Italian Class Actions Eight Months In: The Driving Forces

Massimiliano De Santis
Renzo Comolli
Francesco Lo Passo

Available at: https://works.bepress.com/massi_de_santis/5/
Italian Class Actions Eight Months In:
The Driving Forces

On 1 January 2010, it became possible to file consumer class actions in Italy. An explosion of media coverage, loud proclamations, and filings purportedly claiming billions of Euros in damages saluted the new law. Since then, the pace of filings has slowed down somewhat, though alleged damages are still in the billions. Both Italian and foreign companies have been called to the mat.

In this paper, we provide an overview of the first eight months of the Italian class action experience, from 1 January 2010 to 31 August 2010, through our economists’ eyes. We focus on the economic incentives created by the law and by the role of consumer associations as de facto plaintiffs. In particular, because consumer associations are nonprofit and do not stand to gain directly from a settlement or damage award, they may not necessarily aim to maximize settlements or recoverable damages, as demonstrated, for example, by their choices in the recent Intesa case. We then analyze the goals that consumer associations seem to pursue and derive the implications that these have for damage claims and future settlements. For these and other reasons discussed below, expectations based solely on the US experience would likely often be off the mark. In addition, we review some of the damage claims that have been made in recent actions and find that, while large, they do not appear to be consistent with the opt-in model of the Italian class action. It is also unclear whether plaintiffs have yet refined their estimates to make them consistent with economic principles.

Partly because the law is so recent, there are uncertainties about its interpretation and about the players that will establish their dominance. Future developments could therefore differ substantially from current expectations.

The paper proceeds as follows. We begin with a brief overview of the law—readers already familiar with the law can skip this section. We then provide details on the class actions filed in these first eight months. Lastly, we come to our main focus: the economic incentives, the damage claims, and future settlements.

By Dr. Renzo Comolli, Dr. Massimiliano De Santis, and Dr. Francesco Lo Passo*
A Very Brief Overview of the Italian Class Action Law

How the law came to pass
Before the introduction of the new class action law, forms of collective action already existed in Italy with respect to consumer rights and labor law, but were limited to injunctive relief (they did not contemplate damages). Debates about the enactment of a means of collective redress in the Italian legal system had been going on for years. The Cirio, Parmalat, and other financial scandals in which many small investors lost substantial amounts of money catalyzed such debates. At the end of 2007, a new article was added to the Consumer Code—article 140-bis—introducing class actions in Italy. This article was scheduled to come into force on 30 June 2008, but its application was postponed several times. In July 2009, the original version of article 140-bis was replaced in its entirety with the current one.

Who may file
Under the new law governing Italian class actions, each consumer who is a member of the proposed class has the right to file. Only individuals are considered consumers under the law. Consumers of both goods and services are encompassed. The plaintiff may give a mandate to a consumer association or committee to sue on his behalf. The law does not require the plaintiff to be a member of the consumer association to which he gives a mandate, and does not set forth provisions about the remuneration of the consumer associations specific to class actions. Because of their role, consumer associations and committees are sometimes referred to as “promoters.” Outside of the legal proceeding, they are often loosely described as if they were a plaintiff in the action—a reflection of the fact that they are the de facto engine behind the class action—while the individual consumer, who is an actual plaintiff, is often ignored.

Who may be sued
Only companies can be named as defendants under the law. More precisely, the law uses the word “impresa” to describe defendants. The word “impresa” seems to include what is referred to as a “company” in English, but there is dispute over what that word exactly encompasses even in Italian. Both Italian and foreign companies may be sued in Italy.

Timeframe of applicability
On 1 January 2010 it became possible to file consumer class action lawsuits, but those lawsuits can only cover conduct by defendants subsequent to 15 August 2009. This restriction is now being challenged on constitutional grounds.

Types of claims that can be brought
The types of claims that can be brought are limited to those that involve:

- Contractual rights
- Product liability
- Anti-competitive practices
- Unfair commercial practices

Note that a product liability claim may be brought against the producer even when there is no direct contractual relationship between the consumer and the producer.
While there seems to be little dispute that financial contracts fall under the purview of the class action law (provided that the other conditions are satisfied, e.g., that the purchaser is a consumer), commentators are inclined to exclude class actions that are legally similar to what in the US is covered under Section 10 of the Securities Exchange Act of 1934 and SEC Rule 10b-5. Yet certain consumer associations appear to claim 10b-5-like damages.

