joinder (opt-in instead of the more efficient and widespread opt-out), which is the same solution adopted by Art 140-*bis* Consumer Code and that seems to be a real ballast preventing a successful development of collective redresses for damages.

Also the optional stay of proceedings depending on the contemporary administrative proceedings before an independent authority or an administrative Court is provided by the new procedural rules: this is not new, since both Art 140-*bis* Consumer Code and the decreto legislativo 19 January 2017 no 3, concerning antitrust private enforcement, pertain the same tool.

Regarding the area of application, the new class action has been untied by the consumer protection and now can be intended as a general action for damages,[6] with some residual limitations.

First of all, the class action is alternative to individual suits.

There are no restrictions or conditions to becoming a representative plaintiff or a class member, so that everyone can file a suit, that is natural persons, legal entities, consumers, professionals, investors, savers,[7] enterprises, public and private entities, and, probably, also workers and employees.[8] Furthermore, organizations representing collective interests can file a class action for damages, but their standing to sue depends on their capacity to satisfy some requirements in order to be inserted in a special list, controlled by the *Ministero dello sviluppo economico* (Ministry of Economic Development).

The suit cannot be filed against just anyone, since Art 840-*bis* requires the status of enterprise or public authority or entity managing public services.

The rights grounding the plaintiff claim must be homogenous to all the other subjective rights of the potential class members affected by the same conduct or by different similar conducts, and the class *numerosity* can be considered a condition of admissibility of the action; combining these two requirements

[6] C. Petrillo, 'Situazioni soggettive implicate', in B. Sassani ed, n 1 above, 45.

[7] C. Cavallini, 'Azione collettiva risarcitoria e controversie finanziarie' *Rivista delle società*, 1115 (2010).

[8] R. Donzelli, 'L'ambito di applicazione e la legittimazione ad agire', in B. Sassani ed, n 1 above, 8.

permits to affirm that the structure of the subjective rights must be based on common issues that can efficiently be brought before the court and decided.

Both the class action for damages and the class action for injunctive relief will apply to action filed for torts occurred after the entry into force of the legge no 31/2019.

It's easy to predict that several questions that have emerged during the application of Art 140-*bis* Consumer Code, with reference to torts concerning long term contractual or non-contractual relation, will arise again, but with an additional critical point:[9] from the day of entry into force of the new rules, Arts 139, 140 (regulating the class action for injunctive and declaratory relief) and 140-*bis* (class action for damages) Consumer Code will be repealed, so that there will not be any collective redress for consumer torts occurred before the entry into force of the legge no 31/2019 but still not pursued within the same date.

Art 37 Consumer Code, regulating injunctive relief against unfair contractual terms, will survive, even without proceedings rules, because it refers to the repealed Art 140 Consumer Code.

III. Action for Damages and Declaratory of Common Issues. The Proceedings

The representative plaintiff who files a class action claims, alternatively:

- for damages, if he has suffered harms;

- for declaratory relief of common issues, when the plaintiff is an organization included in the special government list and, even though it has not suffered any harm, brings the collective interest before the court.

In the second instance, it is necessary to imagine a new form of mootness: the only gain that the plaintiff can achieve with his claim would be the binding effect of the adjudication for class members in the subsequent third phase of the proceedings.[10]

This innovative form of class action for damages can be associated with the *Kapitalanleger-Musterverfahrensgesetz*[11] and with the new *Musterfeststellungsklage*,[12]

[9] A.D. De Santis, 'L'azione di classe a dieci anni dalla sua entrata in vigore' *Foro italiano*, I, 2180-2187 (2019).

[10] See a thorough analysis of the problems arising from the *res judicata* effects of the injunctive relief order ruled by Consumer code collective redresses and specifically concerning the effects on common issues, in A.D. De Santis, *La tutela giurisdizionale collettiva. Contributo allo studio della legittimazione ad agire e delle tecniche inibitorie e risarcitorie* (Napoli: Jovene, 2013), 499-519.

