II. Italien

Legal Culture and Judicial Collective Redress: the Italian Experience

Dr. Giacomo Pailli, LL.M. (NYU) Research Fellow, University of Florence/ Dr.Cristina Poncibò, Associate Professor of Comparative Law, University of Turin[1]

I. Hollywood Narratives

Discussions around the enactment of a collective judicial redress mechanism in Italy have been going on for years.[2] Eventually, at the end of 2007, the Parliament introduced art. 140-*bis* in the Italian Consumer Code[3] (hereinafter "ICC") under the label of *azione collettiva risarcitoria* (collective action for compensation of damages).[4] The entry into force of the *azione collettiva* was postponed several times, until in July 2009, the text of art. 140-*bis* was replaced in its entirety with the current one introducing into the Italian procedural system an *azione di classe*, available from January 1, 2010.[5] In 2012 there was a further set of amendments, lowering one of the admissibility threshold (see *infra* para. 2).[6]

1 Giacomo Pailli, University of Florence (Italy), is the author of paragraph 2 and 5. Cristina Poncibò, University of Turin (Italy), is the author of paragraphs 1, 3 and 4 and 5.

2 The article adopts the wording of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013, 60-65.

3 Legislative Decree no. 206 of 6 September 2005, OJ 8 October 2005 no. 162..

4 Art. 2, paragraph 446, of the Law 24 December 2007, no. 244 (Financial Law for 2008). Publications discussing the old draft bill are still available, of course, and they could generate some confusion in readers less experienced with the Italian system.

5 Art. 49 of the Law 23 July 2009, no. 99, OJ 31 July 1999 no. 176..

6 Art. 6 of the Law Decree 24 January 2012, no. 1, ratified by Law 24 March 2012, no. 27.

In fact, before the introduction of the *azione di classe*, forms of collective redress concerning consumer rights already existed in Italy, but were (and are) limited to injunctive relief against traders and the public administration.[7] In addition, when the trader's conduct is open to criminal charges, consumers, or their associations, can claim compensation and restitution by bringing a civil claim within the criminal trial.[8]

The narrative of the class action that is proper of American popular culture has influenced the introduction of the *azione di classe*. Historically, the transplant occurred primarily because of the political and social concerns in the public opinion linked to some dramatic financial mass torts. The discussion around the introduction of an *azione di classe* has been hotly contested and led to highly political debate between liberals and conservatives; individualists (favouring plaintiff autonomy) and communitarians (who are in favour of collective justice); adherents of corrective justice and distributive justice; and proponents of judicial activism and judicial restraint.

A major event conditioning the debate was the "*Parmalat* crack scandal", described as 'one of largest and most brazen corporate financial frauds in history'.[9] Shortly after Parmalat's collapse in 2004, the Italian mass media gave high resonance to the news that lawyers in the US were launching class actions, at a speed unthinkable for Italy, and that Italian investors could be part of them. Such news gave momentum to a broad public debate in the mass media and at a political level about the need to include a new mechanism for collective judicial redress in the Italian legal system.

Beside this already meaningful example, this article tries to show that American popular culture has strongly contributed to create, or at least to increase, the social and political consensus necessary for introducing the *azione di classe*. Interestingly, some Hollywood narratives had already favoured the popularity of the class action

7 Arts. 139-140 ICC regulate an injunction procedure against traders. Consumer associations registered in a list maintained by the Ministry of Productive Activities may request to the court: a) an order enjoining a trader from performing actions harming consumer interests; b) suitable measures to remedy or eliminate the harmful effects of any breach; c) publication of measures in one or more national or local daily newspapers to help correcting or eliminating the effects of any breach.
The Legislative Decree No. 198 of 20 December 2009 introduced a mechanism for collective redress according to which a group of consumers and users and/or their representative associations may petition to the Administrative Tribunal against violations or omission by the Italian Public Administration, including government entities or other public or private bodies providing public service. The scope of the action covers, e.g., violations of qualitative standards or of terms, as well as omission in vigilance or control, or in adopting administrative acts. The Court may order the public administration to comply, but cannot award compensation of damages to individual class members.

8 Over the last two decades or so, damaged parties have advanced a significant number of cases of mass torts by joining criminal proceedings (ie. *costituzione di parte civile nel processo penale*). See N. Coggiola, M. Graziadei 'The Italian 'Eternit Trial': Litigating Massive Asbestos Damage in a Criminal Court', in WH. Van Boom, G. Wagner (eds) *Mass Torts in Europe. Cases and Reflections, Tort and Insurance Law* (Berlin: De Gruyter 2014) at 29.

9 G. Ferrarini, P. Giudici, 'Financial Scandals and the Role of Private Enforcement: The Parmalat Case' (2005) ECGI Law Working Paper No. 40/2005 citing Securities and Exchange Commission v. Parmalat Finanziaria S.p.A., Case No. 03 CV 10266 (PKC) (S.D.N.Y.), Accounting and Auditing Enforcement Release No. 1936 / December 30, 2003.

in Italy, depicting the procedural device as a fundamental tool for citizens' empowerment. Two successful Hollywood movies, *A Civil Action* (1998) and *Erin Brockovich* (2000), contributed greatly in shaping the popular attitude towards mass litigation.

The interdisciplinary study of law and popular culture has already spawned a considerable literature, often centring on representations of law in movies, addressing a range of issues. Writers have used movies to correct inaccurate cultural representations of lawyers and legal processes, track popular attitudes toward lawyers, explore specific legal and social issues, spur discussion of legal problems in the classroom, and trace the ideological qualities of legal and cinematic discourses.[10]

With respect to the case of the *azione di classe*, popular culture has had a surprising capacity of fostering legal change. Responding to Lawrence Friedman's challenge to map the social forces contributing to law's evolution,[11] we note that the influence of the popular culture on law may be greater than one might suppose. This may be especially true when the law is in a state of flux, or when scandals and events like the *Parmalat* crack, generate a strong critique against the limits of the mechanisms to protect citizens' rights.

Given its popularity and according to Hollywood narratives, the 'new' mechanism for judicial collective redress, based on the popular 'perception' of the class action, has become a widespread electoral promise of a cultural revolution in enhancing the effectiveness of citizens' rights. The Italian *azione di classe* is *An American in Rome*.[12] In that movie Alberto Sordi played Nando Moriconi, a young Italian man obsessed with American music and popular culture. He walks in a bow-legged swagger that seems a parody of John Wayne, sports a baseball cap, and dreams of being the next Gene Kelly. In such a context, the voice of Italian legal scholars has been heard only in the academic circles. They have failed in de-constructing the Hollywood narrative of the class action before the politicians, and the society.

In the discussions on the draft bill, consumer groups and unions were arguing in favour of the introduction of a new mechanism dedicate to consumer collective redress. On the other side, traders, industry associations, and insurers pushed for restrictions on collective judicial redress for consumers. This explains why the final text of art. 140-*bis* is not very effective: the law is the result of a political compromise between consumer advocates and the representatives of corporations and insurance companies. As a result, the *azione di classe* is simply a more sophisticated form of joinder of parties based on the representation by an ideological plaintiff, often a consumer association, of a group of consumers. The electoral promise has failed: the Italian government adopted a judicial collective redress mechanism that, despite maintaining its name, is very different from a class action and is certainly deprived of its cultural and social impact.

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10 S. Penney, 'Mass Torts, Mass Culture: Canadian Mass Tort Law and Hollywood Narrative Film' (2004) 30 Queen's L. J. 205 f. (where the author argues that Canadian mass tort law may be influenced by American popular culture, and in particular by Hollywood narratives).

11 L. Friedman, 'Law, Lawyers, and Popular Culture' (1989) 98 Yale L.J. 1579 1583.

12 The reference was to one of Alberto Sordi greatest roles, as the star of *Un Americano a Roma* (1954).

In this paper, we first present an "on the ground" overview of how the *azione di classe* lived and developed in judicial practice in its first years of operation, analysing the case law available. Then, we try to assess the cultural elements of resistance, as well as of cultural appropriation that are evident in this experiment of legal transplant.