**The proceeding**

Broadly speaking, a class action involves two main stages: first, an admissibility stage, and second, a liability and damages stage. Between the first and the second stage, publicity and opt-in take place.

The courts have broad leeway to structure the proceeding, and can consider expert reports both at the admissibility phase and the liability and damages phase.

**Admissibility**

In Italy, the admissibility stage resembles the class certification stage in the US, but the court is additionally charged with making a preliminary inquiry regarding the merits of the case. A class action is deemed inadmissible in one or more of the following cases:

- The claim is manifestly unfounded;
- There is conflict of interest;
- The rights infringed upon are not homogenous; and/or
- The lead plaintiff is unable to adequately represent the interests of the class.

In addition to satisfying the specific requirements for class actions, a proposed class action also needs to satisfy the general requirements for any consumer action:

- The lead plaintiff must be a consumer;
- The lead plaintiff must have “an interest” in the suit.

If a proceeding on the same issue is pending in front of a government authority or an administrative judge, the court may suspend the admissibility phase until the administrative proceeding is completed. This provision seems relevant to class actions claiming anti-competitive conduct.

The admissibility phase ends with a court decision. If the decision finds the class admissible, it determines the requirements that each member must fulfill to be part of the class.

**Publicity and opt-ins**

The Italian class action is based on an opt-in model. Members must affirmatively opt in to the class if they want the decision on damages (or the settlement) to apply to them.

If a court decision finds the class admissible, the decision also orders public dissemination of the admissibility finding and establishes a deadline for consumers to opt in. This deadline for opting in can be no later than 120 days after the deadline for public dissemination. If members do not opt in, they are bound by the decision on liability and damages. If they do not, they retain the option to undertake their own individual lawsuit.
Liability and damages

Subsequently, the proceeding moves on to the phase in which liability and, potentially, damages are determined. If the court finds the defendant liable, the court’s decision specifies either a damage amount or a uniformly applicable criterion to be applied to all claims to calculate the damage for each individual claim.26

There is no provision for punitive damages in the Italian class action law.27

No more than one class action for each matter

No more than one class action for each matter will be allowed to proceed. If more than one is initiated, they will be consolidated into one.28 If a class action is considered admissible, any subsequent class action on the same matter will be dismissed (though each plaintiff can still propose individual actions).29 Only if the class action is found inadmissible can a new one be filed for the same matter.

Lengthy adversarial proceedings with no pre-trial discovery

There are general features of the Italian civil proceeding that apply to class actions too. In the Italian civil procedure there are no pre-trial proceedings, no pre-trial discovery, and no trial by jury.30 Civil proceedings are adversarial: the judge cannot go beyond the parties’ pleadings or the evidence that the parties have presented.31 Moreover, in Italy, commercial judicial proceedings can take three years or more just at the lower court stage.32 If that were the case for class actions, too, the time delays could be a central shaping force of the class actions.

Six Class Actions Filed and at Least 15 More Announced

From 1 January through 31 August 2010, at least six consumer class actions were filed in Italy.33 These cases spanned issues ranging from banking services to flu vaccines. All were filed through a consumer association: Codacons, Unione Nazionale Consumatori, or Adoc. The table below lists the consumer association promoting the action, the defendants, and the subject matter of these six suits.

<table>
<thead>
<tr>
<th>Consumer Association Promoting the Action</th>
<th>Defendant</th>
<th>Matter</th>
</tr>
</thead>
<tbody>
<tr>
<td>Codacons</td>
<td>Intesa San Paolo44</td>
<td>Bank fees</td>
</tr>
<tr>
<td>Codacons</td>
<td>Unicredit35</td>
<td>Bank fees</td>
</tr>
<tr>
<td>Codacons</td>
<td>Voden Medical Instruments36</td>
<td>Flu vaccine</td>
</tr>
<tr>
<td>Codacons</td>
<td>British American Tobacco Italia37</td>
<td>Tobacco</td>
</tr>
<tr>
<td>Codacons</td>
<td>Wecantour38</td>
<td>Travel</td>
</tr>
<tr>
<td>Codacons</td>
<td>Banca Popolare di Novara39</td>
<td>Bank fees</td>
</tr>
</tbody>
</table>

At the time of this writing, only one case has been decided at the admissibility stage—the Intesa San Paolo case; no case has reached the liability and damages stage.
At least 15 more class actions were “announced,” though it remains to be seen how many of these will ever be filed. These “announced” actions span issues ranging from Moody’s reports on sovereign debt to fleas on ferryboats. Would-be promoters of these “announced” class actions include the consumer associations Aduc, Adusbef, Altroconsumo, and Federconsumatori.