[11] See C. Consolo and D. Rizzardo, 'Due modi di mettere le azioni collettive alla prova: Inghilterra e Germania' *Rivista trimestrale di diritto e procedura civile*, 891 (2006); D. Rizzardo, '*Class actions* «fuori dagli Usa»: qualcosa si muove anche alle nostre (ex-) frontiere settentrionali almeno quanto al case management' *Int'l Lis - Rivista di diritto processuale internazionale e arbitrato internazionale*, 28 (2006); see more references in A.D. De Santis, *La tutela* n 10 above, 339, fn 475.

[12] A brief commentary is available at https://tinyurl.com/wopemk5 (last visited 30 December 2019).

but, considering the wide differences regarding forms and techniques in the German and the Italian law system, it is very complicated to imagine a successful transplant of the German approach in Italy.

The suit must be filed before the specialized section of the Tribunal, since the jurisdiction seems to be ordinary,[13] and the venue is determined by the residency of the defendant. Forms of the simplified proceedings are special and the case is decided by the formation of the Court with a sentence, instead of ordinance[14] (Art 840-*ter* Code of Civil Procedure).

Regarding the limits to the national jurisdiction, the Italian jurisdiction can be determined if the action is filed versus a foreign defendant but torts have occurred in Italy (or, anyway, if the rules of the European Parliament and Council Regulation (EU) 2012/1215 of 12 December 2012 determine it); combining the rules of the Reg UE no 1215/2012 with Arts 18-30-*bis* Code of Civil Procedure could permit to identify the Italian Tribunal that has jurisdiction.

The problem concerning the plurality of *criteria* to choose the right jurisdiction in case of class members resident in different EU States, could be solved applying Art 6, para 2, Regulation no 1215/2012, and requiring them to have an address for service in Italy.

With reference to the structure of the proceedings, the suit should be considered subject to the procedural condition of mediation proceedings, if the case concerns one of the topics in the Art 5, para 1, decreto legislativo 4 March 2010 no 28, as well as to the mandatory negotiation proceedings, according to Art 3, decreto legge 12 September 2014 no 132.

In contrast with Art 140-*bis* Consumer Code, legge no 31/2019 has introduced a system of notice of the action whose costs are borne by the Tribunal. The function is to guarantee the largest knowledge of the pending class action, and to avoid costs for the representative plaintiff.

Specifically, the new procedural rules provide the mandatory notice on the web site of the *Ministero della Giustizia* (Ministry of Justice), of:

- the pleading containing the claim and the decree containing the date of the first hearing, within a mandatory date (Art 840-*ter*, para 2);

- the order deciding on admissibility, within ten days from its issuing;

- the order declaring the inadmissibility of the action, the one declaring the dismissal of proceedings (Art 840-*quater*, para 2 states that it is duty of the clerk to notice the order 'immediately');

[13] In the Italian law system, ordinary judges (*Giudice di Pace*, *Tribunale*, *Corte di Appello* and *Corte di Cassazione*) have jurisdiction (id est, the power to decide) on cases concerning subjective rights; there exist also special judges, who have jurisdiction on cases concerning *interessi legittimi* (arising from the *public agencies* powers; eg *Tribunale Amministrativo Regionale* and *Consiglio di Stato*, called administrative courts) and some kinds of subjective rights (eg *Corte dei Conti*, *Tribunale Superiore delle Acque Pubbliche*; also administrative courts have jurisdiction on a large number of cases involving violation of subjective rights).

[14] In the Italian law systems, judges decide cases by sentence, as a general rule.

- the sentence containing the order to pay for damages, within fifteen days from its emission (Art 840-*quinquies*, last para);
- each appeal filed against the decision and each decision defining the appeal proceedings (Art 840-*decies*, para 1);
- the proposal of settlement coming from the Tribunal (Art 840-*quaterdecies*).

In relation to the subsequent phase of adhesion, the notice is mandatory for:

- the drafted settlement drawn up by the representative of the class, according to Art 840-*quaterdecies*, para 3;
- the order which approves or denies the authorization of the representative of the class to settle, according to Art 840-*quaterdecies*, para 6.