II. Law in action: how the Italian azione di classe fared so far

As noted, the "Spaghetti western" *azione di classe*[13] entered into force in January 1, 2010, after a law of 2009[14] completely rewrote art. 140-*bis* of the ICC as previously enacted in 2007. According to the new art. 140-*bis* of ICC, as further amended in 2012,[15] an *azione di classe* may be brought by any consumer or user, or by an association or committee empowered by them. The action may only be brought for declaration of liability and compensation of damages in relation to: (i) contractual claims, including based on standard terms, against a company brought by consumers and users who are found in a similar situation; (ii) homogeneous claims by end-consumers (*consumatori finali*) of a specific product or service against the relevant manufacturer/provider, even in the absence of a direct contractual relationship; (iii) homogeneous claims for damages by consumers and users as a consequence of unfair business practices or violation of competition law.

At the end of the first hearing, after having heard the parties and collected summary information, the Court decides on the admissibility of the action by way of an order. The order denying admissibility may be challenged before the Court of Appeal. The *azione di classe* is admissible when: (i) it is not manifestly unfounded; (ii) there is no conflict of interests; (iii) the individual rights are homogeneous; (iv) the plaintiff appears to be fit to represent the interests of the whole class. If the Court allows the action, it (a) defines the characteristics of the individual rights claimed within the proceedings; (b) sets terms and procedures for the most appropriate publicity; and (c) sets a mandatory term for expression of intention to participate by class members (the participation mechanism is strictly "opt-in"). Upon expiration of the deadline for participation, the Court hears the merits and, if granting the claim, specifies the amounts owed by the defendant to any individual consumer that joined the action. In alternative, the Judge may set the homogeneous

13 For critical remarks in English on the azione di classe, see recently, R Caponi, 'Italian 'Class Action' Suits in the Field of Consumer Protection: 2016 Update' (June 16, 2016). Available at SSRN: https://ssrn.com/abstract=2796611. C Poncibò, 'Forum shopping and consumer collective redress in action: the Costa Concordia Case', in E Lein, D Fairgrieve, M Otero Crespo, V Smith (eds.) *Collective Redress in Europe – Why and How?* (London, UK: BIICL 2015). R Caponi, 'Collective Redress in Europe: Current Developments of "class action" suits in Italy' (2011) 16 ZZPInt 61-77.

14 Art. 49 of the Law 23 July 2009, no. 99, OJ 31 July 1999 no. 176.

15 Art. 6 of the Law Decree 24 January 2012, no. 1, ratified by Law 24 March 2012, no. 27, OJ 24.01.1992, no. 19. The new law lowered one of the admissibility thresholds: while in its original structure, the azione di classe was inadmissible if the group members' rights were not 'identical', these rights now need only to be 'homogeneous', a wider concept already developed by some courts under the previous law.

criteria for the computation of such amounts, encouraging parties to find an agreement on liquidation of damages, failing which the matter returns to the Court for final determination. The decision on the merits may be challenged in front of the Court of Appeal, and the appellate judge has the power to stay the decision of first instance, which, as a general rule of Italian civil procedure, is provisionally enforceable. As usual, a final appeal on points of law may be lodged before the *Corte di cassazione* (Italian Supreme Court). There is no provision on punitive damages or other economic sanctions.

After providing a brief description of its normative structure, it is interesting to examine here how the class action fared in practice. First, numbers. Short of any official statistics, which is already a shortcoming, the *Osservatorio Antitrust* of the University of Trento maintains the more reliable source.[16] According to their data, as of January 2016, 58 *azioni di classe* have been filed in the courts of first instance, out of which 10 were declared admissible and 18 inadmissible.[17]

Despite the number of 58 actions filed according to the *Osservatorio Antitrust* above, we were able to locate the actual judicial orders and decisions only for 20 of them (for a total of 38 between orders and decisions, including by courts of appeal and the Supreme Court). The following analysis is based on these documents only.

There is a handful of decisions by the Italian Supreme Court, but these are mostly on technical aspects, such as the possibility of appealing a declaration of inadmissibility of an *azione di classe* issued by a court of appeal.[18] Below we will examine some of the more interesting cases so far.[19]

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16 The Competition Law Observatory is available at the following address: http://www.osservatorioantitrust.eu/it/azioni-di-classe-incardinate-nei-tribunali-italiani/ (last visited, 13 Jan 2017).

17 C. Poncibò and E. Rajneri have reported the leading cases (precisely a summary of the facts and legal arguments in English) in the Italian Report prepared for the research project on Collective Redress coordinated by the British Institute of International and Comparative Law. The Italian Report is available at https://www.collectiveredress.org/collective-redress/member-states.

18 Cassazione civile sez. I, 21.11.2016, n. 23631, *Intesa San Paolo S.p.A. C. G.F. e altri*, (2016) Diritto & Giustizia (the order of the Court of Appeal declaring an *azione di classe* admissible cannot be appealed, because it does not end the proceedings, but on the contrary it gives instructions on its continuation); Cassazione civile sez. I, 14.06.2012, n. 9772, *Codacons C. Soc. Intesa Sanpaolo*, (2012) 9, I, Foro it. 2304 (the order of the Court of Appeal declaring an *azione di classe* inadmissible is merely procedural and cannot be appealed to the *Corte di cassazione*, because it does not prevent to file individual actions) *contrast* with Cassazione civile sez. III, 24.04.2015, n. 8433, *Codacons C. Soc. Bat Italia*, (2016) 2 Responsabilità Civile e Previdenza, 550 (the Third Chamber of the *Corte*, disagreeing with the First chamber,submits to the Joint Chambers the question of whether an order of the Court of Appeal declaring an *azione di classe* inadmissible can or cannot be appealed to the *Corte di cassazione*).
See also the *obiter* in Cass. n. 23631/2016 *supra*, disagreeing with the earlier decision of the First chamber (but different judges) n. 9772/2012. Along these lines, the chambers of the *Corte* disagree on whether a declaration of inadmissibility prevents to file again the same azione di classe.

19 As the reader surely knows, the Italian legal system does not apply the doctrine of binding precedent, and hence previous decisions are not binding. They may well have a persuasive value, especially if coming from the Supreme Court or a well-reputed lower court. See, e.g.,

a) Codacons

Codacons is a national consumer's association and one of the first to test the new procedural device with four actions. The first *azione* claimed that a bank (Intesa S. Paolo) applied illegitimate banking fees. The action was declared inadmissible both at the first instance and on appeal. The first judge held that the plaintiff lacked standing to bring the action, because in fact his rights had not been harmed by the bank, dismissing the action regardless of whether other potential future class members of the class did in fact suffered a damage from the bank.[20] The Court of appeal confirmed and, thus, *Codacons* petitioned the *Corte di cassazione*, which held that there is no appeal against the order of inadmissibility by the Court of appeal.[21]

The second action launched by *Codacons* focused on compensation of damages due to addictive smoking. The Court of Appeal, confirming the decision of the *Tribunale*,on partially different grounds, held that, beside the action being barred *ratione temporis*,[22] the damages suffered by each participants lacked uniformity and therefore were not "identical".[23] *Codacons* made a petition to the Supreme Court that, disagreeing with its own earlier decision, in 2015 submitted the matter to the attention of the First President of the Court for a possible decision of the issue by the Joint Chambers, not yet made.[24] A statement made by the Court in its order is particularly interesting and deserve attention. The Court noted:

> "… it is not appealing to conclude that the *azione di classe* is merely a *procedural form* of judicial protection of rights, alternative and equal to individual action, so that once declared inadmissible the former, the possibility to bring the latter would prevent to consider a declaration of inadmissibility to have the content of a decision and to be final. If, in fact, *scire leges non est verba earum tenere, sed vim ac potestatem*, the Court deems it reductive to read in […] art. 140-*bis* just an alternative procedural 'form'[…].
>
> A collective action, indeed, due to the increased economic and psychological pressure that may be exerted on the [trader], offers to the plaintiff an 'added value' with reference to an ordinary action: it is more persuasive, may more effectively bring compliance, and it is cheaper for those who participate to it. The court also notes that […] the individual action, on the other hand, as noted, has content, goals and effects that are very different from the collective action […]. It has different goals, because an individual action on consumer's rights leave the plaintiff in a

M Taruffo and M La Torre, 'Precedent in Italy' in D N MacCormick and R. S. Summers (eds) *Interpreting Precedents: A Comparative Study* (Aldershot: Dartmouth Publishing, 1997).