Both Italian and foreign companies have been named as defendants, although so far in the case of foreign companies, only their Italian subsidiaries have been named as a defendant. Among the “announced” class actions, a few could be filed against the foreign company directly.

**Admissibility denied in the first and only case that has been decided so far**

The first Italian class-action case involved Codacons and Banca Intesa Sao Paolo (“Intesa”). This is the only case that has reached a decision in the admissibility phase at the time of this writing.

Codacons filed this case on the very first day on which the law came into effect. The defendant, Intesa, is the second-largest commercial bank in Italy. Carlo Rienzi, the president of Codacons and an Intesa checking account holder, was the lead plaintiff. Allegations included that certain fees charged by the bank on lines of credit linked to checking accounts were unlawful. Plaintiff Codacons claimed damages of €1,250 per account holder, with potentially millions of account holders affected; it declared that total damages were €2.8 billion. Codacons also asked that Intesa change its business practices and stop charging line-of-credit fees to all consumers.

The Court of Torino initially mandated a mediation session that did not result in a settlement. Following the admissibility hearing, the court found the proposed class to be inadmissible. The court ruled that, because Mr. Rienzi was not personally charged the allegedly unlawful line-of-credit fees, he had not suffered damage and therefore could not initiate a class action, or any action, regarding this matter. The plaintiff argued that he could be charged the challenged fees at any time in the future, but the court found that argument unpersuasive, based on the requirement that damage has to be concrete and current. The court did not rule on whether the challenged line-of-credit fees were unlawful, nor was it expected to do so at the admissibility phase.

Codacons announced that it would evaluate whether to appeal the decision or to re-file the action with a lead plaintiff who was charged the line-of-credit fees. At the time of this writing, the deadline for appealing the inadmissibility decision has elapsed; absent any news, we surmise Codacons has opted not to appeal. However, Codacons has the opportunity to re-file the action in the future with a new lead plaintiff.

On a related note, when Codacons filed the Intesa class action, it also filed a lookalike class action against Unicredit (the largest Italian bank) that is now pending in the court of Rome and is awaiting its own admissibility judgment. Codacons may well be waiting to see the outcome of the Unicredit admissibility phase before deciding on whether to file again on Intesa.

**Are six filings many or few?**

The Italian class action law was saluted with an explosion of media coverage. Even before the law took effect, consumer associations were already decrying it as insufficiently strong. The absence of punitive damages was particularly bemoaned. As the months went by, commentators looked at the number of filings, which they interpreted as small, and started to wonder whether the glass was half empty.
Our colleagues at NERA have been collecting data on class actions in the US for more than 15 years, and on such actions in Canada, Japan, and Australia more recently. Of course, the number of filings in Italy looks small compared to the 101 securities class actions filed in the US in the first six months of 2010, but it is actually high compared to the number of securities class actions filed in Australia and Canada, countries where such cases have been introduced more recently than in the US. Australia saw its first filing in 1993, but only in 2009 did it see six filings in one calendar year. Canada, through its various provincial legislations and reforms, has been seeing between two and five filings between 1997 and 2007, and only in 2008 did it reach 10 filings in one year.

### Consumer Associations Have Been the Driving Force Behind Filings

In the first eight months since the inception of consumer class actions in Italy, consumer associations have been proactively seeking opportunities to file class actions under the new law. Each of the six class actions to date was filed through Codacons, Unione Nazionale Consumatori, or Adoc, three of the major consumer associations in Italy (see sidebar). As stated above, the consumer and plaintiff giving the mandate to Codacons in the Intesa case was the president of Codacons itself, which is evidence that consumer associations, rather than individuals, have been the de facto plaintiffs in this period.

**Italian consumer associations are not your old US plaintiff bar**

Consumer associations in Italy are taking the place occupied in the US by plaintiffs’ law firms (and institutional lead plaintiffs) as the driving force behind class actions.