IV. (In)Admissibility of the Action

Art 840-*ter*, para 4, Code of Civil Procedure states that:

> 'the claim is declared inadmissible:
>
> a) if it is clearly groundless;
>
> b) if the tribunal does not recognize the homogeneity of individual rights;
>
> c) if there is a conflict of interests between the plaintiff and the defendant;
>
> d) if the plaintiff does not appear to be an adequate representative of individual homogenous rights of class members'.

It seems reasonable to suppose that the decision could be rendered at the first hearing and that, if it is necessary to consider issues proposed by parties, the Tribunal could give them a legal term to lodge statements.[15]

The choice of an admissibility judgement answers the need of balancing different interests, that is, on one hand, the defendant demanding to dismiss the case as quickly as possible, and, on the other hand, the potential class members, claiming for homogenous rights, to be protected from the risk of joining an ungrounded class action.

But, paying attention to the inadmissibility reasons, it seems sufficiently clear that the Tribunal cannot disregard the numerosity requirement; it seems difficult to imagine that conflict of interests, inadequacy of the plaintiff and lack of homogeneity of individual rights can be scrutinized if there is no reference to the large number of potential class members.

Moreover, if the claim is suited by an organization for the declaration of common issues, an inquiry on the multi offensive conduct seems necessary.

[15] In Italy there is no pre-trial phase, and the judgement can be also achieved after the first hearing. The first hearing is held after the notice of the pleading containing the plaintiff's claim.

The 'homogeneity of rights' between plaintiff and class members has determined, under Art 140-*bis* Consumer Code, great hermeneutic efforts, that have produced uncertain decisions;[16] it is plausible that new class action rules will impose a new interpretation of the notion of homogeneity, considering that class members could not be described as a homogeneous category, such as consumers.

Legge no 31/2019 has modified and clarified the notion of conflict of interest, referring to the conflict between the plaintiff and the defendant.[17]

The new wording, more limited than the one that we find in Art 140-*bis*, para 6, Consumer Code, should remove all doubt about the relevance of conflict of interests between plaintiff and class members,[18] as well as among different groups of class members.[19]

Regarding the adequacy of representation, the wording of Art 840-*ter*, para 4, letter d), differs from the one used by Art 140-*bis* Consumer Code, where the adequacy is referred to the representation of interests of the class.

It is necessary to underline the consequences of this change that forces the plaintiff to represent individual homogenous rights instead of 'interests of the class'.

Considering economic incentives and other simplifications in evidence gathering, as well as the provision that the plaintiff must be an adequate representative of adherents' individual rights, the scrutiny will be directed not

[16] In case law, see Tribunale di Venezia 25 May 2017, *Foro italiano*, I, 2432 (2017); Tribunale di Milano 9 December 2013, *Foro italiano*, I, 590 (2014); Tribunale di Milano 8 November 2013, *Foro italiano*, I, 274 (2014); Corte d'Appello di Napoli 29 June 2012, *Foro italiano*, I, 342 (2013); Tribunale di Napoli 9 December 2011, *Foro italiano*, I, 1909, (2012), with note by A. Palmieri and A.D. De Santis; Tribunale di Firenze 15 July 2011, *Foro italiano*, I, 1910, (2012); Tribunale di Torino 31 October 2011, *Foro italiano*, I, 1910 (2012); Corte d'Appello di Torino 23 September 2011, *Foro italiano*, I, 3422 (2011).

[17] The problem of conflict of interests are well recognized by american academic commentators and courts; see, for example, D. Rhode, 'Class Conflicts in Class Actions' 34 *Stanford Law Review,* 1183 (1982); J.C. Coffee Jr., 'Class Wars: The Dilemma of the Mass Tort Class Action' 95 *Columbia Law Review*, 1343, 1432 (1995) (stressing inadequacy of future claims classes to monitor attorneys); H.M. Downs, 'Federal Class Actions: Diminished Protection for the Class and the Case for Reform' 73 *Nebraska Law Review*, 646, 651 (1994); S. Issacharoff, 'Class Action Conflicts' 30 *UC Davis Law Review*, 805, 828 (1997); S.P. Koniak, 'Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.' 80 *Cornell Law Review*, 1045, 1121-1122 (1995) (stating that it is not efficient to apply conflict of interest principles in a mechanical fashion to class actions); G.H. Curry, 'Conflicts of Interest Problems for Lawyers Representing a Class in a Class Action Lawsuit' 24 *Journal of the Legal Profession*, 397 (2000).