20 Tribunale di Torino, 04.06.2010, *Rienzi C. Banca Intesa S. Paolo*, (2011) 1 Nuovo not. giur. 108 and (2010) 9 I Foro it. 2523.

21 Cfr. Cass. no. 9772/2012, *supra*.

22 According to art. 49, para. 2, of the Law 23 July 2009, no. 99 (introducing the new formulation of art. 140-*bis* in the ICC), the *azione di classe* applies only to "torts committed after the entry into force of the new law", hence after January 1st, 2010.

23 Corte appello Roma 27.01.2012, *Codacons v. Soc. Bat Italia*, (2012) 6 I Foro it. 1908.

24 Cass. no. 8433/2015, *supra*.

> position of clear disadvantage *vis-à-vis* the defendant, whereas the *ratio* of the collective action is clearly to level the playing field, implementing the rule [of substantive equality] of article 3, paragraph 2, of the Constitution".

Such a statement, "business as usual" in an American court, coming from Italy's highest court is a promising sign that something may be changing in the judges' mind-set.

The third *azione di classe* promoted by *Codacons* focused on the services of the school canteens in Milano. The *Tribunale di Milano* in 2013 declared the action inadmissible, on a ground that in the US would go under the label of *commonality* and because the claims appeared manifestly unfounded.[25] In short, from the moment that individual issues outweighed common issues, it could not be said that the claims were homogeneous – hence the negative decision. It appears that the order was not appealed and became final.[26]

Finally, *Codacons* filed proceedings before the *Tribunale di Milano* against a company (Voden Medical Instruments), claiming that the defendant advertised false information in relation to an anti-flu test. The *Tribunale* admitted the class, but rejected the action on the merits. On appeal the Court, recognizing the false advertisement, granted the claim of the sole plaintiff awarding the sum 14.50 €, but dismissed the claim with reference to the single participant that took part to the "class".[27]

After four substantially unsuccessful attempts, *Codacons* seems now to have switched focus away from the *azione di classe* to other channels, e.g., promoting massive participation of civil actions in criminal proceedings.

b) Altroconsumo

Altroconsumo is another leading consumer's association, one of the more reputed, which is still particularly active in exploring the potential of the Italian class action. The first *azione* launched by *Altroconsumo* was against a major Italian bank. The first part of the script is a common one: the *Tribunale di Torino*[28] declared the action inadmissible (for lack of identity of the claims, insufficient resources of plaintiff to carry out the proceedings, and denying the standing of the association), while the *Corte d'appello di Torino* allowed it, interpreting the requirement of identity

25 Tribunale di Milano, *Codacons v. Milano Ristorazione*, unreported, 2013, available at http://www.corteappello.milano.it/allegato_corsi.aspx?File_id_allegato=1283 (last visited 13 Jan 2017).

26 As already noted, despite this order-becoming final, a declaration of inadmissibility does not prevent others (or the same persons) to propose again an *azione di classe* for the same facts. According to art. 140-***bis***, par. 14, of the Consumer Code, only after the action has been declared admissible and the term to become a member of the class has expired, and then the action cannot be filed again for the same facts, against the same defendant. Non-class members still retain the power of individual action.

27 Corte appello Milano 26.08.2013, *De Francesco et al. v. Soc. Voden Medical Instruments* (2013) 11 I Foro it. 3326.

28 Tribunale Torino 28.04.2011, *Gasca e altro C. Soc. Intesa S. Paolo*, (2011) 6 I Foro it., 1888.

in terms of "homogeneity".[29] In what is one of the first decisions on the *azione di classe*, the court held that the "identity" of the claims has to be referred only to the nature of the objective elements that identify the action, but does not extend to the amount claimed by each participants, which can be different. It also noted that, although the members of the class did not show adequate resources, the participation of a renowned association cleared both the requirement of resources and the guarantee of adequate representation of the interests of the class.

The action, thus, returned before the *Tribunale* that in 2014 decided on the merits, holding that in fact the bank had inserted unfair terms in its contracts, but rejected most of the 104 participants to the class due to a defect in their participation documents.[30] In its order on class certification the *Tribunale* directed that each participant's signature had to be authenticated by a public officer, but many participants did not do it.[31] In the end, thus, the Tribunale granted the claim of the three "named" plaintiffs and of only three out of 104 participants, ordering the bank to pay sums between 50,00 € and 430,00 € and legal costs of 36.000,00 €. The Court of Appeal recently confirmed the decision of the *Tribunale*.[32]

Altroconsumo launched another action against a bank before the *Tribunale di Napoli* in 2012, held admissible by both the *Tribunale*[33] and the *Corte d'appello*,[34] but the action seems to be still pending on the merits before the first-instance judge.

The third action was against a train service provider, Trenord, for a series of issues occurred in December 2012 that led to significant delays and discomfort to travellers. The *Tribunale di Milano* declared the action inadmissible in 2013 for lack of homogeneity, but the Court of Appeal overturned such order in 2014 and sent back the case

29 Corte appello Torino sez. I, 23.09.2011, *Gasca et al.v. Intesa S. Paolo* (2011) I 12 Foro it. 3422. This action was under the previous version of art. 140 *bis*, which made reference to "identical claims". As we can see, the 2012 amendment codified an interpretation already explored by courts.

30 Tribunale Torino 10.04.2014, *Gasca et al. v. Intesa Sanpaolo* (2014) 9 I Foro it. 2618: "the bank that after August 15, 2009 [date of entry into force of class action] has applied overdrawn fees in consumers' bank accounts, pursuant to contractual terms that are void, must be ordered to return to the plaintiffs and all legitimate participants these undue sums".

31 In the specific case, such a requirement was specified in the order of admissibility. Regardless, we hope that no other court will ever impose such a cumbersome procedure: bringing an *azione di classe* is already hard enough without this judge-made addition.

32 Corte d'appello Torino, 30.06.2016, *Gasca et al. v. Intesa Sanpaolo*, available at https://www.altroconsumo.it/organizzazione/-/media/lobbyandpressaltroconsumo/images/in-azione/class-action/intesa%20sanpaolo/sentenza%20corte%20appello%202016/sentenza%20nella%20causa%20civile%20d'appello%20r,-d-,g,-d-,%20n,-d-,%201505_2014.pdf (last visited 13 Jan 2017).

33 Tribunale Napoli, sez. II, 16.11.2011, *AssoconsumoOnlus v. Banca della Campania* (2012) 6 I Foro it. 1909.

34 Corte appello Napoli 29.06.2012, *Banca Campania v. Assoconsumonlus* (2013) 1 I Foro it. 342.

to the first judge for a decision on the merits. The Court's reasoning follows the line of the decision of the Court of appeal of Turin above, specifying that "homogeneity of claims…, during the admissibility phase, in which issues of quantification are not relevant, is satisfied if the source of damages is the same for all and the quantification appears to be possible on the basis of uniform criteria". The Court added that the participation to a class action implies a certain degree of "standardisation" of each individual claim, which loses part of its specificity.[35]

On the merits, however, the *Tribunale* rejected the claims, stating that the extra-judicial compensation already offered by *Trenord* to users (a reimbursement of 25 % of the price of a train pass) was enough. Interestingly, there had been around 6.130 participants that opted-in over a potential class of around 700.000. Appeal on the merits is pending.

Two other actions were declared inadmissible, one in Rome the other in Florence. Both aimed at recovering illegitimate VAT paid by users to waste service companies in Italy, but both courts found the action to be outside the scope of art. 140-bis and, therefore, inadmissible.[36]

Finally, following the diesel-gate scandal, *Altroconsumo* launched two *azioni di classe* against car manufacturers. The first is against FCA in Torino, where the Court of Appeal, with a very well-reasoned decision, overturned the *Tribunale* order of inadmissibility and admitted the action, mandating for the first-instance to carry out the merits phase.[37] *Altroconsumo* claims that it was able to file 21,031 declarations of participation.

The second action, against Volkswagen,was filed before the court of Venezia. Once again, at first the *Tribunale* declared the action inadmissible.[38] The judge rejected, in a well-written opinion, all defences raised by Volkswagen, but then (mistakenly) concluded that the evidence submitted by the plaintiff were not enough to support the claim, and thus declared the action inadmissible as manifestly ungrounded. The Court of Appeal, in an equally good decision, following the *Corte d'appello di Torino*'s deci-

35 Corte appello Milano 03.03.2014, *Altroconsumo v. Trenord*, (2014) 5, I Foro it. 1619. According to the Court, only claiming specific individual damages (such a losing a business opportunity) would prevent certification of the class. Accordingly, Tribunale Firenze sez. II, 15/07/2011, *De Zordo v. Soc. Quadrifoglio*, (2012) 6, I, Foro it.