**Like US plaintiff law firms, Italian consumer associations will likely strive to shape the law**

Like US plaintiff law firms, consumer associations may seize the opportunity to articulate legal arguments that will win decisions that may further their interests in future unrelated litigation. Italy is a civil law country; in general, previous decisions have at most persuasive power, with the exception of rulings issued by the Constitutional Court.

With this in mind, in this initial phase where there seems to be uncertainty in the interpretation of various aspects of the law, consumer associations will be less prone than individual plaintiffs to settle those class actions that would allow them to clarify a point of law, especially if the point could be clarified in their favor. For instance, Adoc, in its complaint against Banca Popolare di Novara, is making multiple constitutional challenges, though the only known one is the challenge to the time bar for acts made by defendants on or before 15 August 2009. We believe it is unlikely that Adoc will settle this litigation at least until the constitutional challenge is resolved.

**Unlike US plaintiff law firms, Italian consumer associations will likely not strive to maximize settlements and damages**

In general, there may be important differences between consumer associations and US plaintiff law firms, as consumer associations have economic incentives that are different from those of plaintiff law firms. Because consumer associations are typically nonprofits and do not stand to gain directly from a settlement, their economic interest is not necessarily the maximization of settlements or recoverable damages. Although the final objective of consumer associations is to promote consumer welfare, they may see consumer welfare as broader than the simple recovery of damages.
Consumer associations may aim to send a signal to the overall industry and push for changes in current business practices; they are thus less likely to be enticed to settle by monetary offers alone. An example is the Intesa case: Codacons sought monetary damages but also sought to change the way in which the bank operated in charging fees and interest on lines of credit.\(^{65}\) During mediation, Codacons was willing to forsake its claim of €1,250 per account holder in exchange for a settlement of €1 per account holder and a change in the bank’s contract renouncing the challenged fees for all account holders.\(^{66}\)

Concurrently, consumer associations also have (maybe only implicitly) the goal of increasing the clout of the association.\(^{67}\) Thus, consumer associations 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. They may aim to increase their own visibility because part of consumer associations’ power comes from their reputation and the widening of their association base; thus, publicity is likely to be more important to them than to US plaintiff law firms. Consequently, the reputational damage suffered by defendants could be larger in the current Italian situation than it would be with US-like plaintiff law firms.

**Consumer associations differ in their strategies**

Consumer associations seem to be adopting different strategies with respect to class action. Some, like Codacons, have been filing a comparatively high number of class actions and announcing claims for billions of Euros; others, like Unione Nazionale Consumatori, have filed fewer and financially less ambitious class actions, promoting themselves as more realistic in their aims.

Unione Nazionale Consumatori’s Secretary General stated that the class action law needs to be used with moderation, intelligence, and practicality. He vowed to follow these principles by choosing the suits that could be brought to a conclusion in a short time and maybe choosing those defendants that would be more prone to settle.\(^{68}\) He has not spared criticism towards those consumer associations following the strategy of filing many claims and issuing loud proclamations. Indeed, he compared some of the announcements of claims for billions of Euros to a farce.\(^{69}\)

**Consumer associations and Italian law firms: a match made in heaven?**

As stated previously, consumer associations, not plaintiff law firms, are the engine behind class actions in Italy. US plaintiff law firms differ from Italian plaintiff law firms, and the distinction between plaintiff and defendant law firms can sometimes be blurry in Italy. In Italy, law firms are not permitted to solicit business from potential plaintiffs.\(^{70}\) Moreover, contingency fees are a legal novelty and are at risk of being prohibited again in the near future. It was unlawful for any law firm to work on contingency before January 2007.\(^{71}\) Even today, contingency fee arrangements are still encountering resistance from some law firms that are lobbying to make them unlawful again.\(^{72}\) This uncertainty is likely to be a deterrent for the creation of US-like plaintiff law firms that could see their business model outlawed. Moreover, these contingency fees would be applied to settlements or awards that are likely to be much smaller than those that would be obtained in the US for a similar claim because of the opt-in model that is discussed below.
On the other hand, nothing prevents consumer associations and Italian plaintiff’s law firms from collaborating. Consumer associations are not forbidden from drumming up as many opt-ins as possible and they have access to a large membership base of their own, and perhaps in certain cases the membership bases of trade unions, that count millions of members. For example, in connection with certain financial scandals in which individuals have lost money, Codacons has been funneling individual plaintiffs to a law firm working on contingency fees.\textsuperscript{73}