Italy has not developed a deep experience about conflict of interests in class actions, since the question has been faced only in one case: Tribunale di Firenze 15 July 2011, *Foro italiano*, I, 1910, with note by A. Palmieri and A.D. De Santis.

[18] That could occur and could be relevant, especially in the light of the relation between plaintiff and class members if described as legal representation (see, for example, A.D. De Santis, *La tutela* n 10 above, 709).

[19] See, with specific reference to the consumer class action, A. Motto and S. Menchini, 'Art. 140-*bis*' *judicium.it*, 23 June 2010.

only to economic and financial capacity,[20] but to subjective qualities of the plaintiff and of his attorney.

An important innovation has been introduced by Art 840-*ter*, para 6, Code of Civil Procedure, which states that 'if the inadmissibility is declared according to para fourth, letter a), the plaintiff can bring a new suit only in case of new facts or new law issues'.

The article lays down an innovative *res judicata* effect of the order of inadmissibility in case of clear groundlessness and diversifies the rule compared to other reasons of inadmissibility.

One of the most remarkable innovations in the civil procedure *panorama* consists in the provision of Art 840-*quinquies*, para 3, Code of Civil Procedure, that states 'the duty to advance expenses for the technical consultant is charged to the defendant, unless the Tribunal ascertains the existence of specific reasons'.

The intention to facilitate bringing class action for damages seems clear, especially when the determination of the suffered harms is grounded in scientific or technical requirements or evidence that can determine huge costs.

The power of the Tribunal to base its decision on statistics or presumptions should help the plaintiff to demonstrate the causation between tort and suffered harms, especially when the action is promoted by an organization that did not suffer any damages.[21]

[20] See Tribunale di Cagliari 19 February 2014, *Rivista giuridica sarda*, I, 75 (2015) which stated that the admissibility of a class action is conditioned by existence of requirements of Art 140-*bis*, para 6, Consumer Code, and especially of plaintiff adequacy of representation; the plaintiff can fulfil this requirement only if he is able to efficiently protect interests of future ones of class members, considering his organization and financial resources at the moment of the admissibility evaluation; Tribunale di Napoli 9 December 2011, n 16 above, 1909, expressing the principle that voluntary representation given to a consumer association, enrolled in the list ruled by the *Ministero dello sviluppo economico*, fulfil the requirement of admissibility of the claim, consisting in the plaintiffs' adequacy of representation; Corte d'Appello di Torino 23 September 2011, n 16 above, 3422, expressing the following principle: the class action is admissible if filed by consumers that, even if unable to pay costs of such an expensive lawsuit, have given representative powers to a consumers association who is able to adequately represents class interests; Tribunale di Torino 28 April 2011, *Foro italiano*, I, 1888 (2011) considered that the plaintiff whose financial resources are not sufficient to face costs of a class action, with specific reference to notice costs, cannot be an adequate class representative.

The question of the class action lawsuit's costs (see E. Ferrante, 'La nuova "azione di classe" in Italia' *Contratto e Impresa Europa*, 10 (2011)) has also been analysed considering the German *Verbandsklage* (collective action filed by association) by N. Trocker, 'Interessi collettivi e diffusi' *Enciclopedia giuridica* (Roma: Treccani, 1989), XVII; M. Cappelletti and B. Garth, 'The Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation', in W. Habscheid ed, *Effektiver Rechtsschutz und verfassungsmäßige Ordnung. Die Diskussionsberichte zum VII. Internationalen Kongreß für Prozeßrecht* (Würzburg: Taschen, 1983), 158; see, in the US case law, for example, *Eisen* v *Carlisle & Jaqueline* 417 US 156 (1974), whose motivation is also entirely reported by V. Vigoriti, *Interessi collettivi e processo – La legittimazione ad agire* (Milano: Giuffrè, 1979), 291, and analysed by G. Costantino, *Contributo allo studio del litisconsorzio necessario* (Napoli: Jovene Editore, 1979), 14; see also A. Giussani, *Studi sulle "*class actions*"* (Padova: CEDAM, 1996), 224.