36 Tribunale di Roma, 10.11.2014, *Altroconsumo v. AMA*, availableat https://www.altroconsumo.it/organizzazione/-/media/lobbyandpressaltroconsumo/images/in-azione/class-action/iva%20sulla%20tia%20-%20ama%20roma/ordinanza%20di%20inammissibilit%C3%A0/ordinanza%20inammissibilit%C3%A0.pdf (last visited 13 Jan 2017); Tribunale di Firenze, *Altroconsumo v. Quadrifoglio Spa*, 18/03/2014, availableat https://www.altroconsumo.it/organizzazione/-/media/lobbyandpressaltroconsumo/images/in-azione/class-action/iva%20sulla%20tia-%20quadrifoglio%20firenze/rigetto%20quadrifoglio%20per%20sito.pdf (last visited 13 Jan 2017).

37 Corte d'appello di Torino, 17.11.2015, *Altroconsumo v. FCA* (2016) I Foro it., 1017.

38 Tribunale di Venezia, 12.01.2016, *Vighenzi v. Volkswagen*, available at https://www.altroconsumo.it/organizzazione/-/media/lobbyandpressaltroconsumo/images/media-e-press/comunicati/2016/consumi%20bugiardi%20ricorso%20altroconsumo%20tribunale%20ve%20non%20ammette%20class%20action/ordinanza%20tribunale/ordinanza%20tribunale%20ve%2012_01_2016.pdf (last visited 13 Jan 2017).

sion in *Altroconsumo v. FCA*, criticized the *Tribunale* for confusing the admissibility and the merits phase, admitted the action,and referred the parties back to the *Tribunale* for the continuation of the proceedings on the merits.[39]

While we are far, far away from the speedy and billionaire settlements that Volkswagen reached in the US for the same (alleged) fraudulent conduct, both actions are a sign that something is slowly starting to change in the playing field. On the "Dieselgate", there is also a criminal investigation going on by the *Procura di Verona*, and other consumer associations (e.g., Codacons, Adiconsum and Federconsumatori), are gathering potential victims for participation in the criminal proceedings.

The last action reportedly launched by Altroconsumo, but still in the admissibility phase, is against Samsung, before the *Tribunale di Milano*. The claim is for false advertising of the storage spaceavailable on smartphones, which is only a percentage of what the producer advertises to consumers.

c) Securities

As widely known, a vast majority of US class action are in fact securities class action aimed at settling mass disputes between a company and its shareholders and other investors. The Italian class action does not expressly include or exclude securities, but gives standing only to "consumers or users" and limits its objective scope (see *supra* in this para.).[40] Amidst this uncertainty, there have been two attempts at bringing securities actions under art. 140-*bis*.

The first attempt involved an action brought by a consumer association (ADUSBEF) against one of Italy's major bank (Monte dei Paschi di Siena – MPS), currently experiencing hard times. The Court of appeal of Florence, confirming the lower court, held that, when the subject matter of the claim is stock options, potential class members are acting as shareholders and cannot be considered "consumers or users"; the claim, therefore, falls outside the scope of art. 140-*bis* ICC.[41] Similarly to Dieselgate and other cases, it is reported that also in the case of MPS consumer associations are trying to exploit criminal proceedings pending in Milano, by gathering potential victims to file their individual civil claim for damages as *parti civili* in the criminal trial.

The second attempt crashed upon a procedural technicality, before the judge could even consider the issue of scope of art. 140-*bis*. An action was brought against a bank (Carige), but the *Tribunale di Genova* declared the action inadmissible because the

39 The Press Release is available at https://www.altroconsumo.it/organizzazione/-/media/lobbyandpressaltroconsumo/images/in-azione/class-action/fuel%20consumption%20volkswagen/ordinanza/ordinanza%20corte%20appello%20venezia%20class%20action%20vw%20ammessa%2017_06_2016.pdf (last visited 13 Jan 2017).

40 Art. 140-*bis*, paragraphs 1-2.

41 Corte appello Firenze 15.07.2014, *Masciullo e altro C. Monte dei Paschi Siena* (2015) 9, I Foro it. 2778.
See L Iacomin, 'Azione di classe e tutela degli azionisti' (2015) Giur. It. 89-95.

plaintiff lacked standing to sue.[42] Plaintiff in the action was in fact a *comitato*,[43] a collective association of the bank's shareholders and stakeholders: the court reasoned that a *comitato* was neither an association for the purposes of art. 140-*bis*, nor it had been given by its members a valid power of attorney to sue, and dismissed the action.

Overall, securities class actions do not seem to fit squarely the current scope of art. 140-*bis* ICC. The possibility of bringing shareholders' class actions appear limited by the wording of art. 140-*bis* that refers only to "consumers or users". On the contrary, claims based on financial products or other securities distributed to the consumers may well be found to be within the scope – although the immediate defendant of the action will likely be the bank or institution that sold a specific product to the consumer, rather than the corporation.

d) Water supply

Water supply has been the focus of at least three *azioni di classe*. In the first action, some citizens of a small village in Molise remained without drinkable water for a few days across 2011 new year's eve and asked restitution of fees paid for the water supply service, as well as damages. The court declared the action admissible, and the municipality (*Comune*) was allowed to join into the proceedings the utilities companies that manage the water supply (that in turn joined their insurance providers).[44] On the merits, however, the court ruled that in fact the water shortage was caused by unforeseen events and that the municipality, which did not have the responsibility for supplying the water, had done all it could to protect its citizens and minimize any damage. Furthermore, plaintiff failed to extend their claims to the other parties (i.e., against the utilities companies), although – in any case – according to the judge the claim had no merits. A similar action has been promoted also against the *Comune di Petacciato* for similar facts, but there is no record of a decision on the merits.[45]

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42 Tribunale di Genova, 13.06.2014, *Comitato Tutela del Risparmio v. Banca Carige Spa*, available at http://www.osservatorioantitrust.eu/it/wp-content/uploads/2014/06/Ord-Trib-GE_Comitato-c-Carige-2014.pdf (last visited 13 Jan 2017).

43 A *comitato* is a collective entity of a plurality of persons that pursues a common goal (e.g. charity, mutual assistance, public performances or arts, exhibitions, etc.), and is regulated by Art. 39 ff. of the Italian civil code.

44 Tribunale Roma sez. II 02.05.2013, *Contucci et al. v. Com. Montenero di Bisaccia*, in (2014) 3 *Responsabilità Civile e Previdenza* 965, and Foro italiano 2014, 1, I, 274. This is not a purely descriptive information: art. 140 *bis*, paragraph 10, states that "The intervention of third parties according to art. 105 c.p.c. is excluded". The Court, however, rightly reasoned that the *ratio* of such prohibition was that participation to an *azione di classe* is already regulated and managed through the procedure of participation (art. 140 *bis*, paragraph 9), but that there was no justification for preventing a defendant from joining a third party for purpose of being indemnified.

45 Tribunale di Roma, 02.05.2013, *Casalanguida v. Comune di Petacciato*, available at http://www.consumatoridirittimercato.it/wp-content/uploads/2013/06/Petacciato.pdf (last visisted 13 Jan 2017). It is not unlikely that this action has been decided in the same terms as *Contucci v. Comune di Bisaccia*.