### Alleged Damages Up To €10.5 Billion

#### Billions of Euros in claims

In suits that have been filed in the past eight months, some of the alleged damages amounts are in the high range of those observed in the US. In the Intesa class action, the damages sought were for €1,250 per checking account holder,\textsuperscript{74} totaling €2.8 billion according to Codacons.\textsuperscript{75} According to news sources, total claimed damages for the Intesa and Unicredit lookalike class actions together total €6.25 billion.\textsuperscript{76}

In the British American Tobacco Italia case, Codacons sued the company for using alleged dependence-inducing additives. Damages sought are €2,000 for the induced addiction and €1,000 for cigarette costs, per smoker, amounting to an aggregate of €10.5 billion.\textsuperscript{77} The total claim was estimated by Codacons assuming a 100% opt-in rate and 3.5 million smokers of British American Tobacco brands.

#### Damage claims assume a 100% opt-in rate—resulting in a likely overstatement by orders of magnitude

The claims for billions of Euros we reported above were calculated by Codacons through a simple multiplication of the alleged individual damages claims and the number of individuals allegedly damaged. This assumed a 100% opt-in rate. For example, Codacons has alleged €10.5 billion in damages in the British American Tobacco Italia case, a number which it obtained by multiplying the number of Italian smokers of cigarettes (3.5 million) produced by the defendant by the claimed €3,000 per smoker.\textsuperscript{78} (The €10.5 billion figure also assumes that liability can be proven, and that the ultimate damages liquidated by the court equal those alleged by Codacons.)

Total damages calculated this way are unlikely to provide a good estimate of the total damages a defendant would end up paying if liability were proven, one reason being that consumer inertia will likely lead to low opt-in rates. In fact, opt-in rates can be expected to be much lower than 100% (see the sidebar on this page and Appendix).

Thus, the opt-in model implies that both aggregate damages and settlements are likely to be lower, perhaps substantially so, than they would have been in an opt-out regime. In turn, the smaller expected total class damages diminish the risk for defendants and therefore will likely translate into smaller settlements (assuming that the case of interest is one of the cases that consumer associations have an interest in settling).
No economic analysis has been publicly provided as the basis for reported
damage claims
All of the class actions for which we could find information claim identical damages for each
potential class member. As far as we know, no economic analysis has been publicly provided
as the basis for these fixed amounts. Given the allegations in the respective class actions that
we read in the news, claiming the same totals per claimant seems inconsistent with economic
principles. The class actions against Intesa and Unicredit refer to fees or interest that are
charged on lines of credit. In the absence of more detailed information, economic theory
would suggest that the damage suffered by each member of the class, if any, would depend
on the utilization of the line of credit. Many other facts could potentially be relevant, to be
determined on a case-by-case basis.

In principle, a claimant should be able to recover only damages tied directly to unlawful
actions of the defendants (e.g., imposing an unlawful fee). In practice, in certain situations,
it can be unexpectedly tricky to separate out the consequences of the defendant’s actions
from other intervening factors, and such a separation may require the analysis of an expert
economist. In examples similar to the line-of-credit, the following questions could potentially
be relevant depending on the specific allegations and circumstances: what is the appropriate
but-for world against which to quantify damages? Had the defendant never charged the
allegedly unlawful fees, would the lawful interest rate charged on the line of credit be
different? Were the class members made aware of the fee and did they have other, less
costly, options? Did they attempt to mitigate damages?

What’s Next?
Because of the relatively short amount of time elapsed since the law came into effect and
the small number of lawsuits filed, the situation is still very fluid. In particular, there are still
numerous open legal questions and uncertainties regarding economic incentives. In the short
term, we expect consumer associations to keep filing cases and to test legal strategies. We
expect that the timeliness of decisions will likely be a factor affecting how many class actions
will be filed. In the longer term, there is even more potential for change because of the
potential for legislative reform and the potential that other players will find a way to make class
actions profitable for them.
Appendix: Class actions against the public administration

During the eight months covered in this paper, a different law providing for class actions against the public administration also came into force.\(^{82}\) These class actions cannot claim damages; they can only claim to rectify the inefficiency/negligence of the public administration.\(^{83}\) Partly because class actions against the public administration are even more apt to be used for political purposes than consumer class actions, they have gathered attention. Both political parties and consumer associations have been announcing or filing these class actions.\(^{84}\) We expect to see an increase in the number of class actions against the public administration before elections.