[21] Moreover, the possibility that the defendant bring statistics against the plaintiff ones

Furthermore, Art 840-*quinquies* Code of Civil Procedure provides special rules concerning disclosure of documentary evidence; this rule is clearly inspired by Art 3 decreto legislativo no 3/2017, (that transposed the European Parliament and Council Directive 104/2014/EC of 26 November 2014 on the antitrust private enforcement),[22] but with only one inexplicable difference consisting in the exclusion of any power of the court to order disclosure to third parties.

V. Collecting Class Members. The Opt-In Solution

The technique used to collect in one lawsuit all the claims grounded on homogenous individual rights is the adhesion to the class action.

Each class member who wants to enter the class has to lodge his statements within mandatory dates.

Those dates are connected to two 'time windows'; the class member doesn't need the service of an attorney and by lodging his (only electronic) statements he:

- produces all the effects of the document instituting proceedings;
- states all the facts grounding his subjective right;
- provides for documentary evidence (oral evidence are not allowed);
- gives an anomalous representative power to a representative administrator that is going to be nominated by the tribunal;
- does not become a party, but can access the file of the Office and receives all the communications from the clerk;
- can watch the progress of the proceedings in case of adhesion in the first 'window';
- has the power to pursue the proceedings, in case of dismissal of the plaintiff;
- takes part into the adversarial procedure consisting in the third phase of the proceedings, which is opened after the adjudication;
- has the power to revoke the representation given to the representative administrator and to determine the ineffectiveness of his adhesion, and so to regain the right to sue through an individual suit;
- has the power to revoke the adhesion until the decree delivered by the judge deciding on his claim does not become definitive;
- aims to get a favourable decision, contained in the decree, which can be appealed only by the representative administrator;
- maintains the right to claim – but it is not clear how – for the part of damages that the judge has not liquidated.

should not weaken the effectiveness of this tool, considering that the tribunal has the power to order a technical consultancy to verify which statistics are more reliable.

[22] See G. Finocchiaro, 'La disciplina dell'esibizione delle prove nei giudizi riparatori per violazione delle norme antitrust in attuazione della dir. 2014/104/Ue' *Nuove leggi civili commentate*, 413 (2018), as well as A. Fabbi, 'La "esibizione" istruttoria nel private enforcement del diritto antitrust', in B. Sassani ed, *Il private enforcement antitrust dopo il d. lgs. 19 gennaio 2017, n. 3* (Pisa: Pacini Editore, 2017), 169.

There is no coordination between terms to appeal and terms to adhere, which could give rise to several practical problems if, for instance, someone appeals the order of admissibility or the sentence: the lack of any provision stating any form of stay of terms to adhere appears such a serious gap in the law.

It is difficult to understand the reasons why the Italian legislator has preferred to insist on the opt-in choice rather than building an opt-out class action, but probably that's because it finds hard to stir off the imagine of 'American Stuff', that, in the main European Law systems, appears already passed.[23]

It is not the first that the openness of the Italian jurisprudence[24] has helped the legislator to increase the class action deterrent effect.

After ten years of consumer class action, it should be clear that the class action, conceived as a mere, more or less efficient, alternative to individual suits, gives rise to more problems than it solves and that the real *ratio* to adopt such a refined, powerful and terrible tool (defined legalized blackmail),[25] consists in solving all the controversies arising from a mass tort, achieving the result of increasing the fairness of habitual parties.[26]

Adherents are not parties, but filing a suit, having some of the powers of the parties, must bring about the burden of proof, suffer decays and estoppels.

If the judgement is favourable to the plaintiff, the Tribunal nominates the judge and the representative administrator.

Once the date assigned to bring adhesions has expired, a new proceeding starts, finalized to establish class members' rights; this phase is ruled by the nominated judge and is characterized by the opposition between class members and defendant, with the representative administrator playing a less sided role.

Adherents, defendant and representative administrator take part into the written cross examination proceedings and in case of unspecific objections the fact can be considered admitted.