Although the claim was different, it is interesting to contrast the decision of the *Tribunale di Roma* with the opinion of the Court of appeal of Florence. A group of citizens/users brought an *azione di classe* against the local public utilities company for failure to properly act when a heavy, but expected, snow covered the city in white. There, the court adopted an opposite reasoning: since the contractual relationship is between the city and the utilities company, and citizens are a third party, the action was inadmissible.[46]

Finally, the *Tribunale di Cagliari* recently admitted an *azione di classe* involving water supply issues. A group of 127 users with one law firm brought proceedings against Abbanoa S.p.a., local water service provider, claiming lack or insufficient supply of water in the area of Buggerru, Sardinia.[47] The court admitted the action only for the claim of restitution of all sums paid in the five years before the action and on the equitable damage for lack of availability of these sums. Other claims of damages, which had not been fully described by the plaintiffs, were not "certified" because the court found it impossible to assess the requirement of homogeneity. Decision on the merits is now pending.

e) Travel package

In the first class action decided on the merits, the plaintiffs and the participants to the class (it is not clear how many) claimed that a travel agency breached their rights in relation to an "all-inclusive" travel package. In short, the consumers bought a package specifying certain facilities and services in Zanzibar, but once arrived, they were hosted for three days in a different facility of lesser quality. They spent the rest of the vacation in the agreed resort, which – however – was still under construction. The *Tribunale di Napoli* admitted the action, and on the merits ordered the defendant to compensate each of the twelve members admitted to the class a sum of 1.300,00 € (in relation to a package whose cost was 1.950,00 €), and issued a cost order of total 8.850,00 € (for all participants).[48] It is reported that, soon thereafter, the travel agency filed for bankruptcy.

It is noteworthy that the court adopted a quite restrictive notion of homogeneity, requiring that both the *an* and *quantum* of damages being identical/homogeneous. It, therefore, excluded from the class around thirty consumers who were hosted in a different structure because their damages were found not to be identical as to the *quantum* (and due to lack of evidence that such facility was not adequate).

46 Corte appello Firenze Data: 27/12/2011, *De Zordo v. Soc. Quadrifoglio*, in Foro it. 2012, 6, I, 1908. The court confirmed the earlier decision of the Tribunale Firenze sez. II 15/07/2011, in Foro it. 2012, 6, I, 1910.

47 Tribunale di Cagliari, 17.10.2016, *Silesu et al. v. Abbanoa S.p.A*, available at http://www.sviluppoeconomico.gov.it/images/stories/documenti/Ordinanaza_3160-15-class-action-ABBANOA.pdf (last visited 13 Jan 2017).

48 Tribunale Napoli sez. XII 18.02.2013 n. 2195, *M. v. W.,* (2013) 12 *Guida al diritto,* 16.

f) Settlements

Art. 140-*bis* ICC contains only a few hints on class action settlements, a big topic in US class action practice. The first relates to the definition of a mechanism of liquidation after an action has been successful on the merits: "When granting the claim, the court specifies, ex art. 1226 of the Italian civil code, a sum for each of the class participants, or the homogeneous criteria of calculation. In the latter case, the court gives to the party a term, not more than 90 days, to agree on the liquidation of damages" (paragraph 12); failing such an agreement, it is the court that decides. This provision, which so far has never been put into play (perhaps also because it implies large classes), aims at encouraging a dialogue between plaintiff and defendant after a decision on the *an* of liability has been made by the judge, trying to exonerate the court from having to manage complex liquidation schemes.

The second provision deals more directly with settlements. According to paragraph 15 of art. 140-*bis*, "Waivers/releases or settlements between the parties are at no prejudice of the participants who have not expressly consented. The same applies if the action is discontinued or otherwise terminated early". There is no judge supervision of the content of the settlement, nor any provision for the continuation of the action for non-consenting parties. In addition, art. 140-*bis* ICC provides that a settlement, as well as an out-of-court settlement with a procedural discontinuation of the action, has no effects on the rights of non-consenting participants. There is no requirement that the settlement be made available to participants, nor that it must cover all participants and not the parties themselves, although it is possible that courts will want to have a say on that.

So far, only one action was concluded with a settlement. On March 21, 2016,[49] the *Tribunale di Roma* admitted an action brought by a consumer's association against a telecommunication provider (Wind) for compensation after a blackout of services occurred on June 13, 2014. The certification was revoked, and the action discontinued, with order of May 26, 2016,[50] due to an undisclosed and unsupervised settlement.

It should be noted that a settlement prevents another *azione di classe* to be brought (by others) against the same defendant, for the same facts, only if it is made after the term for opting-in contained in the ordinance admitting the action has expired (art. 140-*bis*, paragraph 14). A settlement made before such term expires should have the only consequence of terminating that specific action, leaving open the road for a new *azione di classe* to be filed.

49 The Court Order is available at http://www.sviluppoeconomico.gov.it/images/stories/impresa/mercato/Ordinanza_Roma_Class_action.pdf (last visited 13 Jan 2017).

50 The Court Order is available at http://www.sviluppoeconomico.gov.it/images/stories/documenti/Ordinanza_roma_annullamento_class_action_2016.pdf (last visited 13 Jan 2017).

g) A first impressionistic assessment

The first seven years of operation of the Spaghetti Western *azione di classe* have been a disappointment for those who praised the introduction of the new device as a groundbreaking development in the Italian system of consumer protection. Beside cultural elements, discussed in the next paragraph, there are certain procedural elements that – both from a normative and an empirical point of view – appear as fatal flaws. Beside the limitation as to the category of disputes (causes of action) that may be filed through an *azione di classe* (e.g., the notable exclusion of securities cases), the single most striking issue is that of participation. As noted, the *azione di classe* features an opt-in only participation mechanism that, so far, has proven unable to build large classes. Only in the recent diesel-gate cases, the plaintiff (consumer association) was able to involve in the class thousands of damaged consumers. In all other cases, the *azione di classe* only included a few plaintiffs and, when particularly "successful", around a hundred participants. The decision of the *Tribunale di Torino* reported above,[51] where the court rejected the participation of almost all class members because they failed to have the signature on their participation form "legalized", is a further example of how an already dysfunctional device may be voided of any meaning by adopting a restrictive stance. We have argued elsewhere that opt-in has intrinsic limits and should be discarded in favour of an opt-out participation mechanism (with safeguards):[52] the Italian case is a further paradigmatic example of how *rational apathy*[53] coupled with opt-in may frustrate the rationale of a collective redress mechanism.

Looking at art. 140-*bis* ICC, there also appear to be a serious under-regulation of settlements, which – the US experience shows – are a delicate moment in which the expectations of the class champions (and especially of their law firm) do not always match the interest of the entire class they represent. The opacity of the single case that settled, discussed above, confirms the need for increased transparency and judi-

51 See *supra* notes 29-31 and accompanying text.

52 G. Pailli, 'The Heritage of Mauro Cappelletti and the Florence Access to Justice Project', in Annuario di diritto comparato, 2016, pp. 29-39. See, also, See R. Mulheron, 'The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis', in Columbia Journal of European Law, vol. 15, 2008-09, pp. 409 ff.

53 In the often cited words of Judge Posner in *Carnegie v. Household Int'l, Inc.,* 376 E3d 656, 661 (7th Cir. 2004): "The more claimants there are, the more likely a class action is to yield substantial economies in litigation. It would hardly be an improvement to have in lieu of this single class action 17 million suits each seeking damages of $15 to $30. The rejected settlement capped damages at these amounts for single and multiple RALs respectively, and while the amounts may be too low they are indicative of the modest stakes of the individual class members. The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative — no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied — to no litigation at all.".

cial supervision of settlements, to reduce the risk of collusion between the plaintiff and the defendant.

Again from a procedural point of view, the *azione di classe* appear to be resting wholly in the hands of the procedural plaintiff that took the initiative and it is not clear how the rights and interests of class participants may be adequately protected. There is no selection of the class champion, but only a provision that if the plaintiff appears unfit, the action is not admitted.[54]

Switching the focus of our brief remarks to the empirical plane, in the vast majority of the proceedings scrutinized above, the promoter of the *azione di classe* were consumers' associations, and two stand out: Codacons (four actions) and Altroconsumo (eight actions). Individual or closed groups of consumers promoted few actions. One example is the first *azione di classe* that won on the merits, which involved a group of consumers seeking compensation against a travel agency for the damages suffered. Three other cases where consumer association were not involved related to problems with water supply to certain well-defined areas; and consumers brought an action against a public utilities company that failed to properly remove the snow in the city of Florence, having as 'class-champion' a member of the city council.

In many cases, the first instance judge ruled for the inadmissibility of the action, while the court of appeal overturned the decision and declared the action admissible (sending it back to the first judge for the merits). Focusing on the reasoning given by each court, it seems that appellate judges are much keener to understand and apply the *esprit de la Loi*.