An important development in class actions against the public administration that is also informative with respect to consumer class actions is that Codacons has managed to get more than 10,000 opt-ins (one month before the deadline) in the case against Inpdap on public pensions.\(^{85}\) This development is even more significant because it appears that opt-ins in this class action stand to gain nothing directly.\(^{86}\) On the other hand, Codacons had originally touted 2,000,000 eligible people based on a 1994 Inpdap estimate.\(^{87}\)
Whenever discussing actual class actions, since no decision on liability has been issued yet, all allegations and damages are to be understood as qualified by the word “alleged” even when, for ease of exposition, we omit it.

1 See, for example, “Dal primo gennaio entra in vigore la class action,” Il Sole 24 Ore, 31 December 2009.

2 We compiled the information in this paper based on a review of news and consumer associations’ websites. We understand that complaints and memoranda are not public documents; we did obtain a redacted version of the decision by the court of Torino in the Intesa class action. We also reviewed article 140-bis of the Consumer Code, as well as books, academic articles, law firms’ working papers, and other materials on the law. A limitation of the data compilation contained in this paper is that “class action” is now a fancy word that occurs often in the press and it is not always used to refer to litigation of the sort we are discussing. All websites listed in this paper were accessed on 8 September 2010.


4 See, for example, Salvatore L. Benvenuto et al., Guida alla Class Action, Il Sole 24 Ore, 2009, chapter 1.

5 Specifically, with the Parmalat case it became apparent that while American investors had a collective way to recover alleged damages, Italian investors did not (except, by trying to participate in the American class action). See, for example, http://investire.aduc.it/ articolo/parmalat+strada+della+class+action+negli+stati_6756.php and http://www.adoc.org/index/it/comunicat.show/sku/42455/PARMALAT%3A+class+action+n+e.html. See also footnote 4.

6 See footnote 4.

7 See footnote 4.

8 The old 140-bis was originally introduced by law 244/2007, commonly known as Finanzaia 2008, while the new 140-bis was introduced by law 99/2009. Publications discussing the old 140-bis are still available, of course, and they could generate some confusion in readers less experienced with the Italian system.

9 Article 140-bis of the Consumer Code. The definition of consumer is contained in Article 3 of the Consumer Code.

10 Thus, firms, institutional investors, etc. cannot be plaintiffs or class members.

11 Article 140-bis of the Consumer Code, Paragraph 1.

12 We take no position on that; this is just one remarkable example of our reliance on our disclaimer throughout this paper.

13 Students of the law debate which Italian court has jurisdiction when a defendant is a foreign company. See, for example, Giuseppe Finocchiaro “La sede dell’impresa decide la competenza per territorio” in Vittorio Nuti and Agostino Palomba (Eds.), La nuova Class Action, Il Sole 24 Ore, 2010, p.50 and Sergio Menchini and Alessandro Motto “Art. 140 bis.” forthcoming in Le nuove leggi civili commentate, section 7, p. 25.


16 Article 140-bis of the Consumer Code, Paragraph 2.

17 For a deeper treatment of the issue, see for example, Cesare Cavallini, “Azione collettiva risarcitoria e controversie finanziarie,” Rivista della società, forthcoming. See also Maria Stella Anastasi et. al, La Class action contro i privati e contro la P.A., Casa Editrice La Tribuna, Chapter I.

18 For example, Salvatore L. Benvenuto et al., Guida alla Class Action, Il Sole 24 Ore, 2009, p.18-20 of pp.223 is surprised that, according to his reading, securities class actions are not under the purview of the law. On the other hand, “La nuova disciplina dell’azione di classe” Assonime, Circolare N. 38, p. 10, 2009 asserts it is controversial whether the relationship between companies issuing securities and investors who buy them is covered by the class action law, although it also adds that it does not appear to be correct to characterize that relationship as a consumption relationship.

19 Adusbef has “announced” a class action against Moody’s. Adusbef alleges that Moody’s manipulated the Italian bond market and claims as damage the drop in the value of Italian sovereign bonds that allegedly resulted from it. See, for example, http://www. helpconsumatori.it/news.php?id=27768.

20 See, for example, Sergio Menchini and Alessandro Motto “Art. 140 bis.” forthcoming in Le nuove leggi civili commentate, section 14, pp. 70-71.