The defendant power to counterclaim or to file suits against third parties is not mentioned; there is a huge gap in the law, as this exigence of defence could rise during this phase for the first time, regarding an individual relation between a class member and the defendant.

Probably, this limitation to the defendant's defence rights can be explained

[23] See A.D. De Santis, 'L'azione di classe a dieci anni dalla sua entrata in vigore' n 9 above, 2176; see also critical consideration to the opt-in rule as provided by Art 140-*bis* Consumer Code expressed by C. Consolo, 'È legge una disposizione sull'azione collettiva risarcitoria: si è scelta la via svedese dello "*opt-in*" anziché quella danese dello "*opt-out*" e il filtro ("L'inutil precauzione")' *Corriere giuridico*, 5 (2008).

[24] See Tribunale di Milano 25 October 2018, *Foro italiano*, I, 2162 (2019), with note by A.D. De Santis, that has recognized as applicable and enforceable in Italy an order that certified a class action settlement, reached before a New York District Court.

[25] See M. Landers, 'Of Legalized Blackmail and Legalized Theft: Consumer Class Action and the Substance-Procedure Dilemma' 47 *Southern California Law Review,* 842 (1973-1974).

[26] See M. Galanter, 'Why the «haves» come out ahead: speculations on the limits of legal change' *Law & Society*, 95 (1974).

considering the *ratio* of the class action for damages and the kinds of cases treated.

The obvious respect to due process of law principles should impose to permit the defendant any right of defence in individual lawsuits, without any form of estoppel.

In the adhesion proceedings any oral evidence is expressly excluded, with only one, partial, exception, consisting in a new – for the Italian law system – form of *affidavit*, that only adherents can lodge.

The role played by the representative administrator is enigmatic.

It is not clear if he can be considered an officer of the court – and in this case the procedural rules concerning, for instance, recusal, should apply – or if he is a party, having a special *legitimatio ad processum*, or if he is a hybrid party, whose framework is going to be built, also in the light of his quality of public officer, stated by law.

Moreover, the coexistence, in the adhesion proceedings, of class members and the representative administrator will lack both in the appeal proceedings against the decree containing the decision on adherents' rights, because the representative administrator has just the standing to file it, and in the collective enforcement proceedings, because there is no standing for them, only for the representative administrator.

The adhesion proceedings can end in three ways:

- the judge rejects the claim brought by the adherent;
- the judge admits the claim totally;
- the judge admits the claim partially.

In the last two cases, the judge emits an enforceable decree for each class member.

In case of collective enforcement or collective settlement, the judge can deliver a motivated decree that a) authorizes the distribution of the money collected by the representative administrator, in order to pay it to all the adherents or b) can declare the impossibility to achieve a reasonable compensation in favour of the class, also considering costs of the proceedings and dismissing the case.

The decree contains the liquidation of attorneys' fees, and, if the class members have adhered without an attorney, it's not clear if the judge has to provide for costs liquidation, at least to refund them the amount of expenses payed to adhere.

The decree provides for money relief and this permits to deny that adherents can invoke any other kind of judicial order, such as ordering something to do or not to do, delivery or eviction.

VI. The Appeal

Arts 840-*decies* and 840-*undeciesdecies* Code of Civil Procedure rules the

appeal, and the regulation appears so full of questions that these can be only hinted.[27]

It is reasonable that, lacking more specific rules, Arts 323-338 Code of Civil Procedure should apply.

Art 840-*decies*, para 2, Code of Civil Procedure states that the decision can be appealed for annulment by the adherents in cases provided by Art 395 Code of Civil Procedure, or if it is the result of collusion.

It seems confirmed that only the plaintiff, and not the class members, can file an appeal against the decision, so that before the Court of Appeal third parties' joinder is considered forbidden.

Art 840-*undecies* Code of Civil Procedure rules the opposition to the decree delivered by the judge by the end of the third phase.

New evidence is not allowed so that the *thema decidendum* and the *thema probandum* cannot be wider than in the first instance.

Only the defendant, the representative administrator and the attorneys of the plaintiff (but only to object the liquidation of their fees) have standing to file opposition.