So far, at least four actions reached a decision on the merits, out of which two were successful and two were rejected. In the two successful cases, the first decided in Napoli saw around twelve participants compensated out of around forty, while the action decided in Torino had 110 participants, but the court eventually admitted only three of them, plus three plaintiffs, rejecting the others on purely bureaucratic reasons.

As to the subject matter of the action, the areas with more than one actions (which means two or three, not ten or twenty) are banking practices, transportation, failure to provide public services (snow, water supply, schools' canteen) and diesel emissions (unfair practices). Two actions tried to stretch the boundaries of this judicial collective redress mechanism to reach securities claims, but unsuccessfully. Single actions focused on damages from smoking, false advertising of medical vaccines, package travel, a telecommunication blackout and false advertisement of the storage space available on Samsung mobile devices.

54 Not to mention the absence in the Italian procedural system of the many devices that ensured the success of US class action, from discovery to punitive damages. See O. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 Am. J. Comp. L. 277 (2002), especially pp. 292-296; G. Hazard, *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 Notre Dame L. Rev. 1017 (1997-1998), p. 1018; N. Trocker – V. Varano, Concluding Remarks, in The Reform of Civil Procedure in Comparative Perspective, (N. Trocker – V. Varano eds., 2005), pp. 255-58.

3. Cultural resistance

The analysis of the case law in paragraph 2 shows that the introduction of the new action has not been very successful in protecting consumer rights. The article argues that, beside certain serious procedural defects, the lack of effectiveness of the art. 140-bis ICC could be explained by also considering some aspects of resistance arising from the legal culture of the country. In one question: can a change in the law bring about a change in legal culture, legal practice and community expectations?

Cultural factors appear to be one of the main forces undermining the potential of the new action, building on procedural shortcomings (see *supra* para. 2). The adoption of a new law, alone, does not seem to be enough to improve the state of the collective private enforcement of consumer rights in the country. The article notes that a change in the culture is needed for the success of the azione di classe. To quote an author 'the legal culture itself should be the object of reform, rather than merely a constraint'.[55]

What, exactly, is "culture" – legal or otherwise? 'Culture' is often a broad, catch-all term for an array of complex beliefs, symbols, and patterns of behaviour. Attempting to define it in a way that permits measurement will inevitably invite the objection that the definition is faulty, that it does not really capture "culture", but only public opinion, religion, language, or whatever other element is used.

In this respect, legal scholars have acknowledged that the definition of legal culture is flexible, and may vary depending on the purpose of the one defining it.[56] In particular, Lawrence Friedman described legal culture as the '(…) ideas, values, expectations and attitudes towards law and legal institutions, which some public or some parts of the public holds'. The author also explains that 'internal' legal culture is the legal culture of 'those members of society who perform specialized legal tasks'.[57]Another author redefined the concept and argued that 'legal culture is about who we are, not just what we do'.[58]

Indeed, 'legal culture', like culture itself, is certainly a controversial term; we do not intend to challenge the limits of an analysis that heavily relies on legal culture. Thus, we treat with caution any generalization based on the explanatory force of the legal culture. Therefore, we agree on the idea that the basic point – that beliefs, assumptions, and practices understood as "cultural" affect the operation of the legal system – is essentially true. Thus, we attempt to find a way to incorporate these considerations into our analysis of the new art. 140-bis ICC.

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55 R. Montana, Adversarialism in Italy: "Using the concept of legal culture to understand resistance to legal modifications and its consequences". European Journal of Crime, Criminal Law and Criminal Justice, 20(1), 2012, pp. 99-120.

56 LM. Friedman, 'The Concept of Legal Culture: A Reply' inD Nelken (ed) *Comparing Legal Cultures* (Dartmouth: Aldershot, 1997) 34.

57 LM. Friedman, *The Legal System: A Social Science Perspective* (Russel Sage Foundation, New York 1975) at 233.

58 D. Nelken, 'Using the concept of legal culture' (2004) 29 Australian Journal of Legal Philosophy 1.

Coming to our argument, some authors have correctly underlined that civil procedure is *culturally constructed* because it also involves some 'cultural issues', for example, the values shared in a society (i.e. equality, fairness).[59] Legal academics have demonstrated an interest in this relationship since the turn of the twentieth century. More specifically, while decades later, in the early 1970's, Mauro Cappelletti has published a seminal article discussing the relationship between culture and civil procedure.[60] In it, he reflected on the intellectual and socio-political background of European civil procedure reforms, and underlined the importance for scholars in the field of civil procedure to include, among the others, a cultural perspective on the law. Similarly, another author argues that procedural systems reflect the 'structure of government' and the 'purpose to be served by the administration of justice'.[61]

In our case, Italy and most European Member States have adopted a collective judicial redress mechanism for consumers that is very different from the popular consumer class action.[62] The Italian *azione di classe* is 'something new' collective judicial with respect to the traditional individualistic conception of litigation in the country. This grounds on the idea that legal culture change is a critical aspect for the success of the new mechanism.[63] Consequently, it aims at discussing the Italian experience in this respect. Thus, a first research question follows: what effect does the new action have on our legal culture? It is possible to confirm this argument by analysing the behaviour of different actors involved: indeed, the law and practice of such action involves various and different actors: consumer associations (the usual lead plaintiffs in Italy), lawyer(s) and one (or more) judge(s).

The article tries to offer a fresh perspective over the much-discussed role of judicial collective redress in the EU.

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59 C. Piché, "The Cultural Analysis of Class Action Law", Journal of Civil Law Studies, vol. 2, 2009, pp. 102-145.

60 M. Cappelletti, 'Social and Political Aspects of Civil Procedure–Reforms and Trends in Western and Eastern Europe' (1971) 69 Mich. L. Rev. 847. Mauro Cappelletti quotes Franz Klein, at 886.

61 M. R. Damaska, *The faces of justice and state authority: a comparative approach to the legal process* (Yale: Yale University Press 1986).

62 For a comparative overview see, recently, DR. Hensler, C. Hodges and I. Tzankova (eds) *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Cheltenham, UK, Northampton, MA, USA: 2016). E. Lein, D. Fairgrieve, M. Otero Crespo, Smith (eds) *Collective Redress in Europe – Why and How?* (London, UK: BIICL 2015). F. Valguarnera, 'Legal Tradition as an Obstacle: Europe's Difficult Journey to Class Action' (2010) 10(2) Global Jurist.

63 DR. Hensler, C. Hodges and I. Tzankova (eds) *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Cheltenham, UK, Northampton, MA, USA: Edward Elgar 2016).

a) Consumer associations

Art. 140-bis ICC assigns a central role to associations, while leaving open the possibility for the injured consumers to act individually before the courts or by establishing a committee. In practice, consumer associations have been the lead plaintiffs in the large majority of cases.

The text of art. 140-bis is a compromise with the American model where every member of the class has standing to sue on behalf of the entire group. It also relies on the previous rules and – more precisely – art. 139 ICC that gives standing to 'certified' association to seek injunctions protecting the collective interests of the consumers. Indeed, the wording of art. 140-bis, by expressly including associations, confirms the historical bias of the Italian legal system for assigning a central role to the public or quasi-public actors in the field of consumer protection. Consequently, the same wording seems to confirm the lack of confidence in the private actors, particularly in law firms and lawyers specialized in mass litigation.

At this regard, empirical data reported above shows that associations, rather than individuals or committees, have been the *de facto* plaintiffs in this period. However, consumer associations cannot take the place occupied in the US by plaintiffs' law firms. Clearly, there are many fundamental differences between consumer associations and law firms, as consumer associations have less financial resources to litigate and different economic incentives from those of law firms. The State or the local authorities provide very limited funding to the associations that usually do not have the economic resources, nor the adequate expertise to deal with mass torts. Because they are typically no-profits and do not stand to gain directly from a settlement, their economic interest is not necessarily the maximization of settlements or recoverable damages (see, also, *supra* at paragraph 2, letter e, on settlements).Although their final objective is to promote consumer welfare, they may see consumer welfare as a broader concept than the simple recovery of damages. Consumer associations may aim to send a signal to the entire industry and push for changes in current business practices. They are less likely to be enticed to settle by monetary offer alone. Concurrently, consumer associations also have (maybe only implicitly) the goal of increasing the influence of the association. Thus, they may aim to increase their own visibility. This is a further reason why they are less likely to be enticed to settle by monetary offers alone.

b) Lawyers

As noted, consumer associations and their lawyers have been more active than individual consumers (or better their lawyers) in filing the action according to art. 140-*bis* ICC. There is a cultural reason: Italian lawyers do not think as 'entrepreneurs'. Art. 24 of the Italian Constitution lays down that 'everybody can initiate legal ac-

tion to protect their legitimate rights and interests. Defence is an inviolable right at every stage and level of the proceedings'. The less well-to-do are 'ensured (…) the means to initiate action and defend themselves before any court or jurisdiction (…)'. This provision is thought to entail a constitutional protection of the legal profession, thus differentiating it from the other intellectual professions and granting it a specificity and a role having institutional implications. Hence, the legal profession cannot be regulated – without prejudice to the aspects of private law – in the same way as the other professions.