22 See, Ordinanza No 29, Court of Turin, May 27, 2010 in the Intesa class action.

23 As said, the lead plaintiff can give mandate to a consumer association to sue on his behalf, but the lead plaintiff remains the individual consumer giving the mandate.

24 For the interpretation of the phrase “an interest,” we again lean on our disclaimer. For the purpose of this paper, one can think that for the consumer to have “an interest” he must have incurred a loss caused by the defendant’s conduct as alleged in the action.


27 See, for example, Salvatore Benvenuto e Fabio Guastadisegni “Il Procedimento” in Salvatore L. Benvenuto et al., Guida alla Class Action, Il Sole 24 Ore, 2009, p.87.


29 Art. 140-bis of the Consumer Code, Paragraph 14. Technically, there is time up to the deadline for opting in to file a new class action and have it consolidated with the one found to be admissible, but it is unclear why anybody would want to do that rather than opting in.


33 See footnote 2 on how the data were compiled.
47 Actions," appeared to overstate the role of punitive damages in US class actions.


49 The comparison here between the number of filings in Italy and the number of filings in the US, Australia, and Canada is not to be taken literally because the data collected by our colleagues on those countries refer only to securities class actions. Thus, the comparison is not "apples to apples."


54 See footnote 43.


58 Consumer associations seem to collaborate on some occasions, both through umbrella "organizations" and through joint statements, although the information about these collaborative efforts is very limited and it is unclear whether some of these umbrella "organizations" have an actual structure or are just overarching labels. See, for example, http://www.consumersforum.it/ and http://it.wikipedia.org/wiki/IntesaConsumatori. On other occasions, consumer organizations have not spared each other scathing criticisms. See, for example, footnote 70.


60 Adoc was spun-off from UIL, Federconsumatori was created with the contribution of CGIL, and Adiconsum was created by CISL's initiative. (See, for example, TuttoConsumatori 2010-2011.) CGIL, CISL, and UIL are the three major trade unions in Italy. They were historically born with well-defined political orientations. Nowadays, CGIL counts more than 5.7 million members, CISL has more than 4.5 million, and UIL more than 2.1 million. (Membership data available at http://www.nera.com/extImage/PUB_Recent_Trends_Japan_0710.pdf.)

61 In Italy there are three levels of recourse, and a separate Constitutional Court. The higher the level of the court issuing the decision, the more persuasive power it has, with decisions issued by the Corte di Cassazione having the most binding power.
It is unclear whether any basis would be expected at this stage, before the damage phase of the proceeding.

See Ordinanza No 29, Court of Torino, May 27, 2010 in the *Intesa* class action.

D.Lgs. 20 December 2009 n. 198 entered into force on 15 January 2010. See, for example, “Pronti, via. Contro la p.a. ecco le prime class action,” *Italia Oggi*, 16 January 2010. The concept of public administration is part of the general cultural background of Italians, but specifically with respect to the law at hand, public administration is defined by article 1 of D.Lgs. 20 December 2009 n. 198. For example, it includes entities that are part of the national health system, schools and universities, regions, provinces and townships, housing projects, and regulated public services. See, for example Aldo Monea “Contro la pa inadempiente un ricorso a garanzia degli standard” in Vittorio Nuti and Agostino Palomba (Eds.), *La nuova Class Action*, Il Sole 24 Ore, 2010, p. 80.

See, for example, Fabio Guastadisegni “La class action pubblica” in Salvatore L. Benvenuto et al., *Guida alla Class Action*, Il Sole 24 Ore, 2009, p. 117-127.

For example, the party Italia dei Valori has announced a class action against the Abruzzo Region, while the party Radicali has “announced” against various regions/cities/government entities on electronic certified mail, while Codacons has filed or announced several class actions. For Italia dei Valori, see, for example, http://www.ilmel.it/abruzzo/2010/08/13/118989-santita_veleni_class_action_dell.shtml. For Radicali, see, for example, http://www.basilicatanet.it/basilicatanet/site/basilicatanet/detail.jsp?sec=1005&otype=1012&ids=534346. and http://news.kataweb.it/class-action-dei-radicali-contro-gli-enti-pubblici-per-la-pec-2-723812.html. For Codacons, see, for example, http://www.codacons.it/dettaglioArea.asp?id=74.