It seems very anomalous, for the class members, the lack of standing to file the opposition, because the judge has decided on their rights and they, even if they are not parties, have some of the powers of the parties themselves.

Joinder of third parties who are interested in the suit is permitted until the date for the first delivery of defendant's pleadings but it does not seem to be enough to heal the *vulnus* to the right of action and defence of adherents, whose only chance to draw on the appeal proceedings could consist in revoking their adhesion.

The defendant could suffer a huge violation of his rights, at least considering costs and fees, because he could lose any chance to recover them from the adherents, once they have released themselves from the bonds of the proceedings; there is only one possibility to save these rules from the doubt of unconstitutionality, and it consists in qualifying the fund – that each class member has to feed – as a warranty for recovering costs and fees in case of revocation of adhesion.

VII. Settlement, Enforcement, Costs and Fees

Under the United States federal class action, settlements represent a crucial element that determines the outcome of the litigation.[28] The defendants aim to settle, once the class action is certified, not only to avoid the risk to pay huge amounts of money, in addition to attorneys' fees and punitive damages, but also because trial is hard and efficient (as well as the enforcement), discovery is

[27] See R. Donzelli, 'Le impugnazioni della sentenza e del decreto', in B. Sassani ed, *Class action* n 1 above, 199.

[28] See, for example, R.G. Bone, *The Economics of Civil Procedure* (New Tork: Thomson West, 2003) 69-108.

invasive and accompanied by duties of disclosure, and, last but not the least, being condemned by a Court plays a moral and social disvalue.[29]

The inefficient opt-in choice and the predictable ability of defendants to manage and to take advantage of many gaps of procedural law (also considering the difficulties to enforce the titles), let suppose they will not be much interested in settling class actions.

Art 840-*quaterdecies* Code of Civil Procedure provides for two forms of class conciliation before the Tribunal,[30] so that, considering the other form ruled by Art 840 *bis*, para 6, Code of Civil Procedure,[31] the suit can be settled in three different ways.

The first one concerns the conciliation occurring during the simplified proceedings and it stems from the Tribunal proposal.

Para from 3 to 9 Art 840-*quaterdecies* Code of Civil Procedure rules terms and forms of conciliation occurring during the trial.

The settlement authorized by the judge and reached between the representative administrator and the defendant is enforceable and also title to take out a mortgage; moreover, the representative administrator has to certify signatures of each class member accepting the settlement.

Art 840-*terdecies* Code of Civil Procedure states that, in case of incompliance of the decree, only the representative administrator can enforce it, while adherents are not able to.

So, only the representative administrator and the plaintiff's attorney have standing to enforce the decree to get their money fees.

The whole amount of money from the enforcement of the decree is deposited in a fund, according to enforcement judge orders, and the representative administrator has to pay each class member according to a pre-approved project of division and the judges' decree.

Concerning costs and fees, the new class action provides for economic incentives for the attorneys (specifically, for the plaintiff attorneys, as well as for the adherents ones) and for the representative administrator; also, costs are reduced, considering, for instance, the forms of public notice.[32]

[29] See A. Giussani, 'La transazione collettiva per i danni futuri: economia processuale, conflitti d'interesse e deterrenza delle condotte illecite nella disciplina delle «*class actions*»' *Foro italiano*, IV, 175 (1998); L.S. Mullenix, 'Class Action Settlements in the United States', available at https://tinyurl.com/vdwmz5l (last visited 30 December 2019); N. Andrews, 'Multi-Party Proceedings in England: Representative and Group Actions', available at https://tinyurl.com/wsp67mm (last visited 30 December 2019).

[30] See A. Giussani, 'Le composizioni amichevoli della lite nella nuova disciplina dell'azione di classe', in B. Sassani ed, 'Class action' n 1 above,149.

[31] The rules states that if the parties (plaintiff and defendant) reach a settlement, the tribunal gives a deadline to class members that, just in this single case, can pursue the proceedings. It is a naive provision, since in Italy parties reach settlements out of the proceedings, and, once settled the case, they do not show up in court (two consecutive hearings) and the judge, who is never informed about the settlement, has to dismiss the proceedings.

[32] See G. Mazzaferro, 'Le spese e le sanzioni', in B. Sassani ed, 'Class action' n 1 above, 163.