Accordingly, the legal profession assists clients' rights in the shadow of the public interest. Evidently, this is an old idea of the legal practice but, with some exceptions, it is still exercising some influence on the majority of practitioners. Italian lawyers may be willing to become 'entrepreneurs', but they have not the skills, nor the competencies, and, more important, they lack the mind-set.

c) Courts

The adversarial tradition assigned the control over the process to the parties with a limited control by the Court. However, this position has changed overtime in the American jurisdictions and England, for example, as new rules were enacted regarding case management, rules on pre-trial conferences, and other judicial activism measures.

Class action law in the U.S. has responded to this cultural context by providing–and sometimes mandating–more active judicial management in-group proceedings. Judges have become increasingly involved with parties in chambers, supervising case preparation and management, helping shape the litigation, and encouraging settlement. They have become "mediators, negotiators, and planners–as well as adjudicators.

This contemporary judicial attitude is the result of a social and cultural trend that Cappelletti has characterized in his writing. He noted that contemporary society is often characterized as a 'mass production and consumption civilization': this characterization reflects, no doubt, a typical feature of modern economies in all parts of the world. However, this feature extends far beyond the economic sector because it also concerns social relationships, feelings and conflicts as well.[64] On such basis, the author noted that the new collective and social rights created because of this phenomenon require an active intervention by the state and other public entities and, surely, judicial case management falls into this type of intervention.

That said, the problem with the failure of the *azione di classe* might be better understood by considering that Italian judges have not *really* reconsidered their traditional role in litigation. To tell the truth, judicial activism is usually in a strained

64 M Cappelletti, 'Vindicating the Public Interest Through the Courts: A Comparativist's Contribution'(1975) 25 Buff. L. Rev. 643; 'La protection d'intérêts collectifs et le groupe dans leprocès civil' (1975) 27 R.I.D.C. 571.
Cappelletti also later wrote a treatise, *The Judicial Process in Comparative Perspective* (Oxford: Oxford University Press 1989). See also, R. L. Abel, 'A Comparative Theory of Dispute Institutions in Society' (1974) Law & Soc'Y Rev. 217.

relationship with Civil Law tradition regarding the role of the judiciary. According to a commonplace, judges in the Civil Law system act as civil servants, unlike the Common Law system where judges may act as activists or protagonists. Certainly, Italian judges protect traditional individual rights, sometimes also advancing individual rights against the political power,[65] but they do not appear to be 'at ease' with the diffuse, collective and fragmented rights and interests. It seems that the problem is the 'collective' dimension of the claims and the consequent need of active case management. With the *azione di classe*, new powers and responsibility related to collective judicial redress for consumers have fallen upon the judiciary in Italy.[66]

The main question is whether the advent of the *azione di classe* is forcing judges to move from a typically individualistic conception of justice to a collective one that is proper of judicial collective redress mechanisms. Traditionally, the civil adjudicative process has been marked by a liberal political philosophy, in which the individual is free to sue or not sue, to defend himself or not, and during the course of litigation, to choose which terms and which procedural devices are ideal to argue his case and present the facts and law. As such, Italian judges involved in mass litigation are supporting this purely individualistic conception of collective justice. They considered the *azione di classe* to be a series of individual actions, an aggregate of individual claims, which will be proven by the lead plaintiff.[67] They do not clearly recognize the collective dimension of the individual prejudice and the collective effect of the breach. Consequently, there are reasons to argue they are not seriously reacting to the social and cultural and social pressure for an active judicial management (see at paragraph 4).

4. Promoting a change in the legal culture?

The idea of legal culture is also central in discussing whether the introduction of the *azione di classe* is promoting a change among the main players in the legal field: consumer associations, lawyers and judges. Here we introduce a second research question (linked to the first): does the new action had some effects in changing the existing legal culture in Italy?

The introduction of a new mechanism for judicial collective redress does not appear, in its seven year of operation, to be contributing to change the local legal

65 We think to the increasing judicial activism at the expense of national politics in recognizing rights for same-sex couples. See L Anaya 'Policymaking in the Italian Courts: The Affermazione Civile Project and the Struggle over Recognition of Rights for Same-sex Couples in Italy' (2014) 23.1 Anthropological Journal of European Cultures, 40-58.

66 M. Cappelletti, *The Law-Making Power of the Judge and Its Limits: A Comparative Analysis* (1981) 8 Monash U. L. Rev. 36.

67 See, e.g., Corte di cassazione, Sezioni Unite, 30/09/2015, no. 19543, according to which "the action regulated by the Consumer's code requires the exercise of an individual right that may be referred to each of the right's holder individually". The Italian Supreme Court clarifies the difference of the action (Art. 140-bis) with respect to the action regulated by the Legislative Decree of 20 December 2009, no. 198 aimed at ensuring the proper functioning of public services. See note 7.

culture and to modify the patterns, values and attitudes of the main actors of the legal environment. Legal players (e.g., lawyers and judges) have not shown a clear understanding of the historical occasion they had in reconsidering their role within the Italian society: a confirmation that culture is very slow to change.

a) Consumer associations

Since the inception of the *azione di classe*, consumer associations have been proactively exploring the new device. They seem to be adopting different strategies with respect to the *azione di classe*. Some, like *Codacons*, have been filing a comparatively high number of actions and announcing claims for billions of Euros. Then, the association has taken a step back after some unsuccessful and costly action to concentrate on political and social activities; others, like the Unione Consumatori, have filed fewer and financially less ambitious actions according to art. 140-*bis* ICC, promoting themselves as more realistic in their aims. At present, Altroconsumo is the most active association in filing suits before Italian courts under the new procedure. Thus, there seems to be a trend towards specialization among associations: only few organisations are representing consumers in judicial collective redress with the aim of recovering economic damages. In any case, few associations have shown to be ready to embrace the new culture of litigation and have represented the main source of development of the *azione di classe*.

b) Lawyers

US class actions work by creating incentives for lawyers to bring private enforcement actions. Though individuals' damages are too small to make a lawsuit worthwhile, a class action can aggregate many claims so that there is a significant total amount at stake-enough to make litigation economically feasible. The potential class recovery is large enough to cover a reasonable attorney's fee. For this reason, it becomes profitable for lawyers to specialize in class action litigation, and a plaintiffs' bar of "entrepreneurial lawyers" emerges. The lawyers' stake in the action, their fee, is large enough for them to search out potential class claims and sue on behalf of the class. Thus, the existence of the class action device can create a market for private enforcement of the law. Increased enforcement, in turn, creates improved incentives for companies to comply with the law and take the appropriate degree of care.

On the contrary, incentives are not sufficient to force Italian lawyers to change their attitudes in a similar direction and to specialise in mass litigation. For example, between 1988 and 2016, Italian courts refused to award non-economic damages in product liability cases. This means that, for a long time, the judges have provided a narrow interpretation of the concept of damage. The traditional position only changed in 2004 when the Italian Supreme Court changed its rule for the first time concerning the possibility of awarding non-economic damages in cases of strict liability, such as product liability cases.[68]

68 Corte di cassazione, 27 October 2004, No. 20814/2004, (2005) Resp. civ., 172.

Also relevant is the fact that the Italian Supreme Court has historically found that punitive damage awards in civil matters are contrary to the Italian system of civil liability that seeks compensation rather than punishment. In its leading case of 2007, the Supreme Court confirmed the Italian lower court's position that punitive damage awards are against public policy.[69] In the judgment n. 1781/2012 of 8 February 2012, the Italian Supreme Court further underscored this position by finding that foreign judgments which award punitive damages are contrary to the public policy and unenforceable in Italy.[70] Both judgments involved injured plaintiffs seeking compensation for their damages. In just assessing compensation, the Italian courts reviewed the damages incurred and recognized contributions from other tortfeasors. The Courts determined that the awards of $1 million and $8 million were excessive and meant to punish the defendants rather than fairly compensate the injured plaintiffs.[71]

The Italian Supreme Court has recently examined as Joint Chambers (*Sezioni Unite*) whether the idea that a damage award may only be of compensatory nature is still a fundamental principle of Italian law (*ordine pubblico*) or, at least when recognition of a foreign decision is sought, damages could also play a punitive/deterrent function.[72] Such decision has taken into consideration the results of comparative law: the German Federal Constitutional Court (on 24th January 2007) and the Spanish Supreme Court (on 13th November 2001) considered that foreign sentences containing punitive damages were not automatically contrary to the public order. Similarly, the French Supreme Court (on 7th November 2012) considered punitive damages contrary to the public order only when the judgment is effectively abnormal.