See, for example, http://www.agi.it/repository/struttura-sito/la-voce-dei-consumatori/codacons/notizie/class-action-oltre-10.000-pensionati-aderiscono-aliazione-del-codacons.

As said, the class actions against the public administration cannot claim damages, so, if Codacons were to prevail, at best it could establish the principle that the pensioners are due extra sums. Each pensioner then would have to sue Inpdap on his or her own. Moreover, it appears that the principle would be established in favor of all pensioners, not just the opt-ins. See, for example, http://www.termilcons.net/index.php/pagina=page_publicForm&idForm=45&css=1.

See Codacons’ own press release, http://www.codacons.it/articolo.asp?id=121800id=. It is unclear how many people who were pensioners in 1994 would be alive today, especially because to be part of this action the pensioner must be a widow or widower of another pensioner, and is thereby likely older then the average pensioner. On the other hand again, the heirs of such people would have been eligible according to Codacons.

62 This point should not be overemphasized: because, in general, previous decisions only have persuasive value, so consumer associations, like any party in litigation, face the risk that a new decision will be different.

63 The Italian procedure to solve constitutional challenges differs from the US procedure. In Italy, the judge may suspend the proceeding and send the constitutional challenge to the Constitutional Court for resolution before resuming the proceeding.

64 On the other hand, we have seen that Codacons, on some occasions, promotes the use of outside law firms using contingency fees. See http://www.codacons.it/articolo.asp?idinfo=123768&id=74.

65 Specifically, Codacons asked the court to declare that certain fees and interests charged by the bank were illegal and to amend outstanding contracts so that bank customers would not be charged these fees in the future. See Ordinanza No 29, Court of Torino, May 27, 2010 in the *Intesa* class action.

66 See, for example, http://www3.lastampa.it/torino/sezioni/economia/ articolo.jsp?tp=229552/.

67 See, for example, Micol Manenti and Alessandro Palmieri “Azione collettiva risarcitoria: dove l’Italian style lascia a desiderare” *Danno e Responsabilità*, No. 7, 2008.


69 See http://newsfood.com/q/4b9f11/class-action-lassordante-silenzio-di-conindustria/ where the Secretary General used the term “operetta.”

70 Art. 19 of Codice di Deontologia, Consiglio Nazionale Forense. Among other things, this article forbids law firms from soliciting business at potential plaintiffs’ homes, workplaces, or any other public place (a practice that, as we know, is common among US tort plaintiff law firms). This article also forbids law firms from offering to a person its services in connection to a specific matter.


72 At the time of this writing, the Italian government has been working on changing the regulation of the law profession for some time. At this stage, the government is planning to abolish contingency fees; but the outcome of this legislative process is unknown. See, for example, Laura Cavesti “Il pressing degli avvocati,” *Il Sole 24 Ore*, 17 April 2010.

73 See http://www.codacons.it/articolo.asp?idinfo=123768&id=74. These cases were not class actions, but the point is the same.

74 See Ordinanza No 29, Court of Torino, May 27, 2010 in the *Intesa* class action.

75 See “Intesa SanPaolo: Codacons annuncia class action per 2,8 miliardi” *Il Sole 24 Ore* Radiocor, April 22, 2010.


78 The number of Italian BAT smokers is itself an allegation; as far as we know there is no finding of fact in this case. See also footnote 37.

About NERA
NERA Economic Consulting (www.nera.com) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For half a century, NERA’s economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world’s leading law firms and corporations. We bring academic rigor, objectivity, and real world industry experience to bear on issues arising from competition, regulation, public policy, strategy, finance, and litigation.

NERA’s clients value our ability to apply and communicate state-of-the-art approaches clearly and convincingly, our commitment to deliver unbiased findings, and our reputation for quality and independence. Our clients rely on the integrity and skills of our unparalleled team of economists and other experts backed by the resources and reliability of one of the world’s largest economic consultancies. With its main office in New York City, NERA serves clients from more than 25 offices across North America, Europe, and Asia Pacific.

Contact
For further information and questions, please contact the authors:

**Dr. Renzo Comolli**  
Senior Consultant, New York City  
+1 212 345 6025  
renzo.comolli@nera.com

**Dr. Massimiliano De Santis**  
Senior Consultant, New York City  
+1 212 345 8055  
massimiliano.desantis@nera.com

**Dr. Francesco Lo Passo**  
Director, Rome  
+39 06 4888 101  
francesco.lopasso@nera.com