The legislator clearly aims to realize more attractive proceedings in order to promote the class action litigation.[33]

In fact, the plaintiff attorneys can get more fees in respect to what the tribunal states if the third phase ends with a favourable decree for class members.[34]

Also, class members' attorneys can get fees whose amount will be determined by a specific administrative decree enacted by the *Ministero della Giustizia* and the *Ministero dello sviluppo economico*.

All the representative administrator's credits are considered privileged (the measure of this unspecified privilege is seventy-five percent) on all the goods foreclosed.

A special economic incentive consists in the defendant duty to advance expenses for technical consultant.

VIII. The Class Action for Injunctive and Declaratory Relief

The first and most important aspect of the new Art 840-*sexiesdecies* Code of Civil Procedure consists in an enlargement of standing to sue, which is extended to individuals, who are interested in filing an injunction against the defendant.

Also, non-profit organizations and associations have standing, but they have to be enrolled in a list kept by the *Ministero della giustizia* and to meet some financial conditions.

There are two forms of class action for injunctive relief: the first one can be filed by non-profit organizations; the second one can be filed by individual persons whose interests are coincident to collective ones, so that physiologically the plaintiff has to claim for an injunction that can be useful for an entire class.

The injunctive class action can be filed only against enterprises or public

[33] As explained by R.G. Bone, *The Economics of Civil Procedure* n 28 above 260, 'the complexity of the class action stems mainly from the large number of actors involved and wide range of strategic opportunities the device opens up. In a large class action, there are lots of interested persons, including: (1) representative parties, (2) class attorneys, (3) absent class members with interests that may differ from one another, (5) defendants, and (6) the judge. All these persons have their own particular interests in the class action and the conflict and competition among them can produce high social costs'.

The economic analysis of the device shows that the main key of class action success consists in avoiding to file the so called hybrid class actions, ie class actions embracing both cost-justified and non-cost-justified individual suits.

Regarding third party funding, Italy has not developed a significative experience yet (see E. D'Alessandro ed, *Prospettive del* third party funding *in Italia/Perspectives on Third Party Funding in Italy* (Milano: Ledizioni, 2019)).

In Italy, the class actions deterrent effect (see for example C. Engel, 'Does Class Action Have a Deterrent Effect?' 172(1) *Journal of Institutional and Theoretical Economics (JITE)*, 104-107 (2016)) has paradoxically regarded plaintiffs, since it has not produced any results regarding defendants' misconducts; the deterrent effect does not stem from litigations costs but from the extreme complexity of the rules, also related to the inefficiency of the opt-in system.

[34] No success fee would be up to the plaintiff's attorney in case of class settlement.

authorities or entities managing public services, in case of illicit conducts connected to their activities.

The remedy can be considered general – in fact it is inserted in the Code of Civil Procedure – so that it will be necessary to coordinate it with other specific class actions for injunctive relief provided by special laws (eg Art 37 Consumer Code, Art 28 legge 20 May 1970 no 300 (*Statuto dei Lavoratori*), Art 28 decreto legislativo 1 September 2011 no 150).

The suit can be filed to receive a judicial order against illicit commission or omission, so that the order could consist in a specific *facere*;[35] this is a very innovative choice from the legislator.

The trial is ruled by Arts 737-739 Code of Civil Procedure[36] and the *Pubblico Ministero* is a necessary joinder; also Art 840-*quinquies* Code of Civil Procedure applies.

The enforcement of the judicial order is ruled by Art 614-*bis* Code of Civil Procedure, whose field of application excludes labour lawsuits, and that is defined 'also applicable beyond its limitations'; the real meaning of this locution is not clear, but one of the possible interpretations consists in considering the indirect enforcement rule applicable also in labour litigation.

[35] See G. Basilico, *La tutela civile preventiva* (Milano: Giuffrè, 2013), 217; D. Amadei, *L'azione collettiva inibitoria. Sistema, tutele ed attuazione* (Torino: Giappichelli, 2018).

[36] Those articles rule the *procedimenti in camera di consiglio*, which is a special form of simplified proceedings.