Furthermore, Italy applies the "English rule" according to which a prevailing party recovers his attorney's fees from the loser. Thus, the plaintiff may finance the action by relying on the loser paying rules (i.e. the losers pays). Nevertheless, Italian courts quite often shift away from a rigid application of the rule and do not require the losing defendant to pay the actual amount of a plaintiff's litigation costs.

In addition, it was unlawful for any law firm to work on contingency or conditional fees before January 2007. Conditional fees are a legal novelty: what Italian attorneys can do is to reach an agreement with their clients to receive not a percentage of the damages awarded to their client, but only a success fee on top of their regular

69 Corte di cassazione, 19 January 2007, No. 1183/2007, *Parrott v. Società Fimez*, (2007) 4 Resp. civ., 373.

70 Corte di cassazione, 8 February 2012, No. 1781/2012, *Società Ruffinatti v. Oyola-Rosado*, (2013) I Giur. It., 126.

71 It is unclear whether the Italian courts would have reached similar results if the underlying U.S. decisions had distinguished between compensatory and punitive damages.

72 Corte di cassazione, sez. I, ordinance of 16 May 2016, no. 9978 referring this matter from the First Chamber to the Joint Chambers. The Joint Chambers of the Cassazione have issued the judgment no. 16601 of 5 July 2017 by recognizing, for the first time, a foreign judgment awarding punitive damages..

fees. Anyway, also the latest developments are probably not sufficient to make the azione di classe a profitable business for Italian law firms.[73]

c) Courts

Third and last, it should be noted that the courts are reconsidering their organisation with the aim of managing the *azione di classe*. Notably, they are trying to shape the clerk's offices to manage the actions ruled by art. 140-*bis* in a more effective way: for example, they have started using computerized court databases to manage the large amount of data of group members that is proper of the *azione di classe*. They have also felt the need to hire additional staff to manage the large amount of paperwork generated by this device. Unfortunately, these initiatives are not supported by adequate funding.

To conclude this paragraph, it is now clear that the critical issue for the success of art. 140-*bis* ICC is to identify and promote a new way of thinking – a cultural shift – to move away from old patterns and old habits when approaching 'mass justice'. The new action is doomed to failure if we do not consider the aspects we have briefly introduced in paragraph 3 and 4 about the impact of legal culture. Surely, culture is durable and culture change is very difficult and slow to realize, also in the age of globalisation. In this respect, we argue that a culture change in this case involves, at least, two general issues: accepting some elements of the adversarial paradigm in a civil law tradition (as in the case of Italy), and altering attitudes toward procedure. In practice, it seems that the Italian legal system (and others in the EU) are (partially) going in the opposite direction by focusing on non-adversarial dispute resolution processes, such as mediation and arbitration. In the second perspective, the entire procedural environment needs to be re-examined, with specific attention to aspects such as lawyers' fees and legal aid.

5. Conclusions

The description of the few actions under the art. 140-*bis* ICC that have been tested in Italy leaves room for little doubt: the new device has not produced the intended results. While some may praise the role of the courts as active filters, preventing unmeritorious or ungrounded claims to go forward, it is quite evident that art. 140-*bis* ICC had no impact. So far, only two actions reached a successful decision on the merits, and in both cases, the class included few participants. The courts of first instance (*Tribunali*) appear to be quite reluctant at embracing the new mechanism, while the courts of appeal (of Turin, Milan and Venice, specifically) have been much keener in interpreting the rules according to the *ratio legis*. The opt-in mechanism is fatal to the creation of large class and determines the irrelevance of the actions brought. The azione di classe appears to be largely in the hands of the procedural plaintiff, the class champion, while the participants have no or little rights. There is not judicial super-

73 Third party funding is possible, since legal rules do not openly forbidden it. In spite of that, the lack of statutory regulations and, even more, of any case law on the matter, puts third party funding of litigation in a sort of 'twilight zone' nobody seems willing to explore.

vision over settlements. The law does not regulate the central question of funding. As seen, failure of the new action has pushed many consumer's associations, which initially played with the new mechanism, to try to exploit the options opened by bringing a civil action into a criminal procedure (see para. 1 *supra*).

For the sake of completeness, a draft bill is currently under examination in the Italian Parliament.[74] If approved in its current form, the new law will remove the *azione di classe* from the ICC and merge it within the code of civil procedure. Among the welcoming changes: a provision according to which, if the procedural plaintiff settles the claim, participants may continue the *azione di classe*; more data reporting; uniform rules for the participation, which can take place also after the (positive) decision on the merits has been issued. Interestingly, the amendment provides for a mandatory compensation for the group plaintiff and, separately, to his lawyer according to a percentage of the whole compensation provided by the law. Moreover, the draft bill also contains new rules on settlement, increasing transparency and judicial supervision, and provisions for collective enforcement of the decision.

In any case, the main question here remains whether – despite changes in the normative sphere – the Italian legal culture will be ready 'to make a significant change' in overcoming the factors of cultural resistance to collective litigation.[75] Our brief evaluation found that the new legal provision (art. 140-bis ICC) had limited impact on attitudes, especially with lawyers and judges. In such a perspective, the draft bill may not be sufficient to overcome the current limitations, which seems to be mainly resting on a deeply rooted Italian legal culture.

The Italian experience is not very far from those of some other EU Member States, trying to strike a difficult balance: on one hand, they aim to seek (at least some of) the advantages of collective redress, and, on the other hand, they are not really willing to promote a change in the domestic legal culture. As a result, many of the collective redress mechanisms seen in European States do not truly empower the 'common man' against powerful corporations, but only provide a certain rationalization of litigation and cost efficiency improvement in a few well-selected legal fields. There is no need to stress that comparative legal scholarship draws the attention to the 'local tuning' affecting the legal transplantation by underlying the influence, in every country, of cultural, political and economic factors.[76] Indeed, it seems that the EU and its Member States are already looking forward to the less problematic mechanisms of alternative dispute

74 The draft bill is available at http://www.senato.it/leg/17/BGT/Schede/FascicoloSchedeDDL/ebook/45728.pdf (last visited 24 Jan 2017).

75 A. Watson, *Legal Transplants* (USA: University of Georgia Press, 1993).

76 E. Örücü, 'Mixed and Mixing Systems: A. Conceptual Search', in E. Örücü, E. Attwooll, S. Coyle (eds), *Legal Systems: Mixed and Mixing* (The Netherlands: Kluwer Law International, 1996), 335-351.
M. Graziadei, 'Comparative Law as the Study of Transplants and Receptions', in M. Reimann, R. Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press 2006), 441.

resolution for consumer individual and collective disputes.[77] However, the result is not, so far, particularly encouraging, as the solutions developed in most European countries are, with some exceptions, extremely fragmented, very much too conservative and too limited in scope to offer substantial improvements for citizen's rights. In the words of an author: 'civil procedure is always 'portable': we just need to remember that it never travels alone'.[78] To be effective, the transplant of a mechanism for judicial collective redress, as the Italian case confirms, should take place by taking into consideration the local legal environment and, more difficulty, by accepting some fundamental changes in our legal culture.

77 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes (Directive on consumer ADR), OJ L 165, 18.6.2013, 63-79.

78 E. Silvestri, 'The Difficult Art of Legal Transplants: The Case of Class Actions' (2010) 35 Revista de Processo, 99.